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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND DISTRICT COURTS
OF THE UNITED STATES AND THE COURT
OF APPEALS OF THE DISTRICT
OF COLUMBIA

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

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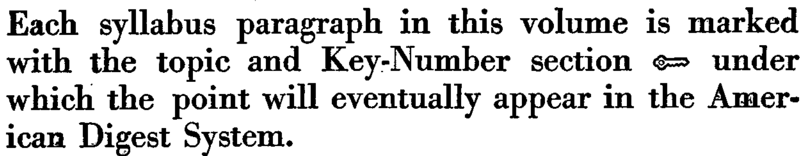

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[1] Died May 8, 1919.
[2] Appointed July 22, 1919, to succeed Joseph T. Johnson.
[3] Died September 26, 1919.
[4] Resigned August, 1919.
[5] Appointed August 5, 1919.
[6] Died September 15, 1919.
[7] Retired pursuant to the statute.
[8] Died September 24, 1919.

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[9] Retired pursuant to the statute.
[10] Appointment confirmed October 13, 1919, vice Hon. David P. Dyer, retired.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS, THE DISTRICT COURTS, AND THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

O. C. BARBER MINING & FERTILIZING CO. v. BROWN HOISTING MACHINERY CO.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1919.)

No. 3148.

1. SALES ⚷439—DEFECTS—BURDEN OF PROOF.
   Where a buyer's retention and use of a locomotive crane prior to suit for the purchase price were sufficient to reveal the claimed defects, the buyer, who defended on the ground of such defects, has the burden of proving them.
2. APPEAL AND ERROR ⚷995—REVIEW—EVIDENCE.
   On writ of error, the Circuit Court of Appeals will not weigh the evidence.
3. SALES ⚷445(1)—ACTIONS—WARRANTY—JURY QUESTION.
   Though Gen. Code Ohio, § 8395, specifies when implied warranties will or will not arise, yet where the facts on which such implied warranties might or might not arise are in conflict, the questions are for the jury.
4. SALES ⚷445(1)—IMPLIED WARRANTIES—JURY QUESTION.
   In an action for the purchase price of a locomotive crane, where the buyer defended on the ground that the crane did not comply with the implied warranty arising under Gen. Code Ohio, § 8395, because the seller was advised of the buyer's needs, etc., *held*, where there was testimony that the crane was sold under its patent or trade-name, and that the buyer's agents inspected the same, the question whether any implied warranty arose was for the jury.
5. SALES ⚷425—BREACH OF WARRANTY—RIGHTS.
   Under Gen. Code Ohio, § 8449, relating to breach of warranty, a buyer, on discovery of the breach, is at liberty either to return or offer to return the article and recover any part of the price paid, or to accept and keep the article and set up breach of warranty by way of recoupment, in diminution or extinction of the purchase price.
6. SALES ⚷287(3)—BREACH OF WARRANTY—ACCEPTANCE.
   Where a buyer of a locomotive crane retained the same and used it for a long time, there was an acceptance, even though the buyer asserted in correspondence that it had not accepted the crane, because it did not comply with an asserted warranty.
7. SALES ⚷442(14)—BREACH OF WARRANTY—DAMAGES.
   Where a buyer of a locomotive crane, notwithstanding discovery of alleged defects, retained and used the crane, and as a result of asserted de-

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

fects it dropped stones on a building when being used, *held* that, under Gen. Code Ohio, § 8449, relating to breach of warranty, damages arising out of such use of the crane cannot be recovered, where the buyer made no attempt to have the defects remedied.

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 Brown Hoisting Machinery Company against the O. C. Barber Mining & Fertilizing Company, which counterclaimed. There was a judgment for plaintiff, and defendant brings error. Affirmed.

F. R. Marvin, of Cleveland, Ohio, for plaintiff in error.

Clinton M. Horn, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Action to recover purchase price, $6,400, and interest, for sale of a 10-ton type "H" 4-wheel Brownhoist locomotive crane. The Brown Company, plaintiff below and herein called the seller, recovered judgment, and the Barber Company, defendant below and herein called the buyer prosecutes error.

The terms of sale were defined by written contract. The crane was to be delivered and completely erected by the seller at the plant of the buyer in Howenstine, near the city of Canton, Ohio.[1] The buyer was then engaged in the manufacture of fertilizing lime from limestone and coal, though not by a method involving the use of a crane. The limestone and coal had been brought to the site of the plant in cars, and removed thence into the kilns in different ways; some in course of removal being dumped in piles, called stock piles, adjacent to the kilns. At the time the contract was entered into certain new kilns were in course of erection near the site of the old kilns and stock piles, and the crane in question was to be used in removing the materials from stock piles to the new kilns. The contract provides:

"The seller guarantees said crane to be capable of handling at the buyer's plant No. 1, Howenstine, Ohio, 300 tons of limestone and mine-run coal from stock pile to cupola in 10 hours, the relative proportions of stone and coal to be three of stone to one of coal."

The petition alleges that the seller delivered and erected the crane and equipment at the buyer's plant in January, 1915, and in all respects complied with the terms of the contract; that the buyer had been in the continuous possession and use of the crane and equipment from that time to the commencement of the suit, October 8, 1915; and that, although the price was payable February 1, 1915, the buyer refused to pay any part of it. The answer admits these allegations, except the one as to compliance with the contract, avers that the crane was

[1] The crane and its equipment were described in the contract thus: "One 10-ton type 'H' 4-wheel Brownhoist steam locomotive crane, with 55-ft. boom, 8-ft. 0 in. gauge, ¾ cab double drum equipment, 16000# counterweight in truck frame and Brownhoist patent 54 cu. ft. grab bucket."

defective in several particulars, and seeks damages in diminution—indeed, in extinction—of the purchase price. The verdict, as well as the judgment, is upwards of $900 less than the amount of the purchase price and accrued interest, though how this happened does not distinctly appear; but, as will be pointed out when considering the measure of damages applied, it is reasonably clear that the sum mentioned was fixed and allowed as the buyer's damages.

[1] 1. *Guaranteed Capacity of the Crane.* It is said that the crane is not capable of removing 300 tons of material in accordance with the terms of the guaranty. The testimony is in conflict upon this subject. This is particularly true of certain tests that were made. Upon this issue it is objected that the court placed the burden of proof upon the buyer. The buyer's retention and use of the crane prior to commencement of the suit were concededly sufficient to reveal the claimed defects; and certainly it could not assert the right to recover damages on account of defects without showing what they were. This was an affirmative defense; and the rule is to place the burden of proving such a defense upon the defendant, the buyer here. Crescent Milling Co. v. H. N. Strait Mfg. Co., 227 Fed. 804, 809, 142 C. C. A. 328 (C. C. A. 8); Dodsworth v. Hercules Iron Works, 66 Fed. 483, 488, 13 C. C. A. 552 (C. C. A. 6).

[2] It is settled that an appellate court of the United States does not weigh the evidence. Besides, although the use of the guaranteed capacity does not seem in practice to have been needed, it is clear enough that the crane easily met the daily requirements of the buyer in the removal of stone and coal from the stock piles to the kilns. The verdict, apart from the allowance of damages as stated, would naturally imply that the guaranty respecting the capacity of the crane was substantially complied with; the effect of the verdict, however, must be considered later.

[3, 4] 2. *Implied Warranty Claimed.* It is urged that conditions existed here which, under the Ohio Uniform Sales Act (Gen. Code, § 8395), charged the seller with an implied warranty that the crane was reasonably fit for the purposes for which the buyer purchased it. Assuming that there is no inconsistency between the admitted express guaranty and the claimed implied warranty (G. C. O. § 8395, par. 6), several considerations arise. It is said that the trial judge erred in refusing to instruct the jury that the implied warranty claimed was, as matter of law, included in the seller's obligation. Against this it is contended, and several witnesses testify without contradiction, that the name under which the crane was sold was its trade-name, and that the grab bucket was patented; and the jury was permitted to consider whether, in the light of all the evidence, including the descriptive matter in the contract, the crane was sold under its patent or trade-name, and was told that if the sale was so made there could not be an implied warranty. This was in accord with paragraph 4 (section 8395):

"In the case of a contract to sell or a sale of a specified article under its patent or other trade-name, there is no implied warranty as to its fitness for any particular purpose."

The buyer claims in avoidance of this provision that the undisputed testimony shows that the seller was fully advised of the purposes for which the crane was desired, and that the buyer relied on the seller's skill and judgment as to the fitness of the crane for such purposes. This is to insist that the claim of implied warranty is controlled exclusively by paragraph 1 (section 8395):

"When the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, * * * there is an implied warranty that the goods shall be reasonably fit for such purpose."

Here again the case presents difficulty touching the state of the evidence. True, before the contract was entered into the seller was advised of the place at which the crane was to be erected and of the purpose to use it in transferring the materials from the stock piles to the kilns; but the testimony is in conflict as to the seller's previous knowledge of certain matters of which the buyer subsequently complained. It is important to note that the matters of subsequent complaint for the most part concern the grab bucket; one complaint is that frequently one or more large pieces of limestone are caught between the teeth or jaws of the bucket, which so far prevent the bucket from closing as to permit smaller pieces to fall upon and injure the roof of a building and endanger employés of the buyer during the movement of the bucket from the stock piles to the kilns; and the other is that the bucket is not adapted to the proper distribution of the materials when discharging them into the kilns.

It is perhaps enough to say of the first of these complaints (1) that the testimony is in conflict upon a question whether the buyer attempts to carry larger stones than those previously disclosed in the stock piles or represented as intended to be conveyed; and (2) that the evident liability and tendency of large pieces of stone or coal so to be caught and of the stone, rather than the coal, to hold the jaws of the bucket apart and permit the escape of smaller pieces in any attempt to load and carry such material, ought to have been revealed by examinations which admittedly the buyer through its general manager and expert engineer made of this type of buckets before the contract was entered into (paragraph 3, § 8395); this is strengthened by the fact that no complaint is made touching the handling of coal, the other material.

As to the second complaint, there is testimony from which it might fairly be inferred that the distribution would not be open to criticism if the bucket were properly placed and operated when discharging the materials into the kilns. These complaints would seem on their face to affect the method of using rather than the inherent qualities of the bucket. It is to be observed, moreover, that the testimony offered to support the complaints was not received for the purpose of showing an implied warranty that the crane would handle stone without dropping any of the smaller parts, or would distribute the materials in any particular way in the kilns; it was received for the purpose of determining whether the buyer made known to the seller the pur-

pose for which it needed the crane, and relied on the skill and judgment of the seller in that behalf.

If, then, it be borne in mind that the solution of the issues of implied warranty depended on the one hand upon whether the crane was sold under its trade-name, and on the other whether the buyer made known to the seller the purposes of purchasing the crane and also relied on the seller's skill and judgment as to the fitness of the crane, and, further, that testimony was received on both of these subjects independently of the testimony relating to the method pursued in loading and operating the bucket, it becomes plain that the trial judge believed that the testimony was in such conflict as to require its submission to the jury. And the questions were submitted under instructions as to what facts either express or implied would justify a finding that an implied warranty of fitness existed, and with a further instruction that such a finding was permissible notwithstanding the express guaranty as to the capacity of the crane. The court was thus dealing with distinct and in some respects opposed issues, and also with conflicting testimony touching the problem of implied warranty; in these circumstances the applicable provision of the Sales Act was to be ascertained according to the preponderating testimony under the several issues—as, for instance, was the crane sold simply under its trade-name, or did the buyer make known to the seller the purpose for which the crane was required, and particularly did the buyer rely on the seller's or on its own skill and judgment?

Manifestly these questions, like any ordinary disputed questions of fact, were determinable by the jury. Mr. Williston says, in his work on Sales (section 214, at p. 284):

"If the seller's liability is based on representations and affirmations, because of which the law imposes upon him the obligations of a warrantor, disputed questions of fact as to the nature of the assertions and the reliance of the buyer will generally give rise to disputed questions of fact, which will require submission to the jury of the whole question of warranty."

In Kansas City Bolt & Nut Co. v. Rodd, 220 Fed. 750, at page 755, 136 C. C. A. 356, at page 361, our own court held it to be error to instruct "the jury not to consider evidence of plaintiff's reliance upon the alleged warranty." Again, we may by way of analogy call attention to the ruling of this court in D. H. Watjen & Co. v. Louisville Tobacco Warehouse Co., 240 Fed. 919, 923, 153 C. C. A. 605, that issues of fact whether a sale had been conducted under rules of an association or wholly through private negotiation, and whether a warranty had been given concerning the subject of the sale, were to be determined by the jury, and that it was error to refuse so to submit the issues. In Dushane v. Benedict, 120 U. S. 630, 646, 648, 7 Sup. Ct. 696, 30 L. Ed. 810, where the plaintiff sought to recover the purchase price of rags and the defense was breach of warranty regarding the quality of the rags, it was held erroneous to direct a verdict for the plaintiff; the court saying that under the evidence the question whether an express or implied warranty existed should have been submitted to the jury. And submissions to the jury of similar questions under appropriate instructions were approved in Noble v. Fagnant, 162

Mass. 275, 285, 286, 38 N. E. 507; Rodgers & Co. v. Niles & Co., 11 Ohio St. 48, 49, 57, 78 Am. Dec. 290; Henry & Co. v. Talcott, 175 N. Y. 385, 393, 67 N. E. 617; Horse Importing Co. v. Novak et al., 105 Iowa, 157, 159, 160, 74 N. W. 759; Englehardt v. Clanton, 83 Ala. 336, 341, 342, 3 South. 680; Foster v. Smith, 184 Ill. App. 255, 257; Woods v. Thompson, 14 Mo. App. 38, 45, 46, 88 S. W. 1126. Aside from the allowance of damages of upwards of $900, the effect of which we shall presently determine, the logic of the verdict is that under the evidence either an implied warranty did not arise or, if one did arise, it was substantially fulfilled.

[5-7] 3. *Measure of Damages, and Effect of Verdict.* The instruction on the subject of measure of damages in substance was that if the jury should find that the express guaranty had been broken, or that the implied warranty claimed had been proved, and also broken, the loss would be the difference between the value of the crane in its actual condition at the time of delivery and the value it would have possessed if all the seller's obligations had been met; that in estimating this difference the latter value should be treated as $6,400, the contract price, and the former the market value, or, in the absence of a definite market value, the actual value of a crane of this kind, though not meeting the requirements of the sale; and that the evidence did not tend to show any proximate damages other than such reduction in value of the crane. Counsel's objection to this portion of the charge is that it was not comprehensive of the buyer's entire loss, since it prevented the jury from considering claimed proximate damages occasioned by breach of warranty; reliance being placed on paragraphs 6 and 7 (G. C. O. § 8449, Sales Act):

"(6) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events from the breach of warranty.

"(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

The insistence is that the injury to the roof on which pieces of stone dropped fom the bucket, cost of employing a man to distribute the materials in the kilns, and waste of material falling from the bucket constitute "loss directly and naturally resulting, in the ordinary course of events from the breach of warranty" (paragraph 6), and also that such loss was due to "special circumstances showing proximate damage of a greater amount" than the difference between the value of the crane at the time of delivery and the value it would have had if it had "answered to the warranty" (paragraph 7).

We cannot accept these views. It will be observed that the contention of counsel is not aimed against the court's allowance of recovery for the difference between the values of the crane as before pointed out; it is against the refusal of the court to recognize the items of damage claimed as a loss additional to the difference in values allowed. The learned trial judge excluded these items for the reasons, in substance, that the buyer had accepted and continued

to use the crane with knowledge that such use would result in the very damages complained of, and that damages so inflicted are not recoverable. It is not pretended that the claimed defects were of a nature to escape discovery when the crane was first put into operation and tested. Assuming that a breach of the express guaranty or of an implied warranty occurred, the buyer, it is true, was at liberty either to return or offer to return the crane and to recover any part of the purchase price it might have paid (section 8449, par. 1, d), or to accept or keep the crane and set up breach of warranty by way of recoupment in diminution or extinction of the purchase price (Id. par. 1, a). It scarcely need be said that the buyer elected to rely upon this latter provision. We agree with the District Judge that the buyer accepted the crane, for, although it asserted in correspondence that it had not accepted, its conduct through retention and long use of the crane was a contradiction of the assertion. Dodsworth v. Hercules Iron Works, 66 Fed. 483, 487, 13 C. C. A. 552 (C. C. A. 6).

In this situation, the right to recover damages resulting through the continued use of the crane must be considered in connection, not alone with the buyer's claim of a breach of warranty, but also and particularly with its claim that it was necessary to remedy the defects complained of. It ought to be sufficient to say of the special damages now under consideration that they cannot be, as counsel insist. the direct and natural result of a breach of warranty or due to special circumstances showing proximate injury within the meaning of the Sales Act, and for the obvious reason that the buyer's own conduct was an intervening and the immediate and operating cause. Indeed, the general rule is that a buyer cannot, after discovery of defects in a warranted article, accept and continue to use it in an unchanged condition, and so inflict injuries upon himself and his property at the expense of the seller. Uhlig v. Burnum, 43 Neb. 584, 595, 61 N. W. 749; Swift & Co. v. Redhead, 147 Iowa, 94, 105, 122 N. W. 140; American Glue Co. v. Rayburn, 150 Mich. 616, 620, 114 N. W. 395; Isbell-Porter Co. v. Heineman, 113 App. Div. 79, 83, 98 N. Y. Supp. 1018. and citations; Ducas Co. v. American Silk Dyeing Co., 48 Misc. Rep. 411, 415, 95 N. Y. Supp. 590; Frick Co. v. Falk, 50 Kan. 644, 647, 32 Pac. 360; Cooper v. National Fertilizer Co., 132 Ga. 529, 532, 533, 64 S. E. 650; Hitchcock v. Hunt, 28 Conn. 343, 348, 349; 1 Sutherland on Damages (4th Ed.) § 89, p. 317 top. We do not find any decision, and none is cited, which is opposed to the rule stated or to the decisions set out in its support. This is not to overlook the cases of National Refrigerator Co. v. Parmalee, 9 Ga. App. 725, 72 S. E. 191, and Springfield Milling Co. v. Barnard & Leas Mfg. Co., 81 Fed. 261, 26 C. C. A. 389 (C. C. A. 8). We think that in each of those cases the conduct of the seller operated to charge it with affirmatively consenting to the buyer's use of the article as a fair method of ascertaining the damages suffered while efforts were being made to remedy admitted defects; if this is not rightly to interpret the ultimate facts disclosed in those cases, we cannot follow the decisions.

It results that the court properly excluded the evidence offered to show the items and amounts of damage claimed in addition to such as may have been embraced in the difference allowed between the

values respectively of the crane as contracted for and as delivered. The difficulty with the instant case in this regard is that, aside from the loss covered by this difference in values, the buyer made no showing of any loss incurred within any recognized scope of the seller's liability; it is hence vain to urge, as counsel do, that the matter of special damages was a question for the jury. The parties were throughout more or less at odds upon one feature or another of the crane. Yet the buyer does not appear to have made any effort through outside manufacturers to remedy the claimed defects; it does not show, for instance, whether the grab bucket was susceptible of alteration and remedy nor the expense that any available change would have involved; it simply shows, apart from contentions with the seller, a persistent use of the crane in the regular course of its business, notwithstanding the injurious effects which such use would obviously inflict upon it and its property. The buyer's course was opposed even to the familiar rule that a person injured through wrongful act of another must so far as reasonably practicable mitigate the damage. What in the judgment of ordinarily careful and experienced men would have been a reasonably prudent course to adopt and pursue in similar circumstances, and (apart from the difference in values allowed) what, if any, damage would have directly and proximately ensued, are left to conjecture, although, as to the existence and breach of the implied warranty claimed, the burden of proof was upon the buyer. Noble v. Fagnant, supra, 162 Mass. 286, 38 N. E. 507; Sayles v. Quinn, 196 Mass. 492, 495, 82 N. E. 713; Johnson v. Bowman, 26 Neb. 745, 750, 42 N. W. 754; Crescent Milling Co. v. H. N. Strait Mfg. Co., supra; Dodsworth v. Hercules Iron Works, supra.

It is to be presumed that this feature of the case was lacking in facts, except as to the use already considered; and it need not be added that such lack of proofs could not be supplied through guesswork. An appellate court certainly cannot help out a situation like this.

The effect of the verdict, then, is plainly to show that the crane was worth about $900 less by reason of its condition at the time of delivery than it would have been if it had answered to the express guaranty and to the implied warranty, assuming that such a warranty existed. But it cannot be important whether the reduction was due to one or the other, or to both, of these causes, since the result would be the same, if it were assumed that the jury found under the court's instruction that the crane was sold under its patent or trade-name and consequently that no implied warranty could have arisen as to fitness.[2]

[2] In view of the fact that the question of implied warranty was submitted to the jury, it has, of course, been unnecessary here to consider how far, if at all, that question might as matter of law have been governed by the express terms of the contract itself as respects the contention that the crane was sold under its patent or trade name. See, for example, majority and minority opinions, with citations, in Davis Calyx Drill Co. v. Mallory, 137 Fed. 332, 334, 338, 69 C. C. A. 662, 69 L. R. A. 973 (C. C. A. 8); also Savery Hotel Co. v. Under-Feed Stoker Co., 178 Fed. 806, 808, 102 C. C. A. 254 (C. C. A. 8); Baer Grocery Co. v. Barber Milling Co., 223 Fed. 969, 972, 139 C. C. A. 449 (C. C. A. 4).

It is not necessary further to pursue the subject; we have considered the other assignments, and have found no prejudicial error; accordingly the judgment will be affirmed.

ZAJKOWSKI v. AMERICAN STEEL & WIRE CO.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1918.)

No. 3195.

1. MASTER AND SERVANT ⚷256(2)—INJURIES TO SERVANT—OCCUPATIONAL DISEASE—CAUSE OF ACTION.

   Petition of servant, employed in operation of finishing rolls for pressing sheets of steel, rendered blind and invalided in his employment, *held* to state facts constituting a cause of action for damages due to an occupational disease incident to work plaintiff was performing.

2. MASTER AND SERVANT ⚷150(2)—INJURIES TO SERVANT—OCCUPATIONAL DISEASES—WARNINGS.

   Where an employer continues an employé for a substantial time in work under conditions which, in the absence of precautions, are calculated to engender disease, it is the employer's duty to warn and instruct the employé, and to furnish him with effective means to avoid the danger.

3. MASTER AND SERVANT ⚷94—INJURIES TO SERVANT—OCCUPATIONAL DISEASE—VIOLATION OF STATUTE.

   Under Page & A. Gen. Code Supp. Ohio, § 6330—1, the employer of an operator of finishing rolls for sheet steel was liable for destruction of the health and sight of the operator, caused by the constant glare of strong light on the rolls he was required to inspect; the legal consequences of violating the statute not being limited to the penalty prescribed in section 6330—9.

4. NEGLIGENCE ⚷6—VIOLATION OF PENAL STATUTE.

   Where a statute, though penal in character, plainly imposes a duty for the benefit of a class of individuals, a right of action accrues to a person of such class, injured through breach of the duty.

5. MASTER AND SERVANT ⚷376(2)—WORKMEN'S COMPENSATION ACT—OCCUPATIONAL DISEASE.

   In view of Const. Ohio, art. 2, as amended September 3, 1912, and in view of Page & A. Gen. Code Supp. Ohio, § 6330—1, the Workmen's Compensation Act of the state (103 Ohio Laws, p. 72, approved March 14, 1913) has no application to the case of an operator of sheet steel finishing rolls, blinded and invalided by the strong glare of powerful lights from the glittering surfaces he had to inspect, an occupational disease.

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 Mike Zajkowski against the American Steel & Wire Company. To review a judgment for defendant, plaintiff brings error. Judgment reversed, and case remanded for further proceedings not inconsistent with the opinion.

We understand the theory of this action to be that it is one to recover damages arising under conditions calculated to cause and causing an occupational disease. The case was disposed of below upon the pleadings and the opening statements of counsel. The petition, a very long one, in substance states: The plaintiff, as an employé of defendant, was for two years occupied in the operation of certain power-driven finishing rolls which with certain dies were used for pressing sheets of steel and forming them into

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

desired sizes, and in seeing that the sheets of steel as they came from the rolls were of perfect texture and precise dimensions, and, at the same time, measuring the steel in a minute and particular way through the use of delicate measuring instruments. This was done under electric lights of high power and in substantial part maintained about 18 inches above the plane of the steel sheets. The surfaces of the sheets were "almost as bright as a mirror," and the surfaces of the rolls were bright; the sheets were long and as they came from the rolls they were continuously "waiving, shaking, and wobbling," so that there was at all times an intense glare of light, and at times flashes of light cast into plaintiff's eyes. Plaintiff was obliged to strain his eyes to the utmost in order to discover the condition of the sheets with respect to texture and dimensions, irregularities, and scratches. Defendant's foreman found it necessary to use a magnifying glass to inspect plaintiff's work. To produce steel sheets of the quality indicated, they were put through various processes, such as dipping into chemicals and applying oils, grease, and water, before reaching the rolls, and thus plaintiff's eyes, hands, and system became saturated with these substances, so that his health and the sight of both eyes were ultimately destroyed. Meanwhile he notified defendant that his eyesight was becoming "blurred and foggy," and that he could not read the gauging instrument as freely as before. This brought about an examination on the part of defendant's physician; but plaintiff was sent back to his work, and he remained until March, 1916, when he notified defendant that he could not see to do the work; he was thereupon led by defendant's foreman from the premises and "told to go home." In the course of his work he was not provided with goggles or other devices to prevent the splashing of liquids into his eyes or to diminish the strain upon them. Defendant gave him no notice or warning of the dangers of injury to his eyesight or health, nor instructions in that behalf, and he was ignorant of these dangers. He had been in defendant's employ some four years when he was ordered to enter upon the work above described; at the time of entering upon the new work he was possessed of perfect eyesight and health. The disease so contracted was aggravated through the overheated condition of the place in which plaintiff was required to work, and also through extra exertions caused by defects in the machinery and lack of necessary assistance; and plaintiff frequently complained to defendant concerning the defective condition of the machinery, and repeated promises were made to remedy the defects, though these promises were not kept. Damages are claimed in the sum of $50,000.

The answer admits defendant's operation of the plant for the alleged purpose of manufacturing wire and other products, that plaintiff was in its employ as a laborer, denies the other allegations of the petition, and as a further defense avers that it had complied with the Workmen's Compensation Act of Ohio, and that by reason thereof plaintiff is not entitled to maintain the action. It was in effect admitted in the statements of opposing counsel that defendant had complied with the requirements of the Compensation Act.

At the close of the opening statements of counsel and on motion of defendant a verdict was directed in its favor, and judgment entered accordingly, upon which plaintiff below founds the writ of error.

Louis H. Winch, of Cleveland, Ohio, for plaintiff in error.
Wm. L. Day, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and McCALL, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). [1] In the view of the learned trial judge, the Workmen's Compensation Act (102 Ohio Laws, p. 524) gave to defendant immunity from any right of action that might otherwise have accrued to plaintiff under the facts alleged in his petition. Laying that act to one side for the

present, we think the petition states facts constituting a cause of action for damages due to an occupational disease which was incident to the work plaintiff was performing. Diseases of occupation have been the subjects of much concern and investigation both abroad and in our own country. Such diseases, of course, signify causes and conditions, whether natural or artificial, which attend the performance of work and injuriously affect the persons exposed. They have been variously defined, such as, for instance, "the poor health which results from working under improper conditions"; again, "disease due to the employment"; and Dr. Thompson, in his recent work on Occupational Diseases, says that such diseases—

"may be defined as maladies due to specific poisons, mechanical irritants, physical and mental strain, or faulty environment, resulting from specific conditions of labor. * * * They arise from a great variety of poisons, irritating substances, and exposure to unusual physical conditions."

The occupation described in the petition extended over a period of more than two years, and the disease complained of developed and progressed by gradual process until it culminated at last in the loss of plaintiff's eyesight and health alike. Plaintiff's trouble was not due to causes outside of the environment of his work, nor was it one of accident or of traumatism in the sense of violence; it was due to causes incident to his service whose effects upon his eyesight and health are alleged to have been unknown to him though within knowledge reasonably imputable to defendant. The instant case is broadly distinguishable from that of Industrial Commission v. Roth, 120 N. E. 172, 16 Ohio Law Rep. 251, 252, 254, to be reported in 98 Ohio St. 34, where Roth, though not a painter, was directed temporarily to do some painting, and died from inhaling poisonous fumes and vapors arising from a bucket of hot paint; and his death was held to be the result of an "accidental and unforeseen inhaling" of a "specific, volatile poison or gas," and not the result of an "occupational disease"; indeed it was said by Judge Donohue in the course of the opinion:

"In this case it is admitted that the deceased was a common laborer, and that the disease of lead poisoning is not incident to his regular occupation, but, on the contrary, is incident to the work in which he was employed for the two days preceding his illness."

[2] The case set out in the petition falls well within principles of the common law. The general rule is that where an employer places and continues an employé for a substantial length of time in the regular performance of work and under conditions which, in the absence of preventive means and precautions, are calculated to engender in the employé a disorder of serious and injurious character, regardless of the name by which the disease is known, it is the duty of the employer to warn and instruct the employé as to the dangers and to furnish him with reasonably effective means to avoid them, and where as the direct result of failure to perform this duty an employé in the exercise of reasonable care suffers injury through a disorder so contracted, he is entitled to recover. Wiseman v. Carter White Lead Co., 100 Neb. 584, 587, 589, 160 N. W. 985; Thompson v. United Laboratories Co., 221 Mass. 276, 280, 108 N. E. 1042; Fox v. Peninsular,

etc., Works, 84 Mich. 676, 682, 48 N. W. 203; Wagner v. Jayne Chemical Co., 147 Pa. 475, 479, 23 Atl. 772, 30 Am. St. Rep. 745; Meany v. Standard Oil Co. (N. J. Sup.) 55 Atl. 653; Pigeon v. Fuller, 156 Cal. 691, 698, 701, 105 Pac. 976.

[**3, 4**] Furthermore, recognition of the right of recovery upon facts such as are stated in the instant case is found in both constitutional and statutory provisions of Ohio. By amendment of September 3, 1912, to article 2 of the Ohio Constitution (Page's Annotated Constitution [Ed. 1913] pp. 171 to 217, § 35), provision was made looking to the compensation of "workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment," through laws to be passed by the General Assembly; section 35 providing however that—

> "No right of action shall be taken away from any employé when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employés."

On May 6, 1913, the General Assembly of Ohio passed a statute entitled "An act for the prevention of occupational diseases with special reference to lead poisoning." 103 Ohio Laws, 819 to 824. Section 1 of the act (section 6330—1, Page & A. Gen. Code Supp. Ohio) provides:

> "Every employer shall, without cost to the employés, provide reasonably effective devices, means and methods to prevent the contraction by his employés of illness or disease incident to the work or process in which such employés are engaged."

In distinct sections of the same act the manufacture of certain named products of lead is declared to be "especially dangerous," and employers engaged in the manufacture of these products are required to furnish devices and means of specific kinds to avoid the dangers of lead poisoning. Section 9 imposes penalties upon employers for violation of certain sections of the act, including section 1, which are applicable to the particular business in which the offending employer is engaged. Argument is not necessary to show that the purpose of this legislation was to impose upon employers duties designed for the protection of their employés. The effect of the first section, 6330—1, is to charge the employer with the duty to protect employés from the contraction of disease which is incident to the work they are required to perform. The intent plainly is to require the employer, where necessary, to ascertain what "devices, means and methods" are "reasonably effective" to prevent contraction of an occupational disease; and certainly in most instances the employer rather than the lawmaker is qualified rightly to understand what measures are necessary. The class of business occupations thus dealt with manifestly differs from the class of manufactures contemplated by the sections relating to lead products; since the first class would seem to concern work and processes involving dangers not so well known as those attending the manufacture of lead products.

The purpose to impose duties upon employers embraced in the first class as well as the second is accentuated by the imposition of

penalties upon both classes alike; and while there might be greater difficulty in proving an offense under the first class than under the second, the duty is none the less positive in character in the one than in the other. These features derive emphasis in the instant case from the allegations that defendant provided no measures whatever for the protection of plaintiff's eyesight and health. It hardly is necessary to add that the legal consequence of violating section 6330—1 is not limited to the penalty prescribed in section 9 of the act; for the rule is that where a statute, although penal in character, plainly imposes a duty for the benefit of a class of individuals a right of action accrues to a person of that class who is injured through breach of the duty. Variety Iron Co. v. Poak, 89 Ohio St. 297, 303, 307, 106 N. E. 24; N. Y., C. & St. L. R. R. Co. v. Lambright, 5 Ohio Cir. Ct. R. 433, 434; Narramore v. Cleveland, C., C. & St. L. Ry. Co., 96 Fed. 298, 300, 37 C. C. A. 499, 48 L. R. A. 68 (C. C. A. 6); 2 Cooley on Torts (3d Ed.) pp. 1400, 1408, and citations.

[5] We thus come to the ruling below. In considering the petition the District Judge said:

"If it does not state a cause of action under the Workmen's Compensation Law and within the exception of the Workmen's Compensation Law, it does not seem to me that the petition states any kind of cause of action."

We are, however, convinced that this act has no bearing upon the instant case. The act, as the name usually given to it indicates, provides for the collection of a state insurance fund and its disbursement among employés. According to the title of the act, the fund is designed "for the benefit of injured, and the dependents of killed employés" (103 Ohio Laws, 72, approved March 14, 1913). Section 13 defines employers to whom the act is applicable. Section 22 provides for employers' payments of premiums. Section 23 is in part as follows:

"Employers who comply with the provisions of the last preceding section shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injury or death of any employé, wherever occurring, during the period covered by such premium so paid into the state insurance fund. * * *"

The saving clause so referred to is found in section 29, which in substance provides that "where a personal injury is suffered by any employé or where death results to an employé from personal injury * * * while in the course of employment," an employer who has paid his premiums shall not be liable unless such injury or death shall have arisen from the "willful act" of the employer or from the employer's failure to comply with any "lawful requirement for the protection of the lives and safety of employés," but in either of the latter events "nothing in this act contained shall affect the civil liability of such employer."

It is to be observed that the act is limited to compensation for "injury" or "death" of employés; it makes no provision in that behalf for disease. We have seen that the Constitution permits the passage of laws providing compensation for employés or their dependents in cases of "death, injuries or occupational disease." Industrial Commission v. Brown, 92 Ohio St. 309, 110 N. E. 744, presented the ques-

tion whether Brown, an employé who had contracted lead poisoning in the course of his employment, was entitled to participate in the fund designed for the compensation of employés under the original Workmen's Compensation Act of May 31, 1911 (102 Ohio Laws, 524), which, of course, was before adoption of the constitutional amendment. Brown applied to the proper official board for compensation and his claim was disallowed; he appealed to the Hamilton common pleas, where he recovered judgment, which necessarily entitled him to be paid out of the insurance fund (section 36, Id. p. 531), and this action was affirmed by the Court of Appeals of the same county, though reversed by the Ohio Supreme Court. The Compensation Act then under consideration, like the present one, provided only for "injuries or death." Section 20—1, 21—2, Id. 528, 529. In the course of the opinion Chief Justice Nichols said (92 Ohio St. 314, 110 N. E. 746):

> "It is to be observed that the constitutional amendment differentiates between injuries and occupational disease. It clearly recognizes three distinct classes for which provision may be made: (1) Injuries resulting in death; (2) nonfatal injuries; and (3) occupational diseases—and all are to be limited to such as might be occasioned in due course of employment. The present law specifically provides for compensation for two of these classes only and significantly omits any provision for compensation for the third class. Were this claim one that had accrued under the new law, the court could only construe the passage in dispute, in the light of the Constitution, as wholly excluding any compensation for injury by disease, whether occupational or otherwise. The Legislature would have been within its constitutional rights had it included the third class, and its failure to do so, under the circumstances, makes of it a case of designed omission."

This ruling was approved in Industrial Commission v. Roth, supra, 16 Ohio Law Rep. 253. The case of Roth, like that of Brown, grew out of an application to the proper board for compensation to be paid out of the insurance fund. The claim was disallowed by the board on the theory that Roth had died of an occupational disease, and this denial was in effect affirmed on appeal to the Jefferson common pleas, but was reversed in the court of appeals of that county, and the reversal was affirmed in the Supreme Court on the ground, as we have already pointed out, that Roth had met his death through an "accidental and unforeseen inhaling" of a "specific volatile poison or gas" and not from an "occupational disease"; but the implication is clear that if the death had resulted from that disease the right to participate in the insurance fund would have been denied; indeed it is declared both in the first paragraph of the syllabus and in the opinion (16 Ohio Law Rep. 251, 254) that an occupational disease is "not within the contemplation of the Workmen's Compensation Law." The impelling feature of these decisions, when considered together, is that Brown's claim failed because he was affected by an occupational disease, while Roth's succeeded because his death was not the result of occupational disease, but of an accident.

It results, in view of the controlling authority of these decisions, that the Compensation Act is inapplicable, and, it need not be said, that the exemption from liability given by section 23 of the Compensation Act to employers who comply with the provisions of section 22,

and the exceptions contained in section 29 in relation to employers who are open to the charge of willful acts or failure to perform any lawful requirement within the meaning of that section, are not of present importance. It cannot be that the Compensation Act was designed to take away any right of action as respects a claim, like the one here involved, which the act does not purport to include or to allow to be paid out of the insurance fund. Any view to the contrary must ascribe to the General Assembly at once a purpose to frustrate the power vested by the Constitution in respect of occupational disease and a lack of purpose through section 6330—1 to grant relief of any character to employés contracting such disease. That statute was passed after the Compensation Act, and, as already shown, was intended to create and preserve rights of action where the duty it imposes is violated. For similar reasons the case of Woodenware Co. v. Schorling, 96 Ohio St. 305, 117 N. E. 366, Ann. Cas. 1918D, 318, relied on by the company, is not on its facts relevant. Schorling sustained injuries through the fall of lumber from a car, which clearly brought his case within the Compensation Act; and although his employer had complied with the act Schorling sought recovery by an ordinary action at law. Among the grounds urged was that under section 35, art. 2, of the Constitution, and section 29 of the Compensation Act, sections 15 and 16 of the Industrial Commission Act constitute "lawful requirements" for the violation of which the action could be maintained; but it was in effect held that those sections are not self-executing and must be supplemented by special orders of the Industrial Board. Id. 96 Ohio St. 320, 321, 117 N. E. 366, Ann. Cas. 1918D, 318. Thus the decision in that case, like the scope of the statutes it construed, does not reach the question involved in the instant case. In fact, Judge Johnson said (at page 317 of 96 Ohio St., at page 370 of 117 N. E. [Ann. Cas. 1918D, 318]):

> "There is nothing in the Industrial Commission Act which indicates an intention of the Legislature to enlarge or diminish the rights of employés and employers under the Compensation Act, which had then recently been passed."

The Industrial Commission Act was approved March 18, 1913 (103 Ohio Laws, 95, 110), while, as we have said before, section 6330—1 was approved the following May 6th (Id. 819, 824), and no reference was made in the last statute either to the Compensation Act or the Industrial Commission Act. Section 6330—1 stands alone as the latest expression of the legislative will; it is in terms both complete and imperative; it should be given effect.

When it is remembered that plaintiff's action is based upon alleged negligence of defendant and freedom from fault of his own, the conclusion must follow that it was error to deny a right of recovery both under the common law and section 6330—1.

Accordingly the judgment is reversed, with costs, and the case is remanded for further proceedings not inconsistent with this opinion.

YOUTSEY v. NISWONGER.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1918.)

No. 3202.

1. APPEAL AND ERROR ⚷792—DISMISSAL—NECESSITY FOR MOTION.
The Circuit Court of Appeals will, on its own motion, dismiss an appeal, where it appears that it was not taken in time.

2. BANKRUPTCY ⚷461—APPEAL—TIME FOR TAKING.
While an appeal, under Bankruptcy Act, § 25a (Comp. St. § 9609), providing for appeals in bankruptcy proceedings, must be taken within the 10 days permitted, an appeal under section 24a (section 9608) relating to appeals in controversies arising in bankruptcy, may be taken at any time within 6 months.

3. BANKRUPTCY ⚷440—CONTROVERSY IN BANKRUPTCY—WHAT IS.
Proceedings on motion by bankrupt after discharge to reopen estate on the theory that his interest in land had improperly been scheduled as life estate, instead of fee-simple estate, etc., *held* not to present a controversy arising in bankruptcy, appealable under Bankruptcy Act, § 24a (Comp. St. § 9608), but to be reviewable by petition to revise, under section 24b; it appearing that proceeding was of the most summary character.

4. WILLS ⚷442—CONSTRUCTION—INTENTION OF TESTATOR.
The clearly expressed intention on the part of testator as to interest devised should govern, unless forbidden by law.

5. WILLS ⚷607(1)—CONSTRUCTION—INTEREST DEVISED—ESTATES TAIL.
Where an Ohio testator devised lands to his children for their natural life, directing that on their death the property should go to the heirs of their body, but if any should die without leaving heirs of their body tne lands, subject to the rights of curtesy or dower of the spouses of such children, should revert back and be divided equally between those living or their heirs per stirpes, *held*, under Gen. Code Ohio, §§ 8622, 10578, that a son of testator did not take an estate in fee, but his estate ended with his life and his issue took in fee simple.

6. WILLS ⚷629—CONSTRUCTION IN FAVOR OF VESTING OF ESTATES.
The laws favor the vesting of estates, and they will be regarded as so vesting at the death of the testator, unless a contrary intention appears.

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

Petition by William H. Youtsey to reopen bankruptcy proceedings after his discharge and settlement of the estate, against George Niswonger, trustee in bankruptcy. From an order denying the petition, petitioner appeals. Affirmed.

Alexander R. Hawthorne, of Troy, Ohio, for appellant.

F. C. Goodrich and Wm. H. Gilbert, both of Troy, Ohio, for appellee.

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

KNAPPEN, Circuit Judge. Petitioner was in the year 1913 adjudged bankrupt on his voluntary petition. He scheduled in connection therewith his real estate as a "fee-tail estate" in a quarter section of land in Miami county, Ohio, "for life only," and "subject to an in-

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choate right of dower" in his wife; also subject to a lease, not here important.

Bankrupt's interest in the land was derived under the will of his father, who died in 1882. By that will the testator in terms gave a farm to each of his five children; each of four of them, including the bankrupt, being required to pay to the testator's widow a certain sum yearly during her life, in lieu of her dower rights in the several tracts of land. Then followed the express provision that the "devises to the several devisees as named are to be to them for their natural lives. And on their decease to go to the heirs of their bodies, and if any die leaving no heirs of their bodies, then their devise to revert back (subject to right of curtesy or dower as the case may be) and as hereafter provided, and be divided equally between those living or their heirs per stirpes." The foregoing provision was immediately explained by the testator as meaning "although the fee to the several tracts of land by me devised to my several children does not vest in them, but in the heirs of their bodies, that the wives and the husbands of said children herein named, now married or that may hereafter marry, shall have the same interest of dower or curtesy, as though the fee had vested in my said sons and daughters. Except if any die without heirs of their bodies, then to revert as above provided by me in this my will." Testator's wife died in the year 1907; bankrupt having meanwhile made to her the annual money payments required by the will. When bankruptcy occurred, bankrupt had a wife and two living adult children, each of whom was the parent of living children.

The bankrupt's estate, so scheduled, was sold in the course of bankruptcy administration to one of the bankrupt's sons, and the sale duly confirmed. The son thereupon conveyed to his mother an estate in the land for her life; she also claiming an inchoate dower interest under the will, as the bankrupt's wife.

The bankrupt was discharged in the year 1914. In the year 1917, and after the estate had been distributed and closed, the bankrupt petitioned the District Court to open up the case, on the ground that his interest in the land had by mistake been scheduled as a life estate instead of a fee-simple estate, whereby his unsecured creditors received nothing, whereas the fee-simple estate was worth more than enough to pay creditors in full. He asked that his "trustee carry out his trust as provided by act of Congress," etc. Notice of the motion was given by the bankrupt to the son named, as well as to the bankrupt's wife, and the two were heard in opposition to the motion, although they otherwise made no appearance or intervention. Judge Hollister, who presided below, held that the bankrupt had but a life estate, and that he properly so scheduled his interest. The motion to reopen the case, which was also recited in the court's opinion as one to set aside the discharge in bankruptcy, was denied. This appeal is from that denial.

The bankrupt's son and wife were not made parties to the appeal by service of citation or otherwise, and have not been heard in this court, except as they presented their view of the merits in connection with their motion to dismiss the appeal, on the grounds, first, that it came too late, and, second, that the order was not appealable.

[1-3] Whether or not they are entitled to make this motion is unimportant, for it would be our duty to dismiss the appeal on our own motion in case it did not lie or was not taken in time. If the appeal is to be regarded as the motion treats it, as taken under section 25a (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. § 9609]), it would have to be dismissed for the reason that it was not taken within 10 days, even if it could be thought to fall within that section. The appeal was, however, in time if it comes under section 24a, relating to "controversies arising in bankruptcy"—such appeals being permitted within six months. In re Gold (C. C. A. 7) 210 Fed. 410, 414, 127 C. C. A. 142. An ultimate controversy as to the title of the land, duly instituted as between the bankrupt estate and adverse claimants, would doubtless be a "controversy" within section 24a. But such controversy was not ultimately submitted. While the denial of the motion was based upon an adverse construction of the bankrupt's claimed title, such decision was incidental to the denial of the motion to reopen. Had administration been reopened upon the court's conception that the bankrupt owned an estate in fee simple, the reopening of administration would not have been an adjudication in the trustee's favor or against adverse claimants. It would still have been necessary to an adjudication that further proceedings be instituted to test the title, with opportunity to all adversely interested to be heard, including, at least, the other son of the bankrupt and perhaps other contingent heirs. Indeed, the bankrupt's son and wife, who were heard in opposition to the motion to reopen, were evidently notified of the hearing, not as claimants of the fee, but only as purchasers of the life estate; and, as already said, even the purchasers were not made parties to this appeal. The motion to reopen was a proceeding of the most summary character, not even accompanied by possession on the part of the estate of the property in question. It would seem a strained construction to hold this proceeding, so far as it had gone, as of a plenary character, or more than merely a step in the course of administration. If of the latter character, it was reviewable by petition to revise, under section 24b (Comp. St. § 9608). In re Jacobs (C. C. A. 6) 241 Fed. 620, 154 C. C. A. 378; Barnes v. Pampel (C. C. A. 6) 192 Fed. 525, 113 C. C. A. 81—remedies under sections 24a and 24b being mutually exclusive. Barnes v. Pampel, supra. We prefer, however, not to base our disposition of the case upon the nonappealability of the order below, for we think the bankrupt's claim of title on which the motion below was based is without merit.

[4-6] An intention on the part of the testator that the bankrupt should take only an estate which should end with his life, and that thereupon it should pass to the bankrupt's heirs, is expressed as plainly as language can well state it; and it is a commonplace that the testator's intent, when clearly shown, must govern, unless the result is forbidden by law. It is not so forbidden.

In the matter of Andrew S. Youtsey, Bankrupt (D. C.) 260 Fed. 423, 15 Ohio Law Rep. 125, Judge Sater considered the title to a farm derived by Andrew, a brother of the present bankrupt, likewise under the father's will in question, and held that the testator did not create

a fee tail, but a life estate in Andrew, with vested remainder in his children. Judge Hollister applied this view to the present bankrupt's title. In the Andrew Youtsey Case it was necessary to define the actual estate held by Andrew on account of certain conveyances and transactions by parties interested in the estate remaining after the termination of the bankrupt's estate. Such considerations do not exist here. For the purposes of the case before us it is immaterial whether the devise was, in legal definition, to the bankrupt for life and after his death to his heirs in fee (subject only to the provision for dower by the bankrupt's wife), or whether of a fee tail, passing after the bankrupt's death to the heirs of his body instead of to his heirs generally; for, as applied to the first contingency, the Ohio statute (G. C. § 10578) provides that "the conveyance shall vest an estate for life only in such first taker, and a remainder in fee simple in his heirs"; and as to the other contingency, it is declared with equal plainness (G. C. § 8622) that "all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." Thus, in either contingency, the bankrupt's estate ended with his life. This result is not affected by the construction placed by the Ohio courts upon section 8622, by which the children of the bankrupt (if he is a donee in tail) took no estate in the land which they could alienate during their father's lifetime. Dungan v. Kline, 81 Ohio St. 371, 90 N. E. 938. Nor, treating the estate in question as one in fee tail, is it important whether the bankrupt's interest as first donee was technically a mere life estate or a tenancy for life of an entailed fee. See Harkness v. Corning, 24 Ohio St. 416, 426, and following; Dungan v. Kline, supra, 81 Ohio St. 371, 382, 90 N. E. 938 and following. Regardless of legal terminology, his estate ends with his life, he is without power to convey an interest which will continue thereafter, and his issue take in fee simple. Pollock v. Speidel, 17 Ohio St. 439; Harkness v. Corning, supra; Dungan v. Kline, supra. The dower right given to the bankrupt's wife seems, under the Ohio statutes to be consistent with an estate in fee tail. Harkness v. Corning, supra, 24 Ohio St. 416, 429.

The argument in support of the bankrupt's contention that under his father's will he took a fee-simple estate seems to be that the testator intended to pass the entire title to some one, that the will speaks from the testator's death, that at that time neither of the bankrupt's sons were living and there were thus no heirs of the bankrupt's body, and that therefore the entire estate vested in him as the first donee.

This contention seems to us completely answered, first, by the fact that the language of the will plainly excludes the notion that the "heirs" of the bankrupt's body who were in the testator's mind were merely those who might be in existence at the latter's death; and, second, by section 8622 of the General Code, which, after declaring that "no estate in fee simple, fee tail or any lesser estate in lands or tenements, lying within this state, shall be given or granted, by deed or will, to any person or persons but such as are in being," adds, "or to the immediate issue or descendants of such as are in being at the time of making such deed or will; and all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." We

are not cited to, nor have we found, any decisions of the courts of Ohio or elsewhere tending to sustain appellant's contention, in the face of the statute just cited. The authorities are otherwise.

The rule that the law favors the vesting of estates, and that they will be regarded as so vesting at the death of the testator unless a contrary intent appears, has upon this record little, if any, application. There is no point in the argument that the testamentary provision in question violates the rule against perpetuities. Gen. Code Ohio, § 8622; Turley v. Turley, 11 Ohio St. 173; Dungan v. Kline, supra; In re Andrew S. Youtsey, Bankrupt, supra, 14 Ohio Law Rep. at page 129.

In view of what we have said, it is not very material whether the appeal is dismissed or the order below affirmed. Our disposition will take the latter form.

CITY OF PADUCAH v. PADUCAH WATER CO.

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

No. 3158.

APPEAL AND ERROR ⚷781(2)—DETERMINATION OF MOOT QUESTION—SUIT BY WATER COMPANY AGAINST CITY—REPEAL OF ORDINANCE.

Where a water company sued the city to restrain enforcement of an ordinance and resolution, as impairing the obligation of the water supply contract between the company and the city and as depriving the company of its property without due process of law, and the city repealed its ordinance, the question involved became moot, and decree for the company will be reversed and the suit dismissed, despite the fact that the resolution of the city, involving a question of remote rather than present concern, was adopted after the beginning of suit and the repeal of the ordinance.

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Suit in equity by the Paducah Water Company against the City of Paducah. From decree for plaintiff, defendant appeals. Reversed, and cause remanded, with direction to dismiss the suit.

This suit grew out of a question arising in the city of Paducah, whether as respects streets about to be permanently paved the cost of renewing or replacing therein service pipes connecting the water mains with the property lines of consumers should be borne by the water company or by the abutting owners.

The city of Paducah, under an ordinance as amended in October, 1884, granted to J. A. Jones and his assigns the privilege of constructing and operating waterworks, and of laying mains, conduits, and pipes, with fire hydrants, in and along the streets, alleys, avenues, and public grounds of the city, to supply water for both public and private purposes during a term of 40 years, unless the works should be purchased by the city. The Paducah Water Company, a Kentucky corporation, appears to have succeeded to this grant as early as 1887 and to have operated the plant ever since. The ordinance prescribed annual rentals which the city itself undertook to pay during a term of 20 years for the supply of water through certain fire hydrants to be placed on the water mains at points it should select; also general water rates "equal to, but not exceeding, the average rates charged" in five named cities; but the grantee was distinctly required to "furnish water free of

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charge to all city buildings, public schools, and churches, also one public drinking fountain for man and beast in each ward of the city, at such places as the council may designate, also, one fountain in each and every public park the city may hereafter establish and one in the courthouse square."

While the ordinance forbids under penalty any person or corporation to take or use water from the works "for domestic or other purposes without contracting for same," it makes no specific provision for service pipes, and so does not expressly impose any obligation upon the company nor upon the consumer to pay the cost of installing, connecting, or renewing such pipes. No showing or question is made concerning payment for service pipes used in furnishing water free of charge. It is, however, in substance shown that, from the installation of the water works until the present controversy arose, the service connections and pipes used in supplying water to private consumers were furnished by the abutting property owners and at their expense through plumbers employed by them and licensed by the city; that the water company has uniformly repaired "such pipes between the mains and the property lines when necessary," though where streets were permanently improved under direction of the city the abutting owners have made renewals of service connections and pipes.

On May 30, 1917, the city adopted an ordinance which in effect required the water company upon 10 days' notice to "renew or replace, at its own expense, any service pipes extending from the water mains * * * to the property lines of the water consumers," denounced failure so to do as a misdemeanor and, upon conviction, imposed a fine of $5 for each day the company should fail or refuse to comply with the notice, providing, however, that such notice should not be given "except in the case of service pipes in and under streets to be paved with permanent * * * pavement," and that such renewals or replacements should not be required except where the commissioner of public works should find them to be necessary. On the 1st of June following, notice was given to the company to comply with the measure. This was the first time the city in terms imposed that duty upon the water company.

On June 8th the company commenced the present suit to restrain enforcement of the ordinance, and according to one of the assignments of error a temporary restraining order was granted, though this does not otherwise appear in the record. On the day following, the city adopted an ordinance repealing the one of May 30, 1917, and also passed a resolution rescinding all action taken under the ordinance so repealed, including the service of notice, and the city thereupon set up these facts both by special response and answer to the bill of complaint.

After so attempting to restore the situation existing prior to the ordinance of May 30th, the city on July 9th passed a resolution reciting the existence of an emergency concerning a permanent reconstruction proposed of a portion of Jefferson street and the laying of water pipes therein, and of a controversy as to whose duty it was to lay the connecting pipes between the mains and the property lines, and thereupon providing that the commissioner of public works should notify the water company to commence the laying and connecting of such service pipes, and, in the event of the company refusing or failing so to do, that the commissioner lay and connect such pipes, keeping an account of the cost, which it was further provided should be "charged and collected either from the water company or the private property owners as the courts may determine." Pursuant to the resolution notice was on the same day served by the commissioner upon the company, and the resolution and notice were made the subject of an amendment to the bill.

After hearing, the court entered a decree (December 13, 1917) adjudging in effect that the waterworks ordinance of 1884 constituted a contract between the city and the company; that this contract deprived the city of any right to compel the company to pay the cost of laying service pipes; that the ordinance of May 30th would impair the obligation of the contract in that it would impose upon the company duties and obligations not provided for and not within the power of the city to exact; that inasmuch as the ordinance of May 30th was in force from its date until the adoption of the repealing or-

dinance of June 9th, which was after the suit was begun, some obligations under the provisions of the repealed ordinance might be claimed or attempted to be enforced by the city. And the city was perpetually enjoined from enforcing or attempting to enforce any portion of the repealed ordinance. For similar reasons the city was perpetually enjoined from executing or attempting to execute any provision of the resolution of July 9th as against the company, and the company was allowed its costs. The city appeals.

John K. Hendrick, of Paducah, Ky., for appellant.
D. H. Hughes, of Paducah, Ky., for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and COCHRAN, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). We do not see that the facts of the case, above in substance stated, present any question calling for decision. The grounds of the company's complaint are that the effect of the passage and enforcement of the ordinance of May 30, 1917, and the resolution of July 9th following, would be to impair the obligation of the water supply contract of 1884 and also to deprive the company of its property without due process of law. The repeal of this ordinance and rescission of the notice served under it rendered any inquiry into what the effect of its continuance and enforcement would have been upon the rights of the water company simply a moot question. It is the duty of courts to decide only real and pending issues, and not to pronounce judgment upon abstract propositions or moot questions, no matter how the opinion might affect future action in similar circumstances (Mills v. Green, 159 U. S. 651, 653, 16 Sup. Ct. 132, 40 L. Ed. 293; Richardson v. McChesney, 218 U. S. 487, 492, 31 Sup. Ct. 43, 54 L. Ed. 1121); and the question is none the less moot where legislation is the occasion of complaint and is repealed as here during pendency of the suit (Berry v. Davis, 242 U. S. 468, 470, 37 Sup. Ct. 208, 61 L. Ed. 441).

Furthermore, the resolution of July 9th presents a question of remote rather than present concern. The most that can be said of the measure is that in the event of its execution it would impose an obligation of an alternative character as respects the company and the property holders; for the resolution distinctly provides that the city itself shall at its own expense replace the service pipes in Jefferson street upon the mere refusal of the company so to do, and to look for reimbursement to the one or the other source of obligation according as the duty of replacement shall ultimately be judicially determined to rest upon the company or upon the property owners. Clearly, as respects any action that the city might bring against the company to recover the cost it had incurred in replacing the service pipes in Jefferson street, the defense so far as remedy is concerned would be plain, adequate, and complete at law.

It results that the decree must be reversed and the cause remanded, with direction to dismiss the suit; and inasmuch as the ordinance of May 30, 1917, was repealed, and the resolution of July 9th passed, after the suit was begun, the costs in this court will be equally divided

JEUNG BOCK HONG et al. v. WHITE, Commissioner of Immigration. *

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3145.

1. ALIENS ⟹32(13)—ADMISSION OF CHINESE—REVERSAL OF CONCLUSION OF IMMIGRATION BUREAU.
If, taking together discrepancies in the testimony of two Chinese applying for admission to the United States as sons of a native-born citizen, the executive officers of the Immigration Bureau and the Department of Labor found the evidence in support of the right to land and enter the United States was so impaired as to render it unsatisfactory, the court, on application of the Chinese for habeas corpus, is not authorized to reverse the conclusion.

2. ALIENS ⟹32(13)—EXCLUSION OF CHINESE—FINALITY OF ORDER OF EXECUTIVE OFFICERS.
Where the court cannot say that proceedings relative to the exclusion from the United States of two Chinese, claiming to be sons of a native-born citizen, were manifestly unfair, or that the actions of the executive officers of the Immigration Bureau or Department of Labor prevented fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute, the order of the executive officers within the authority of the statute is final.

3. ALIENS ⟹32(12)—QUESTIONS REVIEWABLE—OBJECTION NOT MADE BELOW OR ON APPEAL.
On appeal in habeas corpus proceedings by two Chinese, seeking admission to the United States as sons of a native-born citizen, a claim or objection as to the proceedings of the immigration officers, not set forth in the petition for the writ, and not made in the court below or on appeal, but made for the first time in the addendum to counsel's brief after submission of the case on appeal, cannot be considered, in the absence of a record presenting the proceedings referred to.

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

Habeas corpus proceeding by Jeung Bock Hong and Jeung Bock Ning against Edward White, as Commissioner of Immigration at the Port of San Francisco. From an order discharging the writ, and remanding petitioners for deportation, petitioners appeal. Affirmed.

Marshall B. Woodworth, 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.

MORROW, Circuit Judge. This is an appeal from the District Court of the United States, denying petition for a writ of habeas corpus.

The appellants, Jeung Bock Hong and Jeung Bock Ning, two Chinese boys, 12 and 14 years of age, respectively, arrived at the port of San Francisco, Cal., on the steamship China May 8, 1917. They applied for admission to the United States as the sons of Jeung Mun Kee, who is a native-born citizen of the United States, and presented,

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*Rehearing denied October 14, 1919.

as evidence of their right to enter the United States, affidavits of the father, Jeung Mun Kee, and a brother, Jeung Bock Shew, who had been previously landed in the United States, to wit, on or about July 24, 1916. Admission to the United States was denied appellants upon the ground that the relationship to the father Jeung Mun Kee, had not been satisfactorily established, by reason of a discrepancy between the testimony of the two boys.

It is claimed on behalf of the appellants that the action by the officers of the Immigration Bureau and of the Department of Labor in holding the appellants for deportation was an abuse of discretion committed to them by statute, and resulted in denying them a fair hearing, to which they were entitled under the law. The charge that there was a denial of a fair hearing and abuse of discretion by the officers of the Department of Labor is based mainly upon a discrepancy between the testimony of the petitioner Ning and his brother Hong, with respect to their home in a Chinese village.

Ning testifies that the house where they lived is joined to the houses on either side of it, while Hong testifies that there is a space between the houses of two or three feet. This discrepancy and other minor discrepancies lead the Commissioner General of Immigration to hold "that the applicants quite possibly are not brothers, as claimed, and that both (if either) are not sons of the alleged father," and, as a conclusion, the Commissioner General found that the applicants had "not established in the affirmative and satisfactory manner, which has always been required in this class of cases, that they are entitled to admission." The Assistant Secretary of Labor, upon the evidence, found that the "disagreement between the applicant and his brother regarding the houses of the home village—whether they touch or are separated by as much as two or three feet—causes a suspicion as to the probability of relationship," and thereupon the Assistant Secretary affirmed the excluding decision of the Commissioner General.

[1] The discrepancies in the testimony appear to be unimportant, but if, taking them altogether, the executive officers of the department found that the evidence in support of the petitioners' right to land and enter the United States was so impaired as to render it unsatisfactory, the court is not authorized to reverse that conclusion.

[2] We cannot say that the proceedings were manifestly unfair, or that the actions of the executive officers were such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In such cases the order of the executive officers within the authority of the statute is final. Low Wah Suey v. Backus, 225 U. S. 460–468, 32 Sup. Ct. 734, 56 L. Ed. 1165.

[3] It is next contended that this case comes within the decision of this court in the Case of Quan Hing Sun et al. (decided October 11, 1918) 254 Fed. 402, —— C. C. A. ——. It was there established on behalf of the appellant, who was of the Chinese race, but a son of a native-born citizen of the United States, that, under the regulations prescribed by the Commissioner General of Immigration, a different procedure was pursued by the immigration officers in determining the right of the petitioner to enter the United States from that pursued

under other statutory regulations for determining the right of persons other than those of the Chinese race to enter the United States. This objection was set forth in the petition for the writ of habeas corpus and established beyond question. Referring to such proceedings in detail, this court held that the method of inquiry pursued in that case was unfair to the petitioner, and reversed the decision of the District Court and directed further proceedings.

In this case no such claim was made in the petition for the writ of habeas corpus, and no such claim was made in the court below or on the appeal to this court. It was made for the first time in the addendum to counsel's brief after the submission of the case in this court. In the absence of a record presenting the proceedings referred to, it cannot be considered on appeal.

The decision of the District Court is affirmed.

GRANCOURT v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3249.

1. WAR ⚷4—WAR POWERS—HOUSES OF ILL FAME.
   Under Const. art. 1, § 8, giving Congress the power to raise and support armies and make all laws which shall be necessary and proper for carrying into execution such powers, Act May 18, 1917, § 13 (Comp. St. 1918, § 2019b, appendix), authorizing the Secretary of War to do everything by him deemed necessary to suppress and prevent the keeping and setting up of houses of ill fame within such distance as he may deem needful of military camps, and making the keeping of any house of ill fame within the designated distance a misdemeanor, is valid.
2. WAR ⚷4—HOUSES OF ILL FAME—EVIDENCE.
   In a prosecution for violating Act May 18, 1917, § 13 (Comp. St. 1918, § 2019b, appendix), by setting up a house of ill fame within the distance prescribed by the Secretary of War, testimony by police officers, repeating questions asked of defendant by soldiers as to character of her establishment, transactions with such women, etc., *held* properly admitted.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Blanche Grancourt was convicted of violating Act May 18, 1917, § 13, and she brings error. Affirmed.

Indictment charging violation of section 13 of the Act of May 18, 1917, c. 15, 40 Stat. 83 (Comp. St. 1918, § 2019b, appendix), and section 37 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]).

Sidney P. Robertson and Frank J. Hennessy, both of San Francisco, Cal., for plaintiff in error.

John W. Preston, Sp. Asst. Atty. Gen., and Annette A. Adams, U. S. Atty., and James E. Colston, Sp. Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

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MORROW, Circuit Judge. [1] The defendant is charged with a violation of section 13 of the Act of May 18, 1917, entitled "An act to authorize the President to increase temporarily the military establishment of the United States." 40 Stat. 76–83.

Section 13 (Comp. St. 1918, § 2019b, appendix) provides:

"Sec. 13. That the Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdyhouses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training, or mobilization place, and any person, corporation, partnership or association receiving or permitting to be received for immoral purposes any person into any place structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000, or imprisonment for not more than twelve months, or both."

Under this authority, the Secretary of War has made a rule which provides that the keeping or setting up of houses of ill fame, brothels or bawdyhouses within five miles of a military camp, fort, post, training or mobilization place, being used for military purposes by the United States, is prohibited.

This law was enacted pursuant to the authority conferred by Congress by section 8 of article 1 of the Constitution of the United States "to raise and support armies" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

It is not the exercise of the police power of the state, but the constitutional authority of the United States. Pappens v. United States, 252 Fed. 55–57, — C. C. A. —.

"The power to raise and support armies gives to Congress in wartime an authority over every branch of national life which is well-nigh unlimited. The events of recent years have shown this impressively. When an army is in training or in the field, every branch of commerce or industry, even the home life and habits of the people, may be placed under any necessary restraint to facilitate its 'support.'" The Government of the United States, by Munro, p. 268.

In a general demurrer to the indictment, it was objected that the indictment did not charge or state facts sufficient to constitute a public offense. It stated all of the essential facts to constitute the offense described in the statute and the order of the Secretary of War.

The particulars set forth were sufficient to inform the defendant of the nature and character of the charge and of all matters necessary to enable her to prepare her defense, and there was no defect in form. Sheridan v. United States, 236 Fed. 305, 310, 149 C. C. A. 437, and cases there cited.

[2] The admission of testimony of certain police officers repeating questions asked of the defendant by certain soldiers as to whether

there were any women in the house, transactions with such women of an immoral character, and the testimony of the policemen that the occupation of the women in the house was that of prostitution was properly admitted as relevant, material, and competent under well-known rules of evidence.

The judgment of the District Court is affirmed.

UNITED STATES v. COULBY.

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

No. 3233.

1. STATUTES ⚿219—CONSTRUCTION OF INCOME TAX LAW—DEPARTMENTAL DECISION—CONFLICT.

   Where the Internal Revenue Department decided a question under the Income Tax Law two ways, neither decision can be given the effect usually given to an established practice of an executive department.

2. INTERNAL REVENUE ⚿7—INCOME TAXES.

   Under Income Tax Law 1913, a member of a partnership need not include as part of his net income, subject to tax, funds derived from or through the partnership, which has been received by the firm as dividends on stocks owned by it in corporations taxable on their net income.

3. INTERNAL REVENUE ⚿4—INCOME TAX ACT—CONSTRUCTION.

   In case of ambiguity in the Income Tax Act of 1913, the language is to be construed most strongly in favor of the taxpayer.

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 Harry Coulby against the United States. There was a judgment for plaintiff, and the United States brings error. Affirmed.

The opinion of the District Judge is reported in 251 Fed. at page 982.

Joseph C. Breitenstein, Asst. U. S. Atty., of Cleveland, Ohio.

A. C. Dustin, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. [1] This case presents the question: Whether the portion of a dividend which was paid on corporate shares to a partnership holding such shares as an asset, and which portion was ultimately paid to a member of the firm as his proportionate share of the firm's profits, was, within the true meaning of the Federal Income Tax Act of 1913 (Act Oct. 3, 1913, c. 16, 38 Stat. 114), net income in the sense that the corporation and the partner were each bound to pay thereon the normal tax of 1 per cent.; in a word, was it the purpose so to tax the same dividend twice? The question has been decided both ways in the Internal Revenue Department (Montgomery's Income Tax Procedure [Ed. 1918] pp. 231, 232); and hence the effect usually given to an established practice of an executive department

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charged with the execution of a statute has no present relevancy. The court below denied recovery, and the government brings error.

[2, 3] The facts of the case and the question involved, as well as the manner in which the issue was made and tried, are fully set out in the opinion of Judge Westenhaver; and in view of his discussion of the Income Tax Act of 1913, and of the effect upon that act of the later one of 1916 (Act Sept. 8, 1916, c. 463, 39 Stat. 756), an opinion here would not accomplish any useful end. We concur in and adopt the conclusion reached. However, the statement made in the opinion that a partnership has no legal existence, aside from the members who compose it, is too broad, as, for instance, in view of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. § 9585 et seq.]), yet as applied to the particular portion of the statute and the question in hand it is correct, and with this explanation we approve the reasoning of the opinion.

It may be added that, unless the construction placed on the statute by the learned trial judge is the natural and the rational one (38 Stat. pp. 166, 167, 169, 172), the language of the act is of such doubtful import as to require it to be construed most strongly against the government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 38 Sup. Ct. 53. 62 L. Ed. 211: Knowlton v. Moore, 178 U. S. 42, 47, 20 Sup. Ct. 747, 44 L. Ed. 969; State of Ohio v. Harris, 229 Fed. at pages 892, 898, 144 C. C. A. 174 (C. C. A. 6).

It results that the judgment must be affirmed.

CRYSTAL PERCOLATOR CO., Inc., v. LANDERS, FRARY & CLARK (two cases).

(District Court, D. Connecticut. May 15, 1919.)

Nos. 1477, 1478.

1. ACTION ⚷57(1)—CONSOLIDATION—BILLS FOR INFRINGEMENT OF PATENT.
   Under equity rule 26, a plaintiff may properly join in a single bill two causes of action for infringement of several patents, and hence, where separate suits were brought on a mechanical and a design patent, each for a percolator, it was proper to consolidate them.
2. PATENTS ⚷168(1)—CONSTRUCTION—ARGUMENTS IN PATENT OFFICE.
   Arguments made in the Patent Office by the applicant to the examiners are not to be taken as a measure of his patent, when not accompanied by any changes in the claims, and so need not be considered in construing the patent.
3. PATENTS ⚷35—CONSTRUCTION—SALES.
   In an infringement suit, where complainant's device did not have the structure specified in a claim of the patent, evidence of the sales of the article cannot be considered on the question of the validity of the claim.
4. PATENTS ⚷165—SCOPE—LIMITS.
   The scope of every patent is limited to the invention described in the claims, read in the light of the specifications, and the inventor is entitled to nothing beyond the claims.
5. PATENTS ⚷1—EFFECT.
   A patentee receives nothing from the law which he did not have before; the only effect of his patent being to restrain others from manufacturing,

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using, or selling that which he has patented, the purpose of the patent law being to protect him in his monopoly.

6. PATENTS ⚷174—CONSTRUCTION—IMPROVEMENTS.
Where an improvement is narrow in its character, the invention is ordinarily confined to the specific device, and the patentee receives little aid from the doctrine of equivalents.

7. PATENTS ⚷328—CONSTRUCTION—INFRINGEMENT.
The Ricciardelli patent, No. 1,180,881, claim 3, for a percolator support, if construed as valid, notwithstanding the prior art, *held* not infringed.

8. PATENTS ⚷26(2)—COMBINATION PATENTS—VALIDITY.
Generally speaking a combination of old elements, in order to be patentable, must produce by their joint action a novel and useful result, or an old result in a more advantageous way, and the mere bringing of old devices into juxtaposition, and their allowing each to work out its own effect, without the production of something novel, is not invention.

9. PATENTS ⚷328—CONSTRUCTION—VALIDITY.
The Ricciardelli patent, No. 1,180,881, claim 4, for a percolator support, consisting of a combination of a friable receptacle having an upstanding cylindrical neck and the support therefor an upright, a handle pivotably carried by said upright, etc., *held* invalid; the combination producing no new and novel result and not showing invention.

10. PATENTS ⚷28—DESIGN PATENTS—VALIDITY.
To entitle a person to a design patent, under Rev. St. § 4929, there must be originality and the exercise of inventive faculty, which will produce something new and beautiful, and the adaptation of old devices or forms to new purposes, however convenient or beautiful, is not invention.

11. PATENTS ⚷328—DESIGN PATENTS—CONSTRUCTION—VALIDITY.
The Ricciardelli and Bleichrode design patent, No. 47,545, for a percolator, *held*, in view of the prior art not to show invention, and to be invalid.

In Equity. Bills by the Crystal Percolator Company, Incorporated, against Landers, Frary & Clark, which were consolidated. Bills dismissed.

Asher Blum, of New York City, for plaintiff.
Harrie E. Hart, of Hartford, Conn., for defendant.

THOMAS, District Judge. [1] The plaintiff, by assignment, is the owner of a mechanical patent for percolator supports, No. 1,180,881, issued on the 25th of April, 1916, to Fiore Ricciardelli, and a design patent, No. 47,545, for a percolator, issued on July 6, 1915, to F. Ricciardelli and J. B. Bleichrode. Separate suits were brought on each patent. They were tried together and will be decided together. Under equity rule 26 (201 Fed. v, 118 C. C. A. v), as Judge Dickinson says in Eclipse Machine Co. et al. v. Harley-Davidson Motor Co. (D. C.) 244 Fed. 463:

"A plaintiff may now join (upon proper occasion) as many different causes of action as he may have. The only restrictions are that each cause must be one cognizable in equity; that the different rights of action all belong to the plaintiff, or, if more than one, to the plaintiffs jointly; and that if there are several defendants sufficient grounds for joining them must appear."

To meet the spirit of the rule it is better to join such causes of action as are here set forth in the same bill.

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The bill based on the mechanical patent charges infringement. The defenses are invalidity and noninfringement. Claims 3 and 4 are in suit. They are as follows:

3. "The herein described percolator support comprising a base, an upright rising therefrom and having a pin projecting vertically from its upper end, a handle having an opening through it removably and pivotally mounted on said pin, a hand grip at one end of the handle, and a collar at the other end thereof composed of two parts whereof one is secured to the handle and the other is hinged to the first part with its free end adapted to lie against the handle, and a clasp for holding said end in place."

4. "The combination with a friable receptacle having an upstanding cylindrical neck, of a support therefor including a base, an upright, a handle pivotally carried by said upright, a two-part collar of channel iron whereof one part is rigidly carried by one end of the handle and the other part is hinged at its outer end to the first part with its inner end adapted to lie against the handle, a clasp slidably mounted on the handle and adapted to embrace such inner end, and packing within the channels of both parts, for the purpose set forth."

The patent in suit relates generally to coffee percolators of the type where there is an upper chamber or receptacle of glass in which the powdered coffee is placed, a lower chamber or receptacle of glass in which the water is placed, and a funnel tube of glass which extends from the upper chamber or receptacle down into the lower chamber or receptacle.

With the application of heat to the lower receptacle the water is heated until there is sufficient pressure created to force the water up through the funnel tube into the upper receptacle, where it mixes with the coffee. When the water has nearly all ascended into the upper chamber, the receptacle is swung away from the flame, and then the condensation in the lower receptacle creates a vacuum, which permits the liquid which has ascended into the upper receptacle to trickle back through the coffee into the lower receptacle. The bottom of the funnel tube is spaced a suitable distance from the bottom of the lower receptacle, so that all of the water in the lower receptacle does not ascend.

The patent in suit is directed specifically to a support for this percolator; the title of the patent being "Percolator Support." That support comprises generally a base, an upright rising from the base, a handle pivotally mounted at the top of the upright, a hand grip at the outer end of the handle, and a collar at the opposite end of the handle from the hand grip for engaging and supporting the percolator parts. The collar surrounding the neck of the globe is made of two parts hinged together. It has a groove to receive a resilient packing that gently, but firmly, grips the globe. The hinged parts of the collar are connected by a sliding clasp, and this arrangement prevents contact between the neck of the glass globe and the collar itself.

The handle carrying this collar is mounted pivotally at its center to an upright carried by a base on which the alcohol lamp is placed, so that the entire percolator can be swung away from the lamp without disturbing it or the base.

Respecting the prior art, it is conceded that the process of making coffee by infusion is very old. It dates back to 1839, with improvements made in 1841 and 1842, all as shown in the British patents to

Vardy & Platow and the French patents to Malpeyre, Hiraux, and Fortant.

It has for years been recognized as a fact that the great objection to all such devices lies in the danger of breakage of the glass receptacle suspended over the flame, with its consequent and manifest dangers, whenever the water in the lower receptacle has arisen to the upper receptacle. A still further objection to using this process of making coffee is due to the inherent fragility of the glass globes employed, causing constant breakage in their handling and cleaning in the kitchen, and the expense incidental to the breakage, so that the sales of this device have never been large, and it is fair to say will never be large, as long as fragile glass globes are employed for this purpose. The use of the device is something of a fad, though the coffee brewed by this process is of admitted superiority.

[2] Counsel for plaintiff, both in oral argument and in their brief, direct with much care the court's attention to the proceedings in the Patent Office as disclosed by the file wrapper, and urge the importance of the final decision of the examiners in chief to sustain the claims in suit. This record shows that, after many amendments to the claims, they were all finally rejected by two different primary examiners, and that on appeal, on an ex parte hearing, the four claims of the patent were allowed by two members of the examiners in chief; the third member being absent. All of the evidence in this record was not before the examiners in chief. In Auto Pneumatic Action Co. v. Kindler & Collins et al., 247 Fed. 323, 328, 159 C. C. A. 417, the Circuit Court of Appeals for this Circuit has held that it is unnecessary to consider what was said by way of argument during the passage of the case through the Patent Office, and that arguments made in the Patent Office by the applicant to the examiners are not to be taken as a measure of his patent, when not accompanied by any changes in the claims. See, also, Spalding & Bros. v. Wanamaker, 256 Fed. 530, — C. C. A. —, decided by Circuit Court of Appeals, Second Circuit, February 13, 1919.

[3-7] The history of the art of percolators of the type with which the patent in suit is concerned will first be discussed in order that we may determine what was in the prior art, and all patents here referred to were, as disclosed by the file wrapper, before the examiner in the Patent Office, and reference was there made to them.

The British patent to Vardy & Platow of 1839 shows an early use of a percolator of the type shown in the patent in suit. The inventor says:

"This invention relates to a peculiar construction of apparatus for making extracts of coffee and other matters, whereby the water is caused to boil and pass out of the vessel by the pressure of steam within, and in passing out of the vessel the water enters into another vessel containing a straining or filtering medium, and mixes with the coffee, tea, or other matter placed in such vessel. The heating means being then removed, the steam in the lower vessel becomes condensed, and thereby produces a partial vacuum under the filtering or straining medium, and the atmosphere pressing on the water combined with the coffee or other matter in the upper vessel causes it to filter through into the lower vessel with considerable quickness, and thus is an

extract of coffee or other matter produced with great advantage, both as to the quality and as to the means of making the same."

Thus, as early as 1839, the plan of action of percolator like that shown in the patent in suit was fully and completely disclosed, although the particular form of structure differs from the particular structure shown in the patent in suit.

In June of 1841, French patent No. 8,051 was granted to Malpeyre. From the official translation in the Patent Office, and respecting its operation, the following appears:

"The operation of this apparatus, which is formed of two vessels communicating with each other by means of a joint passage, consists in causing the water contained in a sphere *b* to boil as a result of the action of the alcohol flame, the alcohol being contained in a receptacle *a*, in order that such water may be enabled to rise into a receptacle *c* and pass or filter through the pulverized coffee which has been put in the latter vessel. After double boiling and hence double rising of the liquid, the coffee returns to the lower part, the sphere *b*, where it will thus be perfectly clarified, possessing all of its aroma and the necessary heat. In that condition, the receptacle *c* is removed and the pressure screw *d* on the end of the rod *e* is loosened. The sphere *b* is then lifted off and used as a coffee pot."

In October of 1841, French patent No. 8,507 was granted to Hiraux for a glass coffee machine. The drawings of the patent show three different types of complete percolators, and Fig. 1 shows a device which comprises a base, an upright arising from one side of the base, a handle mounted on that upright, a hand grip at the other end of the handle, and a collar at the inner end of the handle, which encircles the reduced neck of the lower receptacle to support the percolator parts. This handle may be locked in postition to hold the percolator parts while the coffee is being cooked, but it may be released, so that the handle may be turned in the top of the upright for the purpose of decanting the coffee from the lower receptacle.

In May of 1842, French patent No. 6,395 was granted to Fortant "for a steam coffee machine with extinguisher." This patent shows a base, an upright arising from one side of the base, a handle mounted at the upper end of the upright, a hand grip on the handle at its outer end, and a collar at the inner end of the handle, encircling the restricted neck of the lower receptacle, in order to support the percolator parts, which are apparently of glass.

Without discussing all of the defendant's evidence, it will be sufficient to refer only to French patent to Malpeyre, No. 8,051, June 23, 1841, French patent to Fortant, No. 6,935, May 7, 1842, and the Barto device, which appears in the evidence in this case for the first time as an anticipation, although patents to Zimmerman, No. 1,168,988, issued January 18, 1916, and an earlier one to Ricciardelli, No. 1,121,-399, issued December 15, 1914, are in evidence and relied upon by the defendant. It is seriously contended by the plaintiff, however, that these two patents are not properly part of the prior art, and should not be considered as part of the defendant's evidence; but in view of limiting this discussion to Malpeyre and Fortant, it becomes unnecessary to decide whether Zimmerman's and the first Ricciardelli patents are properly part of the prior art.

Ricciardelli was not a pioneer in any sense. He was a mere improver in details, and first attempted to obtain a patent for a "percolator"; but in view of the prior art, and the requirements of the Patent Office, he restricted his claims to a "support" for a percolator.

Defendant's expert testified that the Fortant patent shows a percolator having a glass kettle for the water and a glass receptacle for the coffee, which are connected and pivotally held by a support consisting of a lamp base, a part extending upwardly from the base, and a handle at the top of the post; the handle having a hand grip at one end and a collar for holding the neck of the kettle at the other end. It was also shown that manifestly the handle could not have been supported on this post without reducing the diameter of the top of the post and making a hole through the handle that fitted the post. Above the handle on the post is a retaining nut, with a ring. The percolator can be swung horizontally on the post under the nut, over and away from the lamp. This defendant's expert demonstrated by a drawing (in evidence) which illustrates a reasonable and plausible construction. When this device is used, the upper receptacle is lifted off, and then the kettle taken by the handle and lifted off the post and the brew decanted.

The Malpeyre patent shows a structure of the same class and for the same purpose, consisting of the lower glass globe or kettle, with a restricted neck having a shoulder at its upper end, a glass urn for receiving the coffee, a strainer at the lower side of the urn, and a funnel extending downwardly from the bottom of the urn into the kettle. This structure is supported by a lamp base, a post extending upwardly from the base, a handle on the post, and a collar at the end of the handle, which clasps the neck of the kettle. The specification of this patent sets forth that after the brew is made the top receptacle is removed and nut is unscrewed, and the lower vessel is then lifted off and used as a coffee pot.

The patents to Malpeyre and Fortant show that it was not new with Ricciardelli to pivotally mount coffee percolators of the kind shown and described in his patent, so that they could be swung over the lamp for effecting the brew and away from the lamp when the brew was made.

The date of the publication and prior use of the Barto device have been established beyond a reasonable doubt. Prior publication is conclusively shown to have been as early as 1891, and prior use as early as 1902. The Barto device has the base supporting the spirit lamp, a supporting post extending upwardly from the base and provided with a socket at its upper end, with a handle that has a collar which supports the vessel containing the water to be heated, which handle has a pin projecting downwardly into the socket. This structure is capable of being swung over the flame or away from the flame. The support of defendant's percolator has, a post rising upwardly from the base, with a socket in the upper end of the post, and a handle, with a pin projecting downwardly into the socket between the outer end of the handle and the collar, which supports the vessel holding the water.

Ricciardelli is not entitled to claim that he was the first person to conceive of a structure adapted to swing horizontally over a flame or away from a lamp flame. The Fortant and Malpeyre patents show such a structure. United States patent to Timby, No. 173,691, shows a structure having a base with a post rising from the base, and a vessel adapted to hold water or other substances to be heated, provided with a handle and a socket fitting down over the post. In this structure the receptacle can be swung over the flame or away from the flame by turning the handle, or it may be lifted off the post for pouring out the contents of the receptacle.

The description of the specific form of collar which supports the vessel as being composed of two parts, one secured to the handle and the other hinged to the first part with its free end adapted to lie against the handle, does not add patentability to the claim. This court, with reference to a similar question, in American Graphophone Co. v. Gimbel Brothers, 234 Fed. 351, held that the addition of the clamp was without the exercise of the inventive faculty, and without the development of any idea which can be termed original. There is no co-operative relation or combination between the post, pin, and handle with the hole and the two-part clamp, as is required by the patent law to constitute invention.

Upon appeal in that case the Circuit Court of Appeals (240 Fed. 973, 153 C. C. A. 659), speaking by Judge Hough, said:

> "If the claims of this patent are taken literally and broadly, they are invalid, as disclosing no patentable invention over Jetter, and as covering aggregations of simple mechanical details not productive of a co-ordinated result."

Consequently there appears to be nothing of substantial novelty recited in the third claim of the patent in suit.

Plaintiff introduced some evidence as to the sales of a percolator which he said was made under the patent in suit. This appears to be immaterial to a discussion of claim 3, for the reason that it does not appear from an examination of the exhibit introduced as a sample of what was sold, and from a reading of the uncontradicted evidence of defendant's expert, that the structure which was sold came within the terms of this claim. It does not have the specific construction described in that claim, and to which that claim must be restricted in view of the prior art.

Therefore the rule that in a doubtful case large sales of a plaintiff's device made according to his patent, and the assumed interfering with those sales by a defendant, does not apply, because the sales, which are only collateral evidence of invention, must be of the structure claimed, and not of something else.

It should be noted that the third claim is for a "support," which includes a base, an upright rising therefrom and having a pin projecting vertically from its upper end, and a handle having an opening through it and removably and pivotally mounted on said pin. No other structure is suggested by Ricciardelli in the patent other than post *F*, pin *f*, handle *E*, with hole *e′* and nut *f′*, screwed on post above handle.

Defendant's support, as found in plaintiff's Exhibit No. 3, does not have this construction.

The Supreme Court of the United States, in Motion Picture Co. v. Universal Film Co., 243 U. S. 502, on page 510, 37 Sup. Ct. 416, on page 418 (61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959), set forth certain rules which are applicable here. The court, speaking by Justice Clarke, said:

"1. The scope of every patent is limited to the invention described in the claims contained in it, read in the light of the specification. These so mark where the progress claimed by the patent begins and where it ends that they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains. It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor by the grant provided for by the statute. * * * 'He can claim nothing beyond them.' Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274 [24 L. Ed. 344]; Railroad Co. v. Mellon, 104 U. S. 112, 118 [26 L. Ed. 639]; Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 554, 559 [6 Sup. Ct. 846, 29 L. Ed. 952]; McCain v. Ortmayer, 141 U. S. 419, 424 [12 Sup. Ct. 76, 35 L. Ed. 800].

"2. It has long been settled that the patentee receives nothing from the law which he did not have before, and that the only effect of his patent is to restrain others from manufacturing, using or selling that which he has invented. The patent law simply protects him in the monopoly of that which he has invented and has described in the claims of his patent. United States v. American Bell Telephone Co., 167 U. S. 224, 239 [17 Sup. Ct. 809, 42 L. Ed. 144]; Paper Bag Patent Case, 210 U. S. 405, 424 [28 Sup. Ct. 748, 52 L. Ed. 1122]; Bauer v. O'Donnell, 229 U. S. 1, 10 [33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150]."

On page 511 of 243 U. S., on page 419 of 37 Sup. Ct. (61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959) referring to the scope of the grant, Justice Clarke said:

"These rules of law make it very clear that the scope of the grant which may be made to an inventor in a patent, pursuant to the statute, must be limited to the invention described in the claims of his patent (104 U. S. 118 [26 L. Ed. 639], supra) and to determine what grant may lawfully be so made we must hold fast to the language of the act of Congress providing for it, which is found in two sections of the Revised Statutes."

In Broadway Towel Supply Co. v. Brown-Meyer Co., 245 Fed. 659, 158 C. C. A. 87, the Circuit Court of Appeals for the Ninth Circuit expressed itself as follows, on page 661 of 245 Fed., on page 89 of 158 C. C. A.:

"It will be seen that the appellee's invention is an extremely narrow one, limited as it is by the prior art. If there is any invention in the Brown patent, it consists in the precise combination therein described, and each element specifically pointed out is an essential part thereof."

That statement is particularly apposite here, as well as the quotation in Judge Gilbert's opinion from Liberman's Ex'rs v. Ruwell (C. C.) 165 Fed. 208. In the Liberman Case, Judge McPherson said:

"Where an improvement is narrow in its character, the inventor is ordinarily confined to his specific device and receives little aid from the doctrine of equivalents. If he depends upon a single limited feature (as is the case here), the doctrine will not ordinarily be applied so as to cover a device in which that feature does not appear."

With these rules from the courts of last resort as our guide, even assuming that the third claim is valid, it must be held that the third claim is to be limited to the exact boundaries fixed by the language of the inventor, and that defendant's structure is not within those boundaries, and therefore there is not infringement of the third claim. But I cannot escape the conclusion that there is grave doubt of the validity of this claim, in view of the prior art and the fact that the defendant's support more nearly resembles the support of the Barto device than the support of the claim, and the further fact that, if the third claim is construed broadly enough to include defendant's support, it will include the supports of the prior art.

[8, 9] Claim 4 recites an assemblage of elements. The general combination of the fourth claim—i. e. (1) a friable receptacle having a cylindrical neck; (2) a support; (3) a base; (4) an upright; (5) a handle pivoted on the upright; and (6) a collar at one end of the handle for supporting the receptacle—was old before Ricciardelli entered the field. The distinction between this claim and the other claims of the patent in suit is that the collar is characterized as made in a particular manner; that is, of a channel iron in two parts, one hinged to the other, with a packing in the channel of both parts for the purpose of grasping the neck of the vessel, so that it will not break, and a clasp for holding the hinged parts together.

The law respecting this matter was authoritatively settled by the Supreme Court in Grinnell Washing Machine Co. v. Johnson Co., 247 U. S. 426, 38 Sup. Ct. 547, 62 L. Ed. 1196. On page 432 of 247 U. S., on page 549 of 38 Sup. Ct. (62 L. Ed. 1196) the court said, also quoting the rule stated in Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241:

"Generally speaking, a combination of old elements, in order to be patentable, must produce by their joint action a novel and useful result, or an old result in a more advantageous way. To arrive at the distinctions between combinations and aggregations definite reference must be had to the decisions of this court. The subject was fully discussed in Palmer v. Corning, 156 U. S. 342 [15 Sup. Ct. 381, 39 L. Ed. 445], wherein the previous decisions were reviewed. The rule stated in Hailes v. Van Wormer, 20 Wall. 353, 368 [22 L. Ed. 241], was quoted with approval, wherein the court said: 'It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination.' Hailes v. Van Wormer, 20 Wall. 353, 368 [22 L. Ed. 241]. In Richards v. Chase Elevator Co., 158 U. S. 299, 302 [15 Sup. Ct. 831, 39 L. Ed. 991], the rule was stated as follows: 'Unless the combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements.' In Specialty Manufactur-

ing Co. v. Fenton Metallic Manufacturing Co., 174 U. S. 492, 498 [19 Sup. Ct. 641, 43 L. Ed. 1058], the rule was again tersely stated: 'Where a combination of old devices produces a new result such combination is doubtless patentable, but where the combination is not only of old elements, but of old results, and no new function is evolved from such combination, it falls within the rulings of this court in Hailes v. Van Wormer, 20 Wall. 353, 368 [22 L. Ed. 241]; Reckendorfer v. Faber, 92 U. S. 347, 356 [23 L. Ed. 719]; Phillips v. Detroit, 111 U. S. 604 [4 Sup. Ct. 580, 28 L. Ed. 532]; Brinkerhoff v. Aloe, 146 U. S. 515, 517 [13 Sup. Ct. 221, 36 L. Ed. 1068]; Palmer v. Corning, 156 U. S. 342, 345 [15 Sup. Ct. 381, 39 L. Ed. 445]; Richards v. Chase Elevator Co., 158 U. S. 299 [15 Sup. Ct. 831, 39 L. Ed. 991].' "

Applying to claim 4 the test above set forth, I conclude that it contains merely a recital of a group of elements which were brought into juxtaposition and each allowed to work out its own end without producing anything new.

The clamp described in claim 4 of channel iron in two parts, hinged together with a packing in the channel of both parts to prevent the glass from being broken, is the same type of packed channel iron clamp as those shown in United States patents to Monehan and Dorner, No. 699,803, and to Morse, No. 276,064.

The combination of the support, the base, and upright with the handle pivotally carried by the upright and the collar for supporting the receptacle is old, such combination being shown in Malpeyre and Fortant, as well as in the Barto device. The only distinction between what is described in the fourth claim and what is shown in these prior references is the pointing out in the claim of a specific form of collar. In the first place, this specific form of collar is aggregated with the specific pivotal support of the handle on the upright.

The construction of the clamp has nothing whatever to do with the mounting of the handle, and the mounting of the handle has nothing whatever to do with the construction of the clamp. Each of these features performs its own and well-known function. In the second place, it would not appear to amount to invention to use the old type of clamp provided for holding fruit jars for holding the neck of a glass percolator vessel. The collar of the fourth claim is made of channel iron to hold the packing. This was a common expedient. The collar was made in two parts, so that it could open and close readily, and if one part was hinged to the other it would follow, as a matter of course, that some type of clamp would be needed to hold the parts together.

The multiplicity of elements recited in the fourth claim does not make it patentable, as each element performs an old and well-known function. No new function is evolved from the combination recited. The new result, so far as one is achieved, is only that which arises from the well-known operation of each one of the elements.

Therefore claim 4 is void for want of invention. Let the bill be dismissed, with costs.

The Design Patent.

This is the case on the Ricciardelli-Bleichrode design patent, No. 47,545, dated July 6, 1915. Title is in plaintiff by assignment. The claim is for the ornamental design for a "percolator."

[10, 11] Defendant's alleged infringing structure is made under design patent No. 51,199, issued August 28, 1917, to Curtiss for a "standard for coffee machines." Defendant claims that in view of the prior art, the patent is invalid, and, if not invalid, it has not appropriated the novelty of the design.

Design patents are issued on the authority of section 4929, R. S. (Comp. St. § 9475), which provides:

"Any person who has invented any new, original, and ornamental design for an article * * * not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, * * * may * * * obtain a patent therefor."

Did Ricciardelli and Bleichrode, in view of the prior art, exercise invention and promote the progress of any useful art in producing the design of their patent, and, if so, has the defendant appropriated anything which Ricciardelli and Bleichrode can be said to have invented? is the sole question presented.

Smith et al. v. Whitman Saddle Co., 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606, has long been the leading case respecting design patents. Chief Justice Fuller, in distinguishing between mechanical structures and designs, quoted the rule laid down by Mr. Justice Brown, when District Judge, in Northrup v. Adams, Fed. Cas. No. 10,328, 12 O. G. 430, and 2 Ban. & Ard. 567, 568, which is as follows:

"To entitle a party to the benefit of the act, in either case, there must be originality, and the exercise of the inventive faculty. In the one, there must be novelty and utility; in the other, originality and beauty. Mere mechanical skill is insufficient. There must be something akin to genius—an effort of the brain as well as the hand. The adaptation of old devices or forms to new purposes, however convenient, useful or beautiful they may be in their new rôle, is not invention. * * * The shape produced must be the result of industry, effort, genius, or expense, and new and original as applied to articles of manufacture. Foster v. Crossin [C. C.] 44 Fed. 62. The exercise of the inventive or originative faculty is required and a person cannot be permitted to select an existing form and simply put it to a new use any more than he can be permitted to take a patent for the mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the imitative faculty and the result is in effect a new creation, the design may be patentable."

The patent in suit shows a base with a spirit lamp and a circular post rising from the base. On the top of the post is a handle with a grip at one end and a collar at the other end, and supported between the grip and the collar. The collar encircles and supports the neck of the glass globe. Extending down into the glass globe is a tube, and mounted upon the top of the globe is a tulip-shaped receptacle provided with a cover.

Among the structures of the prior art relied upon by defendant is the French patent to Fortant, No. 6,935, May 7, 1842. This drawing shows a base with a spirit lamp and a circular post extending upwardly from the base. A handle, with a grip at one end and a collar at the other end, is mounted between the grip and the collar on the post. The collar encircles the upper end of a glass globe and projecting

down into the globe is a tube. Mounted on top of the globe is a tulip-shaped receptacle provided with a cover.

In general outline and appearance the percolator shown in the Fortant patent is substantially the same as the percolator shown in the patent in suit. The entire handle in the Fortant patent is not shown, and the cover at the top of the upper receptacle is a little higher than the cover of the patent in suit; but these do not appear to be material distinctions.

If a design patent had been issued for the Fortant percolator, the plaintiff's patent would appear to be an infringement, or, conversely, if the Fortant percolator was now put upon the market, it would appear to be an infringement of the design patent in suit. Under the rule that that which would infringe if later, anticipates if earlier, it would appear that the Ricciardelli and Bleichrode design was anticipated by the Fortant patent.

However, it does not appear that Ricciardelli and Bleichrode exercised any inventive faculty in producing their design over the design shown in Fortant. They merely employed the ordinary skill of a draftsman. There appears to be nothing original in the Ricciardelli and Bleichrode design. Therefore I conclude, following the rule in the Whitman Saddle Case, supra, that the design patent is invalid for lack of invention and originality.

Even assuming that Ricciardelli and Bleichrode did exercise invention in producing the design of the patent by altering the shape of the Fortant base, handle, and cover, the defendant's device has a base, post, handle, and upper receptacle different in shape from that shown in the patent in suit. If Ricciardelli and Bleichrode exercised invention in the features which distinguish the design of their patent from the Fortant patent, then Curtiss, the patentee of the design used by defendant, exercised invention in producing his design, and therefore the inventions of the Ricciardelli and Bleichrode patents and the Curtiss patent are not the same and there would be no infringement.

Ricciardelli and Bleichrode do not appear to have exercised invention or to have promoted the progress of the useful arts in any way. If absolute identity of appearance is not necessary to infringement, then identity of appearance is not necessary to anticipation. In appearance the Ricciardelli and Bleichrode design more nearly resembles the design shown in Fortant patent than it resembles the design found in defendant's structure.

Plaintiff relies upon the rule that the test of identity of design in the invention is the sameness of appearance to the eye of an ordinary observer, and directs attention to an observation made by the court respecting their similarity when the case was tried and the two devices were side by side and offered in evidence by the plaintiff. The remark then made was based upon the assumption that both devices were made by the plaintiff, in view of the variations appearing in the patent and in the first device offered in evidence, and not respecting their sameness of appearance as bearing upon the question of whether the ordinary observer would take them to be the same.

I therefore conclude that the design of the patent in suit is invalid, as its production did not require the exercise of invention, but, if it be valid, then the defendant's structure does not infringe.

Let the bill be dismissed, with costs.

Ordered accordingly.

H. D. SMITH & CO. v. PECK, STOW & WILCOX CO.

(District Court, D. Connecticut. April 26, 1919.)

No. 1482.

1. PATENTS ⟹285—SUIT FOR INFRINGEMENT—JOINDER OF PATENTS.
   A mechanical patent and a design patent for the same article may properly be joined in a suit for infringement.
2. PATENTS ⟹62—ANTICIPATION—BURDEN AND MEASURE OF PROOF.
   When an unpatented device, the existence and use of which are proven only by oral testimony, is set up as a complete anticipation of a patent, the proof sustaining it must be clear, satisfactory, and beyond a reasonable doubt.
3. PATENTS ⟹328—VALIDITY AND INFRINGEMENT—SCREW DRIVER.
   The Ward patents, No. 737,179, for a screw driver, and No. 37,214, for a design for the same, both *held* not anticipated, valid, and infringed.
4. PATENTS ⟹28—DESIGN—"ORNAMENTAL."
   A design may be "ornamental," within Comp. St. § 9475, authorizing patents for ornamental designs, not in the sense of being ornate or bedecked, but in the sense that it has a certain marked appearance which lends beauty or elegance to it.

In Equity. Suit by H. D. Smith & Co. against the Peck, Stow & Wilcox Company. Decree for complainants.

Archibald Cox, of New York City, and Henry E. Rockwell, of New Haven, Conn., for plaintiffs.

Harrie E. Hart, of Hartford, Conn., for defendant.

THOMAS, District Judge. This is the usual suit in equity, at final hearing on pleadings and proofs, based on the alleged infringement of letters patent No. 737,179, of August 25, 1903, for a screw driver, and on patent No. 37,214, granted November 8, 1904, for a design for a screw driver both issued to the plaintiff, as assignee of William S. Ward.

[1] Both patents are properly joined in the same suit. Eclipse Machine Co. et al. v. Harley-Davidson Motor Co. (D. C.) 244 Fed. 463; Crystal Percolator Co. v. Landers, Frary & Clark, 258 Fed. 28.

The mechanical patent in suit, which will be discussed first, was before this court with the same plaintiff and against Southington Mfg. Co., 235 Fed. 160. The judgment there absolving the defendant from infringement was reversed by the Circuit Court of Appeals (247 Fed. 342, 159 C. C. A. 436), and the defendant was held guilty of infringement. It therefore follows that the defendant in the case at bar infringes, if the patent is valid, and the proof of the prior art is insufficient to avoid infringement, because there is no practical varia-

tion in the defendant's screw driver and the screw driver manufactured by the Southington Manufacturing Company.

It is unnecessary to quote the claims of the patent. They are stated in the opinions of the District Court and the Circuit Court of Appeals, supra.

In the Southington Case the defendant was estopped to question validity, because of a written agreement between the parties which compelled the defendant there to admit validity. So the defendant here pleads as its defense invalidity and noninfringement, and both defenses are properly raised here, as there is no agreement of any kind binding upon the parties to this suit.

But this court is bound to apply to this case the views expressed and conclusions reached by the Circuit Court of Appeals, wherever they are applicable, even though the issues here raised are to be considered as original questions.

Respecting the prior art in the Southington Case, Judge Ward said:

"There was nothing in the prior art like the combination of the article."

This conclusion of the appellate court, thus tersely stated, leaves nothing more to do in this case than to inquire whether the proof as to the prior art is any more persuasive than in the Southington Case, and sufficient to defeat the validity of the patent, under the rules of evidence applicable to the proof of the prior art.

The defendant lays great stress upon the additional testimony respecting the prior art, so far as old patents in allied and different arts are concerned, together with the testimony respecting certain unpatented devices, which it is claimed are complete anticipations of the patent in suit. The evidence respecting old patents in various arts is the same as in the Southington Case, plus a few additional patents in arts which seem to me to present no new questions over those presented in the Southington Case. In the latter case and here the defendant introduced three table knife patents, No. 78,328, issued May 26, 1868, to Moses Rubel; No. 86,252, issued January 26, 1869, to Moses Rubel; and No. 172,874, issued February 1, 1876, to James D. Frary; the screw driver patent, No. 267,709, issued November 21, 1882, to Philip Nadig; three wrench patents, No. 553,059, issued January 14, 1896, to Robert C. Ellrich; No. 666,029, issued January 15, 1901, to Amos Shephard; design No. 34,136, issued February 26, 1901, to William S. Ward; and additional patents on wrenches, screw drivers, chisels, and table cutlery.

In addition, the defendant has introduced three other patents—one to Franz Lehmann, No. 96,928, issued November 16, 1869, for a horseshoer's hoof parer; one to Munson, No. 104,056, issued June 7, 1870, relating to rubber-coated carriage trimmings; and one to Conklin, No. 128,020, issued June 18, 1872, for an ice pick and meat maul. These additional patents, I conclude, add nothing substantial to the prior art.

As to the unpatented devices which are claimed to be anticipations of the patent in suit, the evidence here discloses that certain employés of the plaintiff made in the plaintiff's factory certain screw drivers from discarded wrench bars for their personal use as machinists in

and about their work in the factory, and in some instances for their own personal use at home. This was also the evidence in the Southington Case, but in addition the defendant here has put in evidence three other drivers, made and used by three different persons in the plaintiff's employ, and all made prior to the Ward screw driver. Further, the defendant has put in evidence a driver made in two pieces constructed by Kilborn, another employé, which is in no way similar to the driver disclosed by the patent in suit. Many other screw drivers, of different kinds and made by old established hardware manufacturers of Connecticut, were put in evidence as anticipations. It is a fair conclusion that none of them resemble, except in some slight degree, the Ward screw driver. Some parts of one article may resemble it, and other parts of other articles; but none of them contain the combination of the patent in suit, which is a combination of a particular structure with a particular shape.

[2] In the Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154, the Supreme Court held that, when an unpatented device, the existence and use of which are proven only by oral testimony, is set up as a complete anticipation of a patent, the proof sustaining it must be clear, satisfactory, and beyond a reasonable doubt. I therefore conclude that the defendant, in this aspect of the case, has not met the burden the law imposes upon it.

In Coffin v. Ogden, 18 Wall. 120, 124 (21 L. Ed. 821), the court said:

"The burden of proof rests upon him [the defendant], and every reasonable doubt should be resolved against him. If the thing were embryotic or inchoate, if it rested in speculation or experiment, if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed, while in the other case there was only progress, however near that progress may have approximated to the end in view."

So here, even if it be conceded that the various devices represented progress in the art, they cannot avail to defeat a patent founded upon a completed invention.

[3] Upon all the testimony respecting the prior art I must conclude that there is not sufficient additional testimony over that offered in the Southington Case to justify this court in holding that the prior art is sufficient here to defeat the validity of the patent in suit, and, as the Circuit Court of Appeals in the former case held that "there was nothing in the prior art like the combination of the article," it is apparent that the same finding of fact is justified under the evidence in this case.

The description of the plaintiff's screw driver is given by Judge Ward as follows:

"The patented screw driver consists of an integral solid drop-forging, beginning at the top with an oval butt having a flat hammer face, and continuing into a flat handle web, into which scales of an elliptical shape gradually decreasing in width are riveted, continuing into a conical (incorrectly called conoidal in the patent) tapering bolster, continuing into a round shaft, ending up in the flat blade."

It will thus be noted that the combination of the article which the patent covers is a combination of a particular structure with a particular shape, and this article, the proof shows, in this case, the same as in the Southington Case, is very useful, shows a marked progress in the screw driver art, and a very substantial and steady demand has arisen for it, even though it is higher in price than any other driver on the market.

A consideration of each of the prior art patents is unnecessary because there can nowhere among them be found anything approaching the combination of structure and shape which is a distinctive feature of the Ward screw driver as disclosed in the patent in suit.

I therefore conclude that none of the things offered as prior art is the thing patented. The unpatented devices are at best of the kind and character which may be submitted against almost any invention. Some of them may show separately some one or more features or portions of the patented screw driver, but it is apposite to say of them that "there was nothing in the prior art like the combination of the article."

Holding the patent valid, it necessarily follows, and without discussion, that the defendant must be held to infringe. To be sure, there are slight variations; but they are very slight. The variation in the Southington screw driver was even greater, and the Circuit Court of Appeals held that the Southington screw driver was an infringement. A fortiori does the defendant's screw driver infringe, and it therefore follows that there must be the usual decree for the plaintiff on the mechanical patent.

The design patent was issued November 8, 1904, so there is the usual prima facie case made out in favor of the plaintiff.

The defendant insists that the design patent is entirely lacking in validity, because of (a) failure to disclose invention; (b) as not presenting proper subject-matter for a design patent under the statutes, in that there is nothing ornamental in the structure, as that term is used in the statutes; and (c) because the defendant's structure does not have the appearance of the patented structure, either in the pocketing of the handle scales, or in side view in so far as the appearance of the tapering metal of the web at either end of the handle is concerned.

It will not be necessary to discuss the prior art, as I conclude that there is nothing in it which shows or suggests the lines, planes, and angles shown in this patent. I believe the decision as to the design patent turns upon the question of whether the design is ornamental and whether it is invention.

The statute (Comp. St. § 9475) provides that—

"Any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, * * * may * * * obtain a patent therefor."

The requisites of a design patent, and the rules pertaining to it, and the interpretation of the statute, have been set forth in recent decisions of the Circuit Court of Appeals for this circuit in the following cases:

Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 C. C. A. 465; Baker & Bennett Co. v. N. D. Cass Co. et al., 220 Fed. 918, 136 C. C. A. 484; Steffens v. Steiner, 232 Fed. 862, 147 C. C. A. 56; Strause Gas Iron Co. v. Wm. M. Crane Co., 235 Fed. 126, 148 C. C. A. 620; Miller Rubber Co. v. Behrend et al., 242 Fed. 515, 155 C. C. A. 291.

In Baker & Bennett Co. v. N. D. Cass Co., supra, Judge Rogers, speaking for the Circuit Court of Appeals, said on page 921 of 220 Fed., on page 487 of 136 C. C. A.:

> "It [the design] must be ornate; it must appeal to the eye of the beholder. The inventor of a design entitled to the protection of a patent must produce a result akin to that produced by the artist or sculptor. His design must be new, and it must be beautiful and attractive."

[4] The shape of plaintiff's screw driver is new, and so far as a screw driver may be made so, by a design which is practical in the uses for which it is made, it is beautiful and attractive. It is even ornamental in a certain sense of the word; perhaps not in the sense of being ornate or bedecked, but in the sense that it has a certain marked appearance which lends beauty or elegance to it. And such is the interpretation to be placed upon the word "ornamental." The transition from the two opposed edges of the shank to the converging flat faces of the blade is unusual and pleasing to the eye, and even from the evidence of the defendant it appears that it may be pleasing to the eyes of some people, and under the law that is sufficient.

Judge Rogers, in the Steffens Case, supra, said:

> "To sustain a design patent the design must involve something more than mere mechanical skill. There must be invention."

As nearly as one can approach to invention of design in a screw driver, we have it here. The lines, planes, and angles, and the combination of triangles formed by the intersection of the planes at the region where the square shank merges into the blade, may fairly be said to be new and original, and thus to constitute invention of design. In fact, the whole structure is pleasing to the eye and is novel in design.

While it is true that the defendant's screw driver is not a Chinese copy of the plaintiff's driver, nevertheless it is such a close copy of it that they must be held closely together in order to enumerate the differences. There can be no question but that the ordinary purchaser, when handed the defendant's driver, would conclude he was purchasing the plaintiff's driver, if he could not see them side by side. The variations are so slight as not to avoid infringement, and it follows that there must be a decree for the plaintiff; and it is

So ordered.

JAY et al. v. SPARKS-WITHINGTON CO.

(District Court, N. D. Ohio, E. D. October 18, 1918.)

No. 399.

1. PATENTS ⚷328—VALIDITY—VACUUM TANKS FOR AUTOMOBILES.
Claim 1 of the Higginson & Arundel patent, No. 1,067,814, claims 1, 3, 9, 13, and 14, of the Jay patent, No. 1,132,275, and claims 1, 2, 4, and 5, of the Jay patent, No. 1,134,457, are valid and disclose invention, but were not infringed, except as to claims 9 and 14 of the Jay patent, No. 1,132,275.

2. PATENTS ⚷16—IMPROVEMENT.
Where an art has been advanced step by step by a series of inventions, so that no one inventor can claim the complete whole, each inventor is entitled to the specific form of device which he produces, so far as it differs from those of his competitors.

In Equity. Bill by Webb Jay and the Stewart-Warner Speedometer Corporation against the Sparks-Withington Company. Decree for plaintiffs.

Wilkinson & Huxley and Burton & Burton, all of Chicago, Ill., and Hull, Smith, Brock & West, of Cleveland, Ohio, for plaintiffs.

Williams, Bradbury & See, of Chicago, Ill., and M. B. & H. H. Johnson, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. The bill in this case is the usual one charging infringement of certain patents and praying an injunction. The defenses are the usual defenses of invalidity and noninfringement. Complainants' bill is based on United States letters patent No. 1,067,814, issued to Higginson & Arundel, and Nos. 1,132,273 and 1,134,457, issued to Webb Jay. The Stewart-Warner Speedometer Corporation is the owner of the Higginson & Arundel patent, and the exclusive licensee of the Jay patents. Claim 1 of the Higginson & Arundel patent, claims 1, 3, 9, 13, and 14 of the Jay patent, No. 1,132,273, and claims 1, 2, 4, and 5 of the Jay patent, No. 1,134,457, are the only ones in issue. The article of commerce involved is a vacuum tank used for feeding gasoline to the carbureter of automobile engines. Defendant manufactures under United States letters patent No. 1,255,347, issued to W. Sparks.

Complainants' patents and precisely the same claims were in issue and litigated to a final judgment in the United States District Court for the Northern District of Illinois, Eastern Division. Judge Sanborn heard the case and filed a carefully prepared written opinion, a copy of which has been furnished me and is accessible to counsel. The title of the case is Webb Jay and Stewart-Warner Speedometer Corporation v. Frederick Weinberg and Auto Parts Co. (D. C.) 250 Fed. 469. The issues there involved as to the validity of complainants' patents were precisely the same as in the instant case. They were substantially the same on the issue of infringement, except as to claims 9 and 14 of the Jay patent, No. 1,132,273. This case was carefully heard and the different devices demonstrated at great length on the hearing. Counsel argued the case fully, both orally and by ably prepared briefs. A re-examination has been made by me of all the ques-

tions involved, but in view of the carefully prepared opinion of Judge Sanborn, and of the conclusions reached by me, I deem it sufficient if I state briefly, in such form as will be understood by counsel, and, if need be, by a reviewing court, the grounds upon which I rest my decision, without an exhaustive statement of my reasons.

Neither complainants nor defendant is content to stand on the decision of Judge Sanborn. Complainants insist that the scope of their several patents has been unduly narrowed and limited, while defendant insists that these patents should all be held invalid for lack of novelty, or, in view of the prior art, for lack of invention. The weight to be given to his decision becomes, therefore, an important matter.

I have had this question under consideration in another case, namely, Meurer Steel Barrel Co. v. Draper Manufacturing Co., 260 Fed. 410, decided August 14, 1918. I there held that, while comity between courts of equal dignity in different jurisdictions does not require another court to abdicate its own judgment, it is important that in the interest of uniformity of ruling, and in order to avoid confusion in the law, prior carefully considered decisions should be adhered to until some higher court reaches a different conclusion. I there said:

"The force of this rule is well stated by Mr. Justice Brown in Mast, Foos & Company v. Stover Manufacturing Company, 177 U. S. 485 [20 Sup. Ct. 708, 44 L. Ed. 856]. It is said (177 U. S. 488, 20 Sup. Ct. 708, 44 L. Ed. 856), in substance, that comity is not a rule of law, but one of practice, convenience, and expediency, and has substantial value in securing uniformity of decision and discouraging repeated litigation of the same question. Its obligation is not imperative; if it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity recognizes the fact that the primary duty of every court is to dispose of cases according to the law and facts; in other words, decide them right, and in so doing, the judge is bound to determine them according to his own convictions. If his convictions be clear, he should follow them; but where, in his own mind, there may be a doubt as to the soundness of his views, comity comes into play and suggests a uniformity of ruling to avoid confusion until a higher court has settled the law. The strength of this rule increases in proportion to the number of courts which have passed upon the question, and when it appears that the prior judgment follows a final hearing upon pleadings and proofs and after a protracted litigation, and is the result of careful and painstaking consideration, greater weight should be given it. See, also, Macbeth v. Gillinder (C. C.) 54 Fed. 169; Beach v. Hobbs (C. C.) 82 Fed. 916; Penfield v. Potts (C. C. A. 6) 126 Fed. 475, 61 C. C. A. 371; Doelger v. German American Filter Company, 204 Fed. 274 [123 C. C. A. 472]; Cincinnati Butchers' Supply Company v. Walker, 230 Fed. 453, 144 C. C. A. 595."

The prior art introduced in evidence and considered by Judge Sanborn included all the prior art set up here, except United States letters patents No. 398,516, issued to Lentz, No. 477,295, issued to Charter, Nos. 844,958 and 901,190, issued to Riggs, and No. 1,025,814, issued to Lamp. Of these Lentz adds nothing to Savorgnan, No. 566,625; Lamp and Charter add nothing to Olds; and Riggs adds nothing to Tillison and sundry other similar patents. Other patents in the same art as these then in evidence were equally, if not more, pertinent citations, and, had they been then before the court, would not manifestly have modified the views of the learned District Judge.

Additional evidence is introduced here, also, in relation to the disclosure by publication of the Tice article in the "Motor" of June, 1911. Whether this publication antedates the Higginson & Arundel patents is much disputed. In the view I take of the case, it is unnecessary to determine this issue.

Much evidence was also introduced on this hearing to show that a device constructed according to the disclosures of the Tice article was operative, if not practicable, for use under normal road conditions. Complainant's reproduction of the Tice device, as demonstrated before Judge Sanborn, will operate only under a narrow range of vacuum pressure, and would not begin to function at a higher vacuum pressure than 9 to 11. Defendant has constructed a device in conformity to the disclosures of the Tice article, departing from the size and weight of the two cork floats for what seems to me sufficient reasons. The evidence convinces me that the device thus constructed would operate under a wider range of vacuum pressure, certainly from 3 to 19, and perhaps higher. There is, however, some difficulty in starting it at a higher vacuum than 14. Some allowance must be made for the inefficiencies of the vacuum pump and appliances used in these demonstrations; but these demonstrations, when taken in connection with other testimony that these devices had operated successfully under normal road conditions between Jackson, Mich., and Cleveland, Ohio, convinces me that defendant's contention as to the range of operation is fully sustained. This finding, however, does not require or justify that any greater weight should be given to the Tice publication in the prior art than was given to it by Judge Sanborn. Many defects remain therein, making against its practicability and efficiency. As much invention would, in my opinion, be required to obviate these defects as to obviate those present in the Higginson & Arundel invention.

The situation now before me is one justifying, if not requiring, the application of the rules of comity already stated, unless I am clearly convinced that Judge Sanborn's decision is wrong. It was made on a final hearing, upon pleadings and full proofs, and after protracted litigation, in which both sides were represented by able counsel. The differences in the record before me and that before him are immaterial, and his opinion contains internal evidences that he gave to his judgment careful and painstaking consideration. All of the questions involved are close, but, after a restudy of all of them, the weight of reasoning seems to me to support his conclusions. I am, therefore, adhering to them so far as applicable to the present case.

[1, 2] My conclusion, then, is that claim 1 of the Higginson & Arundel patent, No. 1,067,814, claims 1, 3, 9, 13, and 14 of the Jay patent, No. 1,132,273, and claims 1, 2, 4, and 5 of the Jay patent, No. 1,134,457, are valid. As to their scope, I also adopt Judge Sanborn's conclusion, which he states as follows:

"They are unavoidably narrow. By no fair reasoning are they entitled to be any more than sustained on the ground that Mr. Jay, working along his own lines, which later brought success, is entitled to his own construction; and the same rule applies to Weinberg. 'If the advance towards the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled to the specific form of the device which

he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs.' Adams Electric Ry. Company v. Lindell Ry. Company, 77 Fed. 432, 23 C. C. A. 223, quoting from Railway Company v. Sayles, 97 U. S. 554, 24 L. Ed. 1053."

Claim 1 of Higginson & Arundel patent, No. 1,067,814, claims 1, 3, and 13 of Jay patent, No. 1,132,273, and claims 1, 2, 4, and 5 of Jay patent, No. 1,134,457, are, in my opinion, not infringed. The reasons which induced Judge Sanborn to hold that the construction considered by him was not an infringement applies to each of these claims, and his reasoning commends itself to me as sound. Claims 9 and 14 of Jay patent, No. 1,132,273, are, in my opinion, infringed.

All these patents are for complete combinations. All the elements are old. Invention results only from the combination of these old elements. Jay is entitled to the specific form of device which he produced, and unless a complete and specific combination is claimed, and unless it is found in defendant's construction, there is no infringement. In my opinion, the combination of claims 9 and 14 are the only claims or combination which are reproduced with sufficient identity in defendant's construction to warrant a holding of infringement. Defendant's construction does reproduce the combination of claims 9 and 14, unless the snap-over mechanism, whereby the suction and atmospheric inlet valves are operated, is different. On the hearing before me, and in the briefs, the controversy as to infringement comes down to this element. Claims 9 and 14, it is asserted by defendant, must be limited in consequence of Patent Office proceedings to a snap-over mechanism producing absolute simultaneity of action; whereas, the snap-over mechanism of defendant's construction, it is insisted, does not produce such simultaneity. It is true that, when the gasoline in the upper chamber of defendant's tank is at a high level and the vacuum pressure is low, there is a perceptible interval between the unseating of the air inlet valve and the closing of the suction valve. It is also possible to halt the operation of the mechanism at this point under these conditions, and produce a flow of air through the air inlet and out the suction valve. Under all other conditions of operation there is substantial simultaneity of action. Whether this delayed action in the operation of the two valves is an advantage or disadvantage is disputed, but I am of opinion that it is accidental, and was not designedly produced in defendant's construction. The specifications of the patent under which defendant's device is constructed do not show any such method of construction, or claim any function or result on account of it. The snap-over mechanism as an element is present in both constructions, and in defendant's performs the same function as in complainants', and even if under some conditions it performs the same function, and does something more, it is none the less an equivalent, and not the substitution of a new element. This slight difference in operation under some conditions does not produce a new combination or avoid infringement of claims 9 and 14.

A decree may be taken in conformity to the conclusions herein set forth.

W. R. GRACE & CO. v. LUCKENBACH S. S. CO., Inc., et al.

(District Court, E. D. Virginia. May 24, 1919.)

1. DAMAGES ⚷62(4)—CONTRACT FOR TONNAGE—ACCRUAL OF RIGHT OF ACTION —EXTENSION OF TIME.

It was not incumbent upon the contractor with a steamship company for tonnage, immediately on failure of the company to furnish the tonnage, to obtain other tonnage to carry out the contract, the time provisions of the contract being extended by agreement, as there was no actionable breach until a letter from the company to the contractor, in which the latter was advised absolutely the contract would not be carried out, when the rights of the parties were fixed, and a right of action accrued to the contractor to establish and sue for its damages.

2. DAMAGES ⚷62(4)—BREACH OF CONTRACT TO FURNISH TONNAGE—DUTY TO MINIMIZE.

Damages from breach of contract to furnish shipping tonnage should be computed on the basis of such compensation to the injured party as is necessary to place it in the situation it would have occupied in the absence of breach; but the law imposes on a party subjected to injury from such a breach of contract a duty to make reasonable exertions to render the injury as light as possible.

3. CONTRACTS ⚷172—DUTY TO FURNISH TONNAGE—AMOUNT.

Where a shipping company contracted to furnish 75,000 tons of carriage, 10 per cent. more or less, though before breach it could have fulfilled its obligation by delivering freight room for 67,500 tons, after breach it was under obligation to furnish the 69,200 tons, evidenced by the list of vessels it had previously furnished to the contractor for tonnage, less the number of tons actually furnished.

4. SHIPPING ⚷58(3)—BREACH OF CONTRACT—CHARGE FOR CUSTOMARY GRATUITIES.

Where a shipping company contracted to furnish tonnage, and breached its contract, so that the contractor for tonnage was obliged to secure other ships, the steamship company is not chargeable, as an item of the expense of such other ships, with bonuses or gratuities customarily extended to the captain and officers of ships for faithful services.

5. SHIPPING ⚷58(3)—BREACH OF SHIPPING CONTRACT—IMPROPER CHARGE AGAINST PARTY IN FAULT.

Where a shipping company which had contracted to furnish tonnage breached its contract, so that the contractor for tonnage was obliged to procure other ships, the shipping company was not chargeable, at the suit of the contractor, with 2½ per cent. "commissions on disbursements" covering the entire cost of operation of the other vessels procured by the contractor for tonnage; a commission being admittedly charged only as a matter of bookkeeping, and being in effect a charge for an entire service, part of which devolved on the injured party as a condition precedent to sustaining its claim for damages.

6. SHIPPING ⚷58(3)—BREACH OF SHIPPING CONTRACT—CHARGE AGAINST PARTY IN FAULT.

In an action by a contractor for tonnage against the shipping company, which had breached its contract, where in the contract the contractor for tonnage was allowed a commission of 2½ per cent., not really for services, but rather as rebate, and where such commission has been allowed to the contractor for tonnage in fixing the net amount which the shipping company was entitled to charge as an offset against the contractor, such amount will be disallowed as a charge in the case of vessels chartered by the contractor after the shipping company's breach.

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

7. SHIPPING ⚷58(3)—BREACH OF CONTRACT—CHARGE AGAINST PARTY IN FAULT—EXPENSE OF MINIMIZING DAMAGES.
Where a shipping company breached its contract to furnish tonnage, the contractor for tonnage, in its action for damages, is entitled to allowance for the services of a department of its business rendered in securing other vessels, in reducing as far as possible the cost of carrying the goods involved, though it is difficult to determine precisely what the amount should be.

8. DAMAGES ⚷68—BREACH OF CONTRACT—INTEREST ON UNLIQUIDATED CLAIM.
Where a shipping company contracted to furnish tonnage, and on account of general war and consequent scarcity of shipping the contract proved to be unprofitable and ill-advised, so that the shipping company breached it and refused to furnish the tonnage, the contractor for tonnage was entitled to recover interest on the amount of its damages from the time when the damages became ascertained by the contractor for tonnage having procured other vessels, though as a general rule interest may not be allowed on unliquidated damages for breach of contract; application of the rule resting in discretion.

In Admiralty. Libel by W. R. Grace & Co. against the Luckenbach Steamship Company, Incorporated, and the Luckenbach Company, Incorporated. On exceptions to the commissioner's report. Decree overruling the exceptions and affirming the report directed to be entered.

This case was heretofore heard and decided by this court on the 12th day of March, 1918, and will be found reported in 248 Fed. 953, to which reference is made, without restating the facts, and the cause is now before the court upon the exceptions of the libelant and respondents to the report of Commissioner D. Lawrence Groner, to whom the same was referred by order of the 25th of April, 1918, filed herein on the 25th of November, 1918. The report is as follows:

Preliminary Statement.

The libelant, Grace & Co., a Connecticut corporation, a part of whose business is the importation of nitrates from South America to the United States and their sale to customers here, entered into a written contract with the Luckenbach Steamship Company, Incorporated, on or about the 25th day of October, 1916, as the result of which it was agreed between the parties to the contract that the steamship company would provide for Grace & Co. freight room for 75,000 tons, 10 per cent. more or less, at the option of the steamship company, of nitrate and/or ores, between the 1st of December, 1916, and the 31st of July, 1917, such cargoes to be loaded at one or two ports between Valparaiso and Pasagua, in Chili, and transported thence to one port between Savannah, Ga., and Boston, Mass., in the United States. The freight rate provided in the contract was $15.50 per ton of 2,240 pounds delivered, less 2½ per cent. "address commission," or, in other words, a net rate or charge of $15.11¼ per ton.

The contract was complied with by the steamship company only to the extent of one shipment, aggregating 5,998 tons, which was delivered at the port of New York between the 22d of April, 1917, and the 9th of May, 1917. However, on the 23d of April, 1917, Edgar F. Luckenbach, president of the steamship company, wrote and forwarded to Grace & Co. a letter, in answer to one from it inquiring as to the dates when other ships might be expected to be furnished, in which he said: "In answering the same, beg to inform you that we cannot carry out this freight room contract, which was supplemented by the usual form of nitrate charter party adopted and used by your company, and which usual form of nitrate charter party was made a part of the freight room contract, for the reason that a state of war exists between this gov-

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

ernment and the government of Germany, and we are released under article 13 of this nitrate charter party reading: 'The * * * enemies, pirates, * * * arrest and restraint of princes, rulers and people, political disturbances and impediments, * * * always mutually excepted.'"

The refusal by the steamship company thus announced to carry out the contract was the basis of this proceeding. Grace & Co., having thereafter made other arrangements resulting in bringing forward the nitrate, filed a libel in personam in this court against both the Luckenbach Steamship Company, Incorporated, and the Luckenbach Company, Incorporated; the joinder of the latter company as a defendant being because, as was alleged, the two companies were identical, having the same ownership, directors, and officers, and the steamship company, the immediate party to the contract, being a mere agency of the Luckenbach Company for greater convenience in financing and carrying out the contracts of the latter company. The defense set up by the defendant was that, because of a state of war existing between the United States and Germany and the danger of capture of the vessels proposed to be used, it was released and discharged from the performance of the contract. Your honor held the clause of the contract so invoked inoperative under the circumstances, and also held that the two companies were substantially the same, and were in their joint capacities carrying on the business out of which the breach of contract arose, and were jointly and severally chargeable with the carrying out of the same, and, the defendants declining to make any other or further defense, the case was by proper decree referred to me to ascertain the amount of damages suffered by the libelant.

Part I.

It will be seen by reference to the foregoing statement that the contract which is the subject of this suit was made October 25, 1916, and by the terms thereof was to be performed between the 1st of December, 1916, and the 31st of July, 1917, a period embracing eight calendar months. It was contemplated between the parties that the movement would average approximately 9,000 tons per month, but this understanding was subject to a further provision "that all quantities and deliveries to be mutually arranged between the party of the first part and the party of the second part to suit the steamers of the party of the first part." As early as November, 1916, Grace & Co. begun asking for definite information from the steamship company as to what arrangements were being made for carrying out the contract, and correspondence on this subject between the parties was introduced in evidence and is returned herewith, marked "Libelant's Exhibits 11 to 43, inclusive." This correspondence runs through the months beginning with November, 1916, and ending the latter part of April, 1917. Throughout it shows, on the one hand, Grace & Co. urging the carrying out of the contract and seeking information as to the probable arrival dates at the loading ports of the promised vessels, and, on the other hand, the steamship company giving information and assurances of the movements of their vessels and repeated promises of their early dispatch to the nitrate ports for loading. Throughout the period mentioned there is not a single suggestion on the part of the Luckenbach Company of a repudiation of the contract. On the contrary, there is a recognition of its binding character and reiterated statements apparently showing a determination to furnish the vessels and lift the nitrate. While, therefore, it is undoubtedly true that the provision of the contract as to the time of the delivery of a part of the nitrate was then in default, and while it is perhaps equally true that this failure might, at the option of Grace & Co., have then and there been made the basis of a suit for damages, it is also true that by agreement of parties this provision of the contract was not insisted upon, and it follows that, if thereafter the steamship company had furnished the required tonnage in the amounts contracted for, no breach would have occurred. In other words, the agreement for vessel space for 9,000 tons per month, beginning with December, was not insisted upon by Grace & Co. as the result of the direct promise of the steamship company that it would thereafter furnish the vessels.

[1] It follows, therefore, that there is no merit in the position of the steamship company that it was incumbent upon Grace & Co., immediately upon the failure of the steamship company in December and January, and so on, to furnish the tonnage contracted for, then and there to obtain other tonnage to carry out the contract. The attitude of the parties conclusively shows that they did not so interpret the agreement, and to hold now that the one for whose benefit it was made, and who, to accommodate the other, did not insist that it be fulfilled, had thereby waived its right thereafter to claim a full compliance with the obligation to furnish the tonnage contracted for, would be unconscionable, and would permit the other party, by whose promises of the tonnage on fixed dates the waiver was induced, to take advantage of its own default. It therefore follows that the time provisions of the contract were, as stated, extended by agreement of parties, and that there was, under the circumstances, no actionable breach thereof until the letter of April 23, 1917, from the steamship company to Grace & Co., in which the latter was advised by the former that the contract would not be carried out. In my opinion, the rights of the parties were fixed as of this date, and a right of action then and there accrued to Grace & Co. to establish and thereafter to sue for the damages which it had thereby sustained. That the contract was lawfully made between the parties is admitted. That it was breached by the steamship company has been decided by your honor in the opinion upon the previous hearing.

[2] It follows, therefore, that the damages to be allowed should be computed on the basis of such compensation to the injured party as shall be necessary to place it in the situation that it would have occupied if no breach had occurred. Such damages as will restore to it all that it has lost in the instant case would include such expenditures as were necessary in the exercise of ordinary prudence on his part in the carrying out of the terms of the contract. While this is true, it is equally true that the law imposes upon a party subjected to injury from a breach of contract such as is here shown the duty of making reasonable exertions to render the injury as light as possible. These two general principles are fully recognized by all the authorities, and excellently stated in the opinion of the Circuit Court of Appeals, Sixth Circuit, speaking through Judge Taft, in The Oregon, 55 Fed. 666 et seq., 5 C. C. A. 229, from which it may not be amiss to quote the following: "Damages for breach of contract should be such compensation as will restore the injured party to the same pecuniary condition that he would have been in, had the contract been performed. * * * If, therefore, in cases of freight contracts, the carrier refuses to perform, it is the duty of the shipper, if he can reasonably expect thereby to reduce his loss, to seek other means of transportation, and perform the contract himself. In such a case the difference between his actual pecuniary condition and that in which he would have been had the carrier transported the goods under the contract is, not the profit which he would have made had the contract been performed—for the contract has been performed, and he has acquired the opportunity to sell his merchandise at the market value prevailing at the place of destination—but it is the increased expense of performing the contract; that is, the difference between the contract rate of freight and the freight which he was actually obliged to pay to secure performance. * * * Of course, there is a limit to the increased expense which the injured party may incur in doing what the other was obliged, under the contract, to do, and which he may charge to that other. The limit is suggested in the rule laid down in the leading case of Hadley v. Baxendale, 9 Exch. 341, under which damages for a breach are limited to such as would naturally flow from the breach within the reasonable contemplation of the parties at the time of making the contract. He cannot go to extraordinary and unreasonably excessive expense or take unusual means to accomplish that which the other party agreed to do, and thus impose on the other liability for damages out of all proportion to what either party might have reasonably expected as the loss from the breach. In Le Blanche v. Railway Co., 1 C. P. Div. 286, 302, Lord Esher, Master of the Rolls, then Mr. Justice Brett, used this language: 'We think it may properly be said that, if the party to perform a contract does not perform

it, the other may do so for him, as reasonably near as may be, and charge him for the reasonable expense in so doing.'"

[3] In order to apply these general principles to the facts as shown by the evidence at hand, the first question which arises is the amount of tonnage as to which default was made. The contract, as has been repeatedly shown, provided specifically that the steamship company should furnish to Grace & Co. freight room for 75,000 tons; but it is insisted by the steamship company that, since this clause of the contract contained an option to it to reduce this amount 10 per cent., it was in fact liable only for the carriage of 67,500 tons, less the amount actually carried. In other words, it now insists that after its breach of contract it has the right to exercise the option, and that, instead of 75,000 tons of nitrate, it may and does elect to be bound only to the lesser extent. There is, I think, no question that, if the contract had not been violated, the steamship company could have claimed fulfillment of its obligation when and after it had delivered freight room for 67,500 tons, but another and different question arises under the circumstances here. During the period of its recognition of the contract, confessedly it made no specific election. If there were nothing more in the case, I should unhesitatingly conclude that the status of the contract was at the time of its breach identical as at the time it was made, for I take it that the rule is very clear that, when one contracts in the alternative to do one of two things within a given time, he has until the time is past the right to elect which of them he will perform, but, if he suffers the time to elapse without performing either, his contract is broken and his right to elect is lost. Choice v. Moseley, 1 Bailey (S. C.) 136, 19 Am. Dec. 661.

But it appears from the evidence in this case that some time in March or April, 1917, and while the performance of the contract was still in contemplation by both parties, the steamship company through its president delivered to Grace & Co. a memorandum (or data from which it was made) containing the names of the steamers which it purposed to furnish to carry out the contract, and with the capacity and probable sailing date of each. The list so furnished included the steamers J. L. Luckenbach, 6,000 tons, April loading; Florence Luckenbach, 8,200 tons, May loading; Lewis Luckenbach, 6,000 tons, May-June loading; Hattie Luckenbach, 6,000 tons, June-July loading; Edgar Luckenbach, 12,000 tons, July-August loading; Julie Luckenbach, 12,000 tons, August-September loading; D. N. Luckenbach, 4,000 tons, May-June loading; Henry Luckenbach, 4,000 tons, May-June loading; J. L. Luckenbach, 6,000 tons, June loading; Pleiades Luckenbach, 5,000 tons, July-August loading—the aggregate tonnage proposed to be transported on these ten vessels being 69,200 tons. The program thus outlined by the steamship company contemplated the execution of the contract in its entirety. It was in effect a statement on its part that it would furnish shipping for 69,200 tons, and it was accepted by Grace & Co. if and when fulfilled as a compliance with the contract. It is true that there appears to have been no precise statement at the time that the cargo tonnage named was to be considered by the parties as completing the contract; but I think the only fair inference is that there was a meeting of minds at the time in question, and an agreement then and there that the steamship company was to be bound only to the extent mentioned, and that a compliance by it with the terms of the memorandum would entitle it to a full discharge under its contract. This being true, I have chosen to treat the contract as one on the part of the steamship company to furnish freight room for 69,200 tons, and as admittedly they did in fact furnish freight room for 5,998 tons, the amount of damages for which they are answerable is for failure to furnish freight room for 63,202 tons.

Part II.

This being the basis upon which the damages are to be ascertained and determined, it follows that the next inquiry is whether the conduct of Grace & Co. after the breach of the contract, and in carrying out its provisions, was only such as to restore the situation as nearly as possible to that which it would have been if no breach had occurred. The contract between the steamship company and Grace & Co. for the transportation of the nitrate was on what is known in the shipping business as a rate basis, as distinguished from

a time basis; the difference between the two being that in the case of the rate charter the cost is definitely fixed and ascertained, whereas in the case of the time charter there is a considerable element of doubt, growing out of possible delays in the voyage, opportunities of obtaining cargoes from the port of delivery to the cargo port, etc. When the contract for the shipment of 75,000 tons of nitrate in question was made, the market rates for shipping from South to North America were comparatively easy, and charters on either basis easily obtained. The United States had not then entered the war, and, if the breach had then occurred, it would have been a fairly easy matter for Grace & Co. to have reinstated themselves and lifted the shipment in question with but little additional expense; but between the time of making the contract and the breach a declaration of war had been made between this country and Germany, and the demand for shipping became almost at once abnormally great, resulting in a stiffening and constantly ascending scale of rates.

In the latter part of 1916 the rate for tonnage from South to North America ranged around $15. In April and May, 1917, it had advanced by increased demand to a point where it was then practically impossible to make rate charters at all. Grace & Co., who are among the largest importers of nitrates, their importations in the year 1917 amounting to approximately 600,000 tons, and who were therefore as well equipped as it is possible to be to secure tonnage, went into the market, making bids in an effort to obtain rate charters to lift the nitrate included in the Luckenbach contract. Its vice president, Mr. Fisher, testified that to this end he made several offers for vessels on rate charters, but in each instance was outbid by competitors, and succeeded in getting only one vessel, the Plymouth, at $33.50 a ton. Finding it quite impossible to make any progress in this direction, and that the effects of continuing the competitive bidding would be to still further increase the rate, he did what in my opinion was prudent in the circumstances, and proceeded to get vessels on time charters at the lowest rates then offering in the market. In this way he succeeded in getting possession of the following vessels: S. S. Jelling, chartered May 4, 1917; S. S. Camaguey, chartered May 4, 1917; S. S. Ruby, chartered May 15, 1917; S. S. Thorgerd, chartered May 21, 1917; S. S. Laura Maersk, chartered May 31, 1917; S. S. Edw. Pierce, chartered May 28, 1917; S. S. Karen, chartered June 13, 1917; S. S. Santiago, chartered June 13, 1917; S. S. Evelyn, chartered June 18, 1917; S. S. Edith, chartered June 20, 1917; S. S. Montosa, chartered June 21, 1917; S. S. Clare, chartered June 23, 1917; S. S. Otterstad, chartered June 28, 1917; S. S. Alderney, chartered May 8, 1917; S. S. Plymouth, chartered June 22, 1917.

The latter was the only one of the lot chartered on a rate basis, the other 14 vessels being chartered originally for such periods of time required for the completion of the journey from North to South America, the loading, and back again, and while as to a number of them the period of time required in obtaining cargoes was considerably lengthened by unexpected labor conditions more fully referred to hereafter, the uncontradicted evidence shows that their operation from start to finish and in all its details was conducted by men of experience and admitted capacity and with due regard to minimizing the cost. The total amount of tonnage carried by the fifteen vessels named was 67,763 tons, which is 4,561 tons in excess of the amount which, in my view of the law, is chargeable against the steamship company. In the computation of damages which I shall hereafter make, I have therefore charged off this excess of importation, on the same basis, to Grace & Co. In Libelant's Exhibit No. 7, returned with this report, there is a detailed statement of the cost of operation of the 14 vessels used to lift the nitrate.

[4] I have carefully examined and verified the correctness of the figures there detailed, and the uncontradicted evidence I think amply supports the statement that the expenses of the voyage were reasonable and the charges made, except as hereinafter mentioned, entirely fair; the exception being the charge in each instance of an item under the head of "gratuities." These items, I think, should be disallowed. While the evidence shows that it is the custom of the charterer of a vessel to give a small bonus to the captain and other officers of the ship, under the head of gratuity, for faithful services, I think such a custom is allowable only where the gratuity given is chargeable

against the person giving the same. In this case the ships in question were being operated at the cost of the defaulting signatory to the contract, to wit, the steamship company, and, however universal the custom, it seems to me indefensible to charge against it, notwithstanding its default, an item of expense only justified by custom and optional with the giver.

[5] I am also of opinion that a charge of 2½ per cent. "commissions on disbursements," covering the entire cost of operation of the 14 vessels, is not allowable under the circumstances. This commission in this instance admittedly was charged only as a matter of bookkeeping, and, while it is usually allowed under more or less like conditions, in this instance it would be in effect a charge for an entire service, part of which, in my view of the law, devolved upon the injured party to the contract as a condition precedent to sustaining the claim for damages.

[6] I am further constrained to take this position for the reason that in the contract between the steamship company and Grace & Co. the latter were allowed a commission of 2½ per cent. The services which they were to render for this commission are not stated, and are presumably negligible, if any at all, the commission being more accurately described as a rebate than a commission; but since I have allowed it, as I am bound to do under the terms of the contract, in fixing the net amount which Luckenbach was entitled to charge as an offset against Grace, I think it fair and proper to disallow it as a charge in the case of the vessels chartered after the breach of the contract.

[7] It does not follow from this, however, that there should not be some allowance made to Grace & Co. for the services of another department of their business than that directly concerned in the making of the contract with Luckenbach, being services rendered by them in securing the vessels and in reducing as far as possible the cost of lifting the nitrate. That these services were valuable is shown by the fact that they secured in the case of each vessel, save 4, downward freight—that is to say, cargo from North to South America—at figures which in the aggregate largely reduced the cost of the vessels in question, and to that extent reduced the per ton cost of lifting the nitrate, and while it is difficult to determine precisely what this amount should be, I think it is fair and reasonable under the circumstances to fix it at $10,000, equal to about 2½ per cent. of downward freight, which is accordingly done. With these deductions and this allowance, I think the account as stated in Exhibit No. 7 is correct, and reflects the true and accurate cost per ton of lifting the nitrate, for which default was made by the steamship company.

At the request of counsel for the respondent, the commissioner required the libelant to furnish a schedule (see Libelant's Exhibit 44) of all vessels chartered and used by it between May, 1917, and July, 1917, with a view of determining from such exhibit whether the particular vessels chartered for the purpose and charged against the steamship company were secured at an exorbitant or inflated rate, as against that obtaining for the carriage of other nitrate. While the difference in the cost per ton is a little more than $2 for the vessels engaged exclusively in lifting the nitrate in default, there is positive and uncontradicted evidence in the record that the 14 vessels mentioned and secured on time charter and the 1 on rate charter, as shown in Exhibit 7, were chartered for the express purpose of carrying out the Luckenbach contract. There being an absence of any evidence to show that due care was not used in the making of these charters, and there being, on the contrary, an abundance of evidence to show that due care was used, I am of opinion, and so report, that the cost per ton of carrying other nitrate for Grace & Co. over the period mentioned ought not to affect or change the amount of the recovery herein. It is true, as already mentioned, that the cost per ton was increased by reason of conditions prevailing in Chili when the vessels arrived there for their cargoes. These conditions, growing out of local labor disputes, as a result of which no work was done for several weeks, is a matter of which, in my opinion, the steamship company may not complain. If it had performed its contract according to its terms, much, if not all, of the nitrate which it had undertaken to lift would have been brought to this country prior to the date of these labor troubles. It first de-

layed and then broke its contract, and the result of this combination was not only to increase the price which it was necessary to pay to put the injured party in statu quo, but also to increase the expense of the operation by reason of the conditions mentioned.

Proceeding, therefore, to determine the amount of damages allowable, it will be seen, by reference to the schedule contained in Exhibit 7 and the evidence offered in support of same, that the average cost to Grace & Co. per ton for transporting the nitrate which the steamship company was obligated under its contract to transport was $36.81, making the total cost to Grace & Co. of transporting 63,202 tons, the amount in default $2,326,465.62. From this amount, however, should be deducted, as already noted, the following charges as commissions:

Amount forward			$2,326,465.62
S. S. Jelling	$3,803 00		
S. S. Camaguey	4,462 08		
S. S. Ruby	4,666 63		
S. S. Thorgerd	4,422 55		
S. S. Laura Mearsk	3,536 82		
S. S. Edw. Pierce	4,694 52		
S. S. Karen	2,249 49		
S. S. Santiago	5,620 32		
S. S. Evelyn	4,752 76		
S. S. Edith	5,404 55		
S. S. Montosa	5,099 03		
S. S. Clare	5,568 10		
S. S. Otterstad	5,965 23		
S. S. Alderney	4,456 56		
Making a deduction of		**$64,701 64**	
There should be, as hitherto stated, a further deduction as follows			
Gratuities on account of crew:			
S. S. Jelling	$438 00		
S. S. Camaguey	380 00		
S. S. Ruby	464 60		
S. S. Thorgerd	100 00		
S. S. Laura Mearsk	351 00		
S. S. Edw. Pierce	371 00		
S. S. Karen	330 00		
S. S. Santiago	400 00		
S. S. Evelyn	370 00		
S. S. Edith	425 00		
S. S. Montosa	462 50		
S. S. Clare	462 50		
S. S. Otterstad	610 00		
S. S. Alderney	400 00		
Making a further deduction of		**5,564 60**	
Or a total for all purposes of			70,266 24
Which deducted from the gross cost of completing the contract would leave			2,256,199 38
To which should be added the arbitrary allowance mentioned above for services in securing downward cargoes, etc.,			10,000 00
			$2,266,199 38
Against which should be deducted the amount payable to Luckenbach under the contract, which, on the basis of 63,202 tons, the amount which it was liable to carry at $15.11¼ per ton net, was..			955,140 22
Making the total amount of damages recoverable			$1,311,059 16

Part III.

Having now ascertained and fixed the amount of damages recoverable, there remains only to be determined the question of whether interest should be allowed on this amount.

[8] As a general rule, interest may not be allowed on damages for breach of contract, where such damages are unliquidated and cannot be ascertained by computation, or are so uncertain in amount that they can only be established by litigation. The application of the rule however, is a matter of discretion, depending upon the circumstances in the particular case. Dyer v. Nav. Co., 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153. In the case at bar the damages at the time of the breach were unascertained and unliquidated. After the breach occurred Grace & Co. proceeded at once to do the thing which the steamship company had wrongfully refused to do. The thing done consisted in the transportation of the nitrate from Chili to the United States. This, as has been shown, Grace & Co. did by means of the charter of various vessels hereinbefore enumerated, the last of which arrived at the port of discharge October 13, 1917. When this occurred the damages were ascertained and then and there were payable. If the refusal to pay were based upon excessive demands or unwarranted charges, it would be the proper exercise of discretion to refuse to award interest; but the facts show that this is not true here. The conduct of the libelant was scrupulously fair; that of the respondent, not such as to appeal to the conscience of the chancellor. The facts conclusively show that it made a contract at a time when there was only a fair demand for its vessels, and at a price which presumably would have yielded a fair profit. Relying upon its undertaking, Grace & Co. contracted with its customers for the sale of the amount of nitrate, based on freight cost under the contract, and thereby became liable to such purchasers for the delivery of the same. Having made the contract, the steamship company delayed its fulfillment upon various grounds from time to time until a state of war between this country and Germany having been declared, it thought it saw an opportunity of avoiding a contract which the supervening circumstances show to have been unwisely made, and deliberately breached the same, and, in disregard of the ground upon which the breach was justified, immediately chartered a part at least of the same fleet which it had promised to use in the Grace contract to competitors of the latter company in precisely the same service, at prices far and away above those named in the original contract.

The answers to the interrogatories filed as a part of the record in the case fully sustain the foregoing conclusions, and, except for the fact that the respondent declined to offer any evidence, it is not too much to say that the record doubtless would have shown that even the large amount of damages here allowed were but little, if any, larger than the additional profits received by the respondent in the breach of the contract and the chartering of the ships to others. By such act on its part it has received and has in pocket large gains, while, on the other hand, the libelant, without fault on its part, has been compelled to complete the defaulted contract with funds of its own, for which it has received neither principal nor interest. Under these circumstances, I am of opinion that interest on the entire amount should be allowed, to begin to run from November 1, 1917, and so report.

Kirlin, Woolsey & Hickox, of New York City, and Edward R. Baird, Jr., of Norfolk, Va. (John M. Woolsey, of New York City, of counsel), for libelant.

Carter & Carter and Harrington, Bigham & Englar, all of New York City, and Harry E. McCoy, of Norfolk, Va., for respondents.

WADDILL, District Judge (after stating the facts as above). The gist of the libelant's exceptions is that the commissioner erred in reporting the liability in its favor for the breach of the contract sued on, in the sum of $1,311,059.16, with interest from the 1st of Novem-

ber, 1917; whereas, the damages should have been assessed at $1,371,-325.40, with interest from July 31, 1917.

Briefly, the exceptant says: (1) That the commissioner erred in giving credit to the libelant for only $10,000 to cover operating commissions, gratuities, etc., in carrying out and performing the contract breached, when he should have allowed $70,266.24, making a difference of $60,266.24 against the exceptant. (2) That the commissioner erred in fixing the amount of tonnage that the libelant was entitled to have shipped under its contract with the respondent at 69,200 tons, whereas, under the facts of the case, it should have been 75,000 tons, making a balance of only 63,202 tons of nitrate not delivered by the respondent under the contract, and for which the commissioner held it liable, 5,998 tons having been delivered before the alleged breach of the contract sued on. (3) That interest should have been allowed as of the 31st of July, 1917, instead of November 1, 1917.

The respondents' exceptions are briefly to the effect that the commissioner erred in awarding damages to the libelant for the alleged breach of the contract in excess of the sum of $322,697.21, and that in no event should the award have exceeded $807,379.81. The specifications of objections are as follows: (a) That he treated the contract in suit as calling for the transportation of 69,200 tons of nitrate, instead of 67,500 tons, making a difference of 1,700 tons against the respondent; (b) that the commissioner erred in allowing damages on the basis of the cost of the hire of 14 ships employed specially to lift the tonnage between the dates of 23d of April, 1917, and 31st of December, 1917, covered by the contract between the parties, instead of upon the basis of all the ships employed by the libelant in the transportation of nitrates between said dates, and that there was no sufficient evidence to warrant the commissioner's finding that the 14 ships were specifically hired to carry the nitrates in question; (c) that the commissioner erred in assessing damages upon the basis of the cost of forwarding nitrates after the 23d of April, 1917, instead of upon the basis of approximately equal monthly shipments between December 1, 1916, and July 1, 1917; (d) that the commissioner erred in computing his damages upon the basis of $36.81 per ton, instead of $29.-19½ per ton, for the carriage of the nitrates in question; (e) that the commissioner erred in assessing the cost arising from the breach of the contract, by failing to take into account, during the same period in which the cargo in question was being lifted, that the libelant was engaged in transporting other large quantities of nitrates, and to apportion the cost of transporting the quantity to be carried under the contract in suit and the total tonnage shipped by libelant during said period.

These exceptions were elaborately argued, orally and in writing, and submitted, and after mature consideration thereof the court's conclusion thereon, having regard to the terms of the contract in suit, which are briefly as follows:

"The said party of the first part [Luckenbach Steamship Company, Incorporated] shall provide the said party of the second part [W. R. Grace & Co.] with freight room for seventy-five thousand (75,000) tons, 10 per cent. more or less at the option of the party of the first part, of nitrate and/or

ores between the 1st of December, 1916, and the 31st of July, 1917, as follows: * * * The above-mentioned quantity to be divided as follows: About nine thousand (9,000) tons, 10 per cent. more or less, monthly; the party of the first part to have the right to take up to seventeen thousand (17,000) tons in any one period of sixty (60) days; all quantities and deliveries to be mutually arranged between the party of the first part and the party of the second part, to suit the steamers of the party of the first part"

—is that the report as a whole should be approved and confirmed. The commissioner has, in an able and exceedingly clear opinion, considered and passed upon the several questions presented for consideration, and the exceptions taken to his report by the parties respectively should be overruled; the court adopting his reasons and conclusions as its own regarding the several matters passed upon.

A decree overruling the exceptions and affirming said report will be entered on presentation.

CITY OF SHREVEPORT v. SOUTHWESTERN GAS & ELECTRIC CO.

(District Court, W. D. Louisiana. May 10, 1919.)

No. 7.

1. GAS ⚷14(2)—NATURAL GAS—FRANCHISE—RIGHT TO INCREASE RATES.
   "Pine Island," so called, *held* within the "Caddo gas field," or "fields," so that, gas wells existing on the island of sufficient pressure to bring the gas to plaintiff city, the contingency on which defendant gas company bases its right to increase rates under a franchise did not exist.

2. ESTOPPEL ⚷62(8)—IN PAIS—INCREASE IN RATES BY GAS COMPANY—LACK OF PROTEST ON NOTICE.
   Plaintiff city, when notified by defendant gas company that, as it was necessary to use pumps to force gas into the city, it would cease to operate under its amended franchise, but would continue to operate under the original franchise, by reason of having made no protest or objection, *held* not estopped to contest the gas company's right to increase rates, on the ground that the contingency specified in the franchise, nonexistence of sufficient pressure to bring the gas to the city without pumping, had come to exist; the notice having stated no increase in rates would be made.

3. ESTOPPEL ⚷25—ESTOPPEL BY DEED—ASSIGNMENT OF FRANCHISE—CITY AS PARTY.
   A city, which, by providing the terms under which a franchise might be transferred from one gas company to another, consented in advance to the transfer under the terms stipulated, cannot be said to be a stranger to the assignment of the franchise, to bring it within the rule that strangers to a deed cannot avail themselves of estoppel arising therefrom.

4. GAS ⚷6—FRANCHISE—RIGHTS ACQUIRED BY ASSIGNEE.
   Even in the absence of a specific provision in a gas franchise, its assignee can acquire no greater rights than the assignor, and he is bound to the city which granted the franchise by all the assignor's obligations, and may even be restricted in rights enjoyed under another franchise, where the franchise assigned to him so provides.

5. GAS ⚷14(2)—FRANCHISE—RATES—ASSIGNMENT.
   A gas company, which had a franchise from the city, and thereafter acquired by assignment another franchise, can be held to the more favorable rate specified for manufacturers in the original franchise, and to the

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

more favorable rate for domestic consumers under the assigned franchise, which provided that, in the event of its assignment to any corporation holding a gas franchise from the city, the corporation should operate under the franchise providing the more beneficial and cheaper rate to the city and its inhabitants, even though a higher domestic rate might have been authorized under the original franchise.

In Equity. Suit by the City of Shreveport against the Southwestern Gas & Electric Company. Decree directed, perpetuating preliminary injunction.

B. F. Roberts, City Atty., Foster, Looney & Wilkinson, and Lewell C. Butler, all of Shreveport, La., for plaintiff.

Alexander & Wilkinson and C. H. Lewis, all of Shreveport, La., for defendant.

J. C. Pugh, Jr., of Shreveport, La., for intervener.

JACK, District Judge. The city of Shreveport brings this suit to restrain the defendant gas company from putting into effect an increase in its rates for natural gas. The Shreveport Creosoting Company and the Louisiana Cotton Oil Company have intervened, joining the city in its prayer for an injunction. A preliminary injunction was issued, and the case is now before the court on its merits.

The defendant gas company is the holder of, and is operating under, two franchises to supply the city with natural gas; the first granted in 1905 to the Citizens' Oil & Pipe Line Company, and the second granted in 1907 to J. B. and W. S. Atkins. The former, by various assignments, finally passed to the defendant company, and thereafter the latter, in 1909, was transferred to defendant by the Louisiana Gas Company, assignee of J. B. and W. S. Atkins, by a contract in which the Louisiana Gas Company sold to the defendant company its distributing system in the city of Shreveport and leased to it its franchise. Each of these franchises provides a maximum rate which may be charged, and each contains a proviso under which these rates may be increased. While the city alleges, and the defendant denies, that the proposed increase in rates is unfair and unreasonable, the issue before the court is not the fairness or unreasonableness of the proposed rates, but whether, under the terms of the contracts, the defendant has the right to increase them, and whether the contingency named in the franchises which would authorize the increased rates has arisen. In interpreting these franchises, and determining the intent of the parties at the time they were granted, it is well to consider briefly their history, as shown by the ordinances filed in evidence.

Shortly after the discovery of natural gas north of the city of Shreveport, in Caddo parish, a franchise was granted the Citizens' Oil & Pipe Line Company to supply the city and its inhabitants natural gas, which franchise contained the stipulation that the company should not charge exceeding 50 cents per 1,000 cubic feet, less a discount of 10 per cent. on bills paid prior to the 10th of each month.

Two years after the granting of the franchise to the Citizens' Oil & Pipe Line Company, J. B. and W. S. Atkins applied for and obtained from the city council a similar franchise, which contained, however, a

provision for a cheaper rate—for domestic consumption, not to exceed 25 cents per 1,000 feet, less the same 10 per cent, discount.

While the Atkins franchise was pending, the council was presented a proposed ordinance by the Shreveport Gas, Electric Light & Power Company, defendant gas company's predecessor, providing a reduction in the maximum rate which might be charged by the latter company for natural gas. Both ordinances were passed through their first reading May 21, 1907, and both at a subsequent meeting finally adopted. In this ordinance, amending the original franchise to the Citizens' Oil & Pipe Line Company, the maximum rate for domestic consumption was cut from 50 to 25 cents, with the same discount, 20 cents per 1,000 for public institutions, with a 10 per cent. discount, and 11 cents per 1,000 for manufacturers, less a 30 per cent. discount, up to 20,000,000 cubic feet per month, and with a sliding scale for gas in excess of that amount.

This proposal by defendant company to reduce its rates was, as alleged in the answer, without any consideration whatever from the city. The motive, however, was apparent; the evident purpose being to discourage J. B. and W. S. Atkins, if possible, in the construction of their proposed line, and thus keep down competition. The domestic rate of the Atkins franchise was met, and a special rate was provided for manufacturers. Of course, this might have been done by the company without an amendment to its franchise; but by putting it in this form the company's prospective competitors were given notice that the new rates would be permanent, subject only to the contingency to which allusion has heretofore been made.

In the Atkins franchise there was a proviso that the maximum charge should be 50 cents per 1,000 cubic feet, whenever it should become necessary "to erect and maintain pumping stations to supply gas as required or authorized by this ordinance." In the amendment to the Citizens' Oil & Pipe Line Company franchise it was provided that the rates as therein fixed "shall remain in force and effect as long as what is now known as the Caddo gas field shall furnish gas in sufficient quantities with natural pressure sufficient to force such gas from the gas wells through the pipe line of the company to the city of Shreveport, but should the supply of gas or the natural pressure diminish, so as to make it necessary to use artificial force or power either to pump the gas from the wells or to force it through the pipe line of the company to the city of Shreveport, this amendment shall cease, and the rates hereby fixed shall become inoperative and void, and the rates now authorized to be charged by said company as fixed in said franchise shall revive and become executory, as if this amendment had never been passed, and in such event the said company shall be empowered and authorized to charge such rates as now fixed in its said franchise."

It will be noted that the contingency covered in the proviso of the amendment to the Citizens' Oil & Pipe Line Company franchise was such depletion of the Caddo gas field, as then known, as would necessitate the pumping of the gas to Shreveport, whereas in the Atkins franchise the Caddo gas field is not mentioned in the proviso, thus leaving

it inoperative, and the original rates in effect, so long as gas may be delivered in Shreveport by its own pressure, regardless of the location of the wells.

Later, however, in the Atkins franchise and in another connection, the Caddo gas fields are mentioned. In section 10 it is provided that work on the pipe lines shall begin within 60 days after passage of the ordinance, and that the grantee "shall furnish gas within 12 months from construction of pipe line from their gas wells located in and about the Caddo gas fields." Then follows the clause:

"The use of the term 'Caddo gas fields' shall embrace the Ananias gas field, the Pine Island gas field, and all other neighboring fields that are or may hereafter be developed by said grantees, their heirs, successors, or assigns."

In May, 1915, defendant company gave notice in writing to the city that, it having become necessary to use artificial means to force gas through its pipe line from the Caddo field to the city of Shreveport, as contemplated in its amended franchise, it would cease from that date to operate under such amendment, and would operate under the original franchise. The letter further stated, however, that there was no present intention on the part of the company to increase existing rates, but that the notice was given to preserve the company's legal right to do so.

In 1916 gas was discovered at Cedar Grove, 5 miles south of Shreveport, and was piped to the city by defendant company. About a year later a large gas field was discovered at Elm Grove, about 18 miles south of Shreveport. All the gas now used in Shreveport is piped from Cedar Grove and Elm Grove under its own pressure, without the use of pumps.

Opinion.

First, I will consider the rights of the defendant under its first acquired franchise, that granted the Citizens' Oil & Pipe Line Company. It is evident that neither the Cedar Grove nor the Elm Grove districts, developed after the amendment to the franchise, can be considered as a part of the Caddo gas field as it was then known. The evidence conclusively shows that the wells originally drilled in the Caddo field, as shown on the map filed in evidence, have been so reduced in both volume and pressure as to make it impossible to supply the city from such wells. It is contended, however, that recent developments have shown that on Pine Island there is gas of sufficient volume and pressure to supply the city without the use of pumps. One witness, Mr. Todd, testifies that he is familiar with four wells on Pine Island which have a rock pressure of about 700 or 800 pounds, sufficient to force the gas to Shreveport. To about the same effect is the testimony of Mr. Osborn, who is connected with the gas department of the Standard Oil Company. One of these wells came in 6 or 8 months ago with a capacity of 18,000,000 feet a day. Its present capacity is some less. The defendant offered no testimony whatever as to the volume or pressure of the wells on Pine Island, choosing, it would appear, rather to stand on the position that Pine Island was not a part of the Caddo field, as known at the time of the amendment to its franchise.

Should, then, Pine Island be considered a part of the Caddo gas field, as it was known at the time of the amendment to the Citizens' Oil & Pipe Line franchise? As shown by the map filed in evidence, there was at that time a group of 7 or 8 wells in the immediate vicinity of Caddo City, a little station on the Kansas City Southern road about 22 miles north of Shreveport, and there was within a radius of 3 miles a larger group in the vicinity of Ananias, or Oil City, another station on the same line about three-quarters of a mile nearer Shreveport, and there was one well on Pine Island, about a mile from the nearest of the group about Caddo City. The entire territory covered by all of these wells, the city contends, constituted what was then known as the Caddo gas field; while the defendant contends that these groups constituted several distinct fields, and that only those wells in the immediate vicinity of Ananias, or Oil City, and Caddo City, were in the Caddo field, as then known. As before stated, in the Atkins franchise, the term "Caddo gas fields" was specifically stated to include Pine Island. It is true that, in the Atkins franchise, the term is "Caddo gas fields," plural; whereas, in the Citizens' Oil & Pipe Line franchise, the term is "Caddo gas field," singular. I think, however, there is no distinction to be made in the words "fields" and "field," as used in the franchises, but that they were used just as the terms "lands" and "land" are indifferently used. It is clear, then, that in the Atkins franchise the city considered Pine Island in the Caddo gas field, and there is no good reason to presume a different understanding on the part of the city in the amendment to the Citizens' Oil & Pipe Line Company franchise. Furthermore, it is but reasonable to conclude that such was the intention of the defendant, who, under the circumstances, must necessarily be presumed to have been fully familiar with the Atkins franchise. This amendment was presented to the council by the defendant company's manager, and, if he did not intend to accept the definition of "Caddo gas fields" as contained in the Atkins franchise, he should have so stated. The only restriction he made in the term was to limit it to what was then known as the "Caddo gas field," thus providing against the inclusion in the future of some unanticipated field, such, for instance, as Cedar Grove, but not negativing the inclusion of the neighboring area, on which oil had already been found and which was specifically included in the term "Caddo gas fields" in the contemporaneous Atkins franchise.

[1] I am of the opinion that Pine Island was at the time, as testified by several witnesses, understood and considered a part of the Caddo gas field, and that, as the evidence shows gas wells now exist on Pine Island of sufficient pressure to bring the gas to Shreveport, the contingency on which defendant bases its right to increase its rates has not been established.

[2] The city is not estopped by reason of having made no protest or objection in 1915, when notice was given by the defendant company that, inasmuch as it was then necessary to use pumps to force the gas to Shreveport, it would cease to operate under its amended franchise, but would continue to operate under its original franchise. As the notice stated that no increase in rates would be made, it was a matter

of no material concern to the city. It is not claimed that the defendant was in any wise injured by such failure of the city to protest, or that it thereby was induced to take a different course to its detriment.

Defendant's right to increase its rates is to be measured, not only by the original Citizens' Oil & Pipe Line Company franchise and the amendment thereto, but likewise by the terms of the Atkins franchise. The rate fixed in the latter is more favorable to the domestic consumer, though it does not contain the reduced special rate to the manufacturer, and, as before pointed out, this rate may not be increased so long as the gas is piped into the city under its own pressure. Whether the gas be brought from the original field or another is immaterial.

In 1909 the Louisiana Gas Company, holder of the Atkins franchise, sold its entire distributing system in the city of Shreveport, but not its wells or pipe line, to the defendant company, and "leased" to it its franchise for a period terminating on the date of the expiration of such franchise. The contract was in effect one of partnership, by which the two companies pooled their interests and consolidated their business; the defendant company taking exclusive charge of the sale and distribution of the gas in the city, and both companies jointly continuing to furnish the required gas from their respective wells. The Louisiana Company agreed to furnish 40 per cent. of the gas and the defendant the remaining 60 per cent.; the Louisiana Company to pay $400 per month as its portion of the operating expenses in the city of Shreveport, and to receive as its part of the profits 40 per cent. of the gross receipts. The defendant company specifically bound itself not to charge for gas a rate in excess of the rate authorized in the Atkins franchise.

Furthermore, the Atkins franchise contained a provision that, in the event it should be assigned or transferred to any person or corporation holding a gas franchise from the city, such party should operate under that one of such franchises providing the more beneficial and cheaper rate to the city and its inhabitants. The city contends that, by acquiring the Atkins franchise, the defendant company became bound by its terms, and is now estopped to claim any right, if any it had, under its first-acquired franchise, to increase its rates over those provided in the Atkins franchise.

[3, 4] In answer, counsel for defendant cite a number of cases holding that strangers to a deed cannot avail themselves of an estoppel arising therefrom. This is a well-established principle of law, but it has no application to the assignment of a franchise. Were the law otherwise, the Louisiana Gas Company, by this arrangement with the defendant company, might receive indirectly from consumers a larger price for its gas than it could have collected directly from them under the terms of its franchise. The city provided the terms under which the franchise might be transferred, and thus in advance consented to such transfer under the terms stipulated. It therefore cannot be said to be a stranger to the assignment. The assignment could be made only under the conditions provided. Even in the absence of such specific provision in the franchise, an assignee can acquire no greater rights than his assignor, and he is bound to the city by all of the ob-

ligations of the latter. He may even restrict rights enjoyed under another franchise, where the last-acquired franchise so provides.

In the case of Shreveport v. Shreveport Traction Co., 127 La. 560, 53 South. 863, cited by counsel for defendant, the city had granted to one Lorenz a franchise to operate a street railroad, with the stipulation that, should such franchise be assigned to a company operating another street railroad in the city, transfers should be issued over both lines. The defendant traction company had not purchased or otherwise acquired the Lorenz franchise, but had entered into a contract to operate for Lorenz or his successor cars over such line for a certain definite time which had expired. The testimony showed that the traction company was ignorant of this transfer stipulation in the Lorenz franchise, and had expressly refused to agree to include such a provision in its contract. The court held that the traction company was a subcontractor, and not bound by such agreement between the city and Lorenz, adding, in its conclusion, that the question was rather academic, "since it could hardly be contended, in any event, that defendant could be compelled to grant transfers under a contract, whether express or implied, which no longer exists." The case has no application to the case at bar, in which the defendant is not a subcontractor, but is the assignee of the franchise in question, and does not claim to have been ignorant of its provisions. Hand in hand with the privileges of a franchise must go its reciprocal obligations to the public.

[5] The defendant may, I conclude, be held to the more favorable rate given the manufacturer in the Citizens' Oil & Pipe Line Company franchise, and to the rate made domestic consumers in the Atkins franchise, even though a higher domestic rate might have been authorized under the former. If two franchises, acquired by assignment and operated under by one company, provide different rates, there is no good reason why the company should have the right to demand the higher rate rather than that the city should have the right to demand the lower, and there is certainly no good reason why the city should not demand the rates under the more favorable franchise, when it is so specifically provided in the franchise last acquired by the operating company.

For the foregoing reasons, and in accordance with the views herein expressed, a decree will be entered, perpetuating the preliminary injunction heretofore issued.

GRASSELLI CHEMICAL CO. v. ÆTNA EXPLOSIVES CO., Inc.

(District Court, S. D. New York. January 5, 1918.)

CORPORATIONS ⚷376—REPURCHASE OF STOCK ISSUED TO EMPLOYÉ—NOTE FOR PRICE—RIGHT TO ALLOWANCE OF CLAIM.

Where a New York explosives company, employing an army officer as an expert, agreed to give him $50,000 par value of its capital stock, with the right to sell it back at the end of a year if he terminated his contract of employment which was done, the company having no surplus from which it could purchase its own stock under Penal Law, N. Y. § 664, and Stock Corporation Law N. Y. § 28, and giving a note, in a following conservation receivership of the company the officer was not entitled to allowance of his claim on the note as against creditors.

In Equity. Receivership suit by the Grasselli Chemical Company against the Ætna Explosives Company, Incorporated, wherein Odus C. Horney files a claim against defendant company in the hands of receivers. Claim denied.

Winthrop & Stimson, of New York City, for receivers.

O'Brien, Boardman, Harper & Fox, of New York City (Junius Parker and Ernest R. Early, both of New York City, of counsel), for claimant.

MAYER, District Judge. On April 20, 1915, defendant entered into a contract of employment with Odus C. Horney, wherein it was provided that for Horney's service to the company he was to receive $10,000 a year for five years. At the end of one year, at Horney's option, the contract could be terminated, and Horney was then to have $40,000. It was further provided that Horney was to receive $50,000, par value, of the capital stock of Ætna, with the right to sell it back to Ætna at the end of a year. He was also to receive $100,000, which the company deposited with the Columbia Trust Company in escrow. Prior to the making of the contract Horney was a lieutenant colonel in the United States army, experienced in the manufacture of explosives for ordnance, and as Ætna was about to manufacture military explosives, the services of an able and experienced man were needed.

It may fairly be inferred that the substantial terms agreed upon were made partly in consideration of the fact that Lieutenant Colonel Horney was about to give up his life work and his connection with the United States army. After Horney had been in the employ of Ætna one year, he elected to terminate his contract. He received the $100,000 held in escrow; he delivered the $50,000 par value capital stock to Ætna; he received the company's note for $90,000, of which $40,000 was in payment of salary, and as security for this note he received $110,000 in the bonds of Ætna. On February 13, 1917, Ætna paid Horney $10,000 on account of his note, and on March 15, 1917, Ætna made Horney a further payment of $10,000 and gave him

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

its 30-day note in the sum of $70,000, secured by the $110,000 in bonds. On April 19, 1917, receivers of Ætna were appointed in this court in the above-entitled suit in equity.

On August 6, 1917, Horney filed with the receivers a proof of claim of a debt evidenced by the note of $70,000. The receivers now petition the court for instructions, asking that an order be entered directing that Horney's claim as to $20,000 shall be allowed and approved, and that the court advise and direct the receivers as to whether or not Horney's claim as to the further sum of $50,000 shall be allowed and approved, and for other and further germane relief.

There does not seem to be any question of fact involved, it being conceded, as I understand, that Ætna did not have any surplus at any of the times relevant to the question here involved. The receivers are instructed to allow the claims as to $20,000, and thus there remains for determination the matter of the $50,000.

Counsel for the contending parties are apparently in agreement as to some of the questions involved, and the result is that the point to be decided is whether Horney's claim shall be allowed after the claims of general creditors, and its payment be postponed until general creditors shall have been paid, or whether the claim cannot be allowed now, in view of the fact that Ætna has never had a surplus from the date of the making of the contract to the present time.

It is the law in many jurisdictions that a corporation may not purchase its own capital stock under any circumstances. In New York, however (and Ætna is a New York corporation), a corporation may purchase its capital stock from surplus profits. Penal Law (Consol. Laws N. Y. c. 40) § 664; Stock Corporation Law (Consol. Laws N. Y. c. 59) § 28; Cook on Corporations, § 311, p. 894; Morowitz on Private Corporations, p. 110; Machen, Modern Law on Corporations, p. 625; Williams v. Western Union Telegraph Co., 93 N. Y. 162; In re Fechheimer-Fishel Co., 212 Fed. 357, 129 C. C. A. 33; In re Tichenor-Grand Co. (D. C.) 203 Fed. 720; Hamor v. Taylor-Rice Engineering Co. (C. C.) 84 Fed. 392; Stevens v. Olus Manufacturing Co., 72 Misc. Rep. 508, 130 N. Y. Supp. 22; In re S. P. Smith Lumber Co. (D. C.) 132 Fed. 618. There are, however, a number of cases which seem to hold that under some circumstances a New York corporation may purchase its capital stock. Richards v. Wiener Co., 207 N. Y. 59, 100 N. E. 592; In re Castle Braid Co. (D. C.) 145 Fed. 224; Joseph v. Raff, 82 App. Div. 47, 81 N. Y. Supp. 546; City Bank v. Bruce, 17 N. Y. 507; Moses v. Soule, 63 Misc. Rep. 203, 118 N. Y. Supp. 410; Strodl v. Farish-Stafford Co., 145 App. Div. 406, 130 N. Y. Supp. 35.

There is not, however, anything in any of these cases which justifies the conclusion that a corporation may purchase any of its capital stock from funds other than surplus. An examination of the cases just above cited will show either that it was assumed that the company had a surplus or at least not shown that there was not a surplus or that the stock was purchased for purposes of reissue. It is pointed out in Stevens v. Olus Manufacturing Co., 72 Misc. Rep. 508, 130 N. Y. Supp. 22, that in Joseph v. Raff, 82 App. Div. 47, 81 N. Y. Supp

546, the transaction had been completed, and that the person who was to succeed the president of the company had already agreed to purchase the president's stock before the sale took place, and it further appears that the corporation purchased the stock for the purpose of reissuing it.

In view of what seems to be settled law on the subject, it is not urged that Horney's claim should be allowed and paid pari passu with the claims of general creditors. It is argued, however, that the purpose of the New York statutes (Penal Law, § 664, and Stock Corporation Law, § 28) was to protect creditors, and did not reach far enough to protect the corporation; i. e., the stockholders. I think, however, that this is too narrow a view. Obviously a purchase or repurchase of stock might (and in many cases would) afford to one stockholder an advantage over other stockholders of the same class, in addition to depleting pro tanto the assets of the corporation. The case at bar is a perfect illustration of this proposition, for, under the contract, Horney would receive $50,000 for stock which everybody familiar with the affairs of Ætna knows was not worth $50,000. To the extent, therefore, that $50,000 was in excess of the market value of the stock, a payment to Horney (where there was no surplus) would decrease the assets of the corporation to the detriment of other owners of stock of the same kind.

While, therefore, the purchase of capital stock is not wholly prohibited in New York, it must be limited to those cases and situations where payment therefor can be and is made out of surplus profits. At present there are not any surplus profits, and therefore the final question is whether Horney's rights are in any way enlarged by reason of the fact that the estate is in an equity receivership. The order appointing the receivers decreed:

"It is necessary for the protection and preservation of the respective rights and equities of the complainant and all other creditors of the defendant that the property and business of the defendant be preserved and administered," and the "receivers be and they hereby are authorized to continue, manage, and operate the business of the defendant until the further order of this court, with full authority to carry on, manage, and operate the said business."

No authority has been conferred upon the receivers to wind up the business of Ætna, or to distribute its assets to others than the creditors, or to make payments other than those that may become necessary for the purpose of carrying on the business or disposing of and clearing away litigations. The receivership at this juncture is what is generally spoken of as a conservation receivership; the hope being ultimately to turn the property back to the corporation, or, in other words, to the stockholders.

To allow the claim of $50,000 at this time would be premature, and in fact the court lacks power at present to allow the claim. If the property shall be turned back to the corporation, then the controversy will be one between Horney and Ætna, with which at this time we are not concerned. In order, however, to avoid any question to the effect that the status of the claim is now being determined in the event that, contrary to expectations, the receivership should become a wind-

ing-up receivership, it may be made plain, in the order to be filed on this opinion, that that question is left open, to be passed on if and when the occasion arises.

I have not discussed the question of estoppel due to performance, because that question is fully referred to in the concluding pages of my opinion in Bassick v. Ætna (D. C.) 246 Fed. 974, recently filed, and is covered by the cases of which McCormick v. Market Bank, 165 U. S. 538, 549, 17 Sup. Ct. 433, 41 L. Ed. 817, is an example.

As a transfer by Horney of the note or the collateral to an innocent purchaser may increase the indebtedness of the company, it is proper that Horney shall be enjoined from disposing of the note and the bonds collateral thereto until further application to the court on notice.

In re BRUECK & WILSON CO.

(District Court, S. D. New York. June 2, 1919.)

1. CORPORATIONS ⚿376—REPURCHASE OF STOCK—NOTES FOR PRICE.
   Under the law of New York, where a stockholder in a New York corporation sold his stock to the company, and took its notes, though they were valid when issued, he did so at his peril, and assumed the risk of consummation of the transaction if at maturity of any of the notes, there was no surplus possessed by the company, so that payment of any note would encroach upon the funds which belonged to the company in trust for payment of creditors.

2. BANKRUPTCY ⚿340—CLAIMS—PURCHASE OF STOCK—SUFFICIENCY OF EVIDENCE.
   Evidence *held* to show that the bankrupt company had issued the notes on which claim was filed by the holder in some manner in connection with a sale to it of his stock by the holder's brother-in-law.

3. BILLS AND NOTES ⚿339—HOLDER IN DUE COURSE—DUTY TO MAKE INQUIRY—NOTES GIVEN FOR STOCK.
   The brother-in-law of a stockholder in a company, in taking from the stockholder, in payment of an antecedent debt, notes issued by the company to the stockholder in repurchasing his stock, could not close his eyes as to whether the notes were issued on the purchase of the company's stock, but was under the affirmative duty, in order to protect himself against the New York rule that a company can purchase its stock only with surplus profits, to make inquiry.

In Bankruptcy. In the matter of the Brueck & Wilson Company, a bankrupt. On review of referee's order expunging the claim of one Rothenberg. Order sustained.

Frederick W. Sperling, of New York City, for claimant.

Zalkin & Cohen, of New York City (Moses Cohen, of New York City, of counsel), for trustee.

MAYER, District Judge. The referee has ordered that Rothenberg's claim should be expunged, and this order is here on review. The testimony fully warrants the following conclusions:

(1) That the bankrupt corporation, while solvent and having a surplus sufficient to authorize the transaction, bought from one Blum

his stock in the corporation, for which it issued its 12 promissory notes, each dated October 11, 1915, each for $625, with 5 per cent. per annum interest from January 1, 1916, the first note to be due April 1, 1916, and the remaining notes quarterly thereafter until April 1, 1918, when the last note was to become due.

(2) That the first note was duly paid, but that bankruptcy prevented the payment of the remaining 11 notes.

(3) That Blum delivered all the notes to his brother-in-law, Rothenberg, in consideration of the extinguishment of a valid antecedent debt owing to Rothenberg from Blum, and that Rothenberg did not know the precise details of the transaction whereby the corporation bought its stock from Blum, and made and delivered its notes to Blum in payment therefor.

There is no question in the case of lack of good faith or honest dealing. The sole question is whether, on the facts, it follows as matter of law that Rothenberg was bound to inquire into the circumstances under which the notes were issued, and thus gain knowledge of the fact that the notes were issued by the corporation to purchase its own stock, and consequently take the notes from Blum, with all the chances which Blum ventured when he took these notes.

[1] Under the law of New York the notes were valid when issued, but Blum sold the stock and received the notes at his peril, and assumed "the risk of the consummation of the transaction" if at maturity of any of the notes there was no surplus, and thus that payment of any note would encroach "upon the funds which belong to the corporation in trust for the payment of its creditors." In re Fechheimer-Fishel Co., 212 Fed. 357, 129 C. C. A. 33; In re Tichenor-Grand Co. (D. C.) 203 Fed. 720; Grasselli Chemical Co. v. Ætna Explosives Co. (Horney Claim) 258 Fed. 66. What happened is perfectly clear and entirely natural, and the kind of transaction readily engaged in by men who probably did not know that the law placed limitations on notes of this character.

Rothenberg in 1908 had loaned Blum some of the money which enabled Rothenberg to buy stock in the corporation. In 1915 "the circumstances" under which the Blum-Rothenberg transaction took place are thus related by Rothenberg:

"Mr. Blum had some misunderstanding with Mr. Brueck, and he told me he was going to get out of that firm, and I tried to persuade him to remain in. My business is down South, you know, I am really in Mississippi, and I am not here all the time and when I was gone he got out of that firm, and when I got back in New York here later he had made a settlement with these people, and he asked me if I would not take what he owed me for these notes; that he was going to work for another firm, he was working for William Myer, and he wanted to start free, and he asked me if I would take those notes; and I thought Brueck & Wilson is a good concern, but he wanted me to do it, and I did it. * * *

"Q. And you knew that he had received those in settlement of his interest in the firm? A. I did not know; I cannot say that. If I did, I would tell you so. I tell you what I thought: He owed Sam Wilson and Fred Brueck a lot of money, and Sam Wilson and Fred Brueck owned all of Brueck & Wilson, and I thought he made some settlement with them. I never gave it a thought. * * *

"Q. You knew he sold his stock in the firm when he got out? A. Yes.

"Q. And he got out of the firm? A. Yes.

"Q. Did not you know that he received these notes in payment of his stock? A. No; I did not.

"Q. What did you think he received the notes for, if not for his stock? A. I never gave it a thought, but I naturally thought Sam Wilson and Fred Brueck bought his stock, and they were Brueck & Wilson Company, and I thought they gave him the notes, because the whole thing belonged to Fred Brueck and Sam Wilson at the time. I did not pay any attention to it. I thought there was only the three of them. * * *

"Q. You knew he owned capital stock in that corporation? A. I knew he owned capital stock in the corporation.

"Q. And when you received those notes from him, you knew that he had gotten out of the corporation and disposed of his capital stock in it? A. Yes; I knew he got out of the corporation."

[2] From the foregoing and other testimony to the same effect, and from the fact that the notes were signed by the corporation and were long-term notes, the inference was plain that the corporation had issued its notes in some manner in connection with the sale to it by Blum of his stock. The slightest inquiry of Blum would have disclosed the fact that the notes were issued for stock. In such circumstances, Rothenberg could have decided whether or not to take the notes and extinguish the antecedent debt.

The protection of the New York and similar statutes, reinforced by the decisions of the courts, is based on the proposition that the capital of the corporation is a trust fund for the benefit of its creditors, which cannot be depleted by the corporation by the purchase of its own stock. So important a safeguard should not be removed, nor impaired, where the circumstances are such as at once to excite inquiry by a man of ordinary business prudence. Surely, if Rothenberg had contemplated buying the notes for cash, he would have inquired as to the circumstances of their origin, and no less measure of inquiry should be expected where the consideration is the payment of an antecedent debt.

[3] As matter of law, then, the facts are such that Rothenberg cannot be regarded as an innocent purchaser. If, looking only at his testimony, the inference was not clear that the notes were for the purchase of the corporation's stock, he could not, in any event, close his eyes, but it was his affirmative duty, in order to protect himself (if he so desired), to make inquiry. Not being an innocent purchaser, he took the notes with all the risk which inhered in them as against Blum.

The order of the referee is sustained.

G. RICORDI & CO., Inc., v. COLUMBIA GRAPHOPHONE CO.

(District Court, S. D. New York. May 29, 1919.)

1. COPYRIGHTS ⚷21—AUTHORS ENTITLED—ALIENS—"DOMICILED IN UNITED STATES."
A native Canadian, who came to New York with the intention of remaining, bringing practically all of his property, *held* to be domiciled in the United States, within Copyright Act March 4, 1909, § 8 (Comp. St. § 9524), and entitled to the benefit of the act.

2. COPYRIGHTS ⚷38—MUSICAL COMPOSITIONS—JOINT AUTHORSHIP.
The music is an inseparable part of a copyrighted song, and the copyright is valid where the words were written by an American citizen, although the melody was composed by an alien, who was not eligible to obtain a copyright under Copyright Act March 4, 1909, § 1(e), being Comp. St. § 9517.

3. COPYRIGHTS ⚷21—MUSICAL COMPOSITIONS—ALIEN COMPOSERS.
The proviso to Copyright Act March 4, 1909, § 1(e), being Comp. St. § 9517, denying the right to copyright a musical composition to a foreign author or composer, unless his country grants similar rights to American citizens, is subject to exception in favor of foreigners domiciled in this country, as provided in section 8 (section 9524).

In Equity. Suit by G. Ricordi & Co., Incorporated, against the Columbia Graphophone Company. Decree for complainant.
See, also, 256 Fed. 699.

Nathan Burkan, of New York City, for plaintiff.
W. Laird Goldsborough, of New York City, for defendant.

MANTON, Circuit Judge. The plaintiff seeks to succeed in this suit for infringement of copyright, claiming that it, as assignee of a musical composition, duly copyrighted, entitled "Dear Old Pal of Mine," has obtained rights which have been violated by the defendant. The defendant manufactures sound records, and has manufactured and sold records of this musical composition.

Subdivision (e) of section 25 of the Copyright Act (Act March 4, 1909, c. 320, 35 Stat. 1081 [Comp. St. § 9546]) provides as follows:

"Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use or sale of interchangeable parts, such as discs, * * * for use in mechanical music-producing machines adapted to reproduce the copyrighted music, * * * in a civil action an injunction may be granted upon such terms as the court may impose."

Subdivision (e), § 1, of the Copyright Act (section 9517) provides:

"(e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: Provided, that the provisions of this act, so far as they secure copyright controlling the parts of instruments serving to re-

produce mechanically the musical work, shall include only compositions published and copyrighted after this act goes into effect, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights."

Section 8 (section 9524) provides:

"That the author or proprietor of any work made the subject of copyright by this act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this act: Provided, however, that the copyright secured by this act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only: (a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or (b) when the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens."

The thought resulting in this musical composition was that of Lieut. Gitz Rice, and the testimony is that he discussed, with one Harold Robe, the possibilities of a refrain of a song which he had conceived for the purpose of having the same written in the form of a ballad. He played some of this melody on the piano to Robe, who approved it and stated it was appropriate for a ballad. Robe then wrote the words which are found in the song "Dear Old Pal of Mine," and prepared the lead sheet of the music, containing the form of the rhythm for the verse of the song. Robe submitted these words, under the title "Dear Old Pal of Mine," with the lead sheet, to Rice, who accepted this form of rhythm as suggested, and then wrote the music in that rhythm to Robe's verse. Thus they collaborated and finished this musical composition. Within a few days it was played upon the piano, and the music thereof was taken down in musical notation upon a sheet of paper by Mr. Polla and arranged by him for the piano. This was done in February, 1918, and was afterwards assigned to the plaintiff. It was published for the first time in March, 1918, and was copyrighted in the name of the plaintiff, a New York corporation.

[1] Gitz Rice is a Canadian by birth. He enlisted in the First Canadian contingent of the British army during the war. He was wounded and gassed in November, 1916, and was returned to Montreal to be discharged from military service. In December, 1918, he was placed upon the reserved list, with the privilege of returning to civil occupation. In his testimony, he says he took advantage of this opportunity, and with the intent of making New York City his domicile and future residence he came to this city, where he resided on March 8, 1918, at the time of the first publication of the song. Before becoming a soldier, he lived in Canada, where he was engaged in the business of selling musical instruments. Before going into the army he closed up his business. He arrived in New York in October, 1917, where he took up his residence. It appears that, in response to an invitation given by the British Recruiting Mission, he, without pay, made speeches while clad in the uniform of the Canadian army,

in various parts of New York City, aiding or attempting to aid enlistments. While doing this, however, he declares he followed his newly chosen profession as a composer of music. He opened his bank account in New York, joined New York clubs, and became engaged to marry a New York lady. When he came here, he brought with him all his personal belongings and effects, and he had no property in Canada, except some stock in a company, which was his father's in his lifetime, and from which he is now receiving dividends. In March, 1918, he played in "Getting Together," a propaganda play, to aid recruiting. For this he was paid a salary by the manager of the play. His efforts to stimulate recruiting ceased in December, 1918.

To constitute a new domicile, two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. Among the circumstances usually relied upon to establish the residence is the intent of the person, which may be obtained from his declarations, payment of taxes, and his course of conduct, both socially and in business, while in the new domicile. Mitchell v. U. S., 21 Wall. 350, 22 L. Ed. 584.

I think the conduct and life of Gitz Rice when he came to New York indicated clear intention to make New York City his domicile. I do not find that his declaration to do so, followed by his conduct and what he did in New York, is negatived in any way by the defendant. The proof satisfies me that Gitz Rice and Robe collaborated, and developed and composed this musical composition. The copyright had been granted for a musical composition. It has been successful, and some 350,000 copies have been sold.

[2] In Standard Music Roll Co. v. Mills, Inc., 241 Fed. 360, 362, 154 C. C. A. 240, 242, it was said:

> "Whenever, therefore, a song is now copyrighted as a musical composition, both the words and the music are protected; and, as these do not constitute an indivisible whole, the owner may limit the use of his copyright either to the music or to the words, or he may allow both to be used."

The question presented is whether, assuming that under section 1, subdivision (e), of the Copyright Act above quoted, a copyright could not be obtained for a musical composition composed by Gitz Rice, is the case altered by reason of the fact that the words were written by Harold Robe, an American citizen?

Under section 53 of the Copyright Act (section 9574), the Register of Copyrights is authorized to make, subject to the approval of the Librarian of Congress, rules and regulations for the registration of claims to copyright as provided by the act. Rule 10 defines musical compositions as:

> "Including vocal and all instrumental compositions, with or without words. But when the text is printed alone, it should be registered as a 'book,' not as a 'musical composition.'"

Rule 9 provides:

> "Ordinary songs, even when intended to be sung from the stage in a dramatic manner, or separately published songs from operas and operettas, should be registered as musical compositions, not dramatico-musical compositions."

Section 3 of the Copyright Act (section 9519) provides:

"All the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this act."

In Bentley v. Tibbals, 223 Fed. 254, 138 C. C. A. 489, it is said that copyrighted matter may be included with uncopyrighted matter and not lose the protection of the statute.

Section 3 of the act provides protection of all the copyrightable component parts of the thing copyrighted. Standard Music Roll Co. v. Mills, 241 Fed. 360, 154 C. C. A. 240; New Fiction Publishing Co. v. Star Co. (D. C.) 220 Fed. 994.

The musical composition copyrighted here is a song, and it is said in Grove's Dictionary of Music and Musicians, that:

"A song may be defined as a short metrical composition, whose meaning is conveyed by the combined force of words and melody. The song, therefore, belongs equally to poetry and music; * * * but the musical forms and structures of songs are so much determined by language and metre, and their content by the emotions the words express, that their poetic and literary qualities cannot be put aside."

It is evident that, in this musical composition, the music became an inseparable part of the composition, and was not an independent composition. This has been judicially determined in Hatton v. Kean, 7 C. B. N. S. 268, where it was said:

"The musical composition here was merged in and became part of the entertainment designed and adapted by the defendant."

It was also made part of the British Copyright Act of 1911, where it was said:

"For the purpose of this provision [copyright of mechanical contrivances] a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work."

Therefore it seems that, since this musical composition is the result of joint authorship, Robe having composed part of it, it was the subject for which a copyright could be granted, and should be protected under our act. It should be treated as if he, and not his collaborator in authorship, Gitz Rice, was the sole author thereof. A joint labor in carrying out a common design, even though each does not contribute the same amount of labor and words to the execution of the design, or even if an author should complete a play upon a design of his own, it might be a joint ownership, if another should come and suggest alterations which he agreed to and adopted. Coppinger on the Law of Copyrights (4th Ed.) 110; Maurel v. Smith (D. C.) 220 Fed. 195.

In my opinion, the copyright as granted may also be sustained for the reason that Gitz Rice was domiciled in this country at the time of his application for the copyright and the publication of the composition.

[3] If there is ambiguity between section 1, subdivision (e), and section 8, subdivision (b), we may find enlightenment as to the legislative intent in the report of the committee which drafted the act and had charge of its passage. This may be used in forming a conclusion. U. S. v. Chicago, etc., Co. (D. C.) 157 Fed. 618; Mosle v. Bidwell, 130 Fed. 334, 65 C. C. A. 533. The committee's report, No. 2222, under date of February 22, 1909, p. 9, is as follows:

"It is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices. It is not the intention of the committee to grant to citizens or subjects of foreign countries any rights under the proposed copyright law which such countries do not give to American authors and composers; and for that reason, in this paragraph, which refers to musical compositions, we have the proviso that the rights given shall *not* include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights; and *in section 8 of the bill we provide for reciprocity regarding copyrights generally, excepting only, in the last-named provision, an alien who is domiciled within the United States at the time of the first publication of his work.*"

I think it is clear that Congress intended that domiciled foreigners are entitled to the benefit of the provisions of subdivision (e) section 1, of the act, and that it intended only to exclude subjects or citizens of countries denying similar protection to our citizens. In other words, it intended that domiciled foreigners should receive the same protection and have the same rights as American citizens. An infringement is admitted if it be held that the copyright is good and should be protected. The correspondence indicates clearly that the defendant took the position that the copyright was void and afforded no protection to plaintiff. As indicated above, I think the position assumed by the defendant was erroneous, and a decree is granted for the plaintiff.

The decree should provide an injunction restraining the defendant from manufacturing, using, or selling sound records adapted to reproduce the composition "Dear Old Pal of Mine" until the defendant shall have served notice of its intention to use the composition in the manner prescribed by section 25, subdivision (e) of the Copyright Act, and until it shall have paid the damages awarded by this decree; further, it should provide for an accounting. An allowance of counsel fee of $1,000 will be awarded.

THE LAKE MONROE.

(District Court, D. Massachusetts. November 29, 1918.)*

No. 1666.

SHIPPING ⚿3½, New, vol. 8A Key-No. Series—SUITS FOR DAMAGES—VESSELS SUBJECT TO PROCESS—GOVERNMENT VESSELS.

The provision of Shipping Board Act, § 9 (Comp. St. § 8145a), that vessels acquired by such board and registered as vessels of the United States, "while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities governing merchant vessels," whether the United States be interested therein as owner or otherwise, applies to vessels requisitioned and operated by the Emergency Fleet Corporation, under Act June 15, 1917, § 1 (Comp. St. § $3115^1/_{16}$d), and such a vessel is subject to arrest in a suit for collision.

In Admiralty. Suit for collision by John J. Matheson and others against the steamship Lake Monroe. On motion for process. Granted.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant.

Thomas J. Boynton and Lewis Goldberg, both of Boston, Mass., specially, for the United States.

MORTON, District Judge. Before the United States entered the war, the act of September 7, 1916, was passed, which established the United States Shipping Board and authorized it to construct, charter, and operate commercial vessels, and to form, if advisable, subsidiary corporations to carry out its powers. U. S. Compiled Statutes, § 8146a et seq. Under this statute (section 11) the Emergency Fleet Corporation was organized under the laws of the District of Columbia. After this country became a belligerent, the act of June 15, 1917, was passed (U. S. Compiled Statutes, § $3115^1/_{16}$d), which conferred upon the President extraordinary powers in reference to shipping, and inter alia authorized him to requisition uncompleted vessels and to complete them. By a proclamation dated July 11, 1917, the President delegated to the Emergency Fleet Corporation his powers under the act last referred to, so far as they related to the construction of vessels, and to the United States Shipping Board his powers (speaking very generally) in respect to the operation of vessels.

At the time when this proclamation was made the Lake Monroe was in process of construction for private parties. She was requisitioned by the Emergency Fleet Corporation and completed by it. Upon her completion she was delivered to the United States Shipping Board to be operated by it. The Shipping Board caused her to be registered in the name of the United States, and afterward caused her to be operated through the Emergency Fleet Corporation. This corporation employed the Kerr Steamship Company, or Randall & Co., as its agents to attend to the business details of said operation. The Ship-

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*Affirmed on prohibition proceedings, 249 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. —.

ping Control Committee, one of the administrative bodies of the United States Shipping Board, ordered the Lake Monroe into the coal trade for New England. She carried coal from Lambert's Point, Va., to New England ports, under agreements whereby the shippers paid a stipulated rate per ton for the transportation.

While she was so engaged, she collided with and damaged (as is alleged) the fishing schooner Helena. The master of the Helena thereupon filed a libel in this court and prayed for a warrant of arrest against the Lake Monroe. The United States attorney suggested to the court that the Lake Monroe was a government vessel and was exempt from arrest. There was a hearing on the prayer for process in the libel; and counsel for the Shipping Board were heard in opposition thereto.

I have no doubt that the Lake Monroe is a government vessel, and as such would be exempt from arrest, except for the provisions of section 9 of the Shipping Board Act (U. S. Compiled Statutes 1916, § 8146e). The Broadmayne, 85 L. J. R. Prob. Ad. & Div. 153 (1916); The Scotia, 1 A. C. 501 (1903).

The case therefore turns on the provisions of section 9, supra. This section explicitly says that vessels of the Shipping Board may be registered as vessels of the United States and shall be entitled to the benefits and privileges appertaining to such registry. It further provides that:

> "Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities governing merchant vessels whether the United States be interested therein as owner in whole or in part, or hold any mortgage, lien or other interest therein."

The expression "all liabilities governing merchant vessels" is plainly broad enough to include arrest on process in rem. It seems clear that, as to vessels acquired by the Shipping Board under the act of 1916, the liability here asserted by the libelant exists.

The ultimate question then is whether vessels acquired under the act of 1917 and the presidential proclamation in pursuance thereof stand differently in this particular from vessels acquired under the act of 1916. The parties agree that vessels acquired under the earlier act are used on the same sort of work as vessels acquired under the later one, and that the distinction suggested is not recognized in actual operation. It seems to me that the President, in delegating his powers under the act of 1917 to the bodies organized and existing under the previous act, intended that the ships requisitioned under the later act should be added to those operated or controlled under the former one, and that there should be a single fleet of government controlled vessels, operated by the same instrumentalities and subject to the same liabilities, and I have no doubt that he had power so to deal with the matter.

Moreover, the question presented in this case has already been decided in the Southern district of New York in favor of the right to arrest. The Florence H. (D. C.) 248 Fed. 1012. It would be extremely unfortunate to have a divergence of opinion between the two districts on a question of this character.

Prayer for warrant granted.

THE J. C. REICHERT.

THE JAMES ROY.

(District Court, S. D. New York. May 24, 1915.)

TOWAGE ⚷11(5)—INJURIES TO TOW—GROUNDING.

Two tugs towing a barge heavily loaded with coal, *held* at fault for hugging too closely the New York shore of East River, so that the tow grounded on a shoal which had existed for a long time, and should have been known to the tug masters.

In Admiralty. Libel by Anthony Golden against the steam tugs J. C. Reichert and James Roy. Decree for libelant.

Decree affirmed, 258 Fed. 81, — C. C. A. —.

Carpenter & Park and Henry E. Mattison, all of New York City, for libelant.

Foley & Martin, of New York City, and W. J. Martin, of Chicago, Ill., for claimant.

SMITH, District Judge (of Eastern District of South Carolina, sitting in New York). This is a libel in rem filed April 14, 1914, to recover for the injuries inflicted on a tow by the negligence of her tugs in towing and running her aground near the city of New York, so as to inflict injuries to her bottom.

It appears from the testimony that on April 17, 1913, the boat W. A. Holden, loaded with about 985 tons of coal, was taken in tow at Pier 6, East River, New York, by the steam tugs J. C. Reichert and James Roy, to be towed to Newtown creek, on Long Island, opposite the city of New York. The evidence shows that there was no wind, the water was calm, the tide at ebb, and the weather clear. The formation of the tow was that the tugs were on each side of the Golden—the tug James Roy on the starboard side, and the J. C. Reichert on her port side—in such position that the bow of the Golden projected about 40 feet ahead of the bows of the two tugs, which were about abreast of each other. With the tow thus made up the tugs proceeded up the East River at a rate of about 1 or 2 miles an hour close to the New York shore, hugging that shore so as to avoid the force of the ebb tide. They passed the end of the Jackson street pier in the city of New York very closely, so that the tug J. C. Reichert only cleared the head of the Jackson street pier by about 20 or 25 feet. When just east of Jackson street pier, and with the tow heading a little inward toward Corlear's Hook, the tow grounded in the shoal water in the nook or bight between Jackson street pier and the bulkhead leading to Corlear's Hook, and there held fast, so that her tugs could not move her. While she was in this position, the tug Overbrook, which was a very large and powerful tug and was on her way down the river, was hailed by the master of the tug J. C. Reichert, who seemed to be in general charge of the tow, and at his request the Overbrook cast out a hawser, and made fast to the W. A. Golden, and pulled her down the river stern

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forward, and with little or no exertion released her from the obstruction on which she was grounded.

The two tugs again took charge, made the tow fast to the Jackson street pier until the tide turned flood, and then carried the Golden to her destination at Newtown creek.

The court is satisfied from the evidence, and so finds as a conclusion of fact, that the cause of the grounding was that the two tugs towing the W. A. Golden were hugging the New York shore too close for safety. The space to the east of Jackson street pier was well known to be more or less shoal, and common prudence would have led to its avoidance. Any competent tugmaster should have known that the water was shoal at that point, and with a vessel of the draft of the Golden in tow it would have been common prudence to have sheered off further from the New York shore line, so as to have safely avoided this shoal water. In lieu of so doing, the tugs hugged the shore too close, carried the tow into this shoal water, and she grounded on the bottom of the river at that point; the bottom there being in same condition as had existed for a long period previously.

The court finds there is no sufficient evidence to show that there was any unknown, new, or unexpected shoal, obstruction, ridge, or higher level at that point, but that the vessel grounded upon an existing bottom, which had existed for a long time in the past, and the shoal character of which was well known, and which any skilled tug master competent to tow in the harbor of New York should have avoided.

The decree of the court, therefore, is that the libelant is entitled to recover from the steam tugs J. C. Reichert and the James Roy the extent of the damage inflicted by this grounding; and a reference will be ordered for that purpose. Upon the ascertainment of the amount of the damage so caused, a decree for the same will be entered in behalf of the libelant against the respondent steam tugs.

THE J. C. REICHERT.

THE JAMES ROY.

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

No. 158.

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

Libel by Anthony J. Golden against the steam tugs J. C. Reichert and James Roy, their engines, etc.; the Reichert Towing Line, Incorporated, claimant. Decree for libelant (258 Fed. 79), and claimant appeals. Affirmed.

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

Park & Mattison, of New York City (Henry E. Mattison, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

LEDERER, Collector of Internal Revenue, v. PENN MUT. LIFE INS. CO.*

(Circuit Court of Appeals, Third Circuit. May 23, 1919.)

No. 2399.

1. INTERNAL REVENUE ⚷7—INCOME TAX—LIFE INSURANCE COMPANIES—COMPUTATION OF GROSS INCOME.
The proviso in Income Tax Act Oct. 3, 1913, § 2, G (b), that in computing gross income "life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policy holder as shall have been paid back or credited to such individual policy holder, or treated as an abatement or premium of such individual policy holder within such year," treats policy holders individually and separately, and not in mass, and a company may not exclude from its income a dividend paid to a policy holder, even though for redundancies in premiums previously paid, unless it has received premiums from him during the tax year, and then only to the extent of the amount of premiums so received from him, either actually or theoretically.

2. INTERNAL REVENUE ⚷7—INCOME TAX—LIFE INSURANCE COMPANIES—DEDUCTIONS FROM GROSS INCOME.
So-called dividends paid to policy holders by a mutual level premium life insurance company, consisting of excess premiums collected, are covered by the noninclusion clause of Income Tax Act Oct. 3, 1913, § 2, G (b), and may not be deducted from gross income in ascertaining net income under the deduction clause, as sums paid on "policy * * * contracts."

3. INTERNAL REVENUE ⚷7—INCOME TAX—LIFE INSURANCE COMPANIES—DEDUCTIONS FROM GROSS INCOME—"DIVIDEND."
Interest on redundancies of premiums for previous years, paid by a policy holder in a life insurance company and allowed to remain with the company under the contract, when paid to the policy holder, consti-

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*Certiorari granted 250 U. S. —, 40 Sup. Ct. 14, 64 L. Ed. —.

tutes a "dividend," within the meaning of Income Tax Act Oct. 3, 1913, § 2, G (b), providing for deduction from gross income of "the sums other than dividends paid within the year on policy * * * contracts," and may not be deducted thereunder.

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

4. INTERNAL REVENUE ⟹7—INCOME TAX—LIFE INSURANCE COMPANIES—DEDUCTIONS FROM GROSS INCOME—"DIVIDEND"—"SUM OTHER THAN DIVIDEND."

Under life insurance policies providing for payment to the beneficiaries in installments on death of insured, and for interest on deferred installments, interest so paid is not a dividend, but a "sum other than dividends paid * * * on policy * * * contracts," and deductible by the company from gross income, under Income Tax Act Oct. 3, 1913, § 2, G (b).

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action at law by the Penn Mutual Life Insurance Company against Ephraim Lederer, Collector of Internal Revenue. Judgment for plaintiff, and defendant brings error. Reversed.

For opinion below, see 247 Fed. 559.

Francis F. Kane, U. S. Atty., and Ernest Harvey, Asst. U. S. Atty., both of Philadelphia, Pa., for plaintiff in error.

George Wharton Pepper, of Philadelphia, Pa. (Henry, Pepper, Bodine & Pepper, of Philadelphia, Pa., of counsel), for defendant in error.

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

HAIGHT, Circuit Judge. The defendant in error (the plaintiff below) sued to recover certain moneys which it claims were illegally assessed and exacted from it, by way of taxes for the year 1913, under the Income Tax Act of October 3, 1913 (38 Stat. L. 166, c. 16). The case was tried without a jury, pursuant to sections 649 and 700 of the Revised Statutes (Comp. St. §§ 1587, 1668), and resulted in a judgment in favor of the plaintiff for the full amount claimed.

[1] The questions presented depend for their decision upon the construction to be given to certain of the provisions of section 2, G (b), of the before-mentioned act. The plaintiff is a mutual life insurance company without capital stock, conducting its business on what is known as the "level premium plan," and annually declares "dividends" to its policy holders. In order to relieve this opinion of the burden of a discussion of the method by which premiums are fixed under the level premium plan, and how and out of what funds the so-called "dividends" to policy holders are declared, we refer to the explanation on pages 202, 203, of the opinion in Mutual Benefit Life Insurance Co. v. Herold (D. C. N. J.) 198 Fed. 199. That aptly describes the practice followed by the plaintiff in this case, except that a part of some of the dividends which enter into this controversy were derived from sources other than overpayment of premiums by the policy holders to whom such dividends were paid, as will be hereinafter set forth; but for present purposes the dividends in question

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

may be considered as derived from and as representing the excess of the actual premium or premiums previously paid by a policy holder over the subsequently ascertained cost of his insurance for any given year or years. Such excess is included in the premium as a margin of safety, and is in insurance parlance called, and will be frequently referred to, as a "redundancy."

We deem it unnecessary to describe the different kinds of policies involved in this suit, or how and when and why the dividends accumulated and were payable thereon, respectively; it being, we think, sufficient merely to point out that during the tax year of 1913 (from March 1 to December 31, 1913) the plaintiff paid cash dividends—moneys actually paid, as distinguished from dividends used in abatement of subsequent premiums or to purchase paid-up additions to existing policies, etc.—aggregating in amount $683,729.03, to the holders of 10 different kinds of its policies, and that in many cases no premiums were received or due from the same policy holders that year, and in other cases the premiums received from such policy holders were less than the dividends paid to them, respectively. The company claimed the right to exclude the aggregate of those payments from its total income during that period, in order to ascertain the net income upon which, under the act in question, it was required to pay a tax. The government, on the other hand, took the position that the whole of this sum could not be so excluded. Out of these contrary views the present controversy arose.

The act imposed a normal tax "upon the entire net income arising or accruing from all sources" to every domestic insurance company. Subdivision G (a) of section 2. It also provided that the net income should be ascertained—

"by deducting from the gross amount of the income of such * * * insurance company, received within the year from all sources, * * * the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts." Section 2, G (b).

It then, after making special provisions in separate provisos for mutual fire insurance companies and mutual marine insurance companies, contained, in the latter proviso, the following:

"And life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policy holder as shall have been paid back or credited to such individual policy holder, or treated as an abatement of premium of such individual policy holder, within such year."

The first of these clauses will, for convenience, be hereafter referred to as the "deduction" clause, and the latter as the "noninclusion" clause.

Leaving out of consideration for the moment, the grounds upon which the plaintiff contends that it is entitled to exclude those parts of the dividends paid to policy holders which do not represent the redundancies in the premiums previously paid by such policy holders, the plaintiff's before-stated contention is based on the proposition that under the "noninclusion" clause it may exclude from its total in-

come (income derived from all sources) any moneys which it may have paid as dividends to policy holders during the tax year, provided that such payments represent redundancies in premiums previously paid by the same policy holders, irrespective of whether, during the tax year, it received anything by way of premium from them, respectively. The government's contention proceeds on the theory that dividends paid to a policy holder, or, for that matter, used in abatement of premiums or otherwise credited to a policy holder, may be excluded from the total income in any tax year only when the company has received a premium during the tax year from the individual policy holder to whom the dividend is paid, and then only to the extent of the amount of the premium so received, either actually or theoretically.

These divergent views result from the different interpretations given to the words "portion of any actual premium." The company would read these words as characterizing the source from which the dividend was derived; that is to say, it would permit the exclusion from the total income of dividends paid or credited to policy holders when they represent redundancies in previous premium payments, without regard to whether any premiums were received that year from the policy holders to whom the dividends were paid. The government, on the contrary, would read the words as limiting the extent or amount of the dividend paid or credited to the policy holder, which may be excluded from total income, to the sum received by way of premium from that same policy holder during the year in which the dividend is paid or credited to him, without regard to the source from which the dividend was derived or when it became payable. It is also manifest that under the company's interpretation it is necessary that the policy holders be treated as a whole, while under the government's contention each is dealt with separately.

Under the company's theory, if it received, for example, by way of premium, from all of its policy holders and from other sources, a total income, in any given tax year, amounting to the sum of $1,000-000, and paid to policy holders, from whom it received no premium whatever that year, dividends amounting to $100,000, and which represented redundancies in premiums previously paid by those same policy holders, it would report as its gross income $900,000, whereas in fact its actual gross income was $1,000,000. The result, of course, would be to produce an erroneous net income, because the latter would be based on a false gross income. Under the government's theory, the company would not be entitled to deduct any dividends paid to individual policy holders from whom it had not in that year received some premium, or at least a premium equal to the amount sought to be excluded as paid to him; in other words, if A., a policy holder, in 1913 paid no premium, but received a cash dividend representing redundancies in premiums paid by him in previous years no account would be taken of the dividend paid to him in that year, so far as the company's taxable income is concerned. It would be left out of the calculation altogether. On the other hand, if the company in that year had received premiums from A., B., C., D., etc., and had paid to each of them dividends representing redundancies in

premiums paid in a previous year or years, which as to each individual policy holder was less than, or did not exceed, the premium received from each, respectively, during the tax year, the company would be entitled, in ascertaining its gross income, to exclude the aggregate amount of the dividends so paid that year to those policy holders. The result would be that the amount thus reported as gross income would represent the total of the amount actually received by way of premiums during the tax year. The learned trial judge adopted the plaintiff's theory.

Having thus ascertained the contentions of the respective parties, the theories upon which they are based, and the practical effect thereof, we now proceed to an analysis of the language of the statute, in the light of existing statutory enactments and judicial interpretation thereof at the time the act in question was passed. It will be noted, primarily, that the act, so far as life insurance companies are concerned, provides two distinct steps in the ascertainment of the taxable net income, viz.: (a) The ascertainment of gross income; (b) the deductions to be made from gross income to ascertain net income. In ascertaining gross income, it is specifically provided that certain parts of any actual premium received from any individual policy holder shall not be included, and after the gross income has thus been ascertained, the net income upon which the tax is to be assessed is arrived at by deducting various items, among which are the sums, other than dividends, paid within the year on policy and annuity contracts. This distinction was recognized by the company in making up its return for the tax year in question, because all of the moneys now in controversy were deducted from the company's total income for the purpose of ascertaining gross income, and were not deducted from gross income for the purpose of ascertaining net income.

The original Corporation Excise Tax Act of 1909 (36 Stat. 112, c. 6, § 38), which, so far as it imposed a tax upon the "entire net income," was, in all respects material to this case, the same as the act of 1913, authorized insurance companies to make the same deductions from their gross income, to ascertain their net income, as does the "deduction" clause of the act in question; but it contained no such clause as the "noninclusion" clause of the act of 1913. For many years before the act of 1909 was passed, it had been the policy of life insurance companies, both mutual and stock (when the latter issued participating policies) doing business on the level premium plan, annually to declare "dividends" to policy holders, which represented, as before mentioned, the difference between the premium provided in the policy to be paid and the actual cost of the insurance. The companies permitted the insured to use these dividends in any one of several ways, viz. as an abatement of future premiums, in purchasing paid-up additions, withdrawal in cash, etc. When dividends were used in abatement of premiums, it was clear that the company actually, as distinguished from theoretically, received, in the year in which the abatement was made, not the full amount of the premium charged and payable under the policy, but only the difference between the dividend and the premium; and so in respect to full-

paid additions, while the company received the full premium due and chargeable under the policy, it did not actually receive the dividend as premium on the paid-up addition to the policy.

The result was that the companies sought, in making their tax returns under the act of 1909, to charge themselves only with the moneys actually received in the tax year, and thus to eliminate from their gross income those dividends which, as a matter of bookkeeping, they appeared to have received that year, but actually did not receive. The government, on the other hand, contended that those dividends were such "dividends" as, under the act, the companies were not permitted to claim deduction for, and that they must therefore be included as part of their gross income. The question thus presented first came up for judicial decision in Mutual Benefit Life Insurance Co. v. Herold, supra, and in a well considered and reasoned opinion the late Judge Cross adopted the contention of the insurance companies. His decision was affirmed by this court on January 27, 1913 (Herold v. Mutual Benefit Life Ins. Co., 201 Fed. 918, 120 C. C. A. 256), and the Supreme Court later denied a certiorari to review it (231 U. S. 755, 34 Sup. Ct. 323, 58 L. Ed. 468). Thus by judicial construction one feature of the "noninclusion" clause of the act of 1913 had already been incorporated in the act of 1909 when the later act was passed; i. e., that insurance companies were not required to include in their gross income such part of the premiums payable by policy holders as they had not actually received, but which had been pro tanto abated by the application of dividends. It is proper to here observe incidentally that dividends could not be used in abatement of a premium of a policy holder unless a premium was due from that policy holder, greater or at least equal in amount to the dividend.

On October 3, 1913, the act in question was passed, and in it the "noninclusion" clause appeared for the first time. Reading the "noninclusion" clause in the light of the before-mentioned contentions and the history of the litigation thereon, and bearing in mind that, so far as insurance companies are concerned, the deductions permitted to be made from gross income to ascertain net income were the same in the act of 1909 as in the act of 1913, it seems reasonable to conclude that the "noninclusion" clause was inserted for the purpose of setting at rest (which had not been authoritatively done when the act was passed, because the petition for the certiorari was not denied until December 15, 1913), the contention which the government was making in these matters, and to indicate clearly that it was not the intention of Congress to assess a tax in any given year on such parts of premiums as the company received only in theory during that year, but exclusively on that part of the premiums which they actually received—that which in fact, not in theory, came in to them. It will also be seen by reference to the decision of Judge Cross in the Mutual Benefit Case (198 Fed. 204) that where policy holders withdrew their dividends in cash the total amount of the premium payable under the policy was included in the plaintiff's statement of income received and the tax was imposed thereon by the government;

and the plaintiff in Conn. General Life Insurance Co. v. Eaton (D. C.) 218 Fed. 188, 203, appears to have done the same.

It would therefore appear that, when Congress used the words "paid back" in the noninclusion clause of the act of 1913, it made that act more liberal to the insurance companies, so far as "dividends" paid in cash were concerned, than the previous act had been construed even by the insurance companies. It took another step, and treated a "cash dividend" just as the courts had previously treated a dividend used as an abatement of a premium. It will be observed that the noninclusion clause provides that life insurance companies "shall not *include* as income in any year." Congress did not say that life insurance companies might "deduct" from the total income in any year, etc. It used the words "shall not include." The word "include" carries with it the implication of something received, either actually or theoretically. It is difficult to understand how one may be relieved of including in his receipts something which he never received. How could an insurance company not include in gross income certain moneys paid out to policy holders, if there were no premiums paid by those policy holders that year from which to exclude them? Furthermore, Congress did not say that a life insurance company should not include "such portion of any actual premiums received," etc., but it used the word "premium"—the singular.

To adopt the plaintiff's construction necessitates the reading of the word "premium" as "premiums," in nearly every payment involved in this suit, unless it should be held that Congress intended to permit the deduction of such part or portion of only one previously paid premium as represented a redundancy in such premium. But no reason for such a limitation is conceivable. The words "that year," which the plaintiff contends must be read into the clause after the word "received," if the government's construction is adopted, we think are there by implication, because of the use of the word "premium," instead of "premiums" and the words "shall not include." Furthermore, the act directs that life insurance companies shall not include such portion of the premium received "from any individual policy holder" as shall have been paid back or credited "to such individual policy holder or treated as an abatement of premium of such individual policy holder." It seems quite clear, by the use, thus conspicuously, of the words "individual policy holder," that Congress manifested an intention to treat each policy holder separately—his premium and his dividend—and not all of the policy holders as a whole; the aggregate premiums and the aggregate dividends. In this connection it may be observed that the company keeps a separate account with each policy holder.

If the purpose of inserting the "noninclusion" clause in the act of 1913 was as before stated, then it seems apparent that Congress used the language that it did, advisedly, for that language quite as explicitly expresses the thought that a life insurance company was to be taxed only on the income which it actually received, as distinguished from theoretically, in any tax year, as it is inappropriate to convey the meaning which plaintiff seeks to gather from it. If Congress

had intended that the aggregate of all dividends, representing redundancies in previous premium payments, paid to policy holders in a tax year, should be deducted from the aggregate premiums received from all policy holders in that year, without regard to whether premiums were received that year from all of the policy holders to whom dividends were paid that year, it would not, we think, have used the words "shall not include," but rather the word "deduct"; nor the word "individual," qualifying the words "policy holder," and would have used the word "premiums" instead of "premium." The manifest reason why a difference is made in respect to dividends paid or credited to policy holders which do not exceed the premium received from the same policy holders during the tax year, and those which are in excess thereof, or in respect to those cases where no premium is received from the policy holder to whom a dividend is paid, and those cases where a premium is received, is that Congress desired to tax only the moneys actually received during the tax year, and not those theoretically received, as the government had been contending up to that time.

The plaintiff seeks to support its argument on the proposition that as the moneys paid back to policy holders represent previous excess premium payments upon which, in fact or in theory, the company has theretofore paid a tax, it is unreasonable, in the absence of clear and explicit language to that effect, to presume that Congress intended that they should be taxed again. But this argument loses sight of the fact that no tax whatever is levied on a dividend, other than the initial one imposed when the premium of which it is a part is paid. No tax was imposed for 1913, for instance, on the moneys paid back to policy holders as cash dividends in that year. The tax would be assessed only on such part of the moneys received by the company during that year as premiums from policy holders as was in excess of the dividends paid to the same policy holders that year. On the other hand, to permit the cash dividends, in excess of moneys received, either actually or theoretically, as premiums from the policy holders to whom they are paid, to be deducted in 1913, would relieve the company from paying any tax whatever upon them, because by deducting them from gross income in that year it would nullify or neutralize to that extent the tax which had been imposed upon the premiums, of which they were a part, in previous years. It is thus apparent that what plaintiff really seeks to accomplish is, not to avoid double taxation, but to be relieved from paying any tax whatever upon such parts of premiums, no matter when paid, as represent redundancies, and which are subsequently returned to the policy holders who paid the premiums.

It may be entirely equitable and just that Congress should have adopted such a course, but we do not think that we would be justified in finding such intention in a statute which expressly provides that the tax shall be levied "upon the entire net income arising or accruing from all sources," in the absence of a clear expression to that effect, and especially when to do so would necessitate a strained and unnatural construction of the language used by Congress. Moreover,

immediately preceding the clause in question are those dealing with mutual fire insurance companies and mutual marine insurance companies. The provision in respect to the latter is as follows:

"Provided, further, that mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policy holders on account of premiums previously paid by them, and interest paid upon such amounts between the ascertainment thereof and the payment thereof."

The language there used is quite different from that used in respect to life insurance companies, and the meaning to be gathered from it is clear. It specifically permits those companies to make the very deduction, as deductions, which the plaintiff claims that life insurance companies may make by way of noninclusion. The fact that there is such a marked difference in the language used in respect to the two kinds of companies, and each respectively conveys a different meaning, tends to strengthen the conclusion that so far as life insurance companies were concerned, they were, in ascertaining gross income, to exclude payments or credits to policy holders in the tax year only to the extent of the amounts received, actually or theoretically, from the same policy holders, respectively, during the same year. The same deduction and noninclusion clauses were carried into the Income Tax Act of 1916 (Act Sept. 8, 1916, c. 463, 39 Stat. 756), and later into the act of 1919 (Act Feb. 24, 1919, c. 18, 40 Stat. 1057). The distinction between the two clauses is accentuated in the latter act, as they are placed in separate and distinct sections. Section 233 and section 234. Section 233, which defines gross income, specially provides that in the case of life insurance companies "there shall not be included in gross income such portion," etc., using the same language as the act of 1913; that mutual marine insurance companies must include in gross income the same items as the act of 1913 required, but it makes no mention of what either kind of company may deduct. Section 234 deals with deductions exclusively, and permits the same deductions for life insurance companies (paragraph 11) and for mutual marine insurance companies (paragraph 12), as did the act of 1913.

It therefore appears that Congress has in each revision of the income tax law which it has made since 1913, retained the same language, as respects both life insurance companies and mutual marine insurance companies, as it did in the original act. It is a reasonable conclusion, therefore, that the language used in the act of 1913 was advisedly used, and, as it is different in respect to the two kinds of companies, that Congress intended that there should be a difference in the sums which each could, respectively, deduct on account of previous excess premium payments. That the construction for which we have indicated a preference is the correct one is, we think made more manifest when the action of Congress in using the same language in the act of 1919, as it did in the acts of 1913 and 1916, is considered in the light of the regulations issued by the Treasury Department under the act of 1916. Regulations No. 33, issued January 2, 1918. Those regulations were as follows:

"*Premium Income Paid Back.*—Life insurance companies are authorized to omit from gross income such portion of any actual premium received from any individual policy holder as shall have been paid back or credited to the policy holder or treated as an abatement of his premium.

"The amount authorized by this provision to be excluded from gross premium income on account of any premium refunded to any individual policy holder is explicitly limited to an amount not in excess of the actual premium paid by the individual policy holder within the tax year.

"*Cash Dividends.*—Life insurance companies are entitled under the foregoing holding to exclude from gross income any part of the premium received which is paid back to the individual policy holder within the same return year. Where the dividend is in excess of the premium received, there can be excluded from gross income only the amount of the premium received from such individual policy holder within the same return year."

It must be presumed that Congress, in passing the act of 1919, had in mind the construction which the Treasury Department, in its regulations and instructions to internal revenue collectors, had adopted, and that, if such construction did not properly express the intention of Congress, a change in the language, to express clearly a contrary meaning, would have been made in the act of 1919. Indeed, the Senate committee which had the act of 1919 in charge recommended a new basis for the taxation of life insurance companies, but in conference the Senate receded therefrom, and the basis upon which life insurance companies had been theretofore taxed was continued. See Montgomery's Income Tax Procedure 1919, p. 669.

This situation is then presented: If the construction sought by the plaintiff is followed, although an equitable result would, in one aspect, be therefore accomplished, it would be done only by a strained construction of the statute, and one, indeed, which would not be in harmony with what we think Congress, by the language which it used, manifested as its intention and confirmed by its subsequent action. If, on the other hand, the construction urged by the government is adopted, a reasonable result is reached, which gives effect to what, it may be properly assumed, was the intention of Congress, namely, to tax as the income of life insurance companies in any year only so much of any premium as may have been actually received, as distinguished from theoretically, from any policy holder during that year. In this contingency, there is, of course, no question as to which construction should be adopted. We conclude, therefore, that the plaintiff was not entitled to exclude from its total income during the tax year in question, for the purpose of ascertaining its gross income, any dividends paid or credited to policy holders from whom it did not receive any premium during that year, and as to such policy holders as it did receive premiums from that year it was entitled to exclude only such part of the dividends paid to those policy holders as did not exceed the amount received from them, respectively, by way of premiums, during that year.

[2] Although plaintiff has not contended, except as to items of interest paid to policy holders (which feature of the case will be hereafter referred to), that it is entitled, in ascertaining its net taxable income, to credit for the dividends paid to policy holders, on the theory that such dividends may be "deducted," as distinguished from

"not included," under the "deduction" clause, we have, nevertheless, considered that question. It might readily be conceived that dividends paid to policy holders, representing as they do excess premiums, are paid "on policy * * * contracts." It may also be conceded that such dividends are not "dividends" in the commercial sense, as representing profits. Whether the word "dividends" is used in the "deduction" clause in the commercial sense, or in the sense in which insurance companies ordinarily use it, we do not feel called upon to decide. If it be assumed, however, that the dividends in question are "sums * * * paid * * * on policy * * * contracts," and that they are not dividends in the commercial sense, and that the statute in the clause in question refers to only commercial dividends, it might be argued with force that insurance companies are entitled to deduct them, under the "deduction" clause, from gross income, to ascertain net income, were it not for the noninclusion clause. At the threshold of any such argument, however, we would be met with the fact that dividends paid or credited to policy holders are unquestionably covered by the "noninclusion" clause. Manifestly, if it had been the intention of Congress that these dividends could have been deducted under the original "deduction" clause, there would have been no reason for adding the "noninclusion" clause. Indeed, by the latter, Congress explicitly defined what moneys returned, either in cash or by credit, to policy holders might be excluded by the companies, in ascertaining their taxable net income. Consequently we do not think that any of the cash dividends paid by the plaintiff to its policy holders in the tax year in question, which represented redundancies in previous premium payments, were deductible as "sums other than dividends paid within the year on policy * * * contracts."

[3] Up to this point we have dealt with only those parts of the cash dividends as represented redundancies in previous premiums paid by the same policy holder to whom the dividends were paid. It appears, however, that some of these dividends represent, in part, interest which had accumulated on dividends which had been left with the company under certain forms of policies, and, in part, also on some policies, the share of the policy holders to whom the dividends were paid in funds accruing to holders of the same kind of policies, which for one reason or another had been forfeited, and which, under the terms of the policies, were divided among those policy holders of the same class who had not thus forfeited such benefits. The company claims that it is entitled (although it did not follow that course in making up its tax return) to deduct from its total income, to ascertain the taxable net income, such parts of the dividends as represent interest due to the policy holders, under the "deduction clause" of the statute, as payments made on policy contracts. It also claims the right to exclude from its total income the parts which represent shares of forfeitures, upon the ground that the sums forfeited, and which are divided among the persisting policy holders, represent redundancies in the premiums paid by those policy holders who forfeited their right to the return of such redundancies. Hence it is argued that, under its construction of the words "portion of any actual premium," such

sums are portions of actual premiums theretofore received, and deductible as such, irrespective of whether they originally came from the policy holder to whom the dividend is paid.

Under the construction which we have given to the statute, as long as the dividends paid or credited to any individual policy holder within the tax year do not exceed the amount paid by way of premium by that policy holder during that year, it is quite immaterial from what source or sources the dividend paid or credited arose. Hence the independent question regarding the right to exclude such parts of the dividends as represent shares in the forfeitures of other policies is of no moment. However, as it is sought to procure credit, through the "deduction clause," for the parts which represent interest, it is necessary to ascertain whether such interest payments fall within that clause. Under all of the policies involved in this suit, with one exception, the rate of interest allowed to policy holders on redundancies which were left with the company, and not withdrawn by the policy holder every year, was, in reality, dependent upon the earnings of the company upon its investments. Without attempting to decide, as before stated, because we find it unnecessary to do so, whether the word "dividend" is used in the deduction clause in its commercial sense, as distinguished from the insurance sense, we think that such interest payments are dividends in the commercial sense, as they clearly are in the insurance sense. They represent the policy holders' pro rata share in the earnings on the company's investments over a given period of time, and, as respects most of the policies involved in this suit, they are the result of compound interest. Hence they may not be deducted under the deduction clause.

[4] The one exception above referred to is the interest paid on what have been termed in the testimony "trust certificates." These moneys are not paid to policy holders, but to the beneficiaries under installment policies, which provide for the payment of the face of the policy, not in bulk on the death of the assured, but in installments extending over a period of years. The fund thus left with the company, which, of course, diminishes from installment period to installment period, draws interest, and the interest is then paid to the person entitled to the installments. It is accordingly, in neither an insurance nor a commercial sense, a dividend, but is a sum paid on a policy contract, and as such we think deductible under the "deduction clause" of the act. It appears from the record that, although all of the dividends in controversy were paid in cash to the policy holders, the company, during the tax year in question, received premiums that year from some of the policy holders to whom such dividend payments were made. The government concedes the right of the company to recover the tax paid on such part of the dividends paid to policy holders during the tax year as does not exceed the premiums received that year from the same policy holders, respectively, as it does the tax on an item of $2,774.35, which was inadvertently not included in the original return of the company. The actual amount which the government concedes that the plaintiff is entitled to recover is, however, we think, excessive, because it includes the sums received from holders of "life rate endowment policies" and holders of "ac-

celerated endowment policies," which were considerably more than the sums paid to them, respectively, during that year by way of dividends. Manifestly the company is only entitled in those cases to credit for the amount paid.

As the aggregate amount received by way of premiums from policy holders of the policies in question during the tax year was much less than the amount paid to them by way of dividends, and as judgment was awarded in the court below for the tax assessed on the total amount of dividends paid, it follows that the judgment must be reversed, and a new trial granted.

UNITED STATES v. VALLEY LAND & INVESTMENT CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5122.

1. PUBLIC LANDS ⟹120—CANCELLATION OF PATENT—GOOD FAITH OF ENTRYMEN—EVIDENCE.
In suit by the United States to cancel defendants' patents to certain lands, evidence *held* not to show that defendant entrymen, at the time of filing upon said lands, entered into an agreement by which the title to their respective pre-emption lands would inure to any other person in whole or in part.

2. PUBLIC LANDS ⟹139—PRE-EMPTION—DISPOSITION BEFORE FINAL PATENT.
The pre-emption statute (Rev. St. § 2262) did not require at time of making final proof, as it does at time of filing, that claimant make an affidavit to the effect that application is not made for the use or benefit of any other person or persons, and claimant had full power to dispose ad interim of his claim upon final issue of patent; the motive of applicant at time of final proof being irrelevant.

3. PUBLIC LANDS ⟹120—CANCELLATION OF PRE-EMPTION PATENT—GROUNDS.
In suit by the United States to cancel defendants' patents to certain lands on the ground that defendant entrymen in their affidavits and proofs falsely represented that lands were for their own exclusive use and benefit, the inquiry of the court could not extend beyond the good faith and truth of the statements required by Rev. St. § 2262, of the entryman at time of making entry.

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

Action by the United States against the Valley Land & Investment Company and others. Judgment for defendants, and the United States appeals. Affirmed.

Harry B. Tedrow, U. S. Atty., of Boulder, Colo., and John A. Gordon, Asst. U. S. Atty., of Denver, Colo.

John R. Smith, of Denver, Colo., for appellees.

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

ELLIOTT, District Judge. This is an action by the United States, plaintiff, against the Valley Land & Investment Company, a corpora-

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

tion, Louis E. Kenworthy, Myron L. Meehan, Robert Ryan, Ballentine R. Bohart, Louis W. Stenborn, and Hugh Moreland, defendants, and is a suit in equity, brought for the cancellation of the defendants' patents to certain public lands situated in the state of Colorado.

The cause of action stated by the plaintiff is, in substance, that on and prior to the issue of its patents to the lands referred to in the bill of complaint the plaintiff was the owner thereof, as part of its public domain, and such lands being subject to entry and acquisition under the provisions of the public land laws; that during the year 1913, and on the dates in the bill set out, defendant Kenworthy procured and induced defendants Meehan, Ryan, Bohart, Stenborn, and Moreland each to file in the United States land office for that district a pre-emption declaratory statement, declaring his intention to claim the lands embraced in such statement as a pre-emption right under the public land laws relating to pre-emption claims, and procured them, thereafter, each to file in the said land office an application to purchase the tract described in the said declaratory statement, and also to each file the required affidavits and proofs in support thereof, and to pay the officers at the land office the required fees and purchase price of said land, and procured each of them to otherwise apparently comply with the provisions of said pre-emption laws, and thereby procured the allowance of the entry of said lands and the issue of patents therefor by plaintiff's proper officers.

The date of the filing of said respective pre-emption statements. applications to purchase, allowance of said entries, and the issue of said patents are set forth, and as to the defendant Meehan such dates are as follows: Pre-emption declaratory statement filed May 16, 1913, with the description of the land; allowed by register's final certificate of entry issued January 3, 1914; and patent issued March 30, 1914, conveying title to said land to said Meehan. Similar allegations cover the pre-emption claims patented under the public land laws to the other defendants.

It is further alleged that in said affidavits and proofs so filed in said land office in support of the respective applications of said defendants to purchase, in the respective proceedings in said land office upon which the allowance of said entries were based and the patents issued, each of said entrymen stated, represented, and made to appear, among other things, that said application to purchase said land so embraced in his said pre-emption statement was made by said entryman to appropriate the same to his own exclusive use or benefit, and that he had not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever by which the title to said land which he might acquire from the plaintiff should inure in whole or in part to the benefit of any person except himself.

It is further alleged that by means of said statements, representations, and apparent compliance with the provisions of said laws, relating to pre-emption claims, and not otherwise, said entrymen induced the plaintiff's officers to allow the entry of said lands so applied for and issue final certificates of entry and patents embracing such lands.

It is also alleged that said statements and representations, so made by the entrymen defendants, respectively, were, at all times mentioned in the bill of complaint, false and untrue, and known by the defendants to be false and untrue, in that it was not true that said respective entrymen applied to purchase the lands embraced in said pre-emption statements and applications to purchase, for their own exclusive use and benefit, and in that it was not true that each of said respective entrymen had not directly or indirectly made an agreement with any person or persons whomsoever by which the title to said lands which he might acquire from the United States should inure in whole or in part to the benefit of any person except himself. It is alleged that, on the contrary, at and prior to the time of the filing in the land office by each of the said entrymen of his pre-emption statement, at and prior to the filing in said office by each of said entrymen of his application to purchase the land embraced in said pre-emption statement, and at all the times during said proceedings in said land office, upon which the allowance of each of said entries and the issue of each of said patents was based, in truth and in fact each of said entrymen defendants had an understanding and agreement with said defendant Kenworthy that, when title to said land so applied for had been procured from the United States, a part of said land, to wit, 150 acres thereof, would be by said entryman conveyed to the defendant the Valley Land & Investment Company or to the person or persons designated by defendant Kenworthy, and by reason of the premises plaintiff was defrauded of the title to each and every tract of the lands described in the bill of complaint.

It is thereupon alleged that Meehan now claims to be the owner of the land described in the patent issued to him, a part thereof being subject to a certain mortgage in favor of the defendant the Valley Land & Investment Company, with similar allegations as to the other defendants, with certain differences that are not material.

The plaintiff thereupon prayed that the said patents be cancelled, and that each of the conveyances or instruments based upon said respective entries and patents purporting to effect the title to said lands or any part thereof be cancelled, and that the defendants are and each of them is, without title, claim, or interest in or to said lands or any part thereof; that the plaintiff be decreed the owner of said lands as part of its public domain, free of any claim or incumbrance whatsoever.

Thereupon the defendants answer jointly, in substance admitting that the company defendant is a corporation; that the plaintiff was the owner of the lands mentioned, prior to the issue of patents therefor; that the same were public lands, subject to entry and acquisition only under the provisions of the public land laws, and not otherwise. They further admit that each of the several entrymen named as defendants in the bill of complaint filed in the United States land office for that district the pre-emption declaratory statement referred to in the bill of complaint, and that the register's final certificate of entry was, in due course and upon the dates alleged, allowed, and that patents were duly issued by the United States to the respective defendant entrymen, as alleged in the bill of complaint.

The defendants further admit that the affidavits and proofs filed in the said land office, referred to in the bill of complaint, were of the usual and ordinary form required by plaintiff to be made by entrymen to purchase lands embraced in pre-emption declaratory statements, and contained the usual and ordinary provisions prescribed by law and the rules of the Department of the Interior for final proof, and allege that they were sufficient to entitle the said entrymen and each of them to final certificate of entry, and finally to patent embracing the lands described in the bill of complaint.

The defendants admit that said entrymen, at the time and as a part of said applications to purchase, and upon which said respective patents were issued, made representations with reference to appropriation of the same to their own use, respectively, and that they had not made any agreement or contract with any person or persons by which the title to the lands embraced in said entry would inure to any other person, in whole or in part.

The defendants further admit that by and through such representations and compliances with the provisions of the statute, and the rules and regulations, the defendants took the various steps with reference to said pre-emptions, and allege that neither at the time of filing of their declaratory statements nor at the time of submitting their final proofs had such entrymen, or any of them, made with the defendants or any one else any arrangement, contract, or agreement contrary to or inhibited by any of the rules of the department or plaintiff's public laws.

Defendants specifically deny that they or any of them ever or at all made any contract or agreement with the entrymen or either of them which were fraudulent or unlawful, or which tended wrongfully or illegally to deprive the plaintiff of any of its public lands.

It is thereupon alleged that the defendant the Valley Land & Investment Company, on the 29th day of November, 1912, entered into an agreement in writing with the Sam Farmer Escalante Irrigation Company, whereby the said defendant purchased of said company water rights from its system, estimated to be sufficient for irrigating 1,280 acres of land under the irrigation system of the Sam Farmer Escalante Irrigation Company; that said company was then in the hands of a receiver in an action pending against it, and that in the settlement of said action said company, with funds secured from this defendant company, settled with its creditors and secured the relinquishment of certain lands under its said system, theretofore filed upon and improved by their said creditors, and to induce the Valley Land & Investment Company to purchase its said water rights from this company, to file upon said lands, and to enjoy the benefit of the improvements theretofore made by the former entrymen; that good land, susceptible of irrigation under said system, is limited in area, and the holders of water rights desire the same to be applied to the lands susceptible of irrigation and available under said system, and that this defendant company might thus better assure the application of the said water to the reclamation of said lands this defendant company entered into an agreement with the several entrymen defendants

for the sale of its said water rights, which contract, after formal recitals, and reciting the ownership of this water and that the entryman defendant was desirous of purchasing water rights for lands proposed to be filed on by him under the laws of the United States, recites:

"Now, therefore, it is agreed between the parties hereto that the said first party will, and by these presents does, sell to the second party water rights for the irrigable portion of said lands, to wit, for ——— acres, described above and mentioned to be filed upon by said second party, same being ——— portion of the water rights purchased by said first party from the Sam Farmer Escalante Irrigation Company, said first party reserving the right to substitute the water contract of the new company; that the price to be paid for said water right is $75 per acre, or an aggregate amount of $———, and which said sum and indebtedness is to be evidenced by a collateral note, secured by said water rights on the proportion of said system as aforesaid, and which said note shall be paid upon the making final proof on said land and receiving receiver's receipt therefor, in manner following, to wit: One-half at the time of making final proof and securing receiver's receipt therefor, and one-half in five years, at 6 per cent. interest per annum, secured by trust deed on said lands and water rights."

It was then provided that the second party would forthwith file upon the lands; that he would do all the things required to comply with the laws of the United States with reference thereto; that he would make final proof upon the land, and when final proof was made, and receiver's receipt therefor secured, that he would secure that portion of the purchase price remaining unpaid, as above provided, by the deed of trust and note.

It was provided in said contract, in substance, that if said party of the second part should be unable to pay one-half of the purchase price at the time of making final proof, and if he so elected, he might convey 140 acres of said land and the water right acquired by him from the first party, exclusive of the water right for the 20 acres of said land retained by him, which said conveyance of land and water right to said party or its nominee would be in complete satisfaction and payment of the purchase notes held by the first party; and it was further provided that the second party's selection of his 20 acres of land should be made from the outer boundary of said land and by legal subdivision thereof, and so as to leave the 140 acres in most compact body.

It was further agreed that as further security for the payment of the purchase price of said water right until title should be procured to said land as provided therein, and to insure the further performance of the contract by the party of the second part, as well as any advances made or to be made by any person to aid the carrying out of the provisions of the contract, the second party would execute and deliver to defendant Kenworthy a power of attorney to assure the faithful performance of the contract.

It is then alleged that, after the selection of their several tracts of land for entry by the defendants, they severally purchased from this defendant such water rights, by contract in form as above stated, as were sufficient to irrigate and reclaim the estimated irrigable portion of each of their several tracts and in compliance with the provisions

of said agreement, in the form above referred to, each of said entrymen gave to the defendant Investment Company their collateral notes for the amounts set forth in the pleadings, by which said collateral notes the water rights purchased by each entryman were pledged as security therefor, until said purchase price should be secured by mortgage upon the lands.

There was also a further agreement set forth in the answer, alleged to have been entered into by each of the defendants Ryan, Bohart, and Stenborn, with the defendant Kenworthy, in substance, that, reciting the desire of the defendants severally to procure financial aid to develop, improve, and patent said lands, it was agreed, in consideration of the advances which should be made by defendant Kenworthy, the same should be repaid upon procuring title or receiver's receipt therefor, together with interest on such sums as should be advanced, or in lieu and in satisfaction of said payment the defendant entryman might convey 10 acres of said land and water rights to the said Kenworthy, and it was provided that such contract should constitute a lien or mortgage upon said lands and water rights prior to all other liens, save and except the lien or claim of the Valley Land & Investment Company for the purchase of the water rights, for the amount of said advances and interest, until said advances were fully paid and discharged, with an immaterial interlineation in the contract of defendant Stenborn; that each of the defendant entrymen executed a power of attorney in favor of the defendant Kenworthy to sign and execute any and all papers and instruments necessary and requisite to fully and effectually carry into effect the provisions of the contract above referred to.

It is then alleged that none of said entrymen elected to convey any of their said land under the provisions of said contract either to the defendant Investment Company or defendant Kenworthy, but that each and every of said defendant entrymen secured the purchase price of their said water rights by a mortgage on their several tracts of land, respectively, after making final proof, and elected to exempt from the lien of said mortgage 20 acres of said lands and water rights.

It is further alleged that the powers of attorney were given only to insure the faithful performance of their several contracts, and that nothing was ever done or attempted to be done under or pursuant to said powers of attorney; that neither of said contracts, agreements, or instruments, jointly or severally, contemplated the alienation of said land by said entrymen or any of them, but that all of said contracts and agreements reserved to said entrymen and each of them the full and complete ownership and control of their said several tracts of land, respectively; and that the entry of each of said entrymen was in fact made for his sole use and benefit, and not for the use and benefit of any other person.

It was further alleged by the defendants that they did not have among themselves any other agreement or understanding than that contained and expressed in their said contract above referred to, and had no other understanding or agreement than those, with any other person or persons.

The defendants deny that any affidavits, statements, or representations made by them or either of them in their applications to purchase, or in any of the proceedings in relation to said lands and procuring patents therefor, were false, or that any statements made by said entrymen or any of them were known to be false or fraudulent when the same were made, or at any other time.

It was thereupon admitted that the several defendant entrymen claimed to be and are the owners of the several tracts of land embraced in their several entries. It is further admitted that the defendant the Valley Land & Investment Company has and holds mortgages as mentioned in the plaintiff's bill of complaint, and also that the same and each and all thereof were given for a good and valid consideration and are valid and subsisting liens, and they do not in any manner affect injuriously any of the plaintiff's rights or titles.

Defendants further allege that the only interest which the defendant Louis E. Kenworthy has in said property is by virtue of said agreement hereinbefore set forth for the repayment of advances made to the several defendants by the said Louis E. Kenworthy, the right to the enforcement of which is contained in the terms and provisions of said agreement.

It is thereupon alleged that none of the contracts or agreements were contrary to the rules of the department nor inhibited by the laws of the United States, and that all of the acts of the defendants and each of them in relation to the lands mentioned in plaintiff's bill and all the contracts and agreements made and entered into with the said entrymen were done and made in accordance with and pursuant to the ruling of the Commissioner of the General Land Office and agreeable to the laws of the United States and rulings and findings of the courts in reference thereto; and said acts and doings and said contracts and agreements were done and made by said entrymen, and each and every of them, without any intention of violating the laws of the United States and in the belief that all said acts and doings were authorized by the Department of the Interior and the laws of the United States relating thereto, and upon their denial of all manner of wrongdoing charged in said bill of complaint, prayed that they might be dismissed hence with their costs.

Upon the trial of the issues presented by the pleadings, the allegations of the plaintiff and of the defendants, so far as they refer to the transactions between the defendants that were in writing, were admitted. Judgment was entered in favor of the defendants.

[1] The question presented involves the intent and purpose of the parties to these contracts with reference to the control, ownership, and title of public lands embraced within the pre-emption filings of the several defendants. The real issue was as to the good faith of these entrymen, with their codefendants, and whether or not the entrymen at the time of filing upon said lands entered into an agreement or understanding by which the title to their respective pre-emption lands would inure in whole or in part to any other person.

The first question is: Are the contracts, set forth in the answer, contrary to the provisions of the statutes of the United States, and

are they prohibited either by the spirit or the letter of said statutes? A determination of this issue involves a consideration of the written instruments themselves, independent of the circumstances under which they were executed, under the first assignment of error, to wit:

"The court erred in sustaining defendants' objections to, and in refusing to admit in evidence, the affidavit of nonalienation required of, and filed by each of the entrymen in support and as a part of the pre-emption final proof submitted by each of them on the entries for which the patents in question issued * * *"

—which affidavits involved the good faith provisions of the statute of the United States to the effect that no agreement or contract in any manner or way, with any person or persons whomsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself.

Our judgment is that the trial court did consider this affidavit, and that his holding amounted to a finding that the same was immaterial, rather than that it would not be received, as evidenced by his plain expression with reference thereto in the record, to wit:

"I feel very clear in my own mind that there was no act of fraud on the part of these entrymen, and if this affidavit were admitted it would not change my view in that respect."

Bearing in mind that this affidavit in question was an affidavit required by the rules prescribed by the department and made a part of the final proof, it is interesting to consider what the courts have said with reference to nonalienation statutes applicable to government land. In Adams v. Church, 193 U. S. 510, 24 Sup. Ct. 512, 48 L. Ed. 769, the court was considering the provisions of the Timber Culture Act (Act June 14, 1878, c. 190, 20 Stat. 113), and the rules and regulations promulgated by the Commissioner of the General Land Office, and Justice Day there recites that—

"It appears that Adams made the entry under the Timber Culture Act before the partnership agreement was entered into, and there is nothing in the record to show that, in taking the preliminary oath required by the statute, he acted otherwise than in good faith, and stated the truth as to the situation and his purposes in making the entry. As recited in the title, the purpose of the act is to encourage the growth of timber on the western prairies. * * * Section 2 of the act (20 Stat. 113) requires the person applying for the benefit of the law to make affidavit that he is the head of a family; * * * that the entry is made for the cultivation of timber for the exclusive use and benefit of the applicant; that the application is made in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever; that affiant intends to hold and cultivate the land and to comply with the provisions of the act. * * *"

He thereupon recites the provisions of the statute with reference to the time given for the issuance of final certificate and patent and the provisions of his proof that shall entitle him to a patent. The record showed a sale of an interest in this land to another as a partner, before final proof and the contention was that the same was void as against public policy. The court recites:

"It is pointed out that the final affidavit, required by the rules and regulations of the General Land Office made under authority of section 5 of the

act, is to be in the same terms as the preliminary one, and requires the claimant to make oath that his entry was made in good faith, and not for the purpose of speculation or indirectly for the benefit of any other person whomsoever."

It was then argued that the fact that this sale of an interest by the claimant to another, his partner, before final proof, brought the case within the reasoning and the spirit of Anderson v. Carkins, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272. The court goes on to distinguish between the provisions of the Homestead Law and the Timber Culture Act; that in the case last cited it was held that a court of equity would not grant a decree for specific performance of an agreement to sell the interest of the homesteader made after settlement and before the oath is filed for final certificate; and further stated:

"But the Homestead Act specifically requires that the applicant shall make affidavit before entry is made that it is for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit of any other person. Rev. Stat. § 2290 [Comp. St. § 4531]. Further, the *final proof* [the italics are ours] requires affidavit by the applicant that 'no part of such land has been alienated, except as provided in section 2288' [section 4535]—Rev. Stat. § 2291 [section 4532]—which section limits the right of alienation to 'church, cemetery or school purposes, or for the right of way of railroads.'"

Justice Day thereupon holds that the Anderson Case construes the two provisions of the Homestead Law and states his analysis of the purpose of the Homestead Law, and the necessity for the provision requiring the affidavit at the time of final proof. He then emphasizes the fact that the policy of the government to require such affidavit at the time of final proof, when it intends to make it a condition precedent to granting title, was indicated in the provisions of the homestead act itself, and, further, that it could readily have been pursued by the same provision in the Timber Culture Act, if it was the intent to extend the principle to that statute.

Thereupon, in conformity with the decisions of the Land Department in the cases therein cited, the right of the timber culture entryman to dispose of his holdings, acquired by him in good faith, before final certificate, is fully recognized. It is further held that:

"If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith it would have so declared in the law. Myers v. Croft, 13 Wall. 291 [20 L. Ed. 562]."

Justice Day thereupon closed the opinion:

"To sustain the contentions of the plaintiff in error would be to incorporate by judicial decision a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject."

[2] A comparison of the Timber Culture Act (20 Stat. 113) and the pre-emption statute (section 2262, Revised Statutes), in so far as

the provisions of the laws refer to the nonalienation affidavit, discloses that they are similar, and that there is not an express provision that such affidavit shall be made at the time of or as a part of the final proof, or that the issuance of a patent shall be dependent upon such facts; while in the Homestead Law, as recited in the above case, it is specifically recited not only that the affidavit shall be made as to the purpose and intent and good faith at the time of the entry, but that it shall also appear by affidavit at the time of final proof and before patent issue. We therefore think it entirely consistent, in an interpretation of the intent and purpose of the Congress in the enactment of the provisions of the pre-emption statute, to apply the same rule that is announced in the case above cited by the Supreme Court of the United States.

In this view of the requirements of this pre-emption statute, the affidavit offered by plaintiff below being an affidavit that was made and filed at the time of the making of the final proof, in compliance with the requirement of the Commissioner, exacting such additional statement at the time of final proof, is invalid. Williamson v. U. S., 207 U. S. 459, 28 Sup. Ct. 176, 52 L. Ed. 278. In this case Justice White, in considering the provisions of the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [Comp. St. §§ 4671–4673, 4988, 10216]), said of the necessity for the affidavit required by the rules of the Commissioner to be made and filed as a part of the final proof:

"When the context of the statute is thus brought into view, we are of the opinion that it cannot possibly be held, without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration, at the final hearing, of the declaration concerning his purpose in acquiring title to the land, since to do so would be to construe the statute as including in the final hearing that which the very terms of the statute manifests were intended to be excluded therefrom."

Adams v. Church, supra, is cited, and the court proceeds to consider whether it was within the power of the Commissioner of the General Land Office, under its construction of this statute, to enact rules and regulations by which an entryman would be compelled, at the final hearing to do that "which the act of Congress * * * excluded," and thereby "to deprive the entryman of a right which the act by necessary implication conferred upon him." It is then held that the concluding portion of section 3 of the Timber and Stone Act (Comp. St. § 4673) provided:

"Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

But:

"This power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred"

—and that, as there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, he was under no obligation to make such an affidavit, and had full power to

dispose ad interim of his claim, upon the final issue of patent, the motive of such applicant at the time of the final proof was irrelevant.

[3] This, we think, is particularly applicable to the situation here, and therefore the inquiry of the court could not extend beyond the good faith and the truth of the statements in the affidavit required by the provisions of the law of the entryman at the time of making his entry. In this view the trial court did not err in holding that it was not an affidavit required by statute in the making of the final proof, and that it did not relate to the time of the inquiry, limited by the statute to the time of making the entry.

Upon the determination of the first issue upon the strict construction of the written contracts, it was immaterial, and we understand that the court so held. We think, however, that the trial court took the broader view of the duty to determine the question of fraud, upon the ground and for all of the reasons stated, and as a matter of fact did consider the affidavit as one of the acts performed by the defendants with reference to securing the title to said premises, to be given such weight, if any, as the court found it entitled to.

Conceding the right of these defendant entrymen to make contracts with reference to this property after the time of the entry and the filing of the affidavit required by the statute, we think it clear that a reference to the instruments themselves, alone, fails to establish want of good faith or the falsity of the affidavit in the particulars complained of in the bill of complaint.

Even though the contracts themselves are not contrary to the provisions of the law by their express terms, and therefore are not prohibited thereby, is the real intent and purpose of the entrymen and the other defendants revealed by a consideration of all of the facts and circumstances surrounding the making of the pre-emption filings? The manner in which the defendants are shown to have been interested in making the filings; the circumstances of the defendant entrymen; their attitude toward the lands embraced in their respective entries prior to and after patent; their control or lack of control of such lands; their exercising dominion over them, independent of the other defendants; the manner in which the entrymen finally elected to and did settle for the water rights—do all these things, considered with the written contracts themselves, show that these five entrymen defendants were induced by the Investment Company and its president, Kenworthy, to go upon these lands and locate them for the benefit of said company, and therefore that the affidavits of nonalienation were false, and that the patents to the lands were fraudulently obtained?

A determination of the issue thus presented requires a consideration, not only of the written contracts, but also the testimony of the various witnesses produced by the plaintiff in support of its allegation of fraud.

Robert Ryan, one of the defendants, was sworn by the plaintiff, and testified that he was 77 years old, that he made one of the pre-emption filings in question, and when asked to state the circumstances leading up to the making of the filing, he said, in substance, that it

was a simple matter, that he was looking for a chance to locate some land. He met with misfortune, and was looking for something, and heard that Kenworthy had some water rights; that he went to see the latter, and his talk with him was brief. He asked him if there was an opportunity to get some land and was told there was; did not talk much, but asked Kenworthy when he was going, and if he could go along with him, and, when the time came to go, the latter told the witness to be there, and he was there, and they went upon the land. The testimony of this witness was that the defendants Bohart, Moreland, Stenborn, and Meehan went over to the land with lumber belonging to Kenworthy; that he built a house on his claim; that the other four went onto their respective selections, and they stayed upon the land about seven months.

The witness Hugh Moreland, one of the defendant entrymen, testified, in substance, to the same effect, and he stated, with reference to any arrangements with the defendant Kenworthy or the Investment Company:

"Q. Well, did you have any arrangements whatever with Mr. Kenworthy before you went over there? A. What kind of arrangements?

"Q. I want any kind. A. Well, the arrangements were I was to get 10 acres of land with paid-up water right. I was to give him a mortgage on this 150 acres for this water."

We deem it unnecessary to refer to the specific statements of the other witnesses for the defendants, the import of which is consistent with the foregoing, and which in substance recites that these entrymen made their own selections and filed upon the land; that their attitude toward the land was that of owners, and there is no substantial evidence of intent or purpose that the land or any part of it was taken for the benefit of Kenworthy, or the defendant Investment Company. The entrymen controlled the land to the exclusion of any one else; they exercised dominion over it, and went so far as to give option sales to parties other than these defendants Kenworthy and the Investment Company.

The best proof of the intent and purpose of the parties to the transactions, and especially of the defendant entrymen themselves, is the manner in which they finally elected under the contract to and did settle for the water right by giving their notes and mortgages upon the tracts, respectively, reserving to themselves 20 acres, with the water right thereto, from the mortgage.

There is no intent or purpose shown on the part of the defendants Kenworthy or the Investment Company to exercise any control or dominion over the land. There is no testimony that sustains the conclusion that they wanted the land. They had the water to sell, and were looking for purchasers, as they had a right to do. The land of the plaintiff, without water, is practically worthless. The water is the thing of real value. Certainly it is not to the discredit of the entrymen that they were willing to purchase from or to the discredit of the company or its president to be willing to sell the water to these entrymen. That the price was reasonable is shown by the testimony of the different witnesses. That the water was worth what they were agree-

ing to pay for it, or what the defendant company and its president are to have out of it, is conceded. They have a mortgage upon 140 acres of land, and is it to the discredit of the company that it conceded to these indigent entrymen the advantage of 20 acres of land free and the water right therefor free of the lien of the mortgage? Can it be said that there was a fraudulent intent and purpose to give to the defendant company an interest and title to a part of the land in the fact that the entrymen protected themselves against the uncertainty of being able to pay for the water and thus losing the whole of the land, if the mortgage covered it? We think rather that it is to the credit of this water company that it was willing to sell its valuable right to these indigent entrymen and take as their security a mortgage upon the 140 acres and the water right thereto.

It is suggested that the giving of the mortgage to secure the notes, after the final proof, was an attempt to evade the statute, and, taken together with the contracts, shows the original intent of the parties to violate the good-faith and nonalienation provisions of the statute. With this we cannot agree.. On the other hand, we think it demonstrates the fairness of the Investment Company and Kenworthy. It emphasizes the right of these entrymen to elect to give no security, but the mortgage, for the entire amount due upon the water contracts. The plain terms of these contracts, with all of the facts and circumstances attending the transactions, including from the first knowledge that the entrymen had that there were lands there upon which they could file, down to the final act of the giving of the note and mortgage to secure the same; all unite in establishing the simple situation of the defendant company and its president, Kenworthy, having water for sale, with a right and a desire to sell the same, and the entryman in a perfectly legitimate, honorable way taking advantage of the opportunity, being treated with the utmost fairness, finally closing the transaction of the purchase of the water right by giving the note and mortgage after final proof—all consistent with his rights as an entryman, and in entire harmony with the provisions of the Preemption Law under which the entry was made.

Finally, the plaintiff insists that there is a conflict in the statements of the different witnesses that cannot be reconciled with the honesty of the transaction. Admitting that inferences might be drawn from some of the evidence, some of the facts and circumstances in the case, that would indicate an intent and purpose to violate this provision of the Pre-emption Law, the position of the trial court becomes especially important. After seeing, personally, the witnesses, observing their demeanor upon the witness stand, having an opportunity to judge of the character and stability of the men, he finds:

"These gentlemen impressed me as honest men, as substantial citizens. * * * The men did not hesitate to tell the whole story—both the entrymen and Mr. Kenworthy. I think it was an honest transaction."

The record discloses substantial evidence to sustain the findings of the trial court, and we find no obvious error in the application of the law or mistake in the consideration of the facts.

The judgment of the trial court is affirmed.

MONTE RICO MIN. & MILL. CO. et al. v. FLEMING et al.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5037.

1. ACTIONS ⚷50(2)—JOINDER.
Minority stockholders, who asserted that they had been induced to purchase their shares through the fraud of the promoter of the corporation, cannot join actions personal to them with actions against the majority shareholders on which the corporation alone could sue.

2. CORPORATIONS ⚷320(13)—ACTIONS BY MINORITY STOCKHOLDERS—INJUNCTION.
In a suit by minority stockholders against the corporation officers and others for an accounting for corporate funds that came into the hands of individual defendants and for cancellation of corporate obligation and mortgages on the ground that they were taken fraudulently and without consideration, an order temporarily enjoining foreclosure or disposition of the mortgages is proper.

3. CORPORATIONS ⚷320(13)—ACTIONS BY SHAREHOLDERS—RELIEF.
Where there was no contention that a corporation was not legally organized, or that it was insolvent, *held* that, in a suit by minority shareholders for cancellation of corporate obligations and mortgages on the ground that they were taken fraudulently and without consideration, the complete stoppage of corporate affairs is unnecessary, and a decree enjoining foreclosure or disposition of the mortgages should not enjoin the corporation from employing any person on a salary other than a watchman: thus stopping all corporate affairs.

4. CORPORATIONS ⚷320(13)—STOCKHOLDERS—RIGHTS OF.
The right of a stockholder to sell his stock is one of the commonest incidents, and such disposition should not be enjoined in a suit by minority shareholders against the promoter and organizer of the corporation who it claimed misrepresented the number of shares he received, etc., where it did not appear that the promoter was not the owner of the shares with all lawful rights implied by such ownership.

5. CORPORATIONS ⚷320(13)—BOOKS—INSPECTIONS.
In a suit by minority stockholders who were denied access to the corporate books, an order providing that they should be allowed access to the books is sufficient in the first instance, and the books of the corporation should not be ordered by mandatory injunction to be deposited in court for inspection of the parties.

Appeal from the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Bill by Thurston W. Fleming and others against the Monte Rico Mining & Milling Company and others. From an order granting an injunction, etc., defendants appeal. Order modified, and, as modified, affirmed.

Lawrence R. Boyd, of Lynchburg, Va. (A. W. Morningstar and E. H. Mitchell, both of Lordsburg, N. M., on the brief), for appellants.

W. C. Reid, of Albuquerque, N. M. (J. M. Hervey and E. C. Iden, both of Rosewell, N. M., on the brief), for appellees.

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

HOOK, Circuit Judge. Certain minority stockholders of the Monte Rico Mining & Milling Company sued the company, its officers, its

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

majority stockholders, and others, for a receiver, an injunction, and an accounting. This appeal by defendants is from an order granting an interlocutory injunction and other temporary relief.

The company was organized by defendant Lawrence R. Boyd, his father and another, under the laws of Arizona, with an authorized capital of 500,000 shares of the par value of one dollar each. At the first meeting of the incorporators, a board of directors was chosen, and on the same day Boyd proposed to sell to the company certain mining claims in New Mexico in consideration of its entire capital stock; he to donate to the company 200,000 shares thereof for its treasury. The proposition was accepted and carried out, and the records of the company showed the transaction. The idea was to make all of the stock fully paid and to use the shares in the treasury to raise funds for development.

[1] The plaintiff stockholders acquired treasury shares sold by an agent employed by the company for that purpose. Part of the causes of action stated in the complaint are based upon alleged fraudulent representations, by Boyd personally, to induce the sale of the stock to them. It is averred that he represented that he had retained but 100,000 shares, that the remaining 400,000 were in the treasury, and that he (Boyd) was to serve as president without salary; that Boyd transferred the 300,000 shares retained by him to his wife and his father without consideration and to deceive and defraud creditors; that he caused dummy directors to be elected and irregular meetings of the stockholders and directors to be held; that of $40,000 or more received from sales of treasury stock he converted over $25,000 to his own use and refused to account for it; that the plaintiffs were denied the right to inspect the books and records of the company; that Boyd fraudulently caused the execution to himself and his brother of obligations of the company and mortgages securing them upon all its property without consideration; and that they were about to enforce them, etc. Without attempting to recite all the averments of the voluminous complaint, it is quite apparent that it proceeds upon the erroneous assumption that all controversies growing out of the organization and operations of the company and also individual dealings in its stock may be determined in a single suit. Plaintiffs have joined causes of action against Boyd personal to themselves with causes of action that are enforceable only by or on behalf of the corporation. Upon motion of defendants, the trial court dismissed three paragraphs of the complaint relating to the sale of the mining claims by Boyd for the entire capital stock, his donation of 200,000 shares to the treasury of the company, and his alleged fraudulent representations to induce the stock purchases by the plaintiffs. Aside from irrelevant averments, what remained were causes of action in the company which are properly assertable by stockholders in its behalf upon compliance with the conditions prescribed by Equity Rule 27 (198 Fed. xxv, 115 C. C. A. xxv). The order of the trial court appealed from may be briefly stated as follows: It denied the application for a receiver, but in lieu thereof, upon the giving of a bond by plaintiffs, enjoined the company, its officers and agents, from transacting any corporate business, and required it to deposit all its books, papers, and records with the

clerk of the court for inspection by the parties. It enjoined Boyd and his wife from disposing of the stock standing in their names upon the company books, and, in the case of the former, also the stock belonging to him but appearing in the names of others. It enjoined Boyd and his brother from foreclosing or disposing of the mortgages given by the company; and it enjoined the company from employing any person upon a salary other than a watchman with compensation not to exceed $50 per month.

[2, 3] Reduced to its proper dimensions, the suit is by stockholders for and on behalf of their corporation: First, for an accounting of corporate funds that came into the hands of individual defendants; and, second, for cancellation of company obligations and mortgages on the ground that they were taken fraudulently and without consideration. A recasting of the complaint with a clear observance of the equity rules would be helpful. In the above view, the order temporarily enjoining foreclosure or disposition of the mortgages is right; but we think the balance of the order appealed from should be vacated. There is no contention that the company was not legally organized and is not still an existing corporation with present corporate capacities. Nor is it charged that the company is insolvent. Moreover, this is not a suit for winding up its affairs. A complete stoppage of its operations is not a requisite remedy for the wrongs in issue.

[4, 5] Again, with the dismissal of the three paragraphs of the complaint it cannot be said that Boyd did not become the owner of 300,000 of the 500,000 shares of the stock of the company with all the lawful rights implied by such ownership. The right of a stockholder to sell and transfer his stock is one of the commonest incidents. The consideration of the transfer may be attacked in a proper proceeding by creditors sufficiently equipped, but the conditions are not present here. Again, those who hold the 300,000 shares of stock issued to Boyd for the mining claims are obviously majority stockholders. Their powers over the affairs of their corporation and the limitations upon those powers are too familiar for recital here. It may be said, however, that unless otherwise prescribed by statute any stockholder has the right to inspect the books of the corporation of which he is a member, for proper purposes and under reasonable regulations as to time and place. A denial of the right necessarily implies a remedy, and in Guthrie v. Harkness, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. Ed. 130, 4 Ann. Cas. 433, a judgment was entered requiring defendants to permit inspection by plaintiff. If a case might be so extreme as to justify a court in impounding the books of a going corporation to enforce the right of inspection, which we do not decide, we do not think the one at bar reached that stage. An ordinary order would doubtless prove sufficient, or, if not, a mandatory injunction.

The order appealed from is modified by vacating the several parts thereof excepting that enjoining the disposition or foreclosure of the mortgages given by the defendant company to individual defendants, and as so modified it is affirmed.

NATIONAL METAL EDGE BOX CO. v. AGOSTINI.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 104.

NEGLIGENCE ⚷51—CONDITION OF PREMISES—CARE AS TO TRESPASSERS—CHILDREN.

Defendant *held* not chargeable with negligence in not maintaining a fence or barrier between a canal and a roadway alongside, both of which it owned, which rendered it liable for the death of a boy five years old, who, when playing on the roadway, as was customary and known to defendant, threw a stick upon the ice in the canal, and again into a hole in the ice, and while attempting to recover it was drowned; there being no evidence that children played on the ice with defendant's knowledge.

In Error to the District Court of the United States for the District of Vermont.

Action at law by Victor A. Agostini, administrator of Livio Franceshetti, against the National Metal Edge Box Company. Judgment for plaintiff, and defendant brings error. Reversed.

Melville P. Maurice, of Brattleboro, Vt. (Robert C. Bacon, of Brattleboro, Vt., on the brief), for plaintiff in error.

Robert E. Healy, of Bennington, Vt., for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The defendant in error, in his representative capacity as administrator, brought this action under sections 2839, 2840, of the Vermont Public Statutes, to recover for pecuniary loss to the next of kin of the decedent because of his death by drowning. It is claimed his death, on March 22, 1915, was caused through the negligence of the plaintiff in error.

Plaintiff in error owned and maintained a manufacturing plant at Readsboro, Vt. In connection therewith, it owned and maintained an artificial open ditch or canal, which was filled with flowing water and which was made use of in its business. It maintained a road on the westerly bank of this canal, which had been used by the public for years prior to the day in question. There was no barrier or fence between the canal and the road. Its plant was on the easterly side of the Deerfield river, which flows in a southerly direction. The canal, estimated to be between 900 and 1,200 feet in length, was located somewhat east of the river, and extended in a direction parallel to the river from a dam across the river on the north, to the penstock or headworks of the water power plant of the factory on the south. It conveyed the water impounded by the dam to the penstock or head works. The roadway was 11 or 12 feet wide and the canal about 50 feet wide. Both roadway and canal were controlled by the plaintiff in error. The roadway was built in order to transport logs to the plant on sleighs and wagons. From this roadway, logs were dumped into the canal for storage. Defendant in error conceded the roadway was not a public highway. There were houses between the canal and the river. These houses were approximately parallel to the canal and the roadway on

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

the canal embankment. The decedent lived in the fourth house from the north end of the row of houses. The houses fronted east toward the canal. There was a public highway between the front row of houses and the canal embankment, which extended from the last house toward the south, and past the house where the decedent lived. There was a footpath from the roadway down to the seventh house in the row, which had been used habitually by the residents of these houses.

Prior to the repair to the roadway on the bank of the canal, made by the plaintiff in error, there was a fence consisting of four strands of wire between the roadway and the canal, but on the day of the accident, as stated above, there was no barrier or fence. On the day of the casualty, water was running in the canal, but there was some ice over the top, with two or three holes therein. The decedent, a boy five years of age, was playing a game with a stick sharpened at one end and called a "nipsie." While located on the side of the roadway furthest from the canal, he threw his nipsie out on the ice on the canal; he then went down to the canal bank onto the ice, picked up his nipsie from the ice, and threw it into the water in a hole in the ice, and, while trying to get the "nipsie" out of the water, fell in and was drowned.

It appeared, further, that for years prior people habitually crossed the roadway down the bank of the canal, and some walked along the roadway. Children, including the decedent, frequently played in the roadway near the canal, and plaintiff in error's foreman knew of such practice. Liability is sought to be imposed upon the theory that the canal was attractive to young children, and that they had, with the knowledge of the superintendent, been habitually playing about the canal. The court submitted the issue to the jury, permitting it to find the plaintiff in error negligent in not erecting bars along the banks of its canal, so that young children living in that vicinity, and who it knew were accustomed to travel or play on the banks of the canal, would not get in and drown.

There was no evidence of an express invitation. Defendant in error relies upon an implied invitation, because the premises were an attractive place for children.

The exception to the rule of law that the landowner is not responsible for injuries except when occurring through willful fault or conduct toward persons, upon his premises, who come there without permission, is found in the so-called attractive nuisance cases. Railroad Co. v. Stout (17 Wall.) 84 U. S. 654, 21 L. Ed. 745; Union Pacific v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434.

This doctrine has found approval in the federal courts and, since this action was tried in the federal court, the rule prevailing there, rather than the rule prevailing in the Vermont state court, will be adopted. The Vermont courts have refused to follow the doctrine of the "turntable" cases.

While the frequent use of the roadway by nearby residents and workers in the factory might be said to constitute an invitation for the public generally to use the roadway, still this did not constitute

a license by invitation for them to go into the water or upon the ice of the canal. The decedent, on the occasion in question, was not attracted in play to the canal. He intentionally left the roadway, seeking to recover his "nipsie," after having thrown it upon the ice. After picking it up, he threw it again into a hole in the ice, and, while trying to recover it, fell in. While there is abundant evidence indicating a frequent use of the roadway, there is no evidence that children played on the ice on the canal with or without the knowledge of the plaintiff in error. The theory of liability imposed in the so-called "turntable" cases and persons who are invitees upon private property, is that as to such persons the owners are required to keep the premises in reasonably safe condition. New York Co. v. Pusey, 211 Fed. 622, 129 C. C. A. 88. Attractiveness of the road or invitation to play thereon cannot be said to include the canal.

The decedent was not moved by temptation, if any, offered by the ice upon the canal or its attractiveness to play thereon, but by his wish to recover his "nipsie." Therefore we need not consider what effect might be given to a situation where children have played in the neighborhood or upon the canal and without objection from the plaintiff in error, or occasions when they have sometimes been ordered away. Temptation to play is not an invitation. Erie R. Co. v. Hilt, 247 U. S. 101, 38 Sup. Ct. 435, 62 L. Ed. 1003. The temptation, on this occasion, to leave his place of play, and to run out upon the ice upon the canal to recover his plaything, can in no sense be said to be either due to an invitation or a nuisance which attracted children.

We are of opinion that there was no obligation requiring plaintiff in error to fence the canal, and therefore failure so to do would not be a basis upon which to predicate negligence. We therefore think the court erred in refusing to direct a verdict as requested, to which exception was duly taken.

Judgment reversed.

NEW YORK CENT. R. CO. v. LLOYD.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 191.

APPEAL AND ERROR ⚷1066—QUESTIONS FOR JURY—SUBMISSION OF ISSUE UNSUPPORTED BY EVIDENCE.

In action for death of passenger, killed when train started suddenly while he was alighting at a dark station, submission to jury of question of defendant's negligence in failing to provide sufficient train crew with other issues *held* prejudicial error, where there was no evidence of such insufficiency and a general verdict for plaintiff was returned.

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

Action by Mary P. Lloyd, as administratrix of Victor C. Lloyd, against the New York Central Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

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Alexander S. Lyman, of New York City (William Mann, of New York City, of counsel), for plaintiff in error.

Gormly J. Sproull and Hugh M. Harmer, both of New York City, for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On December 6, 1917, the deceased, Victor C. Lloyd, was a passenger on plaintiff in error's train, and intended to alight at its station at Little Ferry, N. J. The plaintiff in error leases the West Shore Railroad Company and maintains this station. When the train approached the station, the deceased got up, waited inside the car until it came to a stop, and then went out on the platform. When the deceased reached the platform, there were other people attempting to alight therefrom. He proceeded to the lower step while the car was at a standstill, and when about to step on the station platform, holding the rail of the car with his right hand and a bundle with his left, the car started forward, causing him to be swung around and fall to the platform, and roll between the platform and the wheels of the train.

The witness who described the movement of the car said it started with a jerk and that he was thus swung. The train, after proceeding a short distance, stopped. Some 20 or 25 passengers alighted from the train. At the place where the deceased attempted to alight, the platform was dark and the station was not lighted. There was no brakeman on the platform of the car from which the deceased alighted, nor was there upon the station platform at the place of the accident. The crew consisted of two trainmen, a baggageman, and the conductor, and the conductor says it was a full crew. There were six cars on the train, all of which carried passengers. Each car was approximately 55 feet in length. The conductor says the car was started forward, at the time of the accident to the deceased, in response to his signal, which he in turn received from a brakeman in the rear.

The evidence presented a question of fact as to whether or not those in charge of the train were negligent in failing to give the deceased a reasonable opportunity to alight from the car before starting it forward in response to the signal given by the conductor.

The District Judge submitted four questions of fact to the jury, upon which there might be predicated negligence on the part of the employés in charge of the train. The first was the failure of the plaintiff in error, in its duty to the deceased, in not stopping a sufficient length of time at the station at Little Ferry to permit passengers to alight; second, to predicate negligence upon the failure to sufficiently light the platform where the passengers, including the deceased, were attempting to alight from the cars; third, to predicate negligence in starting the train in an improper and negligent manner, by a jerk and sudden start, causing the deceased to be thrown from the platform of the car, down between the station platform and the trucks or steps of the passing train, with which he came in collision and caused his death; and, fourth, that there was not a sufficient crew—"that the crew was inadequate for that train, carrying that number

of people, and there should have been provided by the defendant company more brakemen or flagmen stationed along on the train, so as to advise passengers, and see that passengers had time and opportunity for alighting before starting the train."

The verdict of the jury was a general one, and it is therefore not known whether the jury found the plaintiff in error negligent in respect of all the claims of negligence submitted to them, or any one or several of them. There was no evidence adduced in behalf of the defendant in error, indicating that it was the custom or practice upon railroads of like character, engaged in passenger service, to provide more than a conductor, baggageman, and two trainmen for six-car trains. On the other hand, the evidence of the plaintiff in error indicated that this was a full crew, and that a crew of this kind was customarily used in such service. The court charged the jury:

"Again as to the lack of sufficient care: Railroad companies have not got to hire a man for each platform. I don't think any of them do that, and you would measure the requirements of this railroad company according to what other railroad companies do. According to the standard adopted by companies that use reasonable care for the safety of their passengers. This company would be only required to carry such a number of train crew as ordinarily would be safe in watching at one end of the train to another, and giving the signals that passengers were all on or all off, and that it was safe to start. So, if they had such a number, that would be sufficient; but if you find that there was an inadequate and insufficient number to safely look after the boarding or alighting of passengers, then the defendant might be responsible in that respect for this man's death."

To this counsel for the railroad company excepted in the following language:

"I would like to take an exception to your honor's ruling with respect to the number of employés on the train and submitting to the jury the question of whether or not the defendant was negligent in not having more employés on that train.

"The Court: I think it is a question of fact, in view of all the testimony, of what was the proper number of the crew.

"Counsel: It seems to me that there is no testimony to the contrary that there was a full crew on that train. I don't recall any.

"The Court: But there is testimony as to where these men were, and whether they could have seen and properly safeguarded passengers in alighting, and whether the defendant was required, or not, to carry more crew for the train under the circumstances of this particular road, of carrying such a number of passengers and dropping them in such quantities in different places, and whether or not there would be imposed on the railroad company the duty of carrying a crew of several people, so as to safeguard the passenger trains at such stations as this one.

"Counsel: I take an exception."

The difficulty with the position of the defendant in error is that there was no evidence indicating negligence in the failure to provide a larger number as a crew of the train. There was no showing of the custom or practice to be other than that which prevailed on the night in question in the handling of this train. In the absence of some such evidence, we think it was error to permit the jury to exercise their own unaided judgment as to whether or not the crew was sufficient. D.,

L. & W. Co. v. Donahue, 238 Fed. 770, 151 C. C. A. 620; N. Y. Central Co. v. Banker, 224 Fed. 351, 140 C. C. A. 37.

We think this error involved a substantial right of the plaintiff in error and requires a reversal of the judgment appealed from.

Judgment reversed.

THE MAHANOY.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 225.

COLLISION ⚷96—BOAT LYING IN SLIP—TUG WITH TOW.

Evidence *held* to sustain the claim of libelant that respondent tug or her tow, which she was maneuvering into place in a slip, came into collision with libelant's canal boat, which was being discharged on a pier in the slip.

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

Suit in admiralty for collision by Willis E. Benham against the steam tug Mahanoy; the Lehigh Valley Transportation Company, claimant. Decree for respondent, and libelant appeals. Reversed.

Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (Anthony V. Lynch, Jr., of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. This appellant seeks to recover for damages sustained by the canal boat Sarah E. Thatcher while lying moored at the south side of the pier off Fifth street, Manhattan, East River. On December 30, 1916, the damage occurred. On that day, between 11 and 12 o'clock noon, the steam tug Mahanoy and her tow, the barge J. J. Humphrey, came into the slip. The barge was landed outside of some boats close by at the bulkhead. A question of fact is presented as to whether or not a collision occurred between this tow and the Thatcher. The District Judge, in an opinion delivered orally, dismissed the libel and stated:

> "I am unable to reach a conclusion upon the preponderance of the evidence. and therefore hold that the libelant has not sustained the burden of proving damage by the fault of this tug."

We fully recognize the rule, often enunciated in this court, that the trial judge, in admiralty, has the advantage of seeing and hearing the witnesses, and that this appellate court is reluctant to disturb his conclusion on the facts. He has the opportunity of seeing and hearing the witnesses. The W. H. Flannery, 249 Fed. 349, 161 C. C. A. 357; The Beaver, 253 Fed. 312, — C. C. A. —. But upon appeal, where this court may examine the weight of the evidence, we feel that upon this proof the libelant has borne the burden of proving damage as claim-

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ed. We feel obliged thus to examine the evidence, since the District Judge decided that he was unable to reach a conclusion upon a preponderance of the evidence. In his behalf the appellant called the stevedore who had charge of unloading the Thatcher, and who testified that between 11 a. m. and 12 noon, there was "an awful jar," which knocked him and his partner off their feet while they were stooping to make up a draft of lumber. After this, the witness went half way up the ladder and looked out of the side of the boat and saw the tug, which he identified as the Mahanoy, backing away. The blow appeared to the witness to come amidships, a point from which the Mahanoy was backing. There was damage to the planks at this point. An employé of the stevedore stated that "all of a sudden something crashed into the side of the boat and knocked him over into the other side." He, too, saw the Mahanoy backing away from the Thatcher. He stated there were no other boats moving alongside. The men on the Thatcher shouted to the Mahanoy.

Capt. Kerwin of the Mahanoy admits that they called to him. Another longshoreman, working on the deck, saw the tow coming in towing the canal boat and felt the bump. He was standing at amidships and the contact was forward of him. He did not know whether it was the tugboat or the coalboat which struck. Another employé of the stevedore, who was standing at amidships on the deck, saw the tugboat and saw the collision, but could not tell which of the two struck the Thatcher.

The appellant's wife testified that she looked out after the crash and saw the tug and her tow. She describes it as an "awful crash," and describes a second bump, which was not quite so bad as the first. She heard the man call out to the captain of the Mahanoy, and saw the Mahanoy's deckhand go on board the Thatcher to examine as to the damage. This deckhand admitted that there was damage to the side of the Thatcher. The appellant testified that he was not on the boat at the time of the collision, but came after, and saw a fresh break on the port side, about 25 or 30 feet from the bow.

Opposed to this testimony is that of Capt. Kerwin of the Mahanoy, who denied the collision, but who admitted that, when he started to back out of the slip, men on the Thatcher called to him to look at the damage he had done to her, and further that they showed him a broken plank about 10 feet back from the bow on the port side. His explanation of his maneuvers and backing the boat out is consistent with the claim of the appellant that a collision actually occurred. He said that, when his tug came into the slip, her bow was pointing slightly to the southward, with her stern to the northward, and stern a little up river. The Humphrey put her bow line on the starboard clip of the outside boat, which was a little aft of the blow. After loosening the stern line, he started to back before loosening the other lines, namely, the towing strap and towline. This required his backing up to get the strap off. He thus gave a swing of the Humphrey to land her alongside of the three moored barges.

Under these circumstances, the Humphrey could come in contact with the Thatcher. If the Humphrey's stern did not at first swing

along the outside boat, it is fair to assume that there was something in the way, and this was probable, because the swing brought her into contact with the Mahanoy. The master of the Humphrey testified, as did Thompson, the Mahanoy's oiler, that there was "talk of an accident" outside on the tug.

We think that the testimony offered in behalf of the appellant was sufficiently strong evidence that a collision took place. The surrounding circumstances and the statements made by the appellee's witnesses in some measure corroborate the claim of the appellant. While it is true that there is denial of a collision, there is the fact that a collision was claimed at the time, and a man was immediately sent on board the Thatcher to make an examination of the damage. What caused the fresh break? It was proven that there were no other vessels in the vicinity at the time, or endeavoring to get in or out of the slip. There was the crash, severe enough to cause the workmen to lose their equilibrium. We must accept this as evidence which ordinarily should prevail over strictly negative evidence. Stitt v. Huidekoper, 84 U. S. (17 Wall.) 385, 21 L. Ed. 644. We are of the opinion that the appellant has sustained the burden upon him to prove the claim.

Decree reversed.

CLYDE LIGHTERAGE CO. v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 224.

COLLISION ⚷71(3)—MOORED VESSELS—UNSAFE BERTH.

A barge moored by her master without making soundings in a slip, with her bow to a pier, and left with no one on board, lying over the edge of a sloping bank from which she slipped at low tide, breaking her lines, and coming into collision with another moored vessel, *held* in fault for the collision.

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

Suit in admiralty for collision by the Clyde Lighterage Company against the Pennsylvania Railroad Company. Decree for respondent, and libelant appeals. Reversed.

Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.

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

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] On October 1, 1917, at 2 a. m., a collision occurred between the respondent's barge No. 420 and the libelant's steam lighter Henry C. Rowe, which, at the time, was lying at the end of the pier of the American Linoleum Manufacturing Company at Linoleumville, Staten Island.

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The Rowe was tied from September 29, 1917, at about 5:30 p. m. until the time of the collision, at this mooring. The water was about 15 feet deep. She lay with her bow toward the south and her stern projecting beyond the north corner of the pier. On September 29th at about 7:45 p. m., the No. 420 was moored, bow in, stern out on the north side of the pier about 15 feet inside of the pier end. The master of the No. 420 says he made fast with a 4½-inch bow line in four parts, and a 4½-inch stern line in two parts. He did not touch his lines from the time he made fast until after the accident. At noon on Sunday September 30th he went home, returning at 7 a. m. Monday, after the accident.

At the time of the collision, apparently, there was no one on board the No. 420. She was moored at the edge of the shoal or bank, which sloped sharply into deep water near the pier end; at ebb tide she would take the ground. At the hour of collision, 2 a. m., the tide was ebb, and undoubtedly the No. 420 slipped off the bank or shoal, which consisted of a slippery blue clay, and, her lines not proving strong enough to hold her, she crashed into the stern of the Rowe, breaking the latter's side, upper deck guard, and rudder, and this gives rise to this action.

The District Judge classified the happening as an inevitable accident and found that there was no negligence proven and dismissed the libel. The collision, of course, was not due to an inevitable accident, and the respondent's advocate expressly disclaims any such contention. The Louisiana, 70 U. S. (3 Wall.) 164, 18 L. Ed. 85. The District Judge found that there was no serious dispute in regard to the actual facts. We think the proof justified the claim of the libelant that the respondent was negligent. The master of the No. 420, either without knowledge as to the bottom or without making soundings, moored his boat in an unsafe berth. The bottom, at 10 or 15 feet from the end of the pier, is described by the witnesses as a shoal with a slope something of about 5 or 8 degrees, and then from the shoal there is a perceptible drop down about 30 degrees more in a slimy blue clay. The District Judge found the barge laid over the edge of a ridge in which there was this sharp descent into the water. This is doubted, for it undoubtedly lay on the shoal and slipped off, causing the strain on the lines. The master testified that he did not know about this bottom and that he made no soundings to ascertain its condition. We think it was incumbent upon the master under the circumstances here disclosed, to have made an examination to ascertain the condition of the bottom. Daly v. N. Y. Dock Co., 254 Fed. 691, — C. C. A. —. If the master knew of the condition of the bottom, it would have been negligence to have moored his vessel in this unsafe berth. Again, it appears that the No. 420 was not obliged to take this berth because of unloading, for she was not to discharge the cargo there, and, in discharging her cargo, would be obliged to take a berth further from the pier end. We think the principle enunciated in Campbell v. Penn. R. Co., 85 Fed. 462, 29 C. C. A. 268, is controlling as to the facts here involved. There a collision occurred between a car float and canal boats lying in the same slip. The court said:

"They were bound, however, to exercise such care and prudence in securing her as the circumstances required and the circumstances in this case required a very high degree of care inasmuch as she had repeatedly grounded at low tide, they were chargeable with knowledge of the condition of the bottom, and, if they chose to leave her at that particular place without a watchman, were bound to secure her so that the list she might be expected to take, should there be an unusual fall of the tide, would successfully be overcome."

It is the negligence in berthing and securing the barge that constitutes the fault.

[2] It is claimed, on behalf of the appellee, that the lines were in good condition and practically new. There is a dispute as to this and as to the condition of the lines at the point where they parted. The lines were not produced, and inspection was therefore not afforded to ascertain whether they parted from strain or from being defective or insufficient. The failure to preserve the lines and produce them would justify the inference that, if produced, they would have shown the results of the strain due to the slipping of the barge as it came off the shoal. The Colon, 249 Fed. 462, 161 C. C. A. 418; The Bertha F. Walker, 220 Fed. 667, 136 C. C. A. 309.

The claim advanced by the appellee that the barge master, in leaving, was justified in relying upon the fact that the lines did not break at previous low tides, is without force. There were two low tides on Sunday. He was sleeping at the first low tide, and absent at the second low tide. But, assuming that he was not, the low tide was an occasion and opportunity for making known to him the condition of the bottom where he moored his boat. The successive shocks or blows upon the lines on the occasion of these low tides may well have worn and weakened the lines, which ultimately parted. The barge master did not look at the lines from the time of berthing his boat until after the accident. Where the issue is, as here, between the barge owner and the boat with which it has collided, failure to watch the lines may be negligent. Dailey v. Carroll, 248 Fed. 466, 160 C. C. A. 476.

We think the appellant established negligence on the part of the appellee's servants and was entitled to a decree.

Decree reversed.

AMERICAN REALTY CO. v. CURRAN.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 208.

LOGS AND LOGGING ⟹8(1)—CONTRACT TO CUT WOOD—CONSTRUCTION.

A contract by plaintiff to cut as much wood as possible from certain lots of defendant, and deliver the same on the cars at a railroad station named, for a stated price per cord, defendant to furnish him provisions at cost during the work, *held* to require defendant to furnish the necessary cars.

In Error to the District Court of the United States for the District of Vermont.

Action by O. H. Curran against the American Realty Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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

Charles Batchelder, of Bethel, Vt., and Edward H. Edgerton, of Rochester, Vt., for plaintiff in error.

Alexander Dunnett, Charles A. Shields, and David S. Conant, all of St. Johnsbury, Vt., for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The defendant in error has recovered for breach of a contract dated June 5, 1917, wherein it was provided that the defendant in error cut and deliver on cars, in peeled and rough 4-foot wood at Rickers' Mills, Vt., as much wood as possible during the season of 1917–1918; further, that the phrase "as much wood as possible" would mean at least 1,500 cords. It was provided that the plaintiff in error furnish food to the defendant in error at cost price, plus the freight, and make advances in moneys from time to time "to enable the party of the first part to carry on his work."

On the day of shipment of each car, a notice stating the initial and number of each car and the contents, together with the original bill of lading, was to be mailed to the plaintiff in error at its office in Portland, Me. It was further provided that a scaler be appointed by the plaintiff in error, whose scale should be final, binding, and conclusive. Payments were to be made at the rate of $7 per cord for peeled wood and $6 for rough wood "delivered on the cars as above provided." The defendant in error entered upon the performance of this work and cut and piled 42.12 cords of peeled pulp wood and 1,889.06 cords of rough pulp. On the 31st of October, 1917, plaintiff in error notified the defendant in error to stop work, which he did, whereupon the plaintiff in error entered the camps of the defendant in error, took possession of the supplies and camp outfits, and gave credit to the defendant in error for $522.75. The defendant in error claims that, had he been permitted to work pursuant to the contract, he would have been able to cut approximately 6,000 cords of wood, and it is for this that he sued. The verdict of the jury awarded him $2,045.83. The recovery is for lost profit which the defendant in error would have earned, had he been permitted to carry out the terms of the contract.

Plaintiff in error claims that under the terms of the contract the duty of procuring cars upon which to load the wood rested on the defendant in error which, as stated by the plaintiff in error, "became important during the trial below, or whether the defendant in error could and would have been able to complete his undertaking, expressed in the contract, and cut and deliver on cars the whole of the 6,000 cords which defendant in error claimed was on the lots." The court charged the jury it was the duty of the plaintiff in error to furnish cars at reasonable times and in reasonable numbers to enable the plaintiff in error to load the wood. The direction to stop work is conclusively proven.

The only question presented by this appeal is whether the court fell into error in charging that it was the duty of the plaintiff in error to furnish the cars to be loaded. We think the court correctly instructed the jury. The contract is silent as to who was to furnish the cars for this work, but a contract of employment such as this must be construed in the light of the surrounding circumstances which confronted the

contracting parties at the time. Regard must be had for what was usual and necessary in carrying on the business which was contracted to be performed. A construction should not be placed upon the contract which would give an unfair advantage to one party over the other, unless such was their manifest intention when the contract was made. Rock Island R. R. Co. v. Rio Grande, 143 U. S. 596, 12 Sup. Ct. 479, 36 L. Ed. 277.

Bearing in mind the basic rule, which requires the discovery of the intention of the parties so far as possible, or in finding the minds of the contractors and ascertaining the terms of their agreement, the court must view all of the surrounding circumstances and conditions at the time the contract was made. Leschen Rope Co. v. Mayflower, 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N. S.) 1. In the above reference to the contract, it will be seen that the defendant in error made an ordinary contract of employment, whereby he agreed to cut wood on certain lots of the plaintiff in error at a stipulated price per cord. He was to be provisioned and paid at the price agreed upon. His duty was performed when he cut the wood and hauled and placed it upon the cars. He contracted no further obligation. The place of delivery upon the cars was fixed at Rickers' Mills, Vt., where he cut the wood.

The authorities relied upon by the defendant in error are not in conflict with these views. In O'Brien v. Wilkinson, 117 Wis. 468, 94 N. W. 337, it was expressly stipulated in the contract that the plaintiff had agreed to cut timber, and was to make delivery at a distant station. This required his transporting the lumber to that station, and the court held that from the terms of the contract there was an obligation to obtain the cars necessary to accomplish the result; that is, to make the delivery at the distant station.

In Godkin v. Monahan, 83 Fed. 116, 27 C. C. A. 410, Godkin agreed for a certain price to cut and deliver in the Wisconsin river all the Norway white pine timber suitable for sawlogs standing on a certain section, and these logs so cut were to be banked on the Twin river on or before a fixed date, and later to run into the Wisconsin river. The court held that Godkin was in duty bound to obtain a place on the Twin river on which to bank the logs. There the agreement with Godkin was that the logs should run into the Wisconsin river, and the bank on the Twin river was merely an incident to heading the logs to the Wisconsin river.

In the case of Meekins v. Newberry, 101 N. C. 17, 7 S. E. 655, the plaintiff agreed to raft logs sold to the defendant for towing by steamer, and to deliver them to the defendant when the latter sent a steamer or vessel to tow them. An offer was made by the plaintiff to introduce parol evidence that the defendant was to furnish him necessary rafting gear for properly rafting the logs, and to excuse his failure to raft the logs as per the written contract because of the failure of the defendant to supply the rafting gear. The court excluded this evidence as tending to vary the terms of the written contract. This authority does not aid the plaintiff in error.

The contract is a simple one of employment, and plaintiff in error breached it, apparently without cause. The District Judge very prop-

erly submitted only the question of damages to the jury. There is no error in the clear instructions given to the jury, and we think the judgment should be affirmed.

In re REILLY et al.

KNAPPENBURG v. ROWAN.

(Circuit Court of Appeals, Second Circuit. May 16, 1919.)

No. 74.

1. BANKRUPTCY ⚷440—REVIEW—PETITION TO REVISE.
Bankruptcy court's order requiring bidder to pay balance of purchase price for bankrupt's property is reviewable by petition to revise, under Bankruptcy Act, § 24 (Comp. St. § 9585), but not by appeal.

2. BANKRUPTCY ⚷440—PERFECTING APPEAL—DISMISSAL.
A bankruptcy court's order, improperly sought to be reviewed by appeal, instead of by a petition to revise, will be dismissed.

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

In the matter of John H. Reilly and Thomas P. Reilly, individually and as copartners under the firm name and style of Reilly Bros., bankrupts. From an order requiring James A. Rowan to pay the balance of purchase price bid for the bankrupts' assets, Rowan appeals. Appeal dismissed.

An order in bankruptcy was made requiring appellant, a purchaser at a sale of the assets of the bankrupts, to pay the balance of the purchase price on the bid made by him for such assets. This appeal is from the order.

George A. King, of Dansville, N. Y., for appellant.

C. W. Knappenberg, of Dansville, N. Y., pro se.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Reilly Bros. were adjudicated bankrupts, and their assets, consisting, among other things, of card records, were sold by the trustee appointed in bankruptcy proceedings, at public auction. The appellant, James A. Rowan, was the highest bidder, and his bid was accepted. He refused to pay the balance of the purchase price. Thereupon the trustee obtained an order to show cause, returnable before the District Court on May 15, 1916, requiring him to show cause why he should not pay the balance of the purchase price, as he bid, for these card records. The card records comprised a mailing list of Reilly Bros. The reason for refusal of payment was the claim of breach of warranty made by the trustee at time of sale; it being claimed that the list did not contain the number of names as represented. It is claimed that the trustee represented, at the time of sale, a mailing list of some 67,000 names of retail and wholesale customers and also prospective customers of Reilly Bros., and which list had been valued by appraisers at $4,000. It is claimed that, of the list

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delivered by the trustee, there were but 35,393 names of customers and prospective customers of Reilly Bros., and that the balance, as delivered, were Boyd City Dispatch lists—lists of fruit syrup manufacturers. Reilly Bros. were engaged in the nursery stock business.

This controversy was submitted by the District Judge to the referee, to determine whether or not there were misrepresentations made. The referee has reported against the claim of the appellant, and his report has been confirmed by the District Judge. Rowan, feeling aggrieved, has appealed here.

[1] The practice followed in preparing and carrying on this appeal is contrary to the well-settled rules of this court. It is a proceeding in bankruptcy, and should have been brought to our attention by a petition to revise under Bankruptcy Act July 1, 1898, c. 541, § 24, 30 Stat. 545 (Comp. St. § 9585). Such practice was approved and is settled in this court. In re Franklin Brewing Co., 249 Fed. 333, 161 C. C. A. 341; In re Caponigri, 210 Fed. 897, 127 C. C. A. 466.

[2] We have uniformly held that where the aggrieved party does not proceed to bring his appeal to this court, according to the rules laid down by the court, we will not entertain such an appeal. In re Shidlovsky, 224 Fed. 450, 140 C. C. A. 654; Kirsner v. Taliaferro, 202 Fed. 51, 120 C. C. A. 305; In re Mertens, 142 Fed. 445, 73 C. C. A. 561.

Appeal dismissed.

OTTO COKING CO., Inc., et al. v. KOPPERS CO.

(Circuit Court of Appeals, Third Circuit. May 22, 1919.)

No. 2435.

1. PATENTS ⟹51(1)—INVENTION—ANTICIPATION—RELATED ARTS.

Though two arts, producing the same products from the same source are concededly related, yet differences in them, if fundamental, may validly prevent inventions in one from operating as anticipations of inventions in the other.

2. PATENTS ⟹328—INVENTION—ANTICIPATION—"COKE" OVEN.

The Koppers patent, No. 818,033, for improvements in by-product coke ovens, *held* valid as to claims 1 and 5, and not anticipated by the Paris gas-retort furnaces, nor the Dods gas generator, patent No. 571,558; coke being the mass of carbon, which is left after the volatile matter of coal has been driven off by heat applied in such a manner as not to burn the carbon.

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

3. PATENTS ⟹240—INFRINGEMENT—IMPROVEMENTS.

Infringement of a patented device cannot be avoided by merely improving it.

4. PATENTS ⟹328—INFRINGEMENT—COKE OVEN.

The Koppers patent, No. 818,033, for improvements in by-product coke ovens, *held* infringed by devices built under patents Nos. 1,212,865 and 1,212,866, issued to Wilputte in 1917.

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

5. PATENTS ⚩328—INFRINGEMENT.
Devices manufactured under the Koppers patent, No. 818,033, for improvements in by-product coke ovens, *held* not to infringe the Schniewind patent, No. 673,928, claim 1.

Appeal from the District Court of the United States for the District of Delaware; Charles P. Orr, District Judge, specially assigned.

Suit by the Koppers Company against the Otto Coking Company, Incorporated, and the Wilputte Coke Oven Corporation, with counterclaim by defendants. From a decree holding valid and infringed claims 1 and 5 of complainant's letters patent No. 818,033 issued April 17, 1906, to Heinrich Koppers for improvements in by-product coke ovens, and dismissing the counterclaim for infringement of defendant's letters patent No. 673,928, issued to Schniewind, defendants appeal. Affirmed.

Thomas F. Bayard, of Wilmington, Del. (Odin Roberts, of Boston, Mass., and Francis T. Chambers and John E. Hubbell, both of Philadelphia, Pa., of counsel), for appellants.

Henry Love Clarke, of Chicago, Ill., and Frederick P. Fish, of Boston, Mass., for appellee.

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

WOOLLEY, Circuit Judge. This appeal is from a decree of the District Court holding valid and infringed claims 1 and 5 of the complainant's Letters Patent, No. 818,033, issued April 17, 1906, to Heinrich Koppers, for improvements in by-product coke-ovens, and dismissing a counterclaim of infringement of defendant's Letters Patent, No. 673,928, issued to Schniewind.

The defenses pleaded respectively to the claim and counterclaim of infringement are: (1) Non-infringement; and (2) invalidity of the patent claims in suit, both for anticipation and lack of patentable invention.

Though the decision in this case will affect interests of considerable magnitude, the accompanying opinion probably will be read only by those who are engaged in the by-product coke-oven art and in kindred arts. As discussion in this opinion will be addressed to those who are conversant with the very extensive and complex subject matter of the patents in suit, we shall review the art, prior and present, in no greater detail than we deem necessary to make known the grounds of our decision.

The subject matter of the Koppers patent is by-product coke-ovens and the invention of the patent relates to improved means for heating them. The art of by-product coke-ovens was highly developed at the time of Koppers' invention. It was in itself a broad art. Because of its close relation, industrially and economically, to the great metallurgical arts, it had for many years attracted capital in ample measure and had invited the attention of scientists of the first order throughout the world. Notwithstanding the great advance which the art had

made, the state of the art—that is, the point which the art had reached and at which it had stopped when Koppers made the invention of the patent in suit—disclosed a problem which was present at its beginning, which had persisted throughout its development, and which remained in a large measure unsolved. This was the problem of applying heat to the walls of a coking-chamber with an uniformity of temperature that would insure uniformity in the coking-operation and in the resultant products. Uniformity of heat distribution to coals in process of coking is essential to the production of coke of the structure and composition required for use in metallurgical industries as distinguished from coke suited only for general or domestic uses. Uniformity of heat distribution is essential also to the saving of those distilled by-products—such as benzol and toluol—that are peculiarly subject to destruction during distillation.

Koppers freely availed himself of the art and cleverly combined in his oven many features of merit which are not embraced in his invention. Therefore, in order correctly to estimate the issues of this case and properly to confine their decision to Koppers' invention, it will be necessary to distinguish in Koppers' oven the things which he invented from the things which already existed. This will require a short excursion into the prior art.

Coke is the mass of carbon which is left after the volatile matter of coal has been driven off by heat applied in such a manner as not to burn the carbon. Coking coals are converted into coke in the industrial arts in two principal ways, the gas-retort method and the coke-oven method.

The gas-retort method produces illuminating gas as a main product and yields as a by-product a soft, spongy and fragmentary coke known as "domestic coke." The coke-oven method produces a hard, strong and structurally coherent coke known as "metallurgical coke" because of its utility in foundry and blast furnace processes. In the production of coke of the latter grade, the gases of coal distillation may be altogether consumed as in the wasteful bee-hive coke-ovens, or they may be saved as highly valuable by-products as in by-product coke-ovens. The difference in coke products reflects the difference in methods of producing them and in the problems incident to their production. It is with by-product coke-ovens operated primarily to produce metallurgical coke, and secondarily, gaseous by-products, that we are concerned in this case.

The by-product coke-oven typical of the prior art, though appearing on its outside to be one huge, homogeneous structure, contained within itself two distinct organizations. One had to do with combustion and the other with supplying materials for combustion. These organizations, while inseparably related in their operation, occupied separate parts of the structure and were commonly referred to by reason of their location as the "upper story" and the "lower story" of the oven.

A by-product coke-oven of the prior art, while generally spoken of in the singular, comprised actually a plurality of ovens or coking-chambers, the size of the oven as a whole being determined by the number

of coking-chambers desired. The upper story of the oven was made up of a battery of any number of long, high and narrow coking-chambers extending from side to side of the oven. Intermediate the coking-chambers and parallel with them was a like number of heating-chambers of somewhat similar dimensions. In this alternate arrangement of coking-chambers and heating-chambers, a wall of a heating-chamber was similarly a wall of its adjacent coking-chamber, and so on throughout the battery. Heat was conveyed from a heating-chamber, in which combustion occurred, through the wall dividing it from a coking-chamber to the coking-coals there undergoing distillation.

To facilitate uniformity of heat distribution to its walls, the heating-chamber was divided into many parts by narrow vertical flues extending from near the bottom of the chamber to a channel or flue running horizontally across its top. Nearly midway the heating-chamber, a partition, extending from the bottom upward to this horizontal flue, divided the chamber into two parts. These batteries of coking-chambers and heating-chambers, and certain hot air delivery flues presently to be mentioned, together with the supporting and separating masonry—all made of highly refractory and heat resisting bricks—comprised the combustion organization of the oven located in the upper story.

The lower story of the oven was largely made up of pillars and walls, likewise of refractory brick, to support the upper story. In the center of the lower story, or at its sides, or, indeed, on its outside, was placed one or more sets of regenerators. A "set" of regenerators comprised two regenerators. Between the regenerators and the sides of the oven, when the regenerators were placed in the center, or between the regenerators and the center of the oven, when the regenerators were placed at the sides, was a system of cooling-flues and open arches used to prevent melting or fluxing of the bottom masonry of the upper story, incident to the sub-bottom combustion system employed.

A regenerator, described very generally, is an oven-like structure of firebrick which contains at the bottom an air flue or sole-channel and checkerwork of firebrick upward from the sole-channel nearly to the dome. The functions of a regenerator are, primarily, to heat air, and secondarily, to so heat it that it attains an approach to uniformity of temperature before it is delivered to the heating-chambers of the second story, where it is used with gas as combustion material. Regenerators of the prior art—in coke-ovens as distinguished from gas generators—were placed longitudinal of the battery of heating-chambers, that is, at right angles to each heating-chamber and to each coking-chamber throughout the length or depth of the battery. This was the organization for supplying materials for combustion.

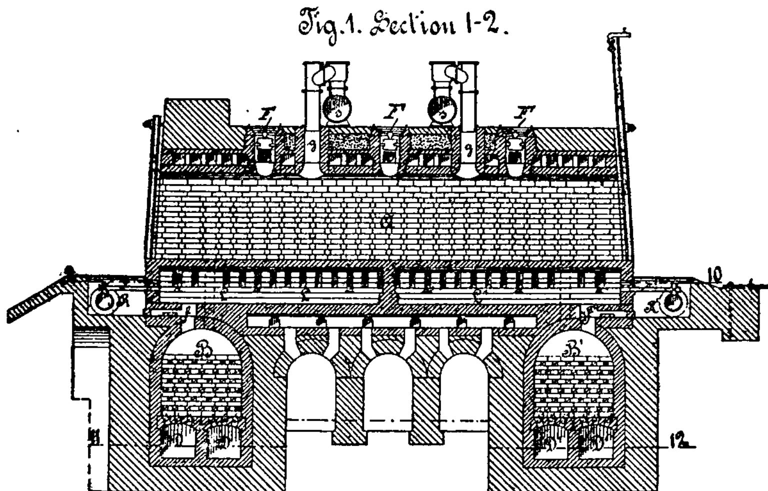
The connection between the two organizations, situate respectively in the upper and lower stories of the oven, was made by at least two flues leading from the regenerator to each heating-chamber, the first extending vertically to the second, and the second extending horizontally under the vertical flame-flues of each heating-chamber. The horizontal connecting flue was termed "bus-flue," and was in the very bot-

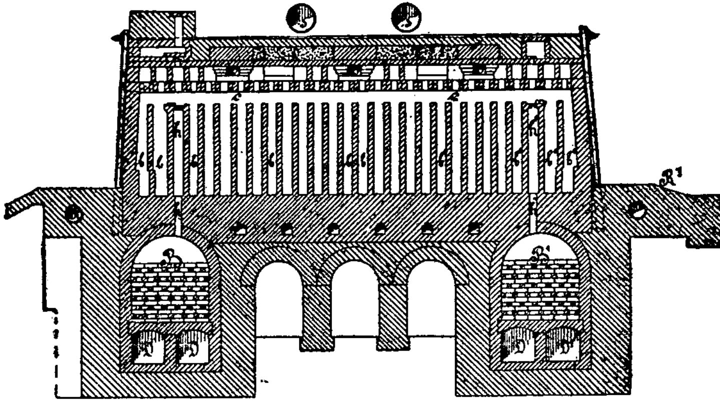
tom of the upper story. It had as many air openings as there were vertical flame-flues. There were as many connections of this kind with the one longitudinal regenerator as there were heating-chambers to be served with preheated air.

In the operation of a regenerative coke-oven, unheated air was drawn by smokestack draft through the sole-channel into the body of the regenerator. It was there heated on its passage upward through a checkerwork of bricks, then conveyed from the regenerator to the bus-flues and thence to one side of the divided heating-chambers, where, in its travel, it mingled with inflowing gas and became ignited, thereby producing a gas jet for each flame-flue on that side of the division. Heat was in this way conveyed to the adjacent coking-chambers with some degree of uniformity. The hot, waste gases arising from combustion were then carried horizontally along the flues at the top of the heating-chambers, across the division, down through corresponding though inactive flame-flues in the other side of the heating-chambers, then into the bus-flues and thence on to the companion regenerator, where they served to reheat its checkerwork as they passed off into the outer air.

This operation was reversed at stated intervals, with the result that one regenerator of the set and one side of the connected heating-chambers were actively heating a corresponding part of the coking-chambers, lying intermediate the heating-chambers, while the other side of the heating-chambers and the other regenerator of the set were inactive except in being reheated for use when the operation was again reversed.

To understand Koppers' invention, it is necessary to have a better understanding of the prior art than can be had from this inadequate statement. Therefore, we insert at this point diagrams of Hoffman's coke-oven (U. S. No. 492,400—1893), an excellent illustration of the elements of the prior art in combination.





An alternate arrangement of coking-chambers and heating-chambers in parallel alignment appears in Boult (British Patent No. 5,979—1883); Hoffman (U. S. Patent No. 492,400—1893); Otto (German Patent No. 88,200—1895); Hilgenstock (U. S. Patent No. 649,450—1900); Schniewind (U. S. Patent No. 673,928—1901); Koppers (U. S. Patent No. 738,918—1903). Vertical flame-flues are seen as early as Herberz (German Patent No. 25,526—1883) in which air and gas for combustion are introduced and ignited by means for regulating their supply. Flue combustion is found also in Koppers (British Patent No. 3,026—1899), in Hoffman (U. S. Patent No. 492,400—1893) and in many other patents. Regenerators in sets, each set ordinarily containing two, and positioned longitudinally the heating-chambers battery, each regenerator serving the whole battery and operated under the system of periodical reversal of air flow, are shown in the cited patents of Hoffman, Schniewind, Otto, and Herberz, and in the early Koppers.

Vertical connections from regenerator to horizontal bus-flues, and vertical connections thence to flame-flues of heating-chambers, for delivery of preheated air for combustion, appear in the same patents.

Koppers invented none of these elements of a by-product coke-oven; neither did he invent their method of operation. All were old in the art, yet all are found in one relation or another in the by-product coke-oven of his patent. As so much of the prior art is found in the organization of Koppers' coke-oven, what is there in his oven that distinguishes it from others in the art? What is the invention for which he was granted a patent?

Koppers has answered these questions by the claims of his patent in suit. They are as follows:

"1. In a coke-oven, a series of heating-chambers, and coking-chambers intermediate the heating-chambers, combined with a *series* of regenerators

below and *parallel* to the heating-chambers and communicating *directly* therewith, substantially as specified."

"5. A coke-oven provided with coking-chambers, two sets of heating-chambers intermediate the coking-chambers, two sets of regenerators *communicating* with the heating-chambers and *arranged below the coking-chambers*, and a partition between the regenerators, substantially as specified."

Prior to Koppers' patent, the efforts of all inventors, including Koppers himself, to produce uniformity of heat intensity over the walls of heating-chambers of by-product, coke-ovens, were directed along the line of delivering and distributing preheated air to heating-chambers from a set of two regenerators which served the whole battery of heating-chambers, whatever the number, and which were positioned longitudinally the battery and at right angles to each heating-chamber. With heating-chambers crosswise the oven and regenerators lengthwise the oven and therefore at right angles to one another, the delivery of preheated air from regenerator to heating-chamber was necessarily roundabout or indirect. As the air, in its transit from regenerator to heating-chamber, traveled up the vertical flue and then along the horizontal channel or bus-flue to the flame-flues, it encountered inequality of air pressure in the flue, with consequent inequalities in air deliveries to the heating-chamber and in flame distribution over its walls.

This being the state of the art, how did Koppers meet its problems? He took what was good in the art and discarded what was bad. He retained the upper story combustion organization substantially as it was, but he departed abruptly from the prior art organization of the lower story. He abandoned the one set of regenerators which had served the whole battery of heating-chambers and provided in their stead a separate regenerator to serve each heating-chamber. In doing this, he greatly multiplied the number of regenerators and filled up the arched spaces which theretofore had been left open to keep the masonry below the bottom of the coking-chambers from fluxing, and in doing this he overcame the chief defect of the sub-bottom combustion system. He then changed the position of regenerators from longitudinal of the battery to crosswise the battery, placed each individual regenerator below and parallel to each heating-chamber and made multiple connections between the two which were vertical and direct instead of horizontal and indirect, thereby causing the preheated air to pass from each regenerator evenly and directly to its companion heating-chamber, where, on combustion, heat intensity is distributed over its walls with practical uniformity.

When Koppers made these changes, he wrought a change in the art from a stagnant struggle for uniform distribution of heat over heating-chamber walls to the achievement of that result. The change was immediately reflected in economy of operation and increase of production. Coke production for a given coking time was substantially doubled. The coke product was of the best metallurgical grade, and the saving of distilled by-products was increased, with a reduced waste of fuel gas used in the heating operation. The art promptly recognized these achievements and adopted Koppers' arrangement to

the extent that over eighty per cent. of the by-product coke-ovens built during the last ten years in the United States have been Koppers ovens, amounting to 4,700 and representing an outlay of between $50,000,000 and $100,000,000. They exceed in number all competing ovens combined.

Koppers' changes from prior art ovens, involving changes in the number, size, and position of regenerators and in their relation to and connection with heating-chambers, may best be understood by comparing Koppers' patent diagrams here inserted with the diagrams of the Hoffman oven previously inserted.

Fig. 1

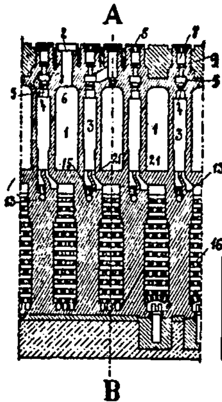


Fig. 2

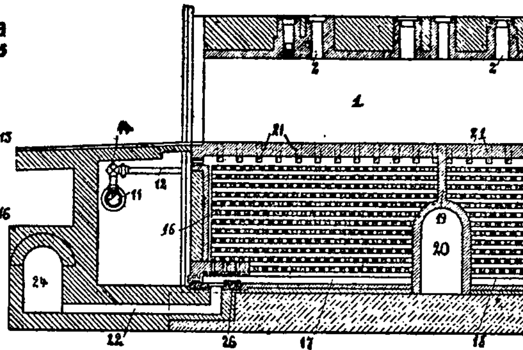


Fig. 3

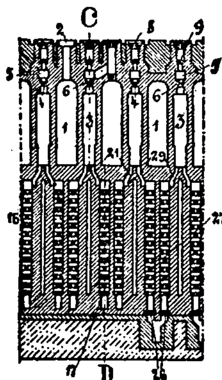
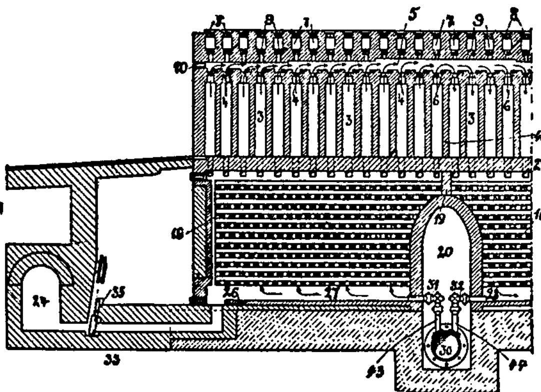


Fig. 4



Measured by all standards, the things which Koppers did involved invention, if he was the first to do them.

But the defendants say, that in multiplying regenerators, in changing their position, and in connecting them directly with the heating-chambers, Koppers was not the first to do these things, citing as anticipations, first, the published report of the Fiftieth Congress of the Technical Society of the Gas Industry of France, held June 24, 1878, at Paris, on the subject of the Paris gas-retort furnaces; and, second, Dods U. S. Patent No. 571,558—1896, for a gas generator.

The fundamental difference between these references and the invention of the patent in suit—which we observe on the threshold and which we shall keep in mind throughout the discussion without burdening this opinion with repeated allusions to it—is the difference in the arts to which the references and the invention of the patent respectively belong. Paris gas-retort furnaces and the Dods gas generator belong to an art fairly described by their names, in which gas is the main product and coke the by-product. It may be termed the art of by-product gas-ovens. The invention of the patent belongs to an art in which coke is the main product and gas the by-product. This is the art of by-product coke-ovens.

[1] Though the two arts, producing the same products from the same source, are concededly related, yet differences in them, if fundamental, may validly prevent inventions in one from operating as anticipations of inventions in the other. While distillation of coal is practiced in both arts, and, therefore, coke-ovens or coking-chambers are included in the organization of both, difference in the process of distillation, in the function of the ovens, and in the products sought and obtained, mark the difference in the arts. The issue of invalidity of an invention in one art because of anticipation by inventions in another art, when the arts are different, though related, must be determined with a cautious regard to the differences that distinguish the two.

The Paris gas-retort contains coking-chambers, and regenerators, or recuperators, for preheating air. The coking-chambers are in the form of semi-cylindrical or tubular retorts, which lie horizontally across the furnace structure, each holding several hundred pounds of coal. These tubular coking-chambers are stacked in rows in what is substantially a flame-filled heating-chamber, in which flames are diffused throughout the chamber, above, below and around all parts of the coking-retorts. The system employed to preheat air for combustion is without reversal in the direction of flow and without alternate change of position of the flames. While coke is a product of the Paris gas-retort, it is incidental, the main object of the Paris gas-retort being the production of gas. In this furnace, there is nothing that requires uniformity of heat distribution, and therefore there is no means to perform that function. In a furnace of this type, the problems of a by-product coke-oven are not present, and, as we regard it, there is nothing in it to suggest the means which Koppers 28 years later employed to solve such problems.

The Dods gas generator (U. S. No. 571,558—1896) comprises com-

bustion-chambers, heating-chambers, and regenerators. Heating-chambers and combustion-chambers are intermediate one another, as in coke-ovens, and regenerators (two in number) are placed below each heating-chamber. The prior art coke-oven system of reversing the flow of preheated air for combustion and of waste gases for reheating regenerators is used. On first view, Dods' organization seems to resemble rather closely the invention of Koppers. On examination, however, it is seen, that the coking-chambers of the Dods gas generator are tapered and in position are steeply inclined, the broader end of the tapered chamber being lower than the upper end; and that the intermediate heating-chambers are of similar dimensions and positions. These heating chambers are open in the sense of being without flame-flues to confine combustion to a particular direction or to control its distribution. As the furnace is a gas-retort, its primary product being gas, there is neither need nor means for the uniform distribution of heat.

[2] The pairs of regenerators under the heating-chamber are stepped one above the other and so are out of parallel with the inclined heating-chambers. Connections between regenerators and heating-chambers for the passage of preheated air are long and unequal conduits. This inequality of delivery conduits, we are told, makes uniform delivery of preheated air impossible. Gas is delivered to the heating-chamber by gas conduits of unequal length parallel with the air conduits, and combustion takes place on the meeting of gas and air in the open heating-chamber. These limitations, we are shown by the testimony, conflict with any practice of coke-oven distillation. As Dods' invention has never reached the industries—although it preceded Koppers by ten years—we do not know whether it is operative. We are inclined to believe, because of its lack of means for uniform heat distribution, that it will not produce metallurgical coke or those by-product gases which are destructively decomposed by overheating and are recovered only by uniform heating. We cannot believe that either the Paris gas-retort furnaces or the Dods gas generator did the things which Koppers did when he invented the coke-oven of his patent, or that they suggested to Koppers the conception which later he put into practice. Therefore, we agree with the learned trial judge, that the Paris gas-retort furnaces and the Dods gas generator do not anticipate Koppers' invention, and find with him that claims 1 and 5 of the Koppers patent in suit are valid.

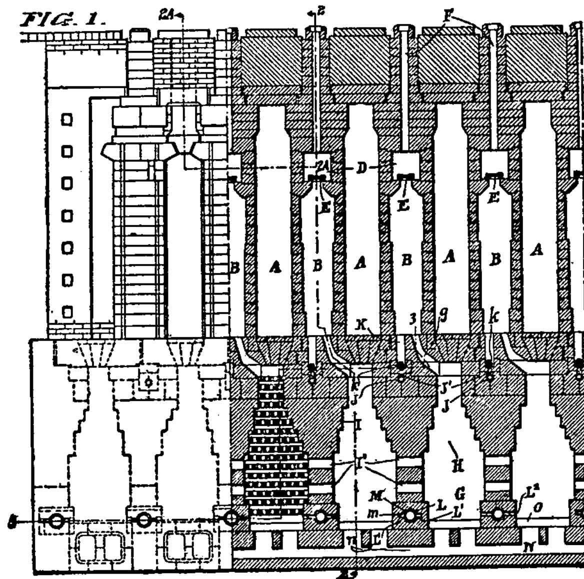
We shall next direct our discussion to the issue of infringement of the Koppers patent in suit.

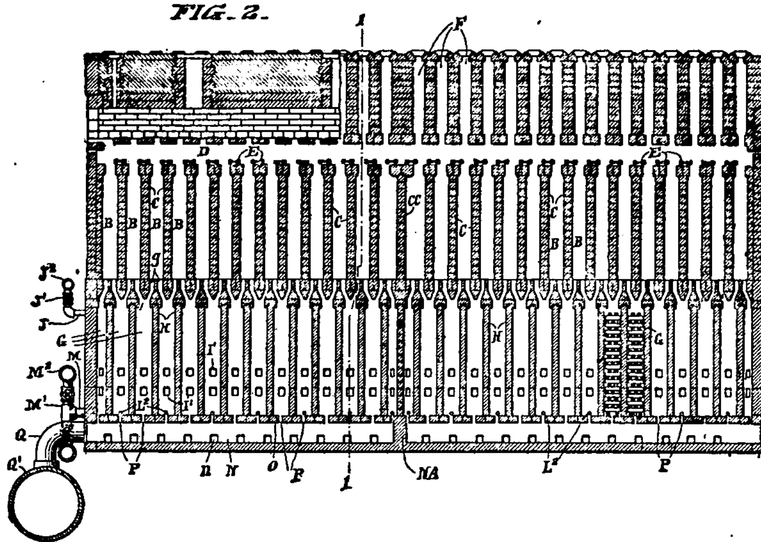
The defendants' alleged infringing by-product coke-ovens were built under patents to Wilputte (U. S. Nos. 1,212,865, 1,212,866—1917). Wilputte, like Koppers, made free use of what he found in the art—with this difference: He found Koppers there. Wilputte took the combustion organization of the upper story of the prior art by-product coke-oven and embodied it in his oven without change, except the elimination of the bus-flue. Koppers cannot complain of this, for he did the same thing. Wilputte's changes, like Koppers', were made in the organization of the lower story. Unless these changes were

his conceptions, the question is: Where did Wilputte get them? From Koppers or from the prior art?

The elements of the Wilputte oven are elements of the prior art. Their organization, confessedly, is not the organization of the prior art. Then whose organization is it? The plaintiff admits that in certain structural details Wilputte differs from Koppers, but contends that, basically, it is the organization of the Koppers invention. The defendants admit similarity in certain structural essentials, but insist that the organization involves a fundamental difference—conceived by Wilputte—which makes infringement of Koppers impossible. In order to compare the Wilputte oven with Koppers' and to distinguish the two, on the issue of infringement, it is necessary to show the principal characteristics of the construction and operation of the Wilputte oven. An examination of diagrams of the last Wilputte patent, here inserted, will, on comparison with diagrams of the Koppers patent, previously inserted, be of assistance.

Externally and considered as a unit, the Wilputte oven is not distinguishable from Koppers. There is no infringement here, for in this respect Koppers is scarcely distinguishable from the prior art. Internally, and considered with reference to its duality of organization, the Wilputte oven is not different from Koppers. Here again there is no infringement, for in this Koppers copied the prior art. The combustion organization of Wilputte, located in the upper story of the oven, is the same as that of Koppers, but as Koppers took this organization from the prior art, it was equally free to Wilputte. The issue of infringement begins at the point where Koppers left the art and began to make changes. This is in the organization of the lower story





and in the connections between the organizations of the two stories of the oven. Wilputte's first change, like that of Koppers, was in the number of regenerators, the change being from a set of two to a number equal to the number of heating-chambers. His next change, like that of Koppers, was in the position of the regenerators from longitudinal of the oven to crosswise the oven and from right angles with the heating-chambers to a position below and parallel to them. Wilputte's last change, like Koppers', was from an indirect connection between the regenerator and bus-flue of each heating-chamber to a multiple direct connection between regenerator and heating-chamber.

Assuming this comparison of the two ovens to be correct so far as it goes, claims 1 and 5 of the Koppers patent read literally on the Wilputte structure. To avoid the legal consequence of such reading, Wilputte distinguishes his structure from Koppers by specifying a difference in the position of the regenerators with reference to the heating-chambers and by indicating a difference in the types of regenerators and in their mode of operation.

It is conceded by the plaintiff, that if the regenerators of the Wilputte oven are longitudinal of the oven, Willputte does not infringe Koppers. This, the defendants maintain, is the case. The first phase of the issue of infringement, therefore, is the position of the Wilputte regenerators.

Viewed as a regenerator extending crosswise the oven, the Wilputte regenerator is the Koppers regenerator substantially in size and dimensions and actually in its location below and parallel to the crosswise heating-chamber. The claimed difference is this: Koppers' regenerator is an unitary structure, while Wilputte's regenerator is divided into twenty-eight compartments by partitions extending from the sole-

channel to the top. Again like Koppers, the Wilputte regenerators are made into a battery of any desired number, extending from the front to the back of the oven. In the battery of Koppers' regenerators. each regenerator is divided from its neighboring regenerator by the supporting walls of the oven. The same is true in Wilputte, with the difference that in the latter there are spaces left open in each supporting wall between all regenerators, the spaces being equal in area to that of two bricks. These spaces are termed "equalizing ports." As these wall-slits or equalizing ports appear in each supporting wall, they leave openings longitudinal of the entire oven. The defendants maintain, first, that the frontal splitting up of the (Koppers) cross-regenerator into multiple compartments makes the partition of each compartment the side of a smaller regenerator, and, second, that the sequence of wall-slits or equalizing ports, being longitudinal of the battery, gives the Wilputte compartmental regenerator a position longitudinal of the battery and not crosswise, and that, in consequence, the regenerator so shaped and positioned is in effect a reversion to the prior art and avoids infringing Koppers.

Elaborate argument was made on this contention. We shall not discuss it in this opinion, because we are satisfied that the inconsiderable openings in the supporting walls between the Wilputte compartmental regenerators do not make the position of the regenerators longitudinal; nor do they make them functionally longitudinal, because under normal conditions, when air is driven into each regenerator compartment by fans and drawn through the regenerator by smokestack draft, the equalizing ports have nothing to equalize and perform no function. Air thus driven and drawn naturally moves upward in each regenerator without stopping to pass laterally through the equalizing ports. In fact, the whole theory of difference between Wilputte and Koppers in mode of operation is based on the fact that into each regenerator compartment of the Wilputte oven a dose of air is fed precisely equal to the capacity of that compartment. This equality of dosage makes the equalizing ports functionless, under normal conditions.

The sole-channel is as certainly a part of a regenerator as the checkerwork of firebricks. The brick checkerwork cannot heat air until air is brought to it. It is the function of the sole-channel to bring unheated air to the regenerator and to feed it at multiple points to the checkerwork above, there to be heated. As the sole-channel is a part of a regenerator, the direction of the sole-channel is a fair indication of the position of a regenerator. The sole-channel of all regenerators of the prior art (also in Koppers) is lengthwise the regenerator, whatever the position of the regenerator with reference to heating-chambers; and so in Wilputte, the sole-channel, or its equivalent, is crosswise the oven and lengthwise the regenerator, passing under and serving unheated air to its many compartments.

For the reasons we have indicated, without elaborating them, we are clearly of opinion, that the Wilputte regenerators are not longitudinal of the battery, but are crosswise, and in this position they follow Koppers.

[3] The next defence is, that, even if the Wilputte regenerator be a cross-regenerator in position, it is different from Koppers' regenerator in structure. This contention is based on the division of the regenerator into compartments. The division of whose regenerator? The division of the regenerator of the old by-product coke-oven art? No, because this art (as distinguished from the related art of gas generators) contained no such regenerator. The regenerator there found was a long regenerator, being longitudinal of the oven and serving all heating-chambers. Was it a division of Koppers' regenerator into compartments? Manifestly so, because Koppers' was the only regenerator of that shape and in that position then in the art. Therefore, the substance of what Wilputte did structurally with reference to his regenerator, was to take Koppers' regenerator and divide it by partitions into as many compartments as there were flame-flues in the heating-chamber above. This, Wilputte could not have done if Koppers or someone else had not invented the cross-regenerator. It follows then, that Wilputte built his regenerator on Koppers. In doing this, he took Koppers' regenerator as it was, both in structure and position, took nothing from it, and added something to it. Being an addition, he did not change its basic structure; the most that he did was to improve upon it. Infringement of a patent device cannot be avoided by merely improving it.

Wilputte's multiple connections between his compartmental regenerator and the flame-flues above, though limited to one for each regenerator compartment, are, taken together, so precisely the vertical and directly communicating air ports of the Koppers invention, that discussion of infringement of this feature is unnecessary. Therefore, considered with reference to the structure of the two ovens, we are forced to find that, basically, they are the same.

But the defendants maintain further, that even if the two ovens are alike in position and structure, the Wilputte multiple compartmental regenerator is fundamentally different from the Koppers unitary regenerator in its mode of operation, and that this difference is so substantial that the coking operation of the oven of the Koppers patent is not, and, indeed, cannot be followed in the Wilputte oven. This contention of difference in mode of operation of the two ovens is based upon a claimed difference in the operation of their regenerators. This contention requires us to discuss somewhat in detail the structure and function of regenerators in by-product coke-ovens.

A regenerator, defined without any attempt to be technical, is a firebrick chamber of a coke-oven used to heat air before it flows into the heating-chamber for combustion. It has three operative parts. The first is the sole-channel. This is a firebrick conduit, which brings unheated air from outdoors and carries it along the bottom of the chamber. The sole-channel contains in its top or roof a number of openings through which the unheated air passes into a checkerwork of firebrick—the second part—which is heated for weeks before the coking operation begins. As the air passes up through the checkerwork, two things happen: First, the air is heated, and second, any inequality in the volume of its initial delivery through the ports of the

sole-channel are baffled into equality of temperature and volume as the air rises to the dome. The third part of the regenerator is the outlet through which the air after it has been heated passes to the heating-chamber. In the prior art regenerator, there was but one air outlet from regenerator to each heating-chamber. This was first vertical, then horizontal into the bus-flue, and then vertical again. There were in the bus-flue as many air outlets as there were vertical flame-flues to be served. Koppers' regenerator is structurally and operatively the regenerator of the prior art differentiated in number, shape and position to serve one instead of many heating-chambers, and differentiated chiefly in having not one but as many air outlets as there are vertical flame-flues to be served and in having these outlets vertical and leading directly to the flame-flues above.

Wilputte's compartmental regenerator contains precisely the same elements, but it is organized to operate in a different way. Instead of the sole-channel of the prior art as an inlet for unheated air, Wilputte has a 6-inch pipe with as many air outlets or orifices as there are compartments to be supplied with air, each outlet being graduated in size to meet the capacity of each compartment. In each compartment there is the old checkerwork of firebricks and from each compartment there is an air outlet leading directly to the flame-flue above. When the operation is reversed, the outflow of waste gases is taken care of by another channel, and, it seems to us, by the 6-inch air inlet pipe also. Be that as it may, we regard the pipe and the exit-channel together as the equivalent of the sole-channel of the prior art, for taken together they perform the same functions, even if they perform them better. The main difference in the regenerative function between Wilputte on the one hand and Koppers and the prior art on the other, is that in Wilputte's regenerator compartments there is no distribution or equalization of air by the baffling operation of the checkerwork beyond the confined area of a compartment, while in Koppers such distribution may extend throughout the regenerator. The problem of equal air distribution in Wilputte is wholly taken care of when the air is brought to the compartments. This is done by the initial injection into each compartment of a quantity of air precisely equal to the capacity of each compartment. This air allotment is termed "air dose." Air distribution from one compartment to another is impossible because of the intervening partitions. Air distribution among the many compartments is regulated by the air doses measured and delivered to each compartment. After delivery to a compartment, the air is heated as it ascends through the checkerwork as before, and after it has been heated it passes from the top of the compartment through a port directly to its corresponding flame-flue above.

It must be conceded, that in mode of operation, there is a difference between the contesting regenerators. On this difference, the defence of non-infringement must rest, for structurally, and, in all else, functionally, Wilputte has followed Koppers.

Notwithstanding the claims of the Koppers patent read literally on the Wilputte oven, the defendants maintain that the true invention of Koppers is not disclosed by the patent claims, but is found in the pat-

ent specification, and particularly in the specification of his original application as it appeared before amendment. In the latter specification, Koppers said:

"It is the object of the present invention, by interposing the regenerator *in the path* of the hot gases, to render it possible to utilize said regenerator as *distributing means.* The invention is based upon the principle that the descending hot gases *become uniformly distributed over the regenerator* and that the ascending gases which are to be preliminarily heated also *undergo such distribution.* This parallel arrangement of heating flues and regenerators is attained by the transverse disposition of these latter, in such manner, that the combustible substances to be preliminarily heated are conducted to the part of the regenerator belonging to one-half of the furnace and *distributed* and burned throughout the length of the furnace, whereupon the burnt gases, descending through the other half of the regenerator reach the chimney."

A similar idea is contained in Koppers' description of his invention in his German patent. It is as follows:

"The leading idea of the present invention is this: so to introduce such a single-chamber air-heater (regenerator) *in the path of the hot gases,* air and off-heat that it acts simultaneously also *as a distributor,* and indeed in so far that while the descending hot gases *distribute themselves uniformly over the regenerator,* the ascending gases to be preheated, *likewise undergo such distribution.* This parallel arrangement of heating-flues and heat magazines (regenerators) is attained in this wise, that the latter are located transversely, that is, in the longitudinal direction of the individual ovens, in such manner, that the combustion substances (air and gas) to be preheated are introduced into the part of the regenerator belonging to one-half of the oven and are *distributed to the oven length,* then burned throughout the oven and finally descending as burnt gases through the other half of the regenerator, arrive at the exit-flue."

These expressions, touching the operation of the invention, do not appear in the patent in suit, but as they are Koppers' utterances they cannot be disregarded. From them, the defendants have construed Koppers' invention to be primarily, if not entirely, the *distribution* of air *by the checkerwork in the regenerator,* and thus construed his invention to be limited to distribution of that kind. If such is the invention, then, manifestly, Wilputte does not infringe, for he distributes air *in his regenerators* in a different way.

The only expression in the specification of the patent, as granted, which bears upon this aspect of the interpretation of the claims, is the following:

"The regenerators above described have the advantage that the passing gases are evenly distributed. As the regenerators are placed directly in the way of the heating-gases, the latter are also evenly distributed in the heating-chambers so that the formation of any whirls and stagnation is avoided."

On this and on the other specification expressions, the defendants' argument of regenerator-distribution as the essence of Koppers' invention is based. But as we read the specification of the patent and the specifications of Koppers' other patents for the same invention, we do not gather that air distribution *in the checkerwork* of the regenerator is the essence of the invention, or that air distribution *in the regenerator* is the whole invention, for manifestly the invention

includes air distribution *to* the heating-chambers. Repeating the specification as quoted, Koppers says:

"The regenerators above described have the advantage that the passing gases *are evenly distributed.*"

"Evenly distributed"—in what? In the *regenerator,* to be sure, not in the checkerwork of any particular regenerator. Air distribution takes place in the regenerators of both ovens; in Koppers, by the sole-channel and main body of checkerwork; in Wilputte, by graduated sole-channel air deliveries to checkerwork of confined area. "Evenly distributed"—*to* what? Manifestly, to the *heating-chamber.* This is true, because the patent specification says so—"As the regenerators are placed directly in the way of the heating-gases (that is, directly in their "path"), the latter (heating-gases) are also evenly distributed *in the heating-chamber."* It is also true because air is passed from regenerator to heating-chamber of both ovens, in a way that effects distribution *in its passage,* namely, by the distributing operation of multiple air ports.

Distribution of preheated air with uniformity *to the heating-chamber* is what Koppers tried to achieve by his invention. Distribution of air to this chamber involves, first, distribution *to* the regenerator; second, distribution *in* the regenerator; and, third, distribution *from* the regenerator. No matter how unheated air is distributed *to* a regenerator, or how it is distributed *in* a regenerator, it will not be distributed *from* the regenerator to the multiple flame-flues of the heating-chamber in uniform volume, there to produce on combustion uniformity in heat intensity, unless it is ported from the regenerator and distributed to the flame-flues uniformly. For such uniform distribution from regenerator to heating-chamber, Koppers provided multiple ports that distribute the air vertically and *directly.* This was the capital thing that Koppers did. It was wholly new. It was made possible only by the change in the number and position of regenerators, and it immediately overcame the factors of inequality of air distribution incident to the horizontal and indirect bus-flue delivery of the prior art. Air distribution by the baffle of the checkerwork of a cross-regenerator would be of no more value than similar distribution in a longitudinal regenerator, if not followed by multiple *direct* distribution from regenerator to heating-chamber. This the prior art clearly shows. And Wilputte's internal air distribution by graduated air feed would be of no value, if not combined with Koppers' multiple direct distribution to heating-chamber. If, instead of multiple air ports in the regenerators of Koppers and Wilputte, whose sole function is to distribute preheated air *to* the heating-chambers, there were in either regenerator a single air port, there would be a complete reversion to the prior art, and the infirmities of the bus-flue, now overcome, would be revived.

In his invention, Koppers uses the sole-channel and checkerwork of the prior art regenerator to perform the old functions of preheating and distributing air until it reaches the top of the regenerator, when the new thing occurs. This new thing is the direct and vertical de-

livery to each flame-flue of regenerator-equalized air as distinguished from the old thing of a horizontal and indirect delivery of air similarly equalized. Wilputte does the same thing. He brings air to each compartment of his regenerator by the equivalent of a sole-channel, gives each compartment a precise dose, thus equalizing the quantity of air by sole-channel deliveries, then by the checkerwork heats just the air the dose contains. This much is new with Wilputte. But the new thing which Koppers invented then occurs in Wilputte, namely, multiple port distribution of air from the top of the cross-regenerator *vertically and directly* to its corresponding flame-flues above.

If Koppers' invention were a regenerator, then Wilputte clearly would not infringe. But Koppers' invention is not a regenerator; it is an organization of which a regenerator is only a part. This organization comprises the elements of coking-chamber, heating-chamber, regenerator, and connections, and in this organization, it is intended, that each element should perform its ordinary function. In his patent claims, Koppers covers simply a series of heating-chambers without specifying the type; a series of coking-chambers intermediate the heating-chambers, without specifying the type; combined with a series of regenerators, without specifying the type; but specifying very particularly that the regenerators shall be "below and parallel to the heating-chambers and communicating *directly* therewith." Invention is in this clause, for here it is that the change in regenerators is made from the longitudinal position of the prior art to the cross position of the patent and from indirect air distribution of the prior art to the direct air distribution of the patent. As Koppers did not invent a regenerator, Wilputte is free to use his improved regenerators in a coke-oven or to use the regenerators of the type Koppers adopted, if he does not place them crosswise the oven and parallel to the heating-chambers and does not connect them directly with the heating-chambers in the manner disclosed by Koppers' claims. But when Wilputte placed his compartmental regenerator crosswise the oven and made as many connections between it and its corresponding heating-chamber as there are compartments in one and flame-flues in the other, and made the connections vertical and direct, he did the things which Koppers taught. He placed the regenerators "directly in the way of the heating-gases" (as the specification says), obtained the normal "advantage" of regenerator "distribution" and also the new advantage of multiple port direct distribution to the heating-chambers, and got the air "evenly distributed in the heating-chambers."

[4] The heart of Koppers' invention is the number and position of regenerators in relation to heating-chambers and in the direct connections between the two. His invention does not consist in making a new kind of regenerator; it consists in placing a regenerator of whatever kind in a new position—that is, below and parallel to the heating-chambers—with new connections that will insure an uniformity of air deliveries. The regenerators of Koppers and Wilputte, even though differing in mode of operation, are none the less regenerators which perform broadly the function familiar to the art, that is, they receive unheated air, preheat it, and deliver it to the top of the re-

generator at comparatively one temperature, thence to be distributed elsewhere. Variations in the method of regenerator distribution whether entirely in the sole-channel as in Wilputte, or partly in the sole-channel and partly in the checkerwork as in Koppers, do not make the chamber any the less a regenerator. Koppers dealt with regenerators. He dealt with their number and with their position in relation to the heating-chambers, and with their connection to the heating-chambers, not with a kind of regenerator. Given a regenerator, infringement occurs or is avoided, not according to the type of regenerator, but according to its position with reference to the heating-chamber and according to the connections between the two. When Wilputte placed his regenerators below and parallel to the heating-chambers, and made connections between the two which were multiple and direct, he got the air distribution of the Koppers invention, and in following him, we think, the defendants' infringed.

To the plaintiff's charge of infringement of the Koppers patent, the defendants interposed a counterclaim of infringement of claim 1 of U. S. Patent No. 673,928, granted to Schniewind, and later assigned to Otto Coking Company, Inc., one of the defendants. This issue of infringement has been elaborately developed and vigorously contested by the parties, and has been studiously followed by us. The charge of infringement is of a claim somewhat limited by specific references to the patent drawings, and is based on a very careful comparison of the elements of the two inventions. On the surface, these elements are markedly dissimilar, yet are claimed to be in all respects identical or equivalent. We shall do nothing more in disposing of this issue than make a very brief comparison of the two ovens.

[5] Schniewind has a pair of regenerators built entirely independent of the oven structure, to avoid the effect of their expansion on the oven brickwork. Being longitudinal of the oven, the two regenerators serve a battery of any number of heating-chambers. Koppers' regenerators correspond in number with the heating-chambers. They are built entirely within the oven structure, and, like the heating-chambers are positioned crosswise the oven, where each regenerator serves a separate heating-chamber. In Schniewind, connection between regenerator and heating-chamber is by one flue which is vertical, then by a connecting flue which is horizontal, running crosswise the heating-chamber like the bus-flue of the prior art, as against Koppers' multiple-vertical-direct flue connection. In Schniewind combustion takes place in a number of horizontally extending combustion-chambers, which are without divisions at the bottom and are divided into four vertical flame-flues toward the top. In Koppers, there are no such chambers, and combustion takes place in the flame-flues themselves. In Schniewind, gas is ported to the combustion-chambers where it meets the air from the horizontal air flue and ignites into a flame that extends first over the undivided portion of the horizontally extending combustion-chambers and then is carried into the vertical flame-flues. In Koppers, the air meets gas in the direct flame-flue ports and on ignition the flame is carried directly into the flame-flues and nowhere else. These, we believe to be the substantial differences

between the two ovens. Instead of regarding them as differences, the defendants argue that they are in substance the same things. We have not been persuaded to this conclusion. As we are clear that Schniewind, being earlier, does not anticipate Koppers, it follows that Koppers does not infringe Schniewind.

The decree below is affirmed.

IDEAL NOVELTY & TOY CO. v. MAJESTIC DOLL CO., Inc.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 219.

PATENTS ⚿328—INFRINGEMENT—DOLL HEAD.

The Rommer patent, No. 1,149,858, for a doll head having movable eyes, the novel feature of which is a spring clip for holding the eyes, which renders them readily removable for replacement, *held* not infringed.

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

Suit in equity by the Ideal Novelty & Toy Company against the Majestic Doll Company, Incorporated. Decree for defendant, and complainant appeals. Affirmed.

Action is on all claims of patent 1,149,858, granted August 10, 1915 to Isaac A. Rommer. The first claim is as follows:

"1. A doll head having eye apertures, sockets adjacent the eye apertures formed in the wall of the head, an eyeball provided with ears, a weight upon the eyeball, *a spring clip having end sections bent outwardly* and adapted to engage the said ears and to rest in the said sockets substantially as shown and described."

Every claim contains the words above italicized.

The court below dismissed the bill, holding that no infringement was shown. Plaintiff appeals.

Andrew Foulds, Jr., of New York City, for appellant.

T. Hart Anderson, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. The stated object of invention is "to provide a doll head with movable eyes, in which the eyes may be readily removed and replaced." The doll referred to is of the kind that shows eyes open when stood or held upright, and closed or "asleep" when prone.

There is nothing new disclosed or claimed except the mode of fastening the eyes to the head. To effect this purpose the "spring clip" of the claims is shown as a hairpin of wire with outwardly bent ends, each end passing through a hole in an "ear" of the piece of metal painted to simulate an eye, and thence into a socket appropriately made in the head.

Plainly, by compressing and releasing such hairpin spring, the "outwardly bent end sections" thereof can be inserted in and detached

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from the head sockets as often as desired, and the eye supported thereby "readily removed and replaced."

While nothing is said on the subject in the specification, it is testified that this construction has advantages when applied to doll heads made of a composition that shrinks in hardening, and continues so to shrink long after most dolls have passed into use. Assuming this to be true, it shows utility only, and that the invention possesses the patent quantum of that commodity is not denied.

Defendant supports "sleeping eyes" in doll heads on a straight wire, said to be part of a wire nail of appropriate diameter. Infringement is asserted because this is declared a fair equivalent for Rommer's "spring clip," etc., because defendant's wire possesses sufficient resiliency to bend on insertion or removal, so that the same result is attained in the same way.

We agree with the lower court that such is not the case, because: (1) The evidence justifies the finding that if defendant's wire is inserted by bending it, instead of distending and then compressing the still plastic head, the wire must be and remain straight to permit the supported eyes to function properly. No alleged infringement shown or testified to shows a straight wire which can fairly be called a "spring," and the spring is the essence of plaintiff's invention. (2) By no permissible stretch of language can a straight piece of steel be described as a "spring clip having end sections bent outwardly," and every claim of Rommer's patent contains this carefully specified and restrictive element.

Therefore, looking at the matter as broadly as so narrow a subject permits, we feel sure that defendant has not even reached the same result as plaintiff, for his eyes are not removable and replaceable at will and without injury or tools, nor has he attained any result in the same way. His wire is ductile, but is not a spring; while as matter of law we hold that the claims are so drawn as not to read on defendant's doll eye. This negatives infringement. Tostevin v. Ettinger, 254 Fed. 434, — C. C. A. —.

Decree affirmed, with costs.

VANDENBURGH v. CONCRETE STEEL CO.*

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 172.

1. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—CONCRETE REINFORCING BAR.
The Vandenburgh reissue patent, No. 14,182, for a concrete reinforcing bar, claims 1 and 2, are void, as too broad. Claims 3 and 5 disclose invention and are valid; also *held* infringed.

2. PATENTS ⚷147—REISSUE—PARTIAL INVALIDITY.
The fact that some of the claims of a reissued patent are invalid, as too broad, does not invalidate other claims.

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

Suit by George E. Vandenburgh against the Concrete Steel Company. Decree for defendant, and complainant appeals. Reversed.

Carlos P. Griffin, of San Francisco, Cal. (James H. Griffin, of New York City, of counsel), for appellant.

Lucius E. Varney, of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. [1] United States reissued patent 14,182, to George E. Vandenburgh, for a concrete reinforcing bar, was held void for want of invention by the District Court for the Western District of Pennsylvania in the suit of Vandenburgh v. Electric Welding Co., 259 Fed. 579, while the court below dismissed the bill in this case against the Concrete Steel Company for noninfringement. Both courts held that the original patent did not contemplate collapsibility of the structure, because the spiral coil was described as rigidly fixed by kerfs and spurs on the reinforcing bar. For this reason it was held that claims 1 and 2 of the reissue, which were intended to cover collapsibility of the structure, were invalid, as too broad. We agree in this conclusion.

But claim 3 of the reissue is literally the same as claim 3 of the original patent, and claim 5 of the reissue is literally the same as claim 4 of the original patent. These claims should be construed consistently with the specifications, which are also literally the same in each patent, as meaning that the spiral coil is rigidly connected with the longitudinal bar at each point of contact. So construed, the claim describes a continuous spiral rigidly and integrally connected with kerfs and spurs in the bar, constituting a trusslike structure within the body of the concrete, resisting lateral and longitudinal strains, and which can be more cheaply manufactured than if the spiral were riveted or welded to the bar at each point of contact.

[2] The defendant's witness Cummings frankly admits that this form of reinforcing structure was new in cement work and has come into general use. The fact that claims 1 and 2 of the reissue are invalid, as too broad, does not invalidate claims 3 and 5. Gage v. Her-

⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 250 U. S. —, 40 Sup. Ct. 11, 64 L. Ed. —.

ring, 107 U. S. 640, 646, 2 Sup. Ct. 819, 27 L. Ed. 601. The defendant's structure when set up to receive the concrete is exactly the same as plaintiff's, except that the spiral coil is not rigidly fixed by kerfs and spurs on the bar. This enables the structure to be collapsed when not in use, a commercial improvement for purposes of shipment, but which does not justify the defendant's appropriation of the plaintiff's structure.

The decree is reversed, with half costs to the plaintiff.

THE SCANDANAVIA II.

(District Court, D. Maryland. May 23, 1919.)

SHIPPING ⟹16—FRAUDULENTLY OBTAINING AND USING CERTIFICATE—ENFORCEMENT OF FORFEITURE—DISMISSAL OF LIBEL FOR DOUBT.

Where there is at least a doubt as to whether Act Sept. 7, 1916 (Comp. St. §§ 8146a–8146r[8]), creating the United States Shipping Board, in any wise affected the status of small craft under 20 tons, libel by the United States to enforce by forfeiture the highly penal provision of Rev. St. § 4189 (Comp. St. § 7775), for fraudulently obtaining and using any certificate of registry, enrollment, or license for a vessel, will be dismissed.

In Admiralty. Libel by the United States against the Scandanavia II. Libel dismissed.

Samuel K. Dennis, U. S. Atty., of Baltimore, Md.

Edwin H. Brownley and John L. V. Murphy, both of Baltimore, Md., for respondent.

ROSE, District Judge. The United States seeks the forfeiture of the gasoline screwboat Scandanavia, because a license was fraudulently obtained and used for it.

There is little question as to the facts. Prior to 1915, a firm trading as Bie & Schiott had been extensively engaged in the shipchandlery business at several American ports. In the year it was succeeded by a New Jersey corporation of the same name, the majority of whose stock was alien owned. In the fall of 1917 it had use for a gasoline launch, and contracted with a boat builder of Camden, N. J., to construct one for it. He did so, and the corporation paid him for it. When it was finished and ready for delivery, he made out his carpenter's certificate, and at the request of the corporation stated that the owner was one John Wilson. At that time Wilson, who has died since the institution of these proceedings, was a bookkeeper in the employ of the Bie & Schiott Company. He had no interest in the boat and had paid nothing for it. As it was of burthen of upwards of 5 tons and less than 20, it was licensed in his name; he making oath that he was its sole owner.

In September, 1918, the United States Food Controller revoked the company's license as a food dealer. In consequence, or partly in consequence, of such revocation, it voted on October 19th, to dissolve. The claimant, Gulbranson, took over the Baltimore and Norfolk branches. He is of Norwegian birth, but was naturalized in 1917. He had been treasurer of the corporation since its formation,

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

and had been associated with its predecessor firm for a number of years. He needed a boat like the Scandanavia II for use in this port, and on October 21, 1918, at his request, it was sent from New York to Baltimore; he agreeing to pay $2,300 for it. When it arrived here, its captain called at the custom house, bringing its papers with him, and subsequently the claimant himself came and requested that the boat be transferred to him. It was pointed out that it was in the name of John Wilson, and that before it could be documented in the name of any one else a proper bill of sale must be executed. Gulbranson, on the 21st of October, presented a simple bill and receipt from Wilson, but was told by the custom house official that a more formal instrument was required. Thereupon a regular bill of sale was executed by Wilson and sent to claimant. He knew that Wilson had never owned any interest in the boat, and that more than 51 per cent. of the stock of the Bie & Schiott Company was, and always had been, owned by aliens. Some of these facts having come to the attention of the custom house officials, they refused to make the transfer. Nevertheless, on December 6, 1918, the claimant sent his check to Wilson for $2,300, in payment for the boat, and Wilson indorsed this check to Bie & Schiott Company.

It is quite clear that Gulbranson was a purchaser with notice. It is therefore unnecessary to inquire as to whether the law is better stated in The Monte Christo, Fed. Cas. No. 9719, or in the Fredericka Schepp (D. C.) 195 Fed. 623.

Section 4189 of the Revised Statutes (Comp. St. § 7775) provides the penalty of forfeiture for the fraudulent obtaining and using of any certificate of registry, enrollment, or license. The government says this statute applies. The claimant says it does not, because a certificate is not obtained fraudulently, unless it is secured for some one to whom it could not have been lawfully issued, had the true facts been known. Weston v. Penniman, Fed. Cas. No. 17,455; Scudder v. Calais S. S. Co., Fed. Cas. No. 12,566.

The first Congress in 1789 provided that no ship should be registered or enrolled unless it was wholly owned by a citizen or citizens of the United States. Act Sept. 1, 1789, c. 11, 1 Stat. 55. So anxious was it to prevent evasions of its policy in this respect that it withheld the privilege of registry from any ship owned in whole or in part by a citizen of the United States who usually lived abroad, unless he was an agent or a partner of some firm of American citizens actually carrying on business in the foreign country in which he was living.

By Act March 3, 1825, c. 99, 4 Stat. 129, provision was for the first time made for the documenting of vessels owned by American corporations; but even then, by its fifth section (Comp. St. § 7717), the president or the secretary of the corporation was required to make oath that, to the best of his knowledge and belief, no part of the ship was owned by any foreigner, and this section remained the law for 33 years, until it was repealed by Act June 11, 1858, c. 145, 11 Stat. 313. Since then the executive departments have granted documents to vessels owned by a corporation organized under the laws of any of the states, without inquiry as to the nationality of its stockholders.

Congress, from time to time, gave more or less sanction to this practice. Act May 28, 1896, c. 255, 29 Stat. 188 (Comp. St. §§ 7707, 7708). In 1911, Attorney General Wickersham officially advised the Secretary of Commerce and Labor that an American corporation, as respects the Shipping Acts, was an American citizen, no matter how large a proportion of its stock was owned by aliens. War is no respecter of legal fictions, and, under stress of the world conflict, Congress, when it came, in 1916, to create the United States Shipping Board, declared that for the purpose of that act (Act Sept. 7, 1916, c. 451, § 2, 39 Stat. 729 [Comp. St. § 8146aa]), no corporation should be deemed to be a citizen of the United States unless the controlling interest therein was owned by citizens of the United States. Since the passage of the last-mentioned act, the Bureau of Navigation has refused to register, license, or enroll any vessel belonging to a corporation the majority of whose stock is not owned by American citizens.

It was doubtless because of this ruling that the Bie & Schiott Company falsely represented Wilson to be the owner of the Scandanavia II. Nevertheless the claimant argues that, whatever may have been the deceitful purpose of Wilson and the officials of the company which employed him, they did nothing which was in law fraudulent, because he says that the act of 1916 concerns itself with only two of the three classes of vessels of the United States, namely, those which are registered, and those which are at once licensed and enrolled, and has nothing to do with those which, because they are under 20 tons burthen, are licensed, but not enrolled. He relies upon the phrasing of the third paragraph of the ninth section of the Shipping Board Act (Comp. St. § 8146e), already mentioned. In that it is said:

"When the United States is at war * * * no vessel, registered *or* enrolled *and* licensed under the laws of the United States, shall, without the approval of the board, be sold, leased, or chartered to any person not a citizen of the United States."

The presumption would be strongly against the federal Legislature having intended to limit its definition of citizens in the manner now claimed, were it not that Congress, two years later, seems to have thought that it had. By the act of July 15, 1918, the word "documented," when used in connection with ships, is defined to mean: "Registered, enrolled or licensed under the laws of the United States." The report of the House committee on merchant marine and fisheries (No. 568, House, 65th Congress, Second Session) declares that the purpose in so doing was to "bring under the act vessels licensed, but not enrolled (i. e., ships under 20 tons). In view of the military value of even small vessels, this change is considered important." The report of the House committee was adopted by the Senate committee on commerce as a part of its report. Senate, 536, 65th Congress, Second Session.

In the light of this fact, there is at least a doubt as to whether the act of 1916 in any wise affected the status of such small craft. The provision here sought to be enforced is highly penal.

The libel will be dismissed.

SOMMERVILLE v. CHESAPEAKE & POTOMAC TELEPHONE CO.*

(Court of Appeals of District of Columbia. Submitted March 4, 1919. Decided May 5, 1919.)

No. 3190.

1. TELEGRAPHS AND TELEPHONES ⚷33(2)—INTERRUPTION IN SERVICE—CONTRACT.
   A telephone contract, providing that a proportionate part of the subscription price would be rebated for interruptions in service continuing after reasonable written notice to the company, but that no other liability should attach, relates only to interruptions taking place without company's knowledge, and is inapplicable to a stoppage of service for failure to pay disputed charges.
2. DAMAGES ⚷91(1)—PUNITIVE DAMAGES.
   Punitive damages are not allowed, except where defendant recklessly disregards the rights of plaintiff.
3. TELEGRAPHS AND TELEPHONES ⚷69—STOPPAGE OF SERVICE—PUNITIVE DAMAGES.
   Plaintiff telephone subscriber *held* not entitled to punitive damages because defendant telephone company stopped serving him on account of his failure to pay disputed telephone charges.
4. TELEGRAPHS AND TELEPHONES ⚷67(1)—STOPPAGE OF SERVICE—DAMAGES.
   A telephone company, which wrongfully stopped serving a subscriber because of his failure to pay disputed charges, is liable in damages for the resulting inconvenience, annoyance, and loss of time occasioned the subscriber.

Appeal from the Supreme Court of the District of Columbia.

Suit by J. Robert Sommerville against the Chesapeake & Potomac Telephone Company. Judgment for plaintiff, and he appeals. Reversed and remanded for a new trial.

George E. Sullivan, of Washington, D. C., for appellant.

Henry B. F. Macfarland, of Washington, D. C., for appellee.

SMYTH, Chief Justice. Sommerville rented a telephone from the Chesapeake & Potomac Telephone Company under a contract whereby he was required to pay $3.25 a month in advance for its use. This gave him the right to 600 outgoing calls in a year, but he was obliged to pay an additional sum for all such calls in excess of that number. A controversy arose between him and the company with respect to the number of calls. The company claimed that he had used 825, while he asserted that he had made only 739 calls. For this number he paid, and refused to pay for more. During July, 1913, a month for which he had paid $3.25 in advance, the company, without any notice to him, cut off his service for one day, claiming that he had failed to pay the amount due for the calls which he had used.

Some 40 or 50 per cent. of Sommerville's business, that of selling engine room supplies, was done over the telephone. After his outgoing service had been cut off, he could not talk with his customers over the telephone, except when they "called him up." If he desired to initiate a call, he was not permitted to do so. In such case he was compelled to visit the patron with whom he wished to communicate

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*Certiorari denied 250 U. S. —, 40 Sup. Ct. 10, 64 L. Ed. —.

and explain why he was not allowed to use the telephone. This, he says, caused him annoyance, inconvenience, and humiliation. In his contract with the telephone company was this condition:

"1. If the service is interrupted otherwise than by the negligence or willful interference of the subscriber, a rebate at the minimum annual rate for the use of a station and for local messages, fixed in the schedule in force at the beginning of the year in which the interruption occurs, shall be made for the time such interruption continues after reasonable notice in writing to the company, but no other liability shall, in any case, attach to the company."

Sommerville brought suit against the company for damages, alleging that he was not indebted in any sum whatever at the time his service was cut off and that the company's action was without justification. The company defended on the ground that he was indebted to it, as above stated, and that because of this it had a right to do what it did. The court instructed the jury that if they found that Sommerville was not indebted to the company at the time the service was withdrawn, he would be entitled to damages, but limited the amount thereof to a proportionate part of the $3.25 which he had paid for the use of the telephone for one month; in other words, that since he was deprived of its use for only one day he could recover only one-thirtieth of that sum. In obedience to this instruction, the jury awarded him 11 cents damages.

It is claimed by Sommerville that the court erred in this instruction; that he was entitled, not only to a proportionate part of the $3.25, but also to exemplary damages, and damages for the inconvenience and humiliation which he suffered. On the other hand, the company asserts that under the provision of the contract quoted above his recovery was limited to the amount paid by him to the company for the period, one day, for which it refused him service.

[1] The jury having found that Sommerville was not indebted to the company at the time his service was withdrawn, we must accept that as a fact, and therefore proceed upon the theory that the action of the company was a violation of his contract. The only question, then, before us, relates to the measure of damages. We do not think the provision of the contract quoted has any bearing upon the matter. It relates to an interruption which takes place without the knowledge of the company, for it provides that the right to damages shall not accrue until "reasonable notice in writing to the company" shall have been given. It does not cover an interruption which is knowingly and purposely caused, as here, by the company itself. The act complained of, while in a sense an interruption, was more in the nature of a termination of the contract for noncompliance with its terms. Nor does the concluding clause of the provision, which says "but no other liability shall, in any case, attach to the company," affect the matter. This, in our opinion, has reference only to the interruption mentioned in the first part of the provision, and was not intended to cover any and every dereliction of which the company might be guilty with respect to the duty which it owed to Sommerville. The measure of damages, we think, must be settled by the common law, and not by the contract.

[2, 3] We at once put out of view the contention of Sommerville that he is entitled to punitive damages. Such damages are never allowed, except where the act has been done by the defendant, or by his authority, with a reckless disregard of the rights of the other party. Lake Shore, etc., Ry. Co. v. Prentice, 147 U. S. 101, 107, 13 Sup. Ct. 261, 37 L. Ed. 97; Denver, etc., Ry. Co. v. Harris, 122 U. S. 597, 609, 7 Sup. Ct. 1286, 30 L. Ed. 1146; Woodward v. Ragland, 5 App. D. C. 220, 229. Here the company acted in good faith, believing that Sommerville was indebted to it, and that it had a right to put an end to his service.

[4] But we think that Sommerville is entitled to more than a proportionate part of the $3.25. While the inconvenience which he suffered was for a short period of time, the same principle must apply as if it was for a month or more. It does not seem reasonable that in these days, when a telephone is an indispensable adjunct to every line of business, the inevitable inconvenience, annoyance, and loss of time caused to a subscriber by the wrongful action of the company in cutting off his service without notice should not be regarded as a proper subject for compensatory damages. To prove that one lost a certain number of dollars by reason of the company's action might be very difficult, and yet, we think, all reasonable men would say that he was injured thereby. That the company may for just cause, such as the failure to pay his bills when the same become due, refuse to further serve a patron, we may concede (Southwestern Telephone & Telegraph Co. v. Danaher, 238 U. S. 489, 35 Sup. Ct. 886, 59 L. Ed. 1419, L. R. A. 1916A, 1208); but, when the company takes such action, it must know at its peril that it has a valid reason for doing so. Here, according to the verdict of the jury, it was wholly without justification.

Nor is authority wanting for the proposition that the company must respond in damages for its action in a case like this.

"The damage sustained by the loss of a telephone in its very nature is largely composed of inconvenience and annoyance. That a person deprived of the use of the telephone is materially damaged, all will concede. What is the amount of damage in dollars and cents cannot be accurately stated by the party suing, for the reason that his damage consists not only in pecuniary losses; but it consists in inconvenience, discomfort, and an annoyance, and it must be left to the jury to determine what is the damage sustained, taking into consideration the discomfort, the annoyance, and inconvenience suffered, together with actual and pecuniary losses." Telephone Co. v. Hobart, 89 Miss. 252, 262, 263, 42 South. 349, 351 (119 Am. St. Rep. 702).

In Shepard v. Milwaukee Gaslight Co., 15 Wis. 349, 82 Am. Dec. 679, a case in which the defendant refused to furnish gas to the plaintiff, the court said:

"The 'inconvenience and annoyance' occasioned directly by the wrongful act or refusal of the defendant are always legitimate items in estimating the damages in actions of this kind."

See, also, Carmichael v. Telephone Co., 157 N. C. 21, 72 S. E. 619, 39 L. R. A. (N. S.) 651, Ann. Cas. 1913B, 1117; Cumberland Telephone & Telegraph Co. v. Jackson, 95 Miss. 79, 48 South. 614; Ives v. Humphreys, 1 E. D. Smith (N. Y.) 196, 202, 203.

In Balt. & Potomac Ry. Co. v. Fifth Bap. Church, 108 U. S. 317, 329, 2 Sup. Ct. 719, 726 (27 L. Ed. 739) the court dealt with damages resulting from a nuisance which annoyed and disturbed the plaintiff. It said:

"'For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer * * *"

—and concluded its opinion thus:

"As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure."

The appellee seeks to distinguish the Hobart, Carmichael, and Jackson Cases on the ground that they involved residence and not business telephones. But why should the rule with respect to business telephones be different from that relating to residence telephones. In each case the right to recover a proportionate part of the rent paid must be admitted. In each the inconvenience and annoyance which would naturally result from a breach of the contract must have been within the contemplation of the parties at the time the contract was entered into. If the householder is entitled to have a monetary value placed by the jury upon his annoyance and inconvenience, why has not the business man the same right? We think he has, and we perceive nothing either in reason or in the adjudged cases which would warrant a contrary holding.

The amount of damages properly recoverable in the case before us may not be large; but, however this may be, we are convinced that where a public service corporation, like the appellee, breaches its duty to a patron by wrongfully depriving him of its service, it must respond in adequate damages for the inconvenience, annoyance, and loss of time resulting from such breach.

The judgment is reversed, at the cost of the appellee, and the case remanded for a new trial in harmony with the views expressed in this opinion.

Reversed.

SHORE v. SPLAIN.

(Court of Appeals of District of Columbia. Submitted April 2, 1919. Decided May 5, 1919.)

No. 3237.

1. HABEAS CORPUS ⚷4, 27—COMMITMENT MUST BE WITHOUT POWER.
   A writ of habeas corpus will not issue, unless the order of commitment was utterly void for want of power, and the writ cannot be used to perform the office of a writ of error or appeal.

2. JUDGES ⚷25(2)—AUTHORITY OF INTERIM JUDGE—CRIMINAL SENTENCE.
   A municipal court judge designated for police court duty during the absence or disability of the regular police court judges, pursuant to Act Feb. 17, 1909, is not disqualified from passing sentence upon a prisoner he tried by the fact that the regular police court judges resumed their duties between trial and date of sentence.

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

3. HABEAS CORPUS ⚷54—PLEADING—SUFFICIENCY.
Allegations in habeas corpus proceeding that plaintiff was sentenced by a municipal court judge, who had been designated as a substitute for police court judges, and that at the time of the sentence the two regular judges were exercising their functions, is insufficient to show that the judge imposing the sentence had previously surrendered his position to one of the regular judges.

4. HABEAS CORPUS ⚷30(3)—SENTENCE—TECHNICAL ERROR.
Under Act Cong. Feb. 26, 1919, requiring appellate courts to disregard technicalities not affecting substantial rights, etc., a habeas corpus writ will not issue to release a prisoner merely because he was sentenced by a municipal court judge designated to temporarily preside in the police court, instead of by one of the regular police court judges, who had resumed their duties.

Appeal from the Supreme Court of the District of Columbia.

Habeas corpus proceeding by Frank Shore against Maurice Splain. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

Alexander Wolf, of New York City, and James L. Pugh, Jr., of Washington, D. C., for appellant.

John E. Laskey, U. S. Atty., and Bolitha J. Laws and Paul B. Cromelin, Asst. U. S. Attys., all of Washington, D. C., for appellee.

SMYTH, Chief Justice. This is an appeal from a decision of the Supreme Court of the District dismissing Shore's application for a writ of habeas corpus. Shore had been tried and convicted in the police court of betting on horse races in violation of the statute. His conviction took place in July, 1918. Hon. John P. McMahon, a judge of the municipal court, presided at the trial under a designation by the Chief Justice of the Supreme Court, made in pursuance of an act of Congress approved February 17, 1909 (35 Stat. 624, c. 134), and which authorized him "to discharge the duties of either of the judges of the police court during their sickness, vacation or disability until the 1st of January, A. D. 1919." At the time of the trial one of the regular judges of the police court was absent.

In due time a motion for a new trial was filed by Shore and argued before Judge McMahon. At the request of Shore, September 7th was fixed as the day on which the court should pass upon the motion, and, in the event that it was overruled, sentence the defendant. On that date Judge McMahon overruled the motion, and, without any objection by Shore, sentenced him to serve a term of 90 days in jail and pay a fine. Judge Hardison, one of the regular judges of the police court, on October 7th ordered that Shore be taken into custody by the marshal for the purpose of being removed to the jail, that he might serve his sentence. The marshal, in obedience to this order, took him in charge. Thereupon Shore sued out this writ, claiming that he was illegally restrained of his liberty. It appears, without contradiction, that at the time Judge McMahon sentenced Shore the two regular police judges were in court discharging their duties.

Appellant urges that when Judge McMahon pronounced the sentence he was neither a judge de jure or de facto, and therefore that

the sentence was void; but he says that either of the regular judges of the police court had legal authority to sentence him. If this be correct, was not the order of Judge Hardison, one of the regular judges, by which the marshal took the appellant into custody, valid? This order was made for the purpose of executing the sentence of Judge McMahon. Thus Judge Hardison in effect made that sentence his own and took steps to enforce it. We suggest, but do not decide, the question.

[1-3] It is settled law that—

"Unless the order of commitment was utterly void for want of power, this application must be denied. The writ of habeas corpus is not to be used to perform the office of a writ of error or appeal." In re Tyler, 149 U. S. 164, 180, 13 Sup. Ct. 785, 789 (37 L. Ed. 689).

When applied to the case at bar, this principle means, as we understand it, that, if the act of Congress under which Judge McMahon was selected affords any warrant for deciding that he was authorized to impose the sentence, the writ must be refused. That act says:

"In case of sickness, absence, disability, expiration of term of service of or death of either of the judges of the police court or of the juvenile court, any one of the justices of the Supreme Court of the District of Columbia may designate one of the judges of the municipal court to discharge the duties of said judges until such disability be removed or vacancy filled. The justice so designated shall take the same oath prescribed for these judges."

According to the appellant the moment the disability of the regular judge is removed, the power of the designated or special judge ceases, even though he may be in the midst of an important trial, thus rendering nugatory all that had been done in the trial up to that time. Such a construction would lead to great public inconvenience and should not be adopted if it can be avoided. Hawaii v. Mankichi, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016; Lau Ow Bew v. United States, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; Bird v. United States, 187 U. S. 118, 124, 23 Sup. Ct. 42, 47 L. Ed. 100.

It was undoubtedly the intention of Congress in providing for a temporary judge, that he should perform the duties of the position during his incumbency and complete any work entered upon by him before he withdrew from the place; otherwise, as in the case of a trial, much of his effort might come to naught if the return to duty of the regular judge had the effect of terminating his authority, and thus the purpose of Congress in providing for a substitute judge would be defeated in many cases. The fact that this interpretation may authorize the presence temporarily of three de jure judges of the court does not militate against it, for Congress has the power to provide for as many judges of the court as it may think proper.

A statute quite similar to the one we are examining has been the subject of juridical determination in several states. State v. Stevenson, 64 W. Va. 392, 62 S. E. 688, 689, 19 L. R. A. (N. S.) 713; State v. Bobbitt, 215 Mo. 10, 30, 114 S. W. 511; Bohannon v. Tabbin (Ky.) 76 S. W. 46, 49; Bedford v. Stone, 43 Tex. Civ. App. 200, 95 S. W. 1086; State ex rel. v. Williams, 136 Mo. App. 330, 336, 117 S. W. 618; Mayer v. Haggerty, 138 Ind. 628, 38 N. E. 42; Fisher

v. Puget Sound Brick, etc., Co., 34 Wash. 578, 76 Pac. 107. In State v. Stevenson, a criminal case involving the death sentence, the defendant pleaded guilty before a special judge who took time thereafter to consider of his judgment. While he was doing so the regular judge returned, assumed the bench, and sentenced the prisoner. The statute under which the special judge was appointed provided that he should serve in the absence of the regular judge. It was argued that the moment the regular judge appeared the authority of the special judge ceased; therefore, that the sentence by the regular judge was valid. But the court, after reviewing the decisions of its own and other states upon the question, ruled:

"That the return of the regular judge would not oust the special judge of jurisdiction to try and finally dispose of any case begun before him."

The Kentucky court in the Bohannon Case, supra, said:

"The fact that the regular judge returned before the case was finally disposed of by the special judge in no wise nullified the jurisdiction of the latter. It would create inextricable confusion if, after a special judge, elected because of the absence of the regular judge, had commenced the trial of a case, his jurisdiction to further try it should be ousted by the return of the regular judge. It needs no argument to demonstrate the hardship and expense to litigants which would arise upon the adoption of such a principle."

In the event of a vacancy in this court on account of the absence of one of its members, the remaining members are authorized to designate a justice of the Supreme Court of the district to sit in his place "while such vacancy * * * shall exist." Code, § 225. Between the submission of a case and its final disposition weeks may intervene. and if during that period the justice whose place the additional justice had taken must remain away from the court, although ready to act, it would greatly impede the dispatch of the public business here. Ever since the organization of the court it has been the practice for the additional justice to participate in the opinions and judgments in cases argued before the court while he was on the bench, although the regular justice whose place he had been appointed to fill had returned to his duties before the judgments were announced. The right of the additional justice to do so has never been questioned by any one so far as we know.

We think Judge McMahon was a de jure judge when he sentenced Shore; but, if not, he was at least a de facto one. He claimed the right to act as one of the judges of an existing court by virtue of the appointment made by the Chief Justice, who, under the statute, had the right to make it. He had taken the oath of office some time before, and for quite awhile had been exercising the functions of a judge of the court by virtue of the appointment. The officers of the court recognized him as one of its judges. No one, not even the appellant, questioned his right to the power which he assumed. He had entered the position rightfully, and, so far as this record shows, he continued in it up to the time when he pronounced the sentence. It is alleged that at the time of the sentence the two regular judges were in court exercising their functions, and from this it might be inferred that he had surrendered his position to one of them; but in a

proceeding of this kind, where it is claimed that his act was void, mere inference is not enough to establish the necessary fact. There should be a direct allegation that he had surrendered the place, and this is wanting. "The result of the authorities is," says the Supreme Court of the United States in Ex parte Henry Ward, 173 U. S. 452, 456, 19 Sup. Ct. 459, 460 (43 L. Ed. 765) that "the title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked." Judge McMahon was certainly acting under color of authority.

In Smith v. Sullivan, 33 Wash. 30, 73 Pac. 793, the statute provided that, in case of the temporary absence or disability of the police judge to act, the mayor should appoint a police judge pro tempore. Under this authority the mayor designated one Miller. The acting judge tried and sentenced Smith for a violation of a city ordinance. At that time the regular police judge was personally within the territory over which the police judge had exclusive jurisdiction, and was not incapacitated from discharging his judicial functions. In view of this, it was argued that Miller's act in sentencing Smith was void. The court rejected the contention, and ruled that Miller was a de facto, if not a de jure, judge.

[4] Moreover, the appellant in his brief argues that "either of the regularly appointed judges of the police court had the legal authority to impose the sentence." His complaint is, not that he should not have been sentenced, but that the act should have been performed by another person. This savors of a technicality involving no substantial right. By a recent act of Congress, approved February 26, 1919 (40 Stat. 1181, c. 48), it is provided that on appeal:

"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."

This is a command to which federal courts must listen, and it supplies an additional reason for holding that the court below committed no error in dismissing the petition of the appellant, Shore, for the writ of habeas corpus.

The judgment is affirmed, with costs.

Affirmed.

McCURLEY v. NATIONAL SAVINGS & TRUST CO.

(Court of Appeals of District of Columbia. Submitted April 3, 1919. Decided May 5, 1919.)

No. 3207.

1. APPEAL AND ERROR ⚷692(1)—RESERVING GROUNDS FOR REVIEW—EVIDENCE.

Sustaining objection to a question does not establish reversible error, where the record does not indicate nature of testimony expected to be elicited.

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

2. WITNESSES ⟹178(3)—TRANSACTIONS WITH DECEDENT—DECLARATIONS OF DECEDENT—WAIVER OF INCOMPETENCY.
Where plaintiff testified she rendered services to defendant's testate under a contract made by a third party in behalf of deceased, a question on cross-examination relative to that contract did not waive the protection of Code of Law 1901, § 1064, prohibiting a surviving party testifying regarding declarations of a deceased, so as to permit plaintiff to thereafter testify to a contract made directly with deceased.

3. APPEAL AND ERROR ⟹1058(2)—HARMLESS ERROR—EVIDENCE.
Excluding a conversation is not reversible error, where witness was later permitted to state the conversation.

4. WITNESSES ⟹163—COMPETENCY—DECLARATIONS OF DECEDENT.
Code of Law 1901, § 1064, providing that, if one of the parties to a transaction dies, the other party cannot testify as to deceased's declarations, etc., prohibits a surviving party from testifying regarding statements such party heard deceased make to third parties.

5. WITNESSES ⟹247—STRIKING OUT ARGUMENTATIVE STATEMENTS.
Where a witness answered on cross-examination that she did not make a certain statement "because it wouldn't have been the truth," the quoted words were properly stricken as argumentative.

6. APPEAL AND ERROR ⟹1047(3)—HARMLESS ERROR—EVIDENCE.
Where a witness, upon being asked what services plaintiff rendered, replied that it was difficult to answer, "for she did everything," striking the quoted words is not reversible error, where the witness was later permitted to state what services she had observed plaintiff rendering.

7. TRIAL ⟹252(12)—INSTRUCTIONS—VALUE OF SERVICES—EVIDENCE.
Where plaintiff alleged she rendered services under an express contract fixing a specified monthly compensation, and there was no evidence regarding the reasonable value of her services, requested instructions, based upon the theory that plaintiff might recover on a quantum meruit, were properly refused.

8. LIMITATION OF ACTIONS ⟹21(3)—PERIOD—CONTRACT ACTIONS.
Where plaintiff claimed she rendered services to defendant's testate under an express contract for a specified monthly compensation, and more than three years elapsed between the date payment became due and the bringing of action, the claim is barred by Code of Law 1901, § 1265 prescribing a three-year limitation period for actions on express or implied contracts, etc.

9. TRIAL ⟹235(1)—INSTRUCTIONS—EVIDENCE.
In action to recover for services rendered defendant's testate, a charge that verbal statements, repeated a long time after by those who heard them, are likely to be affected by a failure to remember exactly, etc., was not improper, where the trial court also stated he expressed no opinion concerning the weight of the evidence.

Appeal from the Supreme Court of the District of Columbia.

Action by Cornelia P. McCurley against the National Savings & Trust Company, executor of the estate of Josiah Bellows, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Daniel W. Baker and William E. Leahy, both of Washington, D. C., for appellant.

J. J. Darlington and W. C. Sullivan, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. The appellant as plaintiff below brought action on the money counts against the appellee as executor of the estate of Josiah Bellows, deceased, to recover $16,297.84, a balance alleged to

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

be due her for personal services, and explained her declaration by a bill of particulars which reads:

"To services as housekeeper, attendant to Helen Bellows, wife of Josiah Bellows, and Josiah Bellows, for managing the estate and doing all work in and about the house, nursing and caring for both Helen Bellows and Josiah Bellows, attending to the business of Josiah Bellows, collecting rents, and doing the banking business of Josiah Bellows, superintending repairs of property, and looking after all the business, and caring for him and his wife when they were unable to care for themselves, and devoting all her time to the interest of Josiah Bellows, and his estate, all covering a period of from July 22, 1901, to June 17, 1915, at rate of $125 per month."

The jury found against her, and from a judgment in favor of defendant she appeals, assigning only 42 errors, all of which, with the exception of 3, are pressed. Of those argued 23 deal with the refusal of the court to permit certain questions propounded to witnesses to be answered, 2 with the action of the court in striking out testimony, 1 with its refusal to strike out evidence, 7 with the refusal by the court of requests made by the plaintiff for instructions to the jury, and 6 with instructions given by the court. We have considered them all carefully, but to analyze each and set down here the result of our work would expand this opinion far beyond its permissible limits; nor do we think it necessary to do so for the proper disposition of the controlling questions in the case.

[1] With respect to the first group of assignments, the plaintiff in no instance, except one, which we shall examine presently, disclosed to the court what she expected to prove by the answers excluded. This is fatal to those assignments. A ruling of the court that a question propounded by a party to his own witness should not be answered must be followed by an offer of the testimony expected, or by something which would clearly indicate it, if it is desired to reserve the point for review in this court. De Forest v. United States, 11 App. D. C. 458, 460; Turner v. American Security & Trust Co., 29 App. D. C. 460, 469. See also Tuttle v. Wood, 115 Iowa, 507, 88 N. W. 1056; Riley v. Missouri Pacific Railroad Co., 69 Neb. 82, 95 N. W. 20; Tietien v. Snead, 3 Ariz. 195, 24 Pac. 324; Leverett v. Bullard, 121 Ga. 534, 536, 49 S. E. 591; State ex rel. Repp v. Cox, 155 Ind. 593, 596, 58 N. E. 849; Boisvert v. Ward, 199 Mass. 594, 597, 85 N. E. 849; Hathaway v. Goslant, 77 Vt. 199, 208, 59 Atl. 835. We are unable to say in the present case whether or not the forbidden testimony would be favorable or unfavorable to the plaintiff. We might assume that it would support her case, but we are not permitted to do this. There is no presumption that the court erred. Appellant, if she would succeed here, must establish error affirmatively. Cliquot's Champagne, 3 Wall. 114, 140, 18 L. Ed. 116; Sturges v. Carter, 114 U. S. 511, 522, 5 Sup. Ct. 1014, 29 L. Ed. 240; Bear Lake, etc., Co. v. Garland, 164 U. S. 1, 25, 17 Sup. Ct. 7, 41 L. Ed. 327.

[2] Even if there were proper offers of testimony, the result would be the same. The chief complaint upon this basis relates to the refusal of the court to permit the plaintiff on redirect examination (a) to state her alleged contract with Mr. Bellows and (b) to relate statements made by Mr. Bellows to third parties, in plaintiff's hearing, with re-

spect to the contract. In her examination in chief the plaintiff said that the contract under which she went to work for Bellows was made with her by Mrs. May L. Dickerson, acting, the context shows, for Bellows. She then described fully what she did while in his employ. In the course of the recital she stated that her son lived with her at the Bellows house, her husband having died some time before. On cross-examination counsel for the defendant asked her this question: "Was it not a distinct part of your contract of employment that your husband—son and husband—should not be there?" To which she answered, "There was nothing in the contract about that." The question clearly referred to the Dickerson contract, for up to that time there was no mention of any other, and was proper cross-examination.

Later the plaintiff was recalled for further direct examination and was asked to state the full contract that she had with Mr. Bellows. The record discloses that the manifest purpose of this was, not to restate the Dickerson contract, but to prove another contract—one which she claimed to have made with Mr. Bellows personally. An objection to the question was sustained on the footing that the witness was incompetent under section 1064 of the Code to testify to any transaction with the decedent. It is now urged that by the above question on cross-examination the defendant waived the protection of the Code, and that it was therefore competent for plaintiff to testify to a contract with Mr. Bellows personally. This might be so, if the question on cross-examination related to such a contract; but, as we have seen, it did not. It concerned the Dickerson contract only, and did not open the door to an investigation of any other contract.

[3] On cross-examination the plaintiff was asked whether or not she made certain statements to the witness Stetson, representing the defendant trust company, when she received $30 from him and gave him a receipt therefor, to which she responded with qualified answers. There were two receipts. The first stated that the money was received "as housekeeper for decedent"; the second, that it was received on account. She desired to explain the receipts, and so her counsel on redirect examination asked her to give the whole conversation which she had with Stetson at the time the first one was given. The court refused to let her do this. Thereupon her counsel noted an exception and offered to show by the witness that she had received the money, not for housekeeping, but merely as an advancement "on a contract that had been made with her."

Defendant contended that the plaintiff was a mere housekeeper, while she asserted, as her bill of particulars shows, that her duties were of a varied character and much more important than those involved in housekeeping. Later she was permitted to say that she did not receive the money "for wages as housekeeper." "I told him [Stetson] that I was only—that bill was only a portion of my allowance." In the same connection this question was put to her: "I know, but I mean the $30 receipt, account of claim for wages as housekeeper for decedent. What conversation did you have with Mr. Stetson about that?" To which she answered, "Just exactly as I told you, that there was that much due to me on this stipulated amount that he was giving me." At first reading the record would seem to indicate that it was

the purpose of the court to strike out this answer, but a closer examination shows that subsequently the parties agreed that it had not been eliminated. Thus it appears that, notwithstanding the previous ruling of the court, she was allowed to state her conversation with Mr. Stetson at the time the receipt in question was given, and, this being so, she has no cause for complaint because she was denied that right in the first instance.

After the two receipts had been placed in evidence, the plaintiff movel to strike them out on the ground, as stated, that the court had not permitted her "to show fully the conversation that surrounded the making of the receipts." As we have just said, this contention finds no support in the record.

[4] Appellant asserts that she should have been permitted to testify to statements made by Mr. Bellows to third parties in her hearing. Section 1064 of the Code provides:

"If one of the original parties to a transaction or contract has, since the date thereof, died, * * * the other party thereto shall not be allowed to testify as to any transaction with or declaration or admission of the said deceased"

—unless the privilege has been waived as provided in the section. There was no waiver here. The prohibition of the statute goes to any transaction with or declaration or admission of the deceased.

Appellant urges that if the admission was made to a third person, but in the hearing of the other party, the latter may testify to it. For this there is no warrant in the statute. It clearly forbids the surviving party to testify to any admission of the deceased made with respect to a transaction had with him. As Mr. Justice Morris said in Dawson v. Waggaman, 23 App. D. C. 428, the Code "is too plain and explicit to allow of any controversy in this regard. The provision is a just one and the testimony was properly excluded." To the same effect are Patten v. Glover, 1 App. D. C. 466; Manogue v. Herrell, 13 App. D. C. 455. Like statutes in other jurisdictions are construed according to the views just expressed. Brader v. Brader, 110 Wis. 423, 85 N. W. 681; Heinisch v. Pennington, 73 N. J. Eq. 456, 68 Atl. 233; Wilder v. Wilder, 138 Ga. 573, 75 S. E. 654; Parks v. Caudle, 58 Tex. 216, 221; Nicholson v. Kilbury, 80 Wash. 500, 141 Pac. 1043.

When examined with respect to the statute they construe there is nothing in the decisions cited by appellant contrary to our holding. In those cases the statute prohibited only transactions and communications between the survivor and the decedent. This is illustrated by Withers v. Sandlin, 44 Fla. 253, 262, 32 South. 829; Mollison v. Rittgers, 140 Iowa, 365, 366, 118 N. W. 512, 29 L. R. A. (N. S.) 1179; McCall v. Wilson, 101 N. C. 598, 600, 8 S. E. 225; In re Estate of Powers, 79 Neb. 680, 682, 113 N. W. 198. Our Code is quite different. It excludes "any * * * declaration or admission of the said deceased"—not merely those which were had between the survivor and the deceased, but any. Even in New York, where the statute makes the witness incompetent only as to "any communication between the witness and the deceased person," it was held in a very persuasive opinion (Griswold v. Hart, 205 N. Y. 384, 98 N. E. 918, 42 L. R. A. [N. S.] 320, Ann. Cas. 1913E, 790), that it closed the lips of the sur-

vivor as to communications with third parties which he heard but in which he did not participate. Wigmore in his work on Evidence (chapter 33, § 578 [referred to in the brief as section 78]), cited by appellant, criticizes all statutes on the subject as "based on a fallacious and exploded principle." His argument might be enlightening if addressed to the Congress, but it does not help in solving the question before us, for, no matter what the basis of the statutes may be, the courts must enforce them while they exist.

[5, 6] Mrs. McCurley was asked on cross-examination if she did not tell another person a certain thing, to which she replied, "I never told her anything of the kind, because it wouldn't have been the truth." The court on motion struck out the words "because it wouldn't have been the truth," and in doing so no error was committed. The answer was argumentative. Another witness was asked to tell just what Mrs. McCurley did in the Bellows family, and she answered, "Why, that is rather a hard question to tell just what she did, for she did everything." The court struck out "for she did everything." This was hardly an answer to the question. Besides, its erasure from the record could not have worked any prejudice to the plaintiff, in view of the fact that in response to the next question the witness was allowed to state what she observed Mrs. McCurley do for the Bellows family.

[7] The requests for instructions which were refused by the court were based on the theory that the plaintiff was entitled to recover according to the value of her services—upon a quantum meruit; but this overlooks the fact that her bill of particulars, by which she is bound, stated that she had an express contract under which she was to be paid for the services enumerated in the bill "at rate of $125 per month." The value of her services was immaterial, for she had, according to her theory, a contract by which Mr. Bellows was obligated to pay her a fixed sum, irrespective of their value. Moreover, there is not a particle of testimony in the record tending to show what the value of her services was. Therefore there was nothing upon which the jury could have based a verdict for their value. Clearly, the court committed no error in this regard.

[8] It is said in the brief that the court confused the jury on the question of the statute of limitations. We do not think so. There was evidence tending to show that, after money for her services became due to Mrs. McCurley, she permitted it to remain in the hands of Mr. Bellows. The jury were told by the court that, if more than three years had elapsed between the date on which it fell due and the bringing of the action, all claim for it would be barred by the statute of limitations. In this we can perceive nothing obnoxious to the law. Code, § 1265.

[9] Finally, it is asserted that the court erred in an instruction which it gave concerning the weighing of the testimony of the witnesses by the jury. The court said that in discharging this duty they had—

"the right to consider the well-recognized condition that surrounds * * * verbal statements which are repeated a long time afterwards by those who heard them. Those infirmities include * * * the failure to remember exactly, * * * and the inability, with the best of intention, accurately to repeat, what was said."

We see nothing improper in these observations. They are in accord with the practical experiences of men. The jury, with these suggestions to guide them, were left wholly free to weigh and determine the facts according to their best judgment, for the learned trial justice had told them that he expressed no opinion concerning the weight of the evidence. Wiborg v. United States, 163 U. S. 632, 656, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; Simmons v. United States, 142 U. S. 148, 153, 12 Sup. Ct. 171, 35 L. Ed. 968; Union Pacific Railroad Co. v. Thomas, 152 Fed. 365, 371, 81 C. C. A. 491.

We are satisfied that the appellant's case was fully and fairly submitted to the jury, and that, under the law, she has no just cause for complaint. For this reason the judgment should be, and it is, affirmed, with costs.

Affirmed.

In re AMERICAN STEEL FOUNDRIES.*

(Court of Appeals of District of Columbia. Submitted March 12, 1919. Decided May 5, 1919.)

No. 1218, Patent Appeals.

TRADE-MARKS AND TRADE-NAMES ⚿20—REGISTRATION—"SIMPLEX" PART OF CORPORATE NAME.

The word "Simplex," as a trade-mark for brake riggings, was properly refused registration, where several corporations used that word as the predominating one in their corporate names.

Appeal from the Commissioner of Patents.

Application by the American Steel Foundries to register a trade-mark. From a Patent Office decision, refusing registration, the applicant appeals. Affirmed.

George L. Wilkinson, of Chicago, Ill., for appellant.

Theodore A. Hostetler, of Washington, D. C., for Commissioner of Patents.

PER CURIAM. The Patent Office refused registration of the word "Simplex" as a trade-mark for brake riggings, on the ground that it was merely the name of a corporation, and several corporations are referred to in the opinion of the Office denying the registration which have the word "Simplex" as the predominating word in their respective names. The refusal is in accord with our decisions. Asbestone Co. v. Carey Mfg. Co., 41 App. D. C. 507; In re United Drug Co., 44 App. D. C. 209; Mansfield Tire & Rubber Co. v. Ford Motor Co., 44 App. D. C. 205; Burrell v. Simplex Electric Heating Co., 44 App. D. C. 452; Simplex Electric Heating Co. v. Ramey Co., 46 App. D. C. 400.

For the reasons given by the Assistant Commissioner in his opinion, which appears in the record, where he reviews all the contentions of the applicant in the light of the adjudged cases, we affirm the decision of the Patent Office.

Affirmed.

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

*Certiorari granted 250 U. S. —, 40 Sup. Ct. 10, 64 L. Ed. —.

FARRELL v. EDWARD RUTLEDGE TIMBER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 19, 1919.)

No. 3276.

1. PUBLIC LANDS ⟹106(1)—LIEU LANDS—LAND OFFICE FINDINGS.
A land office decision, sustaining a lieu land selection upon authority of its previous decision that unsurveyed lieu lands listed by railway companies were designated with reasonable certainty by descriptions applicable to them after they should have been surveyed, *held* not a finding of fact that lands were described with reasonable certainty.

2. PUBLIC LANDS ⟹82—LIEU LAND SELECTION—SUFFICIENCY OF DESCRIPTION.
Designation of railroad lieu lands by description which would apply to them after they should have been surveyed *held* not to describe them with a reasonable degree of certainty as required by Act March 2, 1899, when applied to land separated by 7½ miles of rough, mountainous, and timbered country from a known survey.

Appeal from the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by Beldon M. Delany, for whom Alra G. Farrell was substituted, against the Edward Rutledge Timber Company, and the Northern Pacific Railway Company. Decree for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Beldon M. Delany brought a suit in the court below to have the Edward Rutledge Timber Company, a corporation, declared a trustee for him of the legal title to a quarter section of land of which he claimed to be the equitable owner by virtue of settlement and subsequent entry and final proof under the homestead laws of the United States. The facts as found by the court below are that on July 5, 1901, the Governor of the state of Idaho applied to the Surveyor General of the state, and to the Commissioner of the General Land Office, under the Act of August 18, 1894 (28 Stat. 394, c. 301), for a survey of a township of unsurveyed lands, including the land in controversy. On July 15, 1901, the application was filed in the office of the Commissioner of the General Land Office. Thereafter the state complied with the requirements of the act and obtained title to some of the lands covered by its application, but not the lands involved in this suit.

On July 23, 1901, under the Act of March 2, 1899 (30 Stat. 993, c. 377), the Northern Pacific Railway Company filed its lieu selection list in the local land office at Cœur d'Alene, Idaho. On or about May 1, 1902, W. B. Leach, a citizen of the requisite age and qualified to make homestead entry, having no knowledge of the application of the state or of the filing of the lieu selection list by the railway company, settled upon a portion of the vacant, unoccupied public domain of the United States which was afterwards by the official survey found to be the northeast quarter of section 20, township 43 north, range 4 E. B. M., and he continuously resided and made his home thereon until June 21, 1903, when he sold his claim and improvements to Delany, who was also a citizen and competent to acquire land under the homestead laws. Delany established his home on the land, with the intention of entering the same under the homestead laws of the United States when open for entry, and he improved and cultivated the land and continuously made his home thereon until after the commencement of this suit. On June 4, 1909, the land was surveyed and opened to settlement.

On June 10, 1909, Delany made his application to enter the quarter section on which he resided under the homestead laws, and on November 20, 1912, he offered final proof. His homestead entry was rejected on the ground that it was in conflict with selection by the state of Idaho. From that decision he appealed to the Commissioner of the General Land Office, and on December

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16, 1909, the commissioner sustained the decision of the local land office, and ruled that the right of the state was prior, and that Delany's application was properly rejected on that ground. On June 28, 1915, the claims of the state of Idaho were canceled, and on July 9, 1915, Delany's homestead application was held for rejection on the ground that it was in conflict with the selections of the railway company. Delany appealed to the Secretary of the Interior, and on November 18, 1915, the Secretary affirmed the decision of the General Land Office on the ground that the railway company had the right to make a valid application for the land notwithstanding the claim of the state of Idaho. Patent was issued to the railway company, and the land was thereafter conveyed to Edward Rutledge Timber Company. It was shown that when Leach made his settlement on the land he blazed a line around his claim to locate his boundaries, and posted notices on each corner, and that, when he sold out to Delany, the latter took down Leach's notices and posted notices of his own. Delany did not know that an attempt had been made to appropriate the land, either by the state or by the railway company, and there was nothing on the land or in the local land office to indicate that any such claim was made, except the lieu selection list which was on file and the application of the state, which was a matter of record in the General Land Office.

On June 21, 1903, when Delany purchased the rights of Leach and made settlement on the land, the nearest surveyed line to the said land was the east line of township 43, range 2 E. B. M., 7½ miles distant from the nearest part of said land. The land between those two lines was very rough and mountainous, and the most of it covered with heavy timber. Section 4 of the Act of March 2, 1899, providing for lieu land selections, declares: "In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity." In the list which was filed the railway company described the land as follows: "The following tract which when surveyed will be described as follows: All of 20—43—4, containing 640 acres."

A. H. Kenyon, of Spokane, Wash., and S. M. Stockslager, of Washington, D. C., for appellant.

Stiles W. Burr, of St. Paul, Minn., Jno. J. Skuse and Fred B. Morrill, both of Spokane, Wash., and Horace H. Glenn, of St. Paul, Minn., for appellees.

Before GILBERT and MORROW, Circuit Judges, and DOOLING, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The appellant contends that the land was not described in the railway company's list so as to designate the same with a reasonable degree of certainty. The appellees contend (1) that the lands were designated with a reasonable degree of certainty, and (2) that the acceptance of the list and the issuance of patent by the Land Office involved the finding of fact that the lands were designated with a reasonable degree of certainty, and that such a finding of fact is conclusive.

[1] We find in this case no decision of fact that the description of the land as listed by the railway company designated the same with a reasonable degree of certainty. The record shows, on the contrary, that no decision was made on the facts of the case, and that the action

of the Land Office was but the application of the settled rule of practice which it followed in all cases, that all unsurveyed lands listed by a railway company as lieu lands are designated with a reasonable degree of certainty if they are designated by the description applicable to them after they shall have been surveyed. Thus on the appeal the decision of the Secretary of the Interior states, not that the rejection of Delany's application was supported by the facts, but that it was supported by the reasons given by the department in its decision in Daniels v. Northern Pac. Ry. Co., 43 Land Dec. 381. Turning to that decision, we find it stating that all lists filed for lieu lands by railway companies were accepted under general regulations of the department in every case where the lands were described in the terms of future survey, and the decision points to the Act of Congress of July 1, 1898 (30 Stat. 620, c. 546), which provided that lands under that act be selected in terms of a future survey, as sanctioning the propriety of the settled practice of the Land Department.

Conceding that the act of 1898 had the meaning attributed to it, it is to be observed that a year later, in enacting the statute under which the lieu lands were selected in the present case, Congress adopted a different provision and required, not that the lands be described in terms of future survey, but that they be designated with a reasonable degree of certainty, which, as we take it, means that Congress was not satisfied that the prior statute and prior practice were adequate in every case for the description of listed lands, but that other means of identification might become necessary in view of possible facts which would render the description in terms of future survey inadequate. In the present case, it is clear that the particular circumstances attending this lieu land selection were not taken into consideration by the Land Department. They did not decide that the description was reasonably sufficient, as applied to this particular tract of land. They applied only a rule of practice, and in so doing decided a question of law and not a question of fact.

A similar case was before us. West v. Edward Rutledge Timber Co., 221 Fed. 30, 136 C. C. A. 556, in which we sustained the court below in ruling that the railway company's designation of a list of unsurveyed land by the description by which it would be known when surveyed was legally sufficient, where the tract was within three miles of a surveyed township and could be located with approximate certainty. In that case we said:

"It may be conceded, in so far as it respects this case, that a description of a section or a quarter section by legal subdivisions in the fastnesses of the Cascades or Rocky Mountain ranges, far distant from any government survey, or even generally that a description in terms of future survey, is not such a description as is contemplated by the statute. What may be a sufficient description for designating the tract under one set of circumstances might be wholly insufficient under another."

Our decision was affirmed in West v. Rutledge Timber Co., 244 U. S. 90, 37 Sup. Ct. 587, 61 L. Ed. 1010. In that case the court said:

"What was a description having 'a reasonable degree of certainty' was to be determined by the circumstances. It was in the nature of a question of fact and had tests for decision, as the Court of Appeals pointed out."

This means that the question is in the nature of a question of fact when it is determinable according to the proper tests applicable to facts. It does not mean that the adoption and application of a general rule of practice by the Land Office is a decision of a question of fact.

[2] We are of the opinion that to designate the section of land in which the section in controversy is situated in terms of a future survey was wholly insufficient to designate the same with a reasonable degree of certainty. In the West Case, this court said:

> "But the farther they remove from an established survey, it stands to reason, the greater will be the difficulty of setting foot on the identical tract, until eventually no reasonable being could expect another to tie back to a known surety for the purpose of identification."

With the uncertainty there foreshadowed we are here brought face to face. The homestead settler here could not, without the expenditure of a large sum of money, ascertain in what section his land would be when finally surveyed. The land was 7½ miles from a known survey, and the intervening space was a rough, mountainous, timbered country. Even if he had gone to the expense of a survey, he could not know that the government survey would coincide with his. By the Act of May 14, 1880, c. 89, 21 Stat. 141 (Comp. St. §§ 4536-4538), he was given the right to make his homestead upon unsurveyed lands. He duly marked the boundaries of his claim, and made his residence thereon. He selected a parcel of land in an unsurveyed township, with nothing on the ground or on record in the plats of the local land office to notify him that the tract had been selected by the railway company. Said the court in Lytle v. State of Arkansas, 9 How. 314, 333 (13 L. Ed. 153):

> "The adventurous pioneer, who is found in advance of our settlements, encounters many hardships, and not infrequently dangers from savage incursions. He is generally poor; and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed one hundred and sixty acres. That this is the national feeling is shown by the course of legislation for many years."

And in Ard v. Brandon, 156 U. S. 537, 543, 15 Sup. Ct. 406, 409 (39 L. Ed. 524), the court said:

> "The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon."

The view which we have taken of this branch of the case renders it unnecessary to consider the other assignments of error.

The decree is reversed, and the cause is remanded to the court below, with instructions to enter a decree for the appellant as prayed for in the bill.

SOUTHERN PAC. CO. v. STEVENS et al.

(Circuit Court of Appeals, Ninth Circuit. May 19, 1919.)

No. 3269.

1. APPEAL AND ERROR ⟹1053(3)—HARMLESS ERROR—EVIDENCE—CURE BY INSTRUCTION.
Where a complaint alleged that a certain agent of defendant carrier agreed to furnish plaintiff live stock cars, any error in admitting a conversation regarding agreement by another agent is cured by instruction that recovery must be based on contract made with agent named in complaint.

2. EVIDENCE ⟹355(1)—STATEMENT OF FREIGHT RATES—FAILURE TO FURNISH CARS.
In action to recover for failure to furnish live stock cars, a written statement of freight rates delivered to plaintiffs by defendant's agent and prepared by clerk in agent's office is admissible, although not actually prepared by agent himself.

3. EVIDENCE ⟹357—TRIAL ⟹85—FAILURE TO FURNISH LIVE STOCK CARS—LETTERS AND TELEGRAMS—SPECIFIC OBJECTION.
In action for failure to furnish live stock cars, plaintiffs' telegrams and letter to defendant demanding cars and threatening to hold it liable for damages, etc., *held* admissible, and objection should have been specifically made to any self-serving portions thereof.

4. CARRIERS ⟹47(1)—AGENT'S AUTHORITY—CHIEF CLERK.
A chief clerk in manifest bureau of defendant railroad, with whom plaintiffs claimed to have contracted regarding the furnishing of live stock cars, *held* apparently authorized to represent defendant.

5. CARRIERS ⟹69(5)—CONTRACT TO FURNISH CARS—AGENT'S AUTHORITY—JURY QUESTION.
Evidence that chief clerk in manifest bureau of defendant railroad acted as the traffic manager's assistant in agreeing to furnish plaintiffs live stock cars for shipment originating on a connecting road, etc., *held* to make his authority to bind defendant a jury question.

6. APPEAL AND ERROR ⟹928(2)—RESERVING GROUNDS FOR REVIEW—REQUESTED INSTRUCTIONS.
Refusing requested instructions is not reversible error, where no exception was taken to general charge, since it will be presumed that charge which was given properly presented all questions.

In Error to the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Action by W. Samuel Stevens and Emmet C. Stevens, copartners doing business under the firm name and style of the Stevens Cotton Company, against the Southern Pacific Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

The defendants in error obtained judgment against the plaintiff in error for $5,236.04 damages for failure to furnish cars under a contract to transport 362 head of dairy stock from Mt. Vernon, Wash., to Phœnix and Gila, Ariz. The parties will be named plaintiffs and defendant as in the court below.

There was evidence that the plaintiffs' agents applied to one Gatter, the agent of the defendant at Phœnix, for information as to their contemplated shipment. Gatter referred them to Luce, the general freight and passenger agent of the defendant at San Francisco. They applied at the office of Luce, and the chief clerk on learning their business told them that Frye had that business in charge. They discussed the details of the shipment with Frye, and

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

they testified that he told them that the defendant would handle the shipment promptly and furnish the cars; that it was not necessary to wire his office when ready to ship, but to notify the local agent of the Great Northern Railroad Company at Mt. Vernon, giving him four or five days' notice; and the plaintiffs were given a quotation of a rate from Mt. Vernon to Phœnix and Gila, Ariz. The plaintiffs then purchased the dairy stock, in the vicinity of Mt. Vernon, and on November 26, 1916, ordered the cars from the local agent of the Great Northern Railway Company at Mt. Vernon, Wash. That agent transmitted the order to the defendant, and on December 1st he received the information from the defendant that it could not furnish the stock cars "as yet," but would try to get some as soon as possible, and on the following day the defendant sent word that it was unable to furnish any cars at all. The plaintiffs made efforts to get the cattle shipped, but without avail, and finally shipped them by express to Stockton, Cal., and thence by freight by the Santa Fé to Phœnix. For the enhanced expense of shipping the cattle, and injury to the cattle caused by the delay, owing to storms and inadequate feeding facilities at Mt. Vernon, damages were awarded by the jury.

Francis M. Hartman, of Tucson, Ariz., and J. C. Forest, of Phœnix, Ariz. (Guy V. Shoup and Elmer Westlake, both of San Francisco, Cal., of counsel), for plaintiff in error.

Thomas Armstrong, Jr., Ernest W. Lewis, and R. Wm. Kramer, all of Phœnix, Ariz., for defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] Error is assigned to the admission of evidence of a conversation which the plaintiffs' agents had with Gatter, in which the latter said that the defendant would handle the stock out of Mt. Vernon and give every facility therefor. This was objected to on the ground that the complaint had alleged that the contract was made with Frye at San Francisco. The testimony was admitted as preliminary to the conversation with Frye, and, if there was error in its admission, it was cured by the court's instruction to the jury that the plaintiffs could not recover on the basis of any contract made with Gatter.

[2] Error is assigned to the admission of a written statement of freight rates furnished the plaintiffs' agents at San Francisco, the ground of the objection having been that it was not prepared by Frye. It is a sufficient answer to this to say that the statement was furnished at the request of the plaintiffs' agents and was prepared by a clerk in Frye's office at his direction and was delivered by Frye.

[3] It is contended that it was error to admit in evidence certain exhibits to which objection was made, on the ground that they were self-serving, incompetent, immaterial, and irrelevant. The exhibits consisted of, first, two identical telegrams sent by the plaintiffs on December 5, 1916, one to Luce, the other to Hinshaw, general agent of the defendant at Portland, Or., stating that, after the negotiations regarding stock cars, the plaintiffs had purchased nearly 400 head of cattle, which they were then holding under heavy expense, and that they were damaged by delay, and adding:

"Have made strong demands through local office for cars immediate shipment and now appeal to you direct. Shall hold Southern Pacific responsible for all feed, expenses, deaths, damages suffered through delay. Answer."

It was proper for the plaintiffs to show that they were making every effort to obtain cars from the defendant and were advising them of the importance of having the cars on hand. If there were any self-serving statements in the dispatch, objection should have been directed specifically to these portions thereof, not to the whole body of the dispatch. The same may be said in regard to the dispatch of December 6, 1916, sent by the plaintiffs to Hinshaw, and the letter of December 5, 1916, sent to Luce. In the letter the writer said:

"Have made strong demands through local office for cars immediate shipment, and now appeal to you direct. * * * I will certainly appreciate all immediate efforts possible to stop this tremendous cost to your company and myself. * * * I feel sure that you will appreciate my position in this matter and make every effort to satisfy my losses and facilitate the shipment without further delay."

It is to be observed that the agents of the defendant made no denial of the statements contained in these communications, and apparently accepted the same as stating the truth of the situation. On December 5, 1916, Hinshaw answered the plaintiffs' dispatch to him saying:

"Southern Pacific appreciates your situation and will do everything possible assist, but cannot guarantee furnish cars. Will wire Gatter what can accomplish, but meantime suggest wiring your representative Mt. Vernon continue his efforts. Have Great Northern supply cars."

Before the plaintiffs could render the defendant liable for the additional cost of shipping the cattle by express, it was necessary for them to exhaust every remedy and make every effort to obtain the promised cars. The dispatches and the letters are evidence that they fulfilled that obligation. We are not convinced that the admission of the exhibits was error for which the judgment should be reversed.

[4, 5] Error is assigned to the denial of the defendant's motion for an instructed verdict in its favor. It is urged that the motion should have been sustained for want of proof of Frye's authority to make a contract for the defendant. Frye was the head clerk in the manifest bureau, and in the office of the general freight agent of the road he dealt with the plaintiffs and furnished them quotations of freight rates and, according to their testimony, entered into the contract. He was apparently clothed with authority to represent the defendant in making a contract, and the plaintiffs had the right to rely on his assumption of such authority. 10 C. J. 216, and cases there cited; Northern Pac. R. Co. v. American Trading Co., 195 U. S. 439, 462, 25 Sup. Ct. 84, 49 L. Ed. 269; Aerne v. Gostlow, 60 Or. 113, 118 Pac. 277; Brace v. Northern Pac. R. Co., 63 Wash. 417, 115 Pac. 841, 38 L. R. A. (N. S.) 1135. But the principal question here involved is whether there was evidence sufficient to go to the jury to show that Frye in addition to the ordinary authority of an agent had authority to make this particular contract; the general rule being that the principal is not bound by the contract of a local agent for transportation over a connecting line in the absence of express authority or a course of business from which such authority may be inferred. The cattle were to be carried from Mt. Vernon on the line of the Great Northern to Portland, a distance of 252 miles, and thence on the defendant's line a distance of

about 2,000 miles to points in Arizona. That they were to be carried through without unloading at Portland is shown by Frye's letter to Hinshaw of November 21, 1916, which was written in the name of Luce, "Freight Traffic Manager." There is little evidence on the subject of Frye's authority to make a contract to furnish cars at a point on a connecting road. There is evidence in the case, however, which seems to indicate that such was the course of business of the defendant, and that such was the understanding, not only of Frye, but of the agents of the defendant at Phœnix, Portland, and Seattle. Frye gave the plaintiff a statement of rates, evidently estimated as for the service of the defendant's cars, from Mt. Vernon to Gila and Phœnix, and Frye, on cross-examination, testified:

"If the agent at Mt. Vernon should want Southern Pacific cars, he would make out an application to his superintendent for these cars, and the Great Northern would transmit that order to the Southern Pacific Company, and, if the Southern Pacific Company had the cars that they could furnish, I have no doubt but that they would let the cars go up on the Great Northern."

We think sufficient appears to warrant the jury in finding that Frye was pursuing a customary and authorized course of business in entering into, if he did enter into, the contract which was alleged in the complaint. And here the contract was not made by a local agent of the defendant. Frye in making it acted as assistant to Luce, the general traffic manager of the defendant. In Northern Pacific Ry. Co. v. Amer. Trading Co., 195 U. S. 439, 462, 25 Sup. Ct. 84, 91 (49 L. Ed. 269), it was said:

"A railroad company has the power, as we have seen, to make such a contract of carriage beyond its lines. A general agent would be presumed to have such power."

See, also, White v. Mo. Pac. Ry. Co., 19 Mo. App. 400; Bigelow v. Chicago, Burlington & N. R. Co., 104 Wis. 109, 80 N. W. 95.

We find no error in the denial of the motion for an instructed verdict.

[6] Error is assigned to the refusal of certain instructions requested by the defendant. The bill of exceptions recites that no exception was taken to the general charge. The general charge is not incorporated in the record. In such a case, it will be presumed that the charge which was given properly presented to the jury all questions involved in the case, and error cannot be predicated upon the refusal of requested instructions. Johnston v. United States, 154 Fed. 445, 83 C. C. A. 299; Northern Pac. Ry. Co. v. Tynan, 119 Fed. 288, 56 C. C. A. 192; Columbia Mfg. Co. v. Hastings, 121 Fed. 328, 57 C. C. A. 504; Union Mut. Life Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193.

The judgment is affirmed.

CINCINNATI TRACTION CO. v. COLE et al.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1919.)

No. 3186.

1. FRAUDS, STATUTE OF ⇐18(2)—PROMISE TO ANSWER FOR DEBT OR DEFAULT OF ANOTHER.
   The statute of frauds (Gen. Code Ohio, § 8621), relating to promises to answer for the debt or default of another, does not apply to a promise for a consideration made to the debtor to pay his debt.

2. FRAUDS, STATUTE OF ⇐34—PROMISE TO ANSWER FOR DEBT OF THIRD PERSON—FUNDS IN PROMISOR'S HANDS.
   As the first section of the original statute of frauds provides that no action shall be brought to charge any executor or administrator upon any special promise to answer damages on his own estate, etc., the second section, appearing as Gen. Code Ohio, § 8621, and declaring that no action shall be maintained on a promise to answer for the debt or default of another, unless in writing, etc., does not apply to a promise to answer for the debt of a third person out of such person's funds in the promisor's hands.

3. FRAUDS, STATUTE OF ⇐33(1)—PROMISE TO ANSWER FOR DEBT OR DEFAULT OF ANOTHER.
   Notwithstanding the statute of frauds (Gen. Code Ohio, § 8621), declaring that no action shall be brought on a promise to answer for the debt, default, or miscarriage of another, unless the agreement is in writing, etc., an oral promise to answer for the debt or default of another is enforceable, where the leading object of the promisor was, not to answer for the debt of another, but to subserve some pecuniary or business purpose of his own.

4. FRAUDS, STATUTE OF ⇐34—AGREEMENT TO ANSWER FOR DEBT OR DEFAULT OF ANOTHER—POSSESSION OF FUNDS OF DEBTOR.
   Where a contractor had nearly completed extensive work for defendant, and defendant had retained a large sum already earned, *held*, that a promise by defendant to pay a lumber company the amount which the contractor owed, by which means the company was induced to furnish more lumber and failed to perfect its lien, though oral, is enforceable, despite the statute of frauds (Gen. Code Ohio, § 8621); it being not only a promise for the benefit of defendant, but a promise to pay the debt out of funds of the contractor.

5. CORPORATIONS ⇐433(1)—OFFICERS—AUTHORITY.
   Where an officer of defendant, known as comptroller, whose duty had to do with its auditing and treasury departments, and who at times acted as treasurer and at others as vice president, made a special promise to pay plaintiffs, who were furnishing lumber to a contractor doing work for the defendant, such officer cannot be held, as a matter of law, without authority.

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Action by James O. Cole and others, as executors of Clinton Crane, partners as C. Crane & Co., against the Cincinnati Traction Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

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Joseph Wilby, of Cincinnati, Ohio, for plaintiff in error.
Charles H. Stephens, Jr., of Cincinnati, Ohio, for defendants in error.

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

COCHRAN, District Judge. The positions in the lower court of the parties to this writ were the reverse of what they are here. The trial was by jury, and the principal error assigned is the overruling of defendant's motion for a directed verdict. The motion was not made until after the court's charge to the jury. The right to make it that late is challenged; but, as we hold that the motion was properly overruled, it is not necessary to determine this question. It may be noted, however, that the situation would have been different had the court refused to hear the motion.

[1, 2] The motion was based upon two grounds. One was that the promise, the basis of the action, was one to answer for the debt of another, and, not being in writing or evidenced thereby, was void under the Ohio statute of frauds (section 8621, General Code of Ohio), which is in the usual form of such statutes. We proceed to consider this ground before stating the other.

The promise was claimed to have been made on or about November 9, 1909. If made at all, the conditions under which it was made were these: The Heffron Construction Company had then nearly completed a contract with defendant, made March 30th, previously, by which it was to do certain work on its premises for $15,561.75, of which $9,548.78 had been paid, upon monthly estimates, to an assignee of the Heffron Company, and possibly as much as $2,000 more had been earned, the larger part of which was retained percentage. That company was indebted to plaintiffs in the sum of $2,949.20 for lumber used in that work. Plaintiffs had a right to take out a lien on defendant's premises therefor, which would be unaffected by the assignment or payments thereunder. Section 8334, General Code of Ohio. The defendant, by its contract, had the right to retain out of subsequent payments an amount sufficient to indemnify it against this lien, and, in case of deficiency, had recourse against the Heffron Company and a surety company to make it good.

Plaintiff's evidence tended to show that the making of the promise came about by their refusal to deliver more lumber needed to complete the contract, that it was made in consideration of their promise to continue delivering and not to take out a lien, and that it was to pay plaintiffs, at least conditionally (i. e., if the Heffron Company did not), both for the lumber previously delivered and that thereafter delivered. Thereafter plaintiff delivered lumber which came to $524.71, making the whole amount due them $3,474.06, for the recovery of which the action was brought.

Defendant denied having made such a promise; but it is undisputed that in January, 1910, after plaintiffs had finished delivering, defendant, by letter, absolutely assured them that they would be paid, and their evidence tended to show that they were not advised that it would

not comply with its assurance until it was too late to take out a lien. According to what plaintiff's evidence tended to show, there was a sufficient consideration to uphold defendant's promise. It is not claimed that there was not. It is questioned whether plaintiff's promise, which constituted the consideration thereof, covered the not taking out of a lien. As to this we do not deem it necessary to say more than that we think that plaintiff's evidence justified the conclusion that it did. But the promise to continue to deliver lumber was sufficient of itself to uphold the promise in its entirety, for the plaintiffs were under no obligation to the Heffron Company so to do.

The plaintiff in error bases its contention that the promise sued on was within the statute and hence void, solely upon the fact that, so far as plaintiff's evidence tended to establish the making thereof, it was only a conditional promise; i. e., a promise to pay if the Heffron Company did not. If this did not bring it within the statute, it does not contend that it was within it. The charge of the lower court to the jury presupposed that it was a question for them whether such was the character of the promise. They were told that, if such was its character, there could be no recovery, and that they could find for plaintiffs only in case they determined that the promise was an absolute one; i. e., "to pay—not if the Heffron Company did not pay, but pay anyhow." They were further charged that the written assurance was not sufficient to take the promise out of the statute, for two reasons, to wit, want of authority on the part of the officer of defendant, who had given it, to give it, and the necessity of parol evidence to explain a reference in the letter from plaintiffs, to which it was an answer.

The position of plaintiff in error, that the only promise which plaintiff's evidence tended to establish was a conditional promise, is difficult to combat. The sole witness thereto testified, on cross-examination, that the "precise language" used was, "we will pay this account if Heffron Construction Company does not," and that the language was in substance, "We will see that this account is paid if the Heffron Construction Company does not pay it." His testimony on direct examination is not inconsistent with such having been the language used, and all other pertinent evidence, apart, perhaps, from the absolute assurance referred to, tended to make out a conditional promise; and we will dispose of the case on the assumption that such was the character of the promise. The plaintiff in error is now so cocksure that, this being so, the promise was within the statute and it was entitled to a directed verdict, that we eliminate every other consideration bearing on its being so entitled on this ground, in order that we may meet it where it has chosen to rest its case. Possibly it was not always of this view, i. e., not until after the lower court had charged that, if such was the character of the promise, there could be no recovery. This may account for its not having requested the peremptory instruction until after the jury had been charged.

The plaintiff in error's contention amounts to this: that every conditional promise to pay the debt of a third person is within the statute. Is this so? To answer this question it is necessary to interpret the statute. A statute may be viewed as a symbol. A symbol has

been defined to be "a soul in a body." Rather, perhaps, it should be put that it is a body with a soul. Its phraseology is its body, and its thought is its soul. Sometimes the thought of a statute and its phraseology do not coincide. Where such is the case, it is its thought, and not its phraseology, which is the statute. The sole description of what is covered by the statute here is "a special promise to answer for the debt, default, or miscarriage of another person." We take it that it is the thought of the statute that it is only a conditional promise to pay the debt of a third person—i. e., to pay it if he does not—that is covered by the statute; for it is only such a promise that is a promise to answer for the debt of another within its meaning. It follows that an absolute promise to pay a debt of a third person is not within the statute. Gibbs v. Blanchard, 15 Mich. 292; National Bank v. State Bank, 93 Iowa, 650, 61 N. W. 1065, 57 Am. St. Rep. 284; Lakeman v. Mount Stephen, L. R. 7 Eng. & Ir. App. 17.

In Wald's Pollock on Contracts (3d Ed. by Williston) p. 170, it is said:

> "A promise to be primarily liable, or to be liable at all events, whether any third person is or shall become liable or not, is not within the statute, and need not be in writing."

But it does not follow that, because a conditional promise only is within the statute, every such promise is within it, or, to go back to the phraseology of the statute, that because a promise to answer for the debt of another person only is within the statute that every promise to do so is within it. Whether every such promise is within it depends on its thought; for, as stated, the thought of the statute, and it alone, is the statute. A close observation of its phraseology takes note of the fact that it says nothing whatever as to the person to whom the promise is made. Seemingly, therefore, a promise of the character called for, made to any person, is within it. But, indisputably, such is not the case. Amongst the differences as to what is within the statute there is none here. In the case of Eastwood v. Kenyon, 11 A. & E. 438, it was held that a promise for a sufficient consideration made to the debtor to pay his debt is not within the statute. Lord Denman said:

> "The statute applies only to promises made to the person to whom another is answerable."

Wald's Pollock on Contracts (3d Ed. by Williston) p. 170, puts it that a promise is not within the statute "unless it is made to the principal creditor."

The case of Eastwood v. Kenyon, decided in 1840, is the first case in which this question seems to have arisen. The position was not argued out. It was taken per saltum. The only possible ground upon which it can be based is that a promise which is not made to the person to whom the third person is answerable—i. e., to the creditor—is not within the thought of the statute. That such a promise is not within its thought suggests that possibly there may be other promises to answer for the debt of a third person which are not within its thought, and hence not covered by the statute. And so we find. The clause of the statute of frauds involved here is the second clause of the orig-

inal statute of Charles II. The first clause thereof provides that no action shall be brought "whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate." These two clauses are found in juxtaposition in the same section of the Ohio statute, but in the reverse order. This first clause expressly limits the promise covered by it to a promise to answer out of the promisor's own estate. This suggests that it is the thought of the second clause that the promise covered by it is a promise to answer out of the promisor's own estate, and that therefore it does not cover a promise to answer out of the debtor's estate which may be in the promisor's hands. It is so held, and as to this, too, there is no difference of opinion. Throop on Verbal Agreements, § 13, says:

"And there is a class of cases under the second clause, not appearing to depend upon its wording, which bears a very close resemblance with respect to the principle which governs them, and the facts calling for its application to a corresponding class under the first clause. We refer to those where the promise to pay the debt of another is held to be good without writing, because the promisor held a fund proceeding from the debtor and applicable to the fulfillment of the promise, in contemplation of which the promise was made. The similarity in the situation of the promisor under such circumstances, and that of an executor or administrator having sufficient assets to pay the debt of the decedent, and who, in consideration thereof verbally undertakes to pay it, is very striking. And the principle upon which each description of promises has been held to be without the statute is substantially the same. For while the first clause expressly provides that it shall be applicable only to a promise by the executor or administrator to answer damages out of his own estate, the second manifestly has the same meaning with respect to a liability incurred by one person to answer for the debt, default, or miscarriage of another."

The authorities are numerous to the effect that a promise to answer for the debt of a third person out of such person's funds, in the promisor's hands, is not within the statute. We cite only the authoritative case of Estabrook v. Gebhart, 32 Ohio St. 415. The third paragraph of the syllabus, which gives the law of the case, is in these words:

"E. contracts with S. to build a house, and S. contracts with G. to furnish labor and materials. G. refuses to furnish such labor and materials except upon a promise, made to him by E., that he himself will pay the bill out of the funds coming to S. Held to be a contract not within the statute of frauds, so as to make a writing necessary."

The Supreme Court said:

"The first part of the charge relates to the nature of the alleged promise made by Estabrook. The court told the jury plainly that, if this promise was, merely to answer for Showalter's debt, there could be no recovery for want of writing; but if there was a new contract between Gebhart and Estabrook, by which, to induce Gebhart to furnish the labor and material, Estabrook undertook to pay, out of the funds which would be coming to Showalter, that Gebhart furnished the * * * material relying on this promise, which he would not otherwise have done, and that Showalter was irresponsible and assented to this arrangement, then the contract might be enforced."

[3] But this does not exhaust all the possibilities of a promise to answer for the debt of another, not being within the thought of the statute, and hence not within it. We have already noted that the stat-

ute says nothing whatever as to the person to whom the promise is made. It is equally silent as to the person by whom it is made. Seemingly, therefore, a promise of the character called for, made by any person, is within the statute. But is this so? Our observation of the statute has brought to our attention that its phraseology is indefinite in three particulars, to wit, as to the person to whom it is made, as to the estate out of which the promisor is to answer for the debt, and as to the person by whom the promise is made. We have found that, though the statute is indefinite in phraseology in the first two particulars, it is definite in its thought as to each of them. In view of this, one would naturally expect it to be definite, also, in thought in the third particular, thus making it definite in thought all around. And the means of making it is at hand, just as it is at hand in the other two particulars. In the first particular, it consists in the radical difference between the creditor and any other person; and in the second, in such difference between the promisor's own estate and that of the debtor. So in the third particular it consists in the radical difference between a promisor who has no personal concern in the debt of the third person, and one who has such concern therein. Possibly, if one is duly sympathetic, he will sense that it is the thought of the statute that it is a promise made by a person who has no personal concern in the debt, and none other, which is covered by it, just as it was sensed that it was its thought that it was a promise made to the creditor, and none other, which is so covered. And it seems fitting that, if it is only a promise made to the creditor to answer for the debt out of the promisor's own estate that is within the thought of the statute, that it is only such a promise made by one who has no personal concern in the debt that is within its thought. Why should one who has no personal concern in the debt and one who has be placed on the same footing? The object in view in the enactment of the original statute of frauds is thus stated therein:

"For the prevention of many fraudulent practices which are commonly endeavored to be held by perjury and subornation of perjuries."

The interest prompting a Legislature to protect from perjury is not the same in the case of one who has a personal concern in the debt as in that of one who has no such concern therein. Where the promisor has a personal concern in the debt, the making of the promise is not dependent solely on the testimony of witnesses. The fact of having such concern is a corroborating circumstance in support of testimony tending to show the making of the promise. It renders its making more likely.

These circumstances tend to lead one to take the position, independent of authority, that it is only a promise made by one who has no personal concern in the debt that is within the thought of the statute and hence within the statute itself. When we come to tradition, we find numerous decisions, some of which are authoritative as to us, in which the promise involved has been held not to be covered by the statute, which can be, and which, in our judgment, should be, placed on this ground. The personal concern of the promisor in the debt may be either in its creation or in its payment. It is in its creation, if it is

made before or at the time of the creation of the debt. It is in its payment, if made after the creation thereof. The decisions which are authoritative as to us were in cases where the personal concern of the promisor was in the creation of the debt. They are Emerson v. Slater, 22 How. 28, 16 L. Ed. 360; Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826; Crawford v. Edison, 45 Ohio St. 239, 13 N. E. 80.

The first paragraph of the syllabus in Crawford v. Edison is in these words:

"When the leading object of the promisor is, not to answer for another, but to subserve some pecuniary or business purpose of his own, involving a benefit to himself, or damage to the contracting party, his promise is not within the statute of frauds, although it may be in form a promise to pay the debt of another, and its performance may incidentally have the effect of extinguishing that liability."

There Crawford, the promisor, contracted with Smith to build him a house. Smith subcontracted with Edison to do some work on the house. After Edison had done about two-thirds of his work, Smith abandoned the job and left the country, without having paid Edison anything. Edison claimed that he then refused to do any more work unless Crawford promised to pay him, and, upon Crawford's so promising him, he completed his work. It was held that, if such was the case, Edison was entitled to recover of Crawford the entire amount of his debt. At the time of the promise Crawford had a personal concern in Edison's finishing his work and the creation of the debt for that portion thereof. Otherwise the house would remain uncompleted. It is true that the evidence on behalf of Edison tended strongly to establish an absolute promise on Crawford's part, and it was left to the jury, as here, to determine whether the promise was absolute or conditional, they being told that if it was conditional there could be no recovery. This of itself was sufficient to sustain the judgment of the lower court on the verdict for plaintiff.

But the court did not base its affirmance on this ground, but on that set forth in the first syllabus. It is there said that, though in form a promise to pay the debt of another, yet if the leading object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, it is not within the statute. This statement of the law is taken substantially from the opinion of Mr. Justice Clifford in Emerson v. Slater. The promise sued on in that case was made to one who had contracted with a railroad company to build its railroad by one interested in the company as stockholder and creditor, and was to pay promisee a certain sum if he would finish the railroad by a certain day. The promise was treated as one to answer for the debt of the company to the extent of the sum. The personal concern of the promisor was in the creation of the debt. Its creation would result from the finishing of the railroad. Thereby the railroad would be put in condition for operation, and by its operation the promisor would obtain payment of his debt and dividends on his stock. It was held that the promise was not within the statute. Mr. Justice Clifford thus stated the ground of the decision:

"Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds. Other cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. But 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."

The case of Davis v. Patrick is substantially the same as that of Emerson v. Slater. The promise sued on there was made to one who had contracted with a mining company for the transportation of ore by one interested in the company as creditor, and was to see the promisee paid. Though the promisor was to see him paid for transportation of ore under his contract, both theretofore and thereafter, the suit was only for subsequent transportation; the previous transportation having been paid for by the company. Mr. Justice Brewer said:

"Whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of this statute. But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate, and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise."

And, again:

"The thought is that there is a marked difference between a promise which, without any interest in the subject-matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of a third party, is also and mainly for the benefit of the promisor. The case before us is in the latter category. While the original promisor was the mining company, and the undertaking was for its benefit, yet the performance of the contract inured equally to the benefit of Davis and the mining company. Performance helped the mining company in the payment of its debt to Davis, and at the same time helped Davis to secure the payment of the mining company's debt to him."

We know no authoritative case where the promise was made after the creation of the debt and the personal concern of the promisor was in its payment. But numerous cases of this character can be cited, the decision in which that the promise was not within the statute can and should be placed on the ground that, as the promisor had personal concern in the payment of the debt the promise was not within the thought of the statute. We cite but two, to wit, the early case of Williams v. Leper, 3 Burrow, 1886, and that of Landis v. Royer, 59 Pa. 95.

The promise sued on in Williams v. Leper was made to a landlord, who was about to distrain the goods of the tenant for arrears of rent, by one to whom the tenant had conveyed his goods for the benefit of his creditors. That sued on in Landis v. Royer was made to a mate-

rialman, who supplied lumber to a contractor in erecting a house for the promisor, and who had a right to take out a mechanic's lien on the building. Judge Sharswood said:

"It was the debt of the defendant's own building, the payment of which could legally be enforced against it; though it may not have been personally his debt, his property was answerable for it, and his engagement to pay was in relief of his property."

Judge Campbell, in the course of his opinion in Corkins v. Collins, 16 Mich. 478, thus put the matter:

"When, by the release of the property from a lien, the party promising to pay the debt is enabled to apply it to his own benefit, so that the release inures to his own advantage, it is quite easy to see that a promise to pay the debt in order to obtain the release may be properly regarded as made on his own behalf, and not on behalf of the original debtor, and any possible advantage to the latter is merely incidental, and is not the thing bargained for. That promise is therefore in no proper sense a promise to answer for anything but the promisor's own responsibility, and need not be in writing."

In cases of this kind the promisor is personally concerned in the payment of the debt, for thereby his property is relieved of it. Possibly there is stronger reason for saying that the promise in cases of this kind is not within the statute than that in cases of the other kind. The ground upon which this may be so is this: According to the phraseology of the statute, the only promise which is within it is one to answer for the debt of another person. This means that the debt shall be solely and exclusively the debt of the third person, and not that of the promisor. Where the creditor has a lien, or the right to take out a lien, on the property of the promisor to secure the debt, it may be said that in a sense it is not solely and exclusively the debt of the third person, but is also the debt of the promisor. This is so, in that the property of the promisor is obligated to the payment of the debt. If this reasoning is sound, then it can be said that the ground upon which such a promise is not within the statute is that it is not covered by its phraseology.

This, however, cannot be said of the promise in cases of the other kind. But in reality, notwithstanding the creditor has such lien, or the right to take it out, the debt is solely and exclusively the debt of the third person. In no real sense is it the debt of the promisor. The ground, therefore, upon which to place it that the promise is not within the statute, is that which we have set forth. The statute, according to its thought, covers only a promise to answer for the debt of a third person by one who has no personal concern in the debt. It does not cover a promise by one who has a personal concern therein; and in such a case the promisor has such concern. His property is obligated for it, and by its payment will be relieved of the obligation. If, then, such is the true ground thereof, it follows that in any case where the promisor has a personal concern in the debt, whatever may be the basis thereof, the promise is not within the thought of the statute, and hence not within the statute. The decisions in cases of this kind, therefore, that the promise is not within the statute, indirectly uphold the position that the promise in cases of the other kind are not within it.

We have stated that these decisions can and should be placed on the ground that the statute only covers a promise made by a person who had no personal concern in the creation or payment of the debt, as the case may be, the promises involved therein not being so made, but by one who had such concern, not that they were actually placed on this ground.

Indeed, it cannot be said that the courts who rendered them were clearly conscious that the decisions could be justified on the reasoning which we have put forth. From the quotations made it will be seen that the ground expressed is that the leading object of the promisors is to subserve some pecuniary or business purpose of the promisor. Sometimes the ground is stated to be that a new consideration or benefit has moved to the promisor; and the fact of personal concern has a tendency to support the contention that the promise was absolute, and not a conditional one, and hence not within the statute on this ground. The decisions themselves have been much criticized, though it is recognized that what they stand for is established law. It has been urged that such promises come within the terms or language of the statute, that to exclude them is judicial legislation and that the rule which they establish is anomalous. It has been suggested that, if the promisor is to be liable at all, it should not be on the promise, but in quasi contract for the benefit received.

The decisions have also been a source of error in the reasoning on which they have been based, in that it has sometimes been thought that they were authority for the position that, in every case where a consideration moves to the promisor, the promise is within the statute, which is not the case. We would submit that the position that it is the thought of the statute that only a promise by a person who has no personal concern in the creation or payment of the debt to which it relates is within it is reasonable. It cannot be said that a promise by a person who has such concern therein is within the terms or language of the statute. The statute is silent as to the person by whom the promise is made. It is no more within the terms or language thereof than a promise to answer otherwise than out of the promisor's own estate, or than a promise to answer to the debtor or one other than the creditor. The position, therefore, reads no exception into the statute. It is simply one of three limitations on its scope, which one is constrained to put when one passes through its unlimited phraseology to its thought and looks at that phraseology from the other side. And there is nothing in this position that is calculated to lead one into error. Of course, some limitation must be put upon the words "personal concern." The concern must be such as that which existed in the cases cited and others like unto them; i. e., immediate and pecuniary.

If, then, the views here advanced are sound, a full expression of the thought of the statute as to the character of the promise covered by it would be somewhat like this: It is a promise to answer for the debt of another (i. e., to pay if he does not), made to the creditor by one who has no personal concern in the debt, the answering therefor to be out of his own estate.

Wald's Pollock on Contracts (3d Ed. by Williston) p. 169, characterizes the contract to which the statute relates as "a contract of suretyship or guaranty." Ames, in his Lectures on Legal History, p. 95, characterizes it as "guaranty." And such is what we take to be the ordinary conception of a contract of suretyship or guaranty. In order, then, to bring a promise within the statute, it is not sufficient that it is a promise to answer for the debt of another; i. e., to pay his debt if he does not. The promise must also be to the creditor by one who has no personal concern in the debt, and to pay same out of his own estate. Though it may be a conditional promise, if it is not to the creditor, or not by one who has no personal concern in the debt, or is not to pay it out of the promisor's own estate, it is just as much not within the statute as it would have been, had it been, not a conditional, but an absolute, promise.

[4] We come now to apply the legal positions thus advanced to the case in hand. The defendant had a personal concern in the creation of so much of the debt as was created after the making of the promise, and in so much thereof as had been theretofore created. It had such concern in the creation of the former portion, for it would result from plaintiffs' continuing to deliver lumber, and thereby the completion of the work which the Heffron Company had contracted to do would be furthered. It had such concern in the payment of the latter portion, for thereby its property would be relieved of the lien which plaintiff had a right to take out. Such being the case, the defendant's promise, whatever may have been its character, was not within the statute.

But this is not the only ground upon which it can be said that the promise was not within the statute. To say the least, it was open for the jury to find that the promise was to answer for the debt, not out of its own estate, but out of the Heffron Company's funds. There yet remained to be paid it under the contract over $6,000, of which over $2,000 had been already earned. By the company's contract with defendant it had the right to apply subsequent payments to this indebtedness, and under the contract, and the bond given simultaneously therewith, defendant had recourse against it and the surety company for any deficiency. It must be held, therefore, that this ground of the motion for a peremptory instruction is not well taken.

[5] The other ground is that the officer of defendant who made the promise was without authority to make it. The title of the officer who made the promise on behalf of defendant was comptroller. His duties had to do with the auditing and treasury departments of defendant. He was the supervisor of both departments. The one settled accounts against defendant, and the other paid them. It was a part of his duty to raise money to enable defendant to pay its accounts, and to collect accounts due it. At times he acted as vice president, and at others as treasurer. The question whether it was within the scope of his employment was submitted to the jury. We think it clear that it cannot be said, as a matter of law, that he was without authority. The promise had relation to the payment both of defendant's indebtedness to the Heffron Company and of its indebtedness to plaintiffs, for the latter of which a lien might be taken.

We have considered the other assignments of error carefully, and find them not well taken. There has been no such presentation of them as calls for a further response thereto.

Finding none of the assignments well taken, the judgment of the lower court is affirmed.

THE ADDISON E. BULLARD.

ALLEN et al. v. TURNER et al.

(Circuit Court of Appeals, Fifth Circuit. April 17, 1919. Rehearing Denied June 25, 1919.)

No. 3348.

1. CONTRACTS ⚷163—CONSTRUCTION—PRINT AND TYPEWRITING.
   When a contract is in part printed, and in part written or typewritten, the printed part is to be given the effect called for by its language, except in so far as inconsistent or incompatible with the written or typewritten part.
2. SHIPPING ⚷49(5)—FREIGHT—LIEN—CREATION BY CHARTER.
   A lien may be created by contract between the parties to a charter, not only for freight, but for dead freight, demurrage, and as many more of the usual claims of the shipowner as he may choose to name.
3. SHIPPING ⚷49(5)—FREIGHT—LIEN—STIPULATION OF CHARTER.
   Where the charter of a schooner stipulated that all freight to accrue was to be prepaid, that prepaid freight was to be considered as earned and to be irrevocable, and that the vessel had a lien for all freight, the lien was given and made enforceable for the freight from the time it was due to be prepaid, irrespective of whether the vessel had broken ground at the port of loading.
4. EVIDENCE ⚷394—PAROL EVIDENCE AFFECTING CHARTER PARTY.
   Plain terms of contract between shipowners and charterers embodied in the charter party are not subject to be modified by evidence of communications by telephone and telegraph between the charterers and ship brokers with reference to the chartering of the vessel.
5. SHIPPING ⚷44—CHARTER PARTY—RIGHTS OF CHARTERERS—COAL AS "PROVISIONS."
   Charterers of a schooner, entitled to the whole of the vessel, with the exception of necessary room for crew and storage of "provisions," sails, and cables, were not deprived of space to which they were entitled because the owners of the schooner stored on its deck in lockers 35 or 40 tons of coal to operate the donkey engine, heat the cabin, and discharge cargo.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Provision.]
6. SHIPPING ⚷58(2)—CHARTER PARTY—"DECK LOAD."
   On libel by the owners of a schooner against a cargo of lumber and timber, evidence held to support the conclusion that the timber and lumber carried on the so-called flush deck and the deck next thereunder constituted a full "deck load," within the meaning of the charter party stipulation on the subject.

Appeal from the District Court of the United States for the Northern District of Florida; William B. Sheppard, Judge.

Libel by Horace Turner, managing owner, and J. C. Bush and others, owners, of the American schooner Addison E. Bullard, against

Biddle W. Allen and Camille J. Friedrichs, doing business as Allen & Friedrichs, and the M. A. Quina Export Company. From a decree for libelants (252 Fed. 241), defendants appeal. Affirmed.

John C. Hollingsworth, of New Orleans, La., for appellants.
Scott M. Loftin, of Jacksonville, Fla., for appellees.

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

WALKER, Circuit Judge. This was a libel in admiralty by the owners of the American schooner Addison E. Bullard against the cargo of timber and lumber loaded thereon at the port of Pensacola, and Allen & Friedrichs, the charterers "of the whole of said vessel (with the exception of the cabin, and the necessary room for crew and storage of provisions, sails, and cables), or necessary room for the cargo hereafter mentioned"; the thereinafter mentioned cargo being "lawful merchandise, understood no explosives to be shipped." The claim was for the amount of the charter rate of freight on 2,250 tons of cargo, and was based on the terms of a charter party by which the charterers agreed to pay the libelant—

"For the use of said vessel during the voyage aforesaid at the rate of *thirty and 00/100 dollars ($30.00) per gross ton of 2,240 pounds delivered to vessel. but charterers to pay freight on not less than 2,250 gross tons, vessel's dead weight capacity. Freight prepaid on signing bills of lading, payable in United States currency. Prepaid freight earned, retained and irrevocable.* * * * It is understood and agreed that the vessel has a lien upon the cargo for all freight, dead freight and demurrage."

The libel averred that the schooner was by the charterers loaded with a full and complete cargo of timber and lumber, that such cargo was less than 2,250 tons in weight, and that the charterers and their agents refused to pay freight at the charter rate on 2,250 tons of freight, but insisted on the master signing clean bills of lading for the cargo upon the charterers' paying a much less sum, and that the master offered and remained willing to sign bills of lading for the cargo upon the payment of freight at the charter rate on 2,250 tons. After the libel was filed, under an agreement made, the vessel accepted without prejudice an amount less than that claimed, signed bills of lading for the cargo, proceeded on the voyage, and delivered the cargo at Genoa, Italy, the destination stated in the bills of lading. It was provided in that agreement that the question of the libelant's right to the amount of the difference between what was so paid and what libelant claimed should be adjudicated in this case. The appeal is from a decree sustaining the libelant's claim.

[1-3] The claim asserted was resisted on the ground that no maritime lien arose or existed at the port of loading prior to the vessel's breaking ground. Based upon the circumstances that the charter party was partly printed and partly typewritten—the italicized part of the last above quoted provision being typewritten, the remainder of that provision being part of the printed form made use of—and upon the proposition that the typewritten part is controlling, it is contended that no lien was given for the freight agreed to be prepaid, and that

for the alleged breach of that stipulation the only remedy available to the shipowners was an action at law on the contract. This contention cannot be sustained if effect is given to the printed stipulation:

"It is understood and agreed that the vessel has a lien upon the cargo for all freight, dead freight and demurrage."

When a contract is in part printed and in part written or typewritten, the printed part is to be given the effect called for by its language, except in so far as it is inconsistent or incompatible with the written or typewritten part. There is no inconsistency or incompatibility between the last-quoted provision and the typewritten part of the charter party. The stipulations to the effect that freight was to be prepaid on signing bills of lading, and that prepaid freight was to be considered as earned, and was to be retained and irrevocable, are entirely consistent with the stipulation to the effect that the vessel has a lien for all freight, dead freight and demurrage. A lien may be created by contract between the parties, not only for freight, but for dead freight, demurrage and as many more of the usual claims of the shipowner as they may choose to name. The Peer of the Realm (C. C) 19 Fed. 216. Where, as in the instant case, it is stipulated that all the freight to accrue is to be prepaid, that prepaid freight is to be considered as earned and to be irrevocable, and that the vessel has a lien for all freight, it is made clear that a lien is given and made enforceable for the freight from the time it is due to be prepaid. The language used in the charter party does not leave it in doubt that what was required to be "prepaid on signing bills of lading" was freight in the sense in which that word is understood in maritime law. The Bird of Paradise, 5 Wall. 545, 18 L. Ed. 662. Under such a contract the accrual of the lien is not postponed until the vessel breaks ground. International Paper Co. v. Schooner Gracie D. Chambers (Jan. 13, 1919) 248 U. S. 387, 39 Sup. Ct. 149, 63 L. Ed. 318; Allanwilde Transport Co. v. Vacuum Oil Co. (Jan. 13, 1919) 248 U. S. 377, 39 Sup. Ct. 147, 63 L. Ed. 312; Standard Varnish Works v. Steamship Bris (Jan. 13, 1919) 248 U. S. 392, 39 Sup. Ct. 150, 63 L. Ed. 321. As said in the opinion rendered in the last-cited case:

"The words 'prepaid' freight to be considered as earned' declared a completed right and carried the power of retention without the expression of the latter."

An incident of the completed right is the power to enforce the lien given to secure it. When the vessel was loaded with a full and complete cargo, as stipulated in the charter party, the lien for the stipulated charter hire attached upon the tender of bills of lading for such cargo and the refusal of such tender by the charterers, and it was not in the power of the latter to postpone the attaching of the lien contracted for and its becoming enforceable by making it a condition of the acceptance of the tendered clean bills of lading for the cargo loaded that they be issued upon the payment of less than the stipulated charter hire. The averments of the libel showed that at the time it was filed the libelants had a lien on the cargo which was enforceable in a court of admiralty. Rulings as to the effect of

charter parties containing stipulations for the prepayment of freight, but not containing such provisions as those found in the charter party now in question to the effect that freight prepaid as stipulated is earned and irrevocable, and that the vessel has a lien upon the cargo for all freight, dead freight and demurrage, are not applicable to the facts of the instant case.

[4] The averments of the libel that the vessel was loaded with a full and complete cargo of timber and lumber were put in issue. The evidence on this issue was conflicting. It is not fairly open to dispute that a phase of it supported the averments of the libel in that regard. The trial court found that those averments were proved. The record by no means convinces us that the finding was against the preponderance of the evidence. The contract entitled the charterers to furnish a cargo of any lawful merchandise other than explosives. It was optional with them to ship heavy cargo to the extent of the vessel's dead weight capacity if the freight room not excepted or reserved would hold that much, or to ship light weight cargo, less than 2,250 tons of which would fill the freight space contracted for. They exercised the option by furnishing a cargo of timber and lumber, a considerable part of it being light weight kiln-dried lumber. It is plain that it was in view of the existence of this option that it was stipulated that the charterers were "to pay freight on not less than 2,250 gross tons, vessel's dead weight capacity." That was the stipulated compensation to be paid to the shipowners, whether the full and complete cargo shipped by the charterers did or did not amount to 2,250 gross tons. Over objections by the shipowners, the charterers introduced evidence of communications by telephone and telegraph between the charterers and shipbrokers with reference to the chartering of the vessel. That evidence was relied on to support the conclusion that the compensation to be paid was $30 per ton on the cargo furnished, and that no minimum amount of freight was stipulated for. Even if the brokers were authorized to speak for the shipowners, which was not shown, the plain terms of the contract between the parties, embodied in the charter party, are not subject to be altered or modified by such evidence. The charter party alone is to be looked to as the expression of the final understanding of the parties. Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622.

[5] The charterers raised the issue that they were deprived of cargo space to which they were entitled in consequence of coal being loaded in such space. The evidence showed that between 35 and 40 tons of coal were loaded in lockers on deck, provided for the purpose, and that that amount was necessary for the operation of the donkey engine, which was used in hoisting anchors and sails, heating the cabin and discharging cargo. The provision of the charter party, "vessel to furnish the use of the steam winches, with steam to drive them," shows that it was contemplated that some coal was to be carried. By the terms of that instrument the charterers were entitled to the whole of the vessel, "with the exception of the cabin, and the necessary room for crew and storage of provisions, sails and cables." The statement in the testimony of a witness for the charterers to the effect

that the word "provisions" included such a supply of coal as was taken on for the purposes stated was not contradicted. The word is appropriate to describe necessary stores or materials provided to enable the ship to comply with its obligations under the contract. The evidence was such as to warrant the conclusion that the storage in bunkers on deck of the amount of coal mentioned did not deprive the charterers of space to which they were entitled.

[6] In this court the appellants seek leave to amend their answer to the libel by averring that the beams supporting the topmost deck, sometimes called the flush deck, were so light as to be structurally insufficient to carry the full and complete deck load provided for by the charter party; that such defect shut the charterers out of having a full and complete load on the flush deck, thereby causing alleged damages, a recovery of which is prayed in the amendment sought. The allowance of the proposed amendment would introduce entirely new issues which were not raised in the trial court. The case was tried without any question as to the vessel being such as the charter party called for being raised by any part of the pleadings. The amendment is sought to enable the charterers to show by the evidence already adduced that the alleged lightness of the beams supporting the topmost deck constituted breaches of the charter party's stipulations as to the vessel being "tight, staunch, strong and in every way fitted for such a voyage," and as to its taking on "a full complete deck load consistent with the vessel's seaworthiness." The parties seeking the amendment do not ask to introduce additional evidence.

Waiving the question raised by the objection of the appellees to the allowance of the proposed amendment in this (the appellate) court, the matter we think properly may be disposed of on the ground that, if the new issues sought to be raised had been duly raised by the pleadings in the trial court, on the evidence adduced they could not properly have been decided in favor of the appellants. What is called the flush deck is really the roof or top of a structure which incloses the space above the upper or main deck; the principal object of that structure being to protect from the weather cargo loaded on the deck next below the top of such structure. While it is customary to load some cargo on the so-called flush or shelter deck, we think the evidence was such as to require the conclusions that the flush or shelter deck was not the space contemplated by the stipulation as to taking on "full complete deck load consistent with the vessel's seaworthiness," and that the alleged lightness of the beams supporting such topmost deck was not a breach of the stipulation as to the vessel being "tight, staunch, strong and in every way fitted for such a voyage." Nothing in the charter party shows that the vessel was bound to receive and store on the so-called flush deck a full and complete deck load.

The evidence was such as to support the conclusion that the timber and lumber carried there and on the deck next thereunder constituted a full and complete deck load within the meaning of the charter party's stipulation on the subject. Neither the stipulation as to the vessel being "tight, staunch, strong and in every way fitted for such a voyage" nor any other provision of the charter party dealt with

the question of the cargo-carrying capacity of the topmost or flush deck. That unprotected space was not warranted to be fit for the carriage of any amount of lawful merchandise the charterers were entitled to offer. As the contract did not entitle the charterers to complain on the ground that the lightness of the beams supporting the topmost or flush deck rendered it structurally insufficient to carry a full and complete deck load, and as the evidence called for the conclusion that such a deck load as the contract contemplated was received and carried, the appellant can have no just cause to complain of a refusal to permit the proposed amendment, assuming that it is permissible to allow such an amendment in the appellate court.

For reasons above indicated, the proposed amendment is disallowed, and the decree appealed from is affirmed.

ARMOUR & CO. et al. v. TEXAS & P. RY. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. May 5, 1919.)

No. 3360.

RAILROADS ⟹54—REMOVAL OF TRACK—RIGHT TO EQUITABLE RELIEF—PUBLIC INTERESTS—LEGAL REMEDY.

Though meat-packing companies, acquiring valuable abutting property adapted to their business, have a contract or property right to prevent removal from a street of an industry track serving them, they cannot have relief by injunction against the city, the railroad company, and a trackage company, to restrain removal of the track to another street, when it appears that paramount public interests may be interfered with by granting relief, especially where there is no convincing showing of a lack of legal remedy for damages.

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

Suit against the Texas & Pacific Railway Company, wherein Pearl Wight was appointed receiver, and Armour & Co., a New Jersey corporation, and Armour & Co. of Texas, a Texas corporation, filed an intervening petition. From a decree dismissing the petition, the interveners appeal. Affirmed.

Sam B. Cantey, of Ft. Worth, Tex., and Francis Marion Etheridge and Joseph Manson McCormick, both of Dallas, Tex., for appellants.

Thomas J. Freeman and H. Generes Dufour, both of New Orleans, La., for appellees.

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

WALKER, Circuit Judge. This is an appeal from a decree dismissing an intervening petition filed by the appellants, Armour & Co., a New Jersey corporation, and Armour & Co. of Texas, a Texas corporation, in a suit in which the receiver of the Texas & Pacific Railway Company (which will be referred to as the Railway Company) was appointed. The appellants sought an injunction to prevent the

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

Railway Company and its receiver from executing a contract to remove, and from removing, the tracks on Pacific avenue, in Dallas, Tex., including a switch or industry track serving the petitioners' plant.

The pleadings and evidence in the intervention proceedings disclosed the following facts:

For many years prior to 1912 the Railway Company had and used tracks on Pacific avenue, in the city of Dallas; its authority to do so being conferred by municipal ordinances. In July, 1912, the authorities of the city of Dallas passed an ordinance granting the Railway Company the right and privilege to construct a switch track on Pacific avenue; the location of that track being designated. That ordinance contained the following provisions:

"Sec. 2. That the right, privilege, and franchise hereby granted is granted subject to the city charter and ordinances of the city of Dallas and such future charters and ordinances as may hereafter be passed, and the city expressly reserves the right to at all times amend or alter the ordinance hereby granted.

"Sec. 3. That the right and privilege hereby granted is granted for a period of twenty years from the date of the acceptance of this ordinance, as herein provided for, and provided that in the event the said Railway Company shall be required to abandon, to elevate or to place in subways said main tracks on Pacific avenue, then in that event this franchise shall be subject thereto, and the said grantee shall, during said time, pay, on the second day of January, in each and every year, the sum of ten dollars per year, as a bonus for the right, privilege, and franchise hereby granted: Provided that ten dollars shall be paid for the year 1912.

"Sec. 4. That in accordance with the agreement heretofore made between the city of Dallas and Armour & Co., the owners of a certain lot located on the north side of Pacific avenue, and more particularly located on the northwest corner of Pacific avenue and Harwood street, and extending back to Live Oak street, which switch track is intended to serve said property, it is mutually understood and agreed that as a further consideration for this grant the grantee shall obtain from the said Armour & Co., or the said Armour & Co. shall dedicate to public use sixty-four square feet of land located at the southeast point of its said lot, where the same forms a corner of Harwood and Pacific avenue, and shall likewise dedicate to public use for street purposes thirty-five square feet off the northeast corner of its said lot, where the same forms the southwest corner of Harwood street and Live Oak street; it being the purpose of the said dedication to round the corners at such points and to dedicate such property for street purposes, and it being understood that it requires the amount of square feet herein stated to round off said corners, all of which more fully appears from map on file in the office of the city engineer of the city of Dallas. That the dedication of said property shall be made by the said Armour & Co., whose property is served by said switch, before the final acceptance of this ordinance by the grantee herein.

"That in the event the said Armour & Co. should fail or refuse to make said dedication, it is expressly understood between the parties that the city of Dallas may repeal and cancel the rights and privileges granted under this ordinance, by resolution or otherwise."

Armour & Co. made the dedication called for by the last-quoted provision. Before the adoption of the ordinance it was submitted to the attorney of Armour & Co., and was approved by him, and Armour & Co. conditionally contracted to buy the lot described in the ordinance, and after the adoption of the ordinance bought the lot and made the required dedication. Armour & Co.'s attorney had oral ne-

gotiations with the Railway Company's general attorney and with its general manager, and both those officials were advised that Armour & Co.'s purchase of the lot was conditioned upon the switch track being authorized and constructed, and the Railway Company's general manager assured an agent of Armour & Co. that if the city granted the franchise the Railway Company would put in the switch and maintain and operate it. Following Armour & Co.'s purchase of the lot and the adoption of the ordinance, it had built on the lot a steel reinforced concrete structure exclusively adapted to its business, which includes the refrigeration, smoking, drying, treatment, and curing of meats. The lot and the improvements thereon cost about $130,000. The business in which the property is used is an extensive and valuable one. If the switch track in question is removed, that property would not be available for use in the business for which it was acquired and for which it has been and is used. The business is carried on by Armour & Co. of Texas, which holds the property under a lease contract with Armour & Co., the substance of which, as stated in the summary of the evidence, is that the former pays the latter a net rental of 8 per cent. of the entire value of the property and plant, including taxes, charges, etc.

A result of the growth of Dallas since the Railway Company commenced to use Pacific avenue for its tracks is that there has been a great increase both of railway and other traffic on that street, and of other traffic along the streets crossing Pacific avenue in the locality of the switch track in question. Pacific avenue divides the principal residence section of the city from its principal retail and shopping district. The next street to it in the direction of the leading retail district was spoken of by one of the witnesses as "probably the most used thoroughfare of the city." Traffic in that locality has become greatly congested. The public interest and safety call for either the lowering or raising of these tracks, or the removal of them from Pacific avenue. The continuance of the tracks on the same grade as the street involves constant and increasing danger and inconvenience to many persons. There was evidence to support the conclusions that it is impracticable to lower the tracks on that street, because the lowering of them to the required depth would subject them to being flooded whenever Trinity river, to which the tracks go, is at high-water mark, and that the elevation of the tracks, besides being very expensive, could not be so effected that the industries located on that street could continue to be served by the Railway Company as they are served by the tracks on the street grade. For years past there has been public agitation against the continuance of the conditions on Pacific avenue resulting from the presence on it of the railway tracks.

In the circumstances above indicated the city of Dallas, the receiver of the Railway Company, and the Wholesale Trackage Company, a corporation, agreed upon the terms of a contract providing for the removal of the railway tracks from Pacific avenue and the discontinuance of the use of the street for railway purposes, except that a track serving one industry was to be continued for a specified time, and those required for the operation of certain passenger trains of another

railroad which had acquired a right to use the street were to be continued in use for that purpose, unless other arrangements could be made for those trains, and for the acquisition by the Railway Company of a route for its tracks through another and less congested part of the city, which included a new industrial district, industries located on which could be served by the Railway Company. By the terms of that contract a large part, if not most, of the expense involved in making the proposed change was to be borne by the Wholesale Trackage Company; the money required for that purpose being contributed by owners of real estate expected to be benefited by the proposed change, some of the contributors being owners of lots on Pacific avenue, some of them being owners of nearby real estate which is separated from the heart of the city's retail business section by Pacific avenue, and the remainder being owners of real estate in the industrial district to be established and developed. After permits to make the proposed change had been obtained from the public authorities, the Railway Company's receiver filed in the cause, in which the petition of the appellants was filed, a petition praying that he be authorized by the court to execute the above-mentioned contract, which was the same one the execution of which the appellants sought to have enjoined. Following findings, supported by evidence adduced, that the consummation of the contract mentioned will be highly advantageous to the Railway Company and the citizens of Dallas, the court made a decree denying the injunction sought by the appellants, authorizing the receiver to enter into the proposed contract, and dismissing the petition of the appellants, without prejudice to any rights they may have hereafter to sue for such damage as may be occasioned them by the removal of the tracks in question.

The claim that the appellants have a contract or property right to the continued use of the switch track in question is based upon the circumstances that one of them was instrumental in procuring the adoption of the city ordinance granting the right to use the street for that purpose and dedicated a part of its lot to secure the granting of that franchise; that, before doing so, it was assured by the officials of the Railway Company that the latter would put in the switch and operate it if the city granted the required franchise; and that property was bought and improved in reliance on such assurance. It is not claimed that the switch track was paid for or is owned by the appellants, or either of them. If they have the right claimed, there is no corresponding obligation on either of them to continue to use the switch track. So far as appears, each of them retains the unconditional right to cease at any time to make use of that track or to carry on the business which is served by it. If there is a contract for the continued operation of that track, it is one which is not specifically enforceable against the appellants or either of them. The Railway Company's receiver was not a party to a contract on the subject, if there was one. To enjoin him from removing the switch track would amount to requiring specific performance by him of a contract to which he is not a party, and which is not specifically enforceable against the appellants at his instance. There is no mutuality of either

obligation or remedy. The reciprocal feature of the duty of specific performance which is enforceable in courts of equity is not to be lost sight of. It is a recognized ground for refusing redress by specific performance that it could not successfully be sought against the party applying for it. Where there is such a lack of mutuality, it is an additional impediment in the way of granting the exceptional equitable remedy of specific performance that the party seeking it fails to show that he has not a full, complete and adequate remedy at law for the damage, loss, or injury suffered in consequence of the threatened breach of duty sought to be specifically enforced. To say the least, there was no convincing showing of a lack of an available and adequate legal remedy.

The petition of the appellants contains general statements to the effect that irreparable loss and damage will be occasioned to them by the threatened removal and abandonment of tracks on Pacific avenue serving their plant. The pleadings and evidence do not disclose facts requiring the conclusion that appellants cannot obtain compensation at law to which they may become entitled for the loss or damage caused by the removal of the tracks. If the appellants have a cause of action against any one based upon a discontinuance of the tracks, it is against the city of Dallas and the Texas & Pacific Railway Company, one or both. The insolvency of neither of those parties is shown. It was not shown that the proposed removal was to be so effected as necessarily to cause the interruption or cessation of the business of the appellants in Dallas. While it is shown that the value of the structure in which that business is conducted would be impaired by removal of the track, it is not satisfactorily shown that the value of the lot with the structure on it would be less after the railway track shall have been removed from the street than it was before. There was evidence tending to prove that the value of property on Pacific avenue would be enhanced by the removal of the tracks. It is not shown that the business of the appellants cannot as well and profitably be carried on in the proposed new industrial district, or in another part of Dallas, where railroad facilities would be obtainable. If the record be regarded as showing that any one is liable to the appellants for a loss resulting to them from such a change, it cannot be regarded as convincingly showing that they are without a full, complete, and adequate legal remedy for the enforcement of that liability.

It is not necessary to decide whether the foregoing considerations by themselves are enough to justify the refusal to grant an injunction having the effect of preventing the discontinuance of the use of railroad tracks on Pacific avenue, so far as concerns the serving of the plant of the appellants. The continuance of the conditions resulting from the use of that street by the Railway Company is not only a hardship on that company, subjecting it to burdens and liabilities which may be escaped or materially lessened by a practicable change of location, an advantageous opportunity to make which is offered, but is against the public interest. The street has become such a one that the continued use of it by the Railway Company is not compatible

with the safety and convenience of a populous community. If the appellants have the contract or property right claimed as the basis of the relief sought, it does not follow that they can obtain that relief when it appears that paramount interests will, or even may, be interfered with by granting it. Beasley v. Texas & Pacific Ry. Co., 191 U. S. 492, 24 Sup. Ct. 164, 48 L. Ed. 274; Texas & Pacific Ry. Co. v. City of Marshall, 136 U. S. 104, 10 Sup. Ct. 846, 34 L. Ed. 385; Northern Pacific R. Co. v. Territory of Washington, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092. In the opinion in the last-cited case it was said:

"The court will never order a railroad station to be built or maintained contrary to the public interest."

Change in local conditions may make it against the public interest for such railroad operations as the Railway Company is engaged in to be carried on in a street in the heart of a city along and across which there is considerable and increasing traffic of other kinds. Certainly a court is justified in refusing an injunction sought as a means of enforcing the continued use for steam railroad purposes of a much-traveled city thoroughfare, especially where it is not made plain that the party seeking such relief cannot in an action at law recover such compensation as it may become entitled to for the loss or damage caused to it by the discontinuance of such use.

The conclusion is that the court did not err in refusing the injunction sought and in dismissing the petition of the appellants without prejudice to their right to enforce whatever liability to them may be incurred by the proposed removal of the track in question.

The decree to that effect is affirmed.

OKLAHOMA CITY v. ORTHWEIN.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 4936.

1. COURTS ⚷107—PAVING—ASSESSMENT OF BENEFITS—STREET RAILROADS.
   A decision of the Supreme Court of Oklahoma, construing state statutes and holding that the right of way of a street railroad company is assessable for paving benefits, where it is held in fee, *held* to also apply to right of way held by grant without reverter.

2. JUDGMENT ⚷708—JUDGMENT AS EVIDENCE—INVALIDITY OF ASSESSMENTS.
   In an action against a city, based on its alleged neglect and refusal to make a reassessment of benefits to pay paving bonds, to supply the deficiency caused by its assessment of property which was not subject thereto, a judgment recovered against the city by the owner of such property, declaring the assessment invalid and enjoining its enforcement, *held* admissible in evidence.

3. MUNICIPAL CORPORATIONS ⚷374(1)—CONTRACT FOR PUBLIC IMPROVEMENTS—LIABILITY FOR NONPERFORMANCE.
   Where a municipal corporation, which has power to make a contract for internal improvements, contracts for them and stipulates that the agreed price shall be paid out of funds to be realized from special assess-

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

ments, which it has power to make, but fails and refuses to make sufficient valid assessments, it becomes primarily liable to pay the contract price itself.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action at law by Walter E. Orthwein against the City of Oklahoma. Judgment for plaintiff, and defendant brings error. Reversed in part.

B. D. Shear, A. T. Boys, and E. E. Blake, all of Oklahoma City, Okl., and W. M. Howenstein, of Grandfield, Okl., for plaintiff in error.

G. A. Paul, of Oklahoma City, Okl., for defendant in error.

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

CARLAND, Circuit Judge. The city of Oklahoma City in 1908 deemed it necessary to pave Classen boulevard. In 1911, it deemed it necessary to pave Linwood boulevard, from the west line of Western avenue to the center line of Tenth street, and also Exchange avenue. Proceedings were regularly taken as provided by law for the construction of said paving. The benefits resulting from said paving were assessed upon the lands fronting or abutting thereon. The contractor constructing the paving was paid by the issuance by the city of improvement bonds, to be paid by the money arising from the collection of the assessments made for benefits. The defendant in error, hereafter plaintiff, purchased all the improvement bonds issued for said paving from the contractor, for value, and without notice of any defect in the benefit assessment.

Along the center of Linwood boulevard, Exchange avenue, and Classen boulevard, an electric railway company, hereafter Railway Company, occupied and used a right of way which it had curbed and otherwise improved. The paving done by the city on the boulevards and avenue above mentioned was on the driveways located on both sides of the right of way. The Railway Company refused to pay the amount of the benefits assessed against it, and this fact prevented the accumulation of a sufficient fund to pay all the improvement bonds and interest thereon. The Railway Company claimed that its right of way did not front or abut upon the pavement, within the meaning of the law authorizing the construction of the pavements. Under these conditions the plaintiff made a demand upon the city to cause a new assessment of benefits upon property liable therefor, in order that the bonds owned by him could be fully paid. The city having, as claimed by the plaintiff, unreasonably delayed to make a new assessment, the present suit was brought against the city on the theory that it was liable on account of its willful neglect and refusal to perform a duty imposed upon it by law to create a fund necessary and essential under the obligations contained in the bonds for the purpose of meeting the payment of the installments and interest due thereon.

There were four paving contracts involved in the improvement mentioned, two for Exchange avenue, and one each for the boule-

vards. The complaint in this action was in four counts, corresponding to the four contracts. The trial below resulted in a directed verdict for the plaintiff as follows: First count, $653.10 and interest; second count, $2,744.68 and interest; third count, $754.14 and interest; fourth count, $4,076.02 and interest. The recovery was measured by the invalid portions of the assessments shown by the four ordinances levying the same and recited in the bonds owned by the plaintiff. The only ground of invalidity urged against the assessments was that the right of way of the Railway Company was not assessable for benefits. The trial court sustained this view. Judgment having been entered on the verdict, the city has brought the case here for review.

Before, however, proceeding to consider the assignments of error, it is proper to say that, since the trial of this case below, the Supreme Court of Oklahoma, in the case of Oklahoma Railway Co. v. Severns Paving Co. et al., 170 Pac. 216, a case involving the right of the city of Oklahoma City to assess the right of way of the Railway Company for benefits resulting from paving of the character described in this action, has decided that, where the Railway Company's title to its right of way amounts to a fee title, the assessment of benefits for paving is valid. The decision of the Oklahoma Supreme Court in the case cited was based upon a construction of the statutes of Oklahoma and particularly sections 511, 1175, and 1382, Laws of Oklahoma 1910, and is binding on this court so far as it construes said statutes. The Supreme Court of Oklahoma in the above case affirmed a judgment awarding a mandamus compelling the defendant to make a new assessment. The record in the present case shows that, as to the paving mentioned in the first count, the grant of the right of way of the Railway Company was in perpetuity. The right of way involved in the second and third counts was obtained in part by a grant from the Park Site Realty Company for use as a right of way, with reverter to the grantor upon the abandonment or discontinuance of such use, and in part by dedication from the Packing House Development Company in fee simple and as a right of way without limitation, and in part by grant from Edward Morris, with right of reverter in the grantor in case of the abandonment of such right of way.

[1] In view of the decision above mentioned and the statutes therein construed, we are of the opinion that the assessment of benefits for the paving involved in this action was valid, where the title of the Railway Company to its right of way was in fee, or where it was for a right of way without reverter. There are no data in the record by which we can compute in dollars and cents the invalid or valid portions of the assessments involved in the second and third counts, and the case will have to be remanded, in order that the proper computation may be made. What the title of the Railway Company was, as to the right of way involved in the fourth count, does not appear. The evidence, however, shows that on April 21, 1910, the Oklahoma Railway Company commenced action in the United States Circuit Court for the Western District of Oklahoma against the present

defendant, Bob Parman, city clerk, and Charles McCafferty, county treasurer of Oklahoma county, wherein the assessment involved in the fourth count was attacked as invalid. The defendants filed a demurrer. Subsequently, on April 1, 1912, the Railway Company filed an amended and supplemental complaint, to which the defendants also filed a demurrer. On March 29, 1912, the demurrer was overruled, with leave to answer. No answer being filed within the time limited, an order pro confesso was entered April 25, 1912, and on May 31, 1913, a final decree was entered, declaring the assessment involved in the fourth count of the complaint in this action invalid, and permanently enjoining the defendant from taking any proceedings to collect said assessment. This decree was not appealed from and became final. The court below, being the successor of the Circuit Court, properly followed that decision, and we have no authority on this writ of error to review it. The assessment involved in the fourth count must therefore be regarded as invalid, and the plaintiff, if otherwise entitled to recover, should have judgment on the fourth count.

We now come to consider the assignments of error urged by the defendant. So far as the validity of the assessments for benefits charged against the Railway Company's right of way is concerned, we have already expressed our views following the decision of the Supreme Court of Oklahoma in Railway Co. v. Severns Paving Co., supra. The first count is eliminated from consideration for the reason that the assessment was valid, and the plaintiff is subrogated to the rights of the paving contractor, and can enforce the payment of the benefits assessed for the payment of the paving involved in the first count. The portions of the pavement involved in the second and third counts where the Railway Company's title to the right of way amounts to the fee, under the decision of the Supreme Court of Oklahoma in the case above mentioned, are also eliminated. The question then for consideration is: May the plaintiff recover in this action a general judgment against the city for the proportionate amount of the invalid assessments represented by all of the fourth count and a portion of the second and third? Taking up the assignments of error in their order:

First. There was no error in denying the motion to make the complaint more definite and certain. The matter was discretionary, and no prejudice resulted.

[2] Second. There was no error in allowing the introduction into evidence of the record in the case of Oklahoma Railway Co. v. Oklahoma City et al. It was admissible for the purpose of showing that the assessment involved in the fourth count had been adjudicated invalid. It is true the parties were not the same as in the present action, but that was not necessary. The defendant was a party to that action, and the judgment therein was evidence against it in this case. The record was also evidence that the city had notice that the assessment had been declared invalid. It was also admissible as showing that the defendant had allowed a decree pro confesso to be

entered against it, and had taken no appeal therefrom, which was evidence of negligence.

Third. There was no error in admitting in evidence the claim filed by the plaintiff with the city officers. It was admissible on the question of notice of the invalidity of the assessments and on the question of negligence.

Fourth. There was no error in admitting the testimony of the witness Shartel concerning the building of sewers to drain the right of way of the Railway Company. While the evidence was not very material, it tended to show that the Railway Company had performed what it thought was its duty in the premises. It was not prejudicial in any event.

Fifth. There was no error in the introduction in evidence of the record in case No. 12380, Cleveland-Trinidad Paving Co. v. City of Oklahoma et al. The record was introduced in rebuttal of the testimony of Whit M. Grant, who had testified that he had no recollection of ever being informed as to the decision of the local district court with reference to reassessments.

Sixth. The claim that the power to pave is under the law and Constitution of Oklahoma given to the city officers, and not to the city, has no merit.

Seventh. When the verdict in this case was directed, the defendant requested the court to limit the judgment, so that it could be collected only from benefit assessments. There was no error in this ruling. The city, if liable at all, was liable generally as for negligence and refusal of duty.

Eighth. It is our opinion that the contractor could have maintained this suit if he still owned the bonds, and, having sold them to the plaintiff, the latter can maintain it. The city owes the duty to levy the new assessment to the one who owns the bonds.

Ninth. We have no dispute with the holding of the Supreme Court of Oklahoma that the determination of the amount of benefits is a legislative act and final, but this rule has no application where the property assessed is not liable for any assessment.

Tenth. The bonds upon which the verdict was directed were payable to bearer. They were all produced in court, and that was prima facie proof that the plaintiff was the owner.

Eleventh. The allowance of an amendment to the complaint at the trial, to the effect that the plaintiff sued for himself and other parties similarly situated, while probably erroneous, was not prejudicial. No recovery was had for any one except the plaintiff.

[**3**] Twelfth. Section 728, Comp. Laws of Oklahoma 1909, gave the defendant power to levy new assessments where the original assessment was invalid. On July 14, 1913, the plaintiff presented to the defendant his written request to cause reassessments to be made on account of the illegal assessments against the Railway Company's property, which the defendant failed to grant. Thereupon the plaintiff brought suit against the defendant, which was pending for about two years, and no reassessment was made from the time of bringing that suit and the institution of the present suit on April 27, 1915.

The defendant also allowed the complaint in the case brought by the Railway Company to be taken pro confesso, and never appealed therefrom. The law of Oklahoma, being Session Laws approved April 17, 1908 (Laws 1907-08, c. 10), provided that the city itself should in no case be liable on these improvement bonds; therefore the plaintiff was remediless, unless a valid assessment of benefits should be made and collected. In our opinion, the evidence showed that the city was guilty of negligence and of a willful refusal to make valid assessments to pay the bonds of the plaintiff. The limitation of liability of the city above specified does not, in our opinion, exclude a remedy based upon negligence and willful refusal to perform this duty. Where a municipal or quasi municipal corporation, which has the power to make a contract for internal improvements contracts for them, and stipulates that the agreed price of the improvements shall be paid to the contractor out of funds to be realized out of special assessments, or out of the proceeds of bonds it has the power to issue, and the corporation has power to make the assessments or to issue the necessary bonds, but fails to make sufficient valid assessments, or to issue sufficient bonds to provide the necessary funds to pay the contractor the contract price of his material and labor, or if it misappropriates such funds to other purposes, the corporation becomes primarily liable to pay the contract price itself. Barber Asphalt Paving Co. v. City of Denver, 72 Fed. 336, 340, 19 C. C. A. 139, 143; Bill v. City of Denver (C. C.) 29 Fed. 344; Argenti v. City of San Francisco, 16 Cal. 256, 281, 283; Beard v. City of Brooklyn, 31 Barb. (N. Y.) 142, 150; Commercial National Bank v. City of Portland, 24 Or. 188, 33 Pac. 532, 41 Am. St. Rep. 854; City of Louisville v. Hyatt, 5 B. Mon. (Ky.) 199, 201; City of Leavenworth v. Mills, 6 Kan. 288, 297; Reilly v. City of Albany, 112 N. Y. 30, 42, 19 N. E. 508; Michel v. Police Jury, 9 La. Ann. 67.

Both parties at the close of the evidence requested a directed verdict. The defendant, however, requested the court, in case his motion should be denied, to charge the jury in certain particulars. These requests to charge have been examined, and they present no reason why the verdict should not have been directed for the plaintiff. The entire record convinces that there is substantial evidence to sustain the verdict directed by the court, and that there was no error committed in this behalf.

The judgment on the first count is reversed. The judgment on the fourth count is affirmed, and the judgment based upon the second and third counts is reversed, and the cause remanded as to those counts, with instructions to the trial court to grant a new trial as to the amount due the plaintiff in the instances where in this opinion the assessment of benefits would be illegal. No costs to be taxed as against either party in this court.

THOMPSON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919. Rehearing Denied September 1, 1919.)

No. 4985.

1. POISONS ⟹2—HARRISON ANTI-NARCOTIC ACT—VALIDITY.
Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), declaring that it shall be unlawful for any person to sell, barter, exchange, or give away enumerated narcotic drugs, except in pursuance of the written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, but excepting physicians duly registered in the course of their professional practice, is constitutional.

2. POISONS ⟹4—HARRISON ANTI-NARCOTIC ACT.
Under Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), declaring that it shall be unlawful for any person to sell, barter, exchange, or give away certain narcotic drugs, except in pursuance of a written order of the person to whom such article is sold, on a form to be issued by the Commissioner of Internal Revenue, but which excepts physicians in the course of their professional practice, etc., it is an offense for a registered physician to sell narcotics.

3. STATUTES ⟹228—PROVISO—CONSTRUCTION.
A proviso in a statute must be strictly construed.

4. POISONS ⟹9—HARRISON ANTI-NARCOTIC ACT—EVIDENCE.
In a prosecution under Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), against a physician who sold large quantities of narcotics to habitual users of the drug, medical testimony as to recognized methods among physicians for treating persons addicted to the use of narcotic drugs was admissible, for the purpose of showing that the accused physician did not come within the exception as to physicians dispensing drugs in the course of their practice, for, while the act is in the guise of a revenue measure, it was intended to accomplish a moral purpose.

5. POISONS ⟹9—OFFENSES—EVIDENCE.
In a prosecution against a physician for violating Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), by dispensing narcotics to habitual users of the drug, the exclusion of a letter from the Commissioner of Internal Revenue in response to a query by defendant physician as to dispensing of narcotics *held* proper.

6. CRIMINAL LAW ⟹1186(4)—APPEAL—HARMLESS ERROR.
In a prosecution for violating Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), exclusion of a letter written by the Commissioner of Internal Revenue, in response to an inquiry of defendant physician as to the dispensing of narcotics, *held* harmless, under Judicial Code, § 269 (Comp. St. § 1246), as amended by Act Feb. 26, 1919, if erroneous.

7. CRIMINAL LAW ⟹1178—EXCEPTIONS—ABANDONMENT.
Where the only exception to the admission of evidence was that the court erred in receiving over objection prejudicial and harmful evidence, and the point was not presented either in the brief or oral argument, the matter will be deemed waived.

8. CRIMINAL LAW ⟹371(1)—EVIDENCE—OTHER OFFENSES—INTENT.
In a prosecution for violation of Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), evidence that defendant, a physician, dispensed the drug to addicts and to persons other than those specified in the indictment, is admissible to show his intent.

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

9. POISONS ⇐9—OFFENSES—EVIDENCE.
In a prosecution for violation of Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), by a physician, who dispensed the drug to many habitual users, evidence *held* sufficient to sustain a conviction.

10. CRIMINAL LAW ⇐815(4)—INSTRUCTIONS—HARRISON ANTI-NARCOTIC ACT.
In a prosecution against a physician for violation of Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), a request to charge that a physician cannot be convicted for dispensing prohibited narcotics in the treatment of a patient whose application is by letter, where the physician reduces the amount of the dose for purpose of treatment, was properly refused, because omitting the indispensable conditions that the physician must furnish the drug in good faith and keep the required record..

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

Bascom C. Thompson was convicted of violating Harrison Anti-Narcotic Act Dec. 17, 1914, § 2 (Comp. St. § 6287h), and he brings error. Affirmed.

Albert D. Nortoni, of St. Louis, Mo., for plaintiff in error.

Vance J. Higgs, Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

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

TRIEBER, District Judge. The plaintiff in error, hereinafter referred to as the defendant, was found guilty by a jury on three counts of an indictment charging him with violations of section 2 of the Harrison Anti-Narcotic Act of December 17, 1914 (38 Stat. 786, c. 1 [section 6287h, U. S. Comp. Stat. 1918]).

There were four counts to the indictment, but by direction of the court the jury returned a verdict of not guilty on the fourth count. The counts are all in the same language, except that each charges the defendant with dispensing morphine sulphate to a different person, at a different time, and in different quantities. Each count charges that the defendant was a physician duly registered with the collector of Internal Revenue of the United States, as required by this act, as a dealer in and dispenser of opium, coca leaves, and their salts, derivatives, and compounds, and that he knowingly, willfully, and not in the course of his professional practice only, sold, bartered, dispensed, and distributed—in the first count to one Louis M. Wood, 88 grains of morphine sulphate, a derivative of opium; in the second count, 468 grains, to Mrs. William Cosgrove; and in the third count, 236 grains, to Pearl Spellman; that the sales were not made in the course of his professional practice only, nor in pursuance of a written order from the purchaser on forms issued in blank for that purpose by the Commissioner of Internal Revenue, as required by the act. Each count then proceeds to negative the other exemptions in the act, although that was unnecessary under the provisions of section 8 of the act (Comp. St. § 6287n).

[1] The defendant attacked the constitutionality of the section of the act under which the indictment was drawn by a demurrer to each

count of the indictment, again by special requests for instructions to the jury, and after the return of the verdict by a motion in arrest of judgment. The District Court sustained the constitutionality of the act.

Since the submission of this case in this court the Supreme Court in United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493, and Webb v. United States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497, opinions filed March 3, 1919, sustained the constitutionality of this section. The identical questions now involved in this case were before the Supreme Court in those cases. In the Webb Case, which came before the court on certificate from the United States Circuit Court of Appeals for the Sixth Circuit, the following questions of law were certified:

(1) "Does the first sentence of section 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor, and who cannot obtain an order blank, because not of the class to which such blanks are allowed to be issued?"

(2) "If the answer to question 1 is in the affirmative, does this construction make unconstitutional the prohibition of such sale?"

(3) "If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of section 2?"

The court answered the first in the affirmative and the second and third in the negative. This disposes of this contention of the defendant.

There are a large number of assignments of error, but most of them are to the refusal of the court to give certain special instructions to the jury, which in effect declare the section of the act involved unconstitutional, and therefore need not be considered in this opinion.

[2] One of the grounds assigned in the demurrer was that the act does not make it an offense for a registered physician to sell the narcotics described in the act under any circumstances. Section 2 of the act clearly covers offenses charged in these counts of the indictment. It reads:

"That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

And then it excepts, among others, a physician duly registered, under the act, "in the course of his professional practice."

In the Doremus Case the defendant was charged, as in the instant case, with being a registered physician and had sold a quantity of heroin without a written order on a blank form issued for that purpose. A copy of the indictment in that case will be found in 246 Fed. 958. The Supreme Court, after quoting the act, held:

"It is made unlawful for any person to obtain the drugs by means of the order forms for any purpose other than the use, sale or distribution thereof

by him in the conduct of a lawful business in said drugs, or the legitimate practice of his profession.

"It is apparent that the section makes sales of these drugs unlawful except to persons who have the order forms issued by the Commissioner of Internal Revenue, and the order is required to be preserved for two years in such way as to be readily accessible to official inspection. But it is not to apply (a) to physicians, etc., dispensing and distributing the drug to patients in the course of professional practice, the physician to keep a record thereof, except in the case of personal attendance upon a patient; and (b) to the sale, dispensing, or distributing of the drugs by a dealer upon a prescription issued by a physician, etc., registered under the act."

There was no error in overruling the demurrer on this ground.

[3, 4] It is assigned as error that physicians were permitted to testify as experts as to the well-recognized methods among the medical fraternity of treating persons addicted to the use of narcotic drugs for the purpose of curing them of the habit. The ground upon which the objection is based, as stated by counsel for defendant in his brief, is:

"It was incompetent and prejudicial, for that it tended to raise an issue, even on the erroneous theory on which the case was tried, as to whether or not the plaintiff in error was practicing his profession in a legitimate manner and in good faith, while dispensing the drugs to those who, the evidence shows, admittedly applied to him for treatment as a physician."

That such evidence is admissible was decided by this court in Samuels v. United States, 232 Fed. 536, 542, 146 C. C. A. 494, Ann. Cas. 1917A, 711. See 3 Chamberlayne on Evidence, § 2425. Such evidence is not conclusive, but, as stated by the learned trial judge in his charge to the jury:

"It is competent for medical men to give in evidence their expert medical opinion touching matters within the range of the medical science with which they are familiar; but such expert medical opinion and evidence is not binding upon the jury, and is received as advisory only. The jury is therefore permitted to regard such evidence as advisory, and reckon with it in the light and experience in human affairs, and to accept it or reject it in whole or in part, as you may see fit."

Counsel rely on School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, and Bruce v. United States, 202 Fed. 98, 120 C. C. A. 370, decided by this court. In the last-cited case, evidence of similar nature was introduced against objections, but the cause was not reversed upon that ground. It was the refusal of the court to charge the jury as requested in behalf of the defendant, as appears from the opinion. The indictment in that case was for violation of section 215 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. § 10385]), using the mails in a scheme to defraud.

The School of Magnetic Healing Case was an action to enjoin a postmaster from enforcing an order of the Postmaster General depriving the plaintiffs from using the mails; the order alleging:

"They being engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses."

The bill was dismissed by the trial judge on demurrer. It charged:

"That the plaintiffs, in their business, carried on and conducted, not only the treating of people afflicted with ills at their establishment, * * * but also engaged in the business of teaching and educating others in the practical science of healing, and that a large amount of their business consists of treatment by letter and advice to people throughout the United States and foreign countries; * * * that their business is founded largely and almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting, and remedying thereof."

In reversing the cause the court at the very beginning of the opinion stated:

"As the case arises on demurrer, all material facts averred in the bill are of course admitted."

And thereupon the court held, quoting from the headnotes:

"Such an allegation having been made in a bill of complaint, the business referred to cannot on demurrer be properly pronounced such a fraud within the statutes of the United States as will justify a postmaster withholding matter sent to complainants through the mail in answer to advertisements on an order issued by the Postmaster General under sections 3929 and 4041 of the Revised Statutes of the United States [Comp. St. §§ 7411, 7573], and section 4 of an act approved March 2, 1895, 28 Stat. 963, 964, c. 191; but in overruling the demurrer this court does not mean to preclude the defendant from showing on the trial, if he can, that the business of the complainants, as in fact conducted, amounts to a violation of such statutes.

"The statutes referred to were not intended to cover any case which the Postmaster General might regard as based on false opinions, but only cases of actual fraud in fact, in regard to which opinions formed no basis."

Neither of these cases is applicable to the facts in this cause. The good faith of the defendant treating these persons as a physician, for the purpose of curing them from the narcotic habit, is the main and only issue involved in this case.

The object of the act, although enacted under the taxing power of Congress, was no doubt intended to prevent the growing use of these narcotics, deemed a menace to the nation by Congress. In the language of Mr. Justice Holmes, in United States v. Jin Fuey Moy, 241 U. S. 394, 402, 36 Sup. Ct. 658, 659 (60 L. Ed. 1061, Ann. Cas. 1917D, 854):

"It may be assumed that the statute has a moral end as well as revenue in view, but we are of the opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right."

In United States v. Doremus, it was held:

"The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue"—citing, among other cases, Veazie Bank v. Fenno, 75 U. S. (8 Wall.) 535, 541, 19 L. Ed. 482; In re Kollock, 165 U. S. 526, 536, 17 Sup. Ct. 444, 41 L. Ed. 813; McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561.

See, also, the opinion of this court in Hughes v. United States, 253 Fed. 543, — C. C. A. —.

If physicians and the others mentioned in the exceptions can sell and dispense these narcotics, regardless of the fact whether it is done

in good faith for the relief of a patient, then the moral object of the act is entirely defeated. It certainly cannot be claimed that a physician selling these narcotics, not in good faith, for the purpose of securing a cure of one suffering from an illness, or to cure him from the morphine habit, is doing so "in the course of his professional practice only," as prescribed by the express language of the act. A proviso must be construed strictly, and it takes no case out of the enacting clause which does not fall fairly within its meaning. It carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words, as well as within the reason, thereof. United States v. Dickson, 40 U. S. (15 Pet.) 141, 165, 10 L. Ed. 689; Dollar Savings Bank v. United States, 86 U. S. (19 Wall.) 227, 22 L. Ed. 80; Leavenworth, etc., R. R. v. United States, 92 U. S. 733, 23 L. Ed. 634; Schlemmer v. Buffalo, etc., R. R. Co., 205 U. S. 1, 10, 27 Sup. Ct. 407, 51 L. Ed. 681; Boston Safe Deposit Co. v. Hudson, 68 Fed. 758, 15 C. C. A. 651; Aaron v. United States, 204 Fed. 943, 123 C. C. A. 265; Hopkins v. United States, 235 Fed. 95, 148 C. C. A. 589; United States v. Kansas City Southern Ry. Co. (D. C.) 189 Fed. 471, 476.

[5, 6] Did the court err in excluding the letter from the Commissioner of Internal Revenue to the defendant, in reply to a letter of inquiry made by the defendant? The questions submitted by the defendant stated facts materially differing from the evidence which had been introduced by the government in the case at bar, and on which it relied for a conviction. The questions were adroitly prepared by the defendant, so as to indicate good faith in the treatment of addicts applying to him for a cure.

Another ground upon which the letter was properly excluded is that it does not attempt to give any specific instructions or express the opinion of the Commissioner, except generally. The letter concludes:

> "No inflexible rule can be rendered as to the amount of any of the narcotic drugs which may be prescribed, administered, or dispensed by a physician to a patient, as this is a matter which can be determined only by the needs of each and every individual patient."

The ruling of the court was clearly not prejudicial. Section 269 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [Comp. St. § 1246]), as amended by the Act of February 26, 1919, c. 48, 40 Stat. 1181, provides:

> "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."

[7-10] It is claimed that the evidence did not justify the submission of the issues to the jury, and that the court erred in refusing to direct a verdict of not guilty on each of the counts.

Louis M. Wood, the person to whom the morphine is charged to have been sold by the defendant in the first count, testified that he lived in Springfield, Ill., and was an addict; that he wrote to the defendant at Ferguson, Mo., who, he understood, was putting out a cure for

addicts; thereupon the defendant mailed him a card, on which certain questions were printed, to be answered by the addict and returned to the defendant. The answers of Wood were inserted in the blanks of the card and returned by mail to the defendant. The following is a copy of the card:

"Name: Louis M. Wood. Age 33. Post office: Springfield. County: Sangamon. State: Illinois.

"State drug used: Morphine. How long used: 14 years. By mouth or Hypo. Hypo. Amount used weekly: 120 grains or 2 Btls. Amount used daily: 17 or 18 grs. Dose per day: 4.

"Are kidneys active: Not very. Give usual weight: 190. Present weight: 175."

Shortly after mailing the card the defendant sent him 120 grains of morphine, for which he was paid $10. Every week thereafter he ordered the drug by mail, and defendant sent it to him, reducing it from 2 to 4 grains weekly, until it had been reduced to 88 grains a week, when a government agent took it from him. The same course was pursued by the defendant in selling the drug to Pearl Spellman, the person he is charged with having sold to in the third count. She resided at Terre Haute, Ind., and the application for the drug was made by her through the mails, and the drug sent to her by the defendant by express.

The sales to Mrs. William Cosgrove, the person mentioned in the second count, were made in the office of the defendant at Ferguson, Mo., where she called on him for the purpose of obtaining it. The only examination he made of her condition before selling the drug was by asking her how long she had been addicted to the use of the narcotic, and by merely looking at her arm and limb where she had been using it hypodermically, and asking how much she used. She had used from 120 to 180 grains a week at one time, and had reduced to about 70 grains when she called on the defendant. He then sold her 70 grains. That was the only time he ever saw her personally, as she then returned to her home in Toledo, Ohio, where he sent her the drug every week by express, reducing it gradually to 65 grains a week. In none of the cases were the addicts required by the defendant to be confined, so as to prevent them from securing the drug elsewhere. Wood secured more of the drug from the defendant than he required, and saved some of it for future use, in case he should be unable to secure it from the defendant at a later time.

The physicians, introduced on the part of the defendant, Dr. Morris and Dr. Tyzzer, both testified—Dr. Morris, that "if morphine can be bought by the addict, no doctor would attempt to treat him by the reduction method, unless he confined him;" Dr. Tyzzer that "it is best that the patient should be confined in order to effect a cure," adding, "but if he really follows the directions, and does his part, the result would be the same," meaning that, if he would reduce the use of the narcotic as prescribed, then the result would be the same, although not confined. He also testified that, "if the person is a morphine addict, his will power is broken, and he cannot rely on his own action for any length of time." The physicians introduced by the

government all testified to the same effect, that unless confined an addict is never cured of the habit.

A number of other witnesses testified to having purchased narcotics from the defendant, without personally attending them. He sent it to them by express, they living in other states. Objections to their testimony were made and overruled. The only objection made to the testimony of these witnesses was that they were not named in the indictment; counsel for defendant saying:

"I just want to say that we had no notice of these witnesses. Whether our point is worth anything or not, I want to get it in."

This point was not presented by counsel in this court, either in his brief or in the oral argument, and the only reference to it in the assignment of error is:

"That the court erred in receiving, over defendant's objection and exception, prejudicial and harmful evidence introduced by the United States."

We may well treat this exception as abandoned, but even if it had been properly assigned as error, and insisted on in this court, it would not be error. Such evidence is admissible for the purpose of establishing the intent and bad faith of the defendant. Allis v. United States, 155 U. S. 117, 119, 15 Sup. Ct. 36, 39 L. Ed. 91; New York Mutual Life Insurance Co. v. Armstrong, 117 U. S. 591, 598, 6 Sup. Ct. 877, 29 L. Ed. 997; Moffatt v. United States, 232 Fed. 522, 533, 146 C. C. A. 489. The court in its charge limited this testimony to the question of the good faith solely. It charged:

"Evidence was offered and admitted in the course of the trial tending to prove sales of the drug by the defendant to persons other than those mentioned in the indictment. With respect to that, the court instructs you that, even if you believe from the evidence that the accused did sell and dispense morphine sulphate to persons other than those mentioned in the indictment, not in the course of his professional practice only, you cannot convict the defendant therefor; but you may consider such other sales, if such there were, in determining the intent, or system, or knowledge on the part of the defendant in selling to the persons set out in the indictment."

All the special requests for instructions to the jury, except those which requested the court to charge that the act, so far as it applies to the defendant was unconstitutional, were included in the court's charge, except request No. 11. That request was to the effect that under the act of Congress a physician cannot be convicted for dispensing the prohibited narcotics in the treatment of a patient, whose application is made by letter, and although the physician never comes in personal contact with such patient, provided he reduced the amount on each succeeding shipment of morphine, and furnished the morphine to the person mentioned, as in treatment for a morphine habit, in the course of his professional practice only. This request is in conflict with the act. It lacks two indispensable conditions: First, that the physician furnished the drug in good faith; and, second, that he made and kept the record required by subdivision "a" of section 6287h, U. S. Comp. Stat. 1918.

The evidence shows that the defendant has obtained an extended reputation as a dispenser of morphine sulphate. Addicts from dif-

ferent states would apply to him, and generally through the mails, and without any examination, or even seeing them, the defendant sent it to them. The slight reductions in the weekly sales were evidently merely a subterfuge for the purpose of evading the law. None of the purchasers was ever examined by him, as any reputable physician would naturally do when undertaking the treatment of a person for the purpose of effecting a cure.

Willie Brown and Mamie Nunley each purchased 120 grains weekly, although neither of them was an addict. Brown purchased it for the purpose of peddling it, and Mamie Nunley for Maude Kobein, an addict, in order to make up for the decreasing doses.

Morris Chase, who resided at Terre Haute, Ind., and whom the defendant never saw, obtained it on orders through the mails, and paid him $5 a week for the drugs sent, amounting in the aggregate to $220. His case the defendant never diagnosed. He testified that, when the doses were reduced, he ordered it through the mails in fictitious names, and obtained it in that way.

Chas. Blaker, another witness, testified that he obtained the drug from the defendant seven times, and about half a dozen times he obtained it by sending others for it.

It was also shown in evidence that from February 7, 1916, to October 24, 1916, defendant purchased 270,000 grains of morphine, close to 630 ounces. A number of other witnesses testified to purchases in the same manner, as those of whose testimony extracts have been made. Among them was Jack Barrett, who testified he obtained morphine from the defendant. He obtained it by writing to him from Terre Haute, without ever having been seen by him.

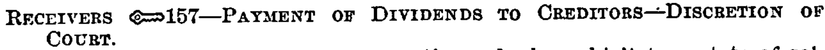
The evidence fails to show that a charge for professional services was ever made by the defendant, only the exorbitant price for the drug was collected.

A careful reading of the testimony convinces beyond a doubt that the defendant, under the cloak of a practicing physician, sold narcotics, and not in the regular practice of his profession, for the purpose of curing addicts, and it was the duty of the court to submit the issues of fact to the jury, whose finding is conclusive in this court. As we find no prejudicial error, the judgment is affirmed.

TODD et al. v. LIPPINCOTT et al.*

(Circuit Court of Appeals, Third Circuit. May 29, 1919.)

No. 2456.



RECEIVERS ⟹157—PAYMENT OF DIVIDENDS TO CREDITORS—DISCRETION OF COURT.

Receivers of an insolvent corporation, who brought it to a state of solvency and its business to such condition that it could shortly pay all its debts, secured and unsecured, from its earnings, *held* properly permitted to pay a dividend to unsecured creditors, to the exclusion of the holders of mortgage bonds on which interest was being paid as it accrued, and which were in litigation as to the question of their maturity because of prior defaults.

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

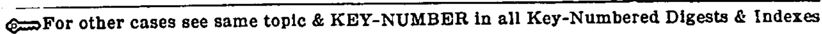
Suit in equity between M. Hampton Todd and Walter Wood, receivers of R. D. Wood & Co., and Heulings Lippincott and Alfred J. Major, receivers for Camden Iron Works. The receivers for the Wood Company appeal from an order authorizing receivers for the Iron Works to pay a dividend. Affirmed.

J. H. Brinton and William F. Norris, both of Philadelphia, Pa., for appellants.

Henry P. Brown, of Philadelphia, Pa., and J. H. Gaskill, of Camden, N. J., for appellees.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and DICKINSON, District Judge.

WOOLLEY, Circuit Judge. This is one of many controversies growing out of the insolvency and complicated relations of R. D. Wood & Company, a partnership, and Florence Iron Works and Camden Iron Works, corporations, disclosed in some measure by the opinion of this court in Wood v. Todd, 251 Fed. 530, 163 C. C. A. 524. The matter now before us had its rise in a petition by the receivers of Camden Iron Works to the District Court for authority to pay a dividend of thirty per cent. on the principal and interest of the corporation's unsecured debts and on a bill in equity filed in opposition by the receivers of R. D. Wood & Company, praying, first, that the holders of mortgage bonds of Camden Iron Works be allowed to share proportionately with the general creditors in the proposed dividend; and second, that the holders of said mortgage bonds be paid additionally a sum equivalent to the amount of a dividend previously paid the general creditors; or, in default of such payments, that cash in the hands of the receivers, equivalent in amount to the dividends paid and to be paid general creditors, be set aside for the protection of the said mortgage creditors. The District Court entered a decree dismissing the bill of the receivers of R. D. Wood & Company and granted the petition of the receivers of Camden Iron Works. From this decree, the receivers of R. D. Wood & Company appealed.



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

*Certiorari denied 250 U. S. —, 40 Sup. Ct. 12, 64 L. Ed. —.

The question on this appeal, as framed by the appellants, is:

"Where receivers are operating an insolvent corporation, may dividends be declared and paid to unsecured creditors to the exclusion of holders of bonds secured by a mortgage on the plant so operated, where foreclosure is not allowed and the insufficiency of the collateral is held to be immaterial?"

If this were an accurate statement of the question here involved, it would be impossible to escape the application of the law declared in Merrill v. National Bank of Jacksonville, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640, and Hitner v. Diamond State Steel Co. (C. C.) 176 Fed. 384, cited and insistently relied upon by the appellants. This law, in effect is, that in a suit in equity brought for the purpose of administering the affairs, paying the debts and distributing the assets of an insolvent corporation, through a receivership, the distribution of such assets shall be pro rata among the creditors, subject to established liens, preferences and priorities, in determining which, a secured creditor may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom, provided, of course, that dividends must cease when the claim has been paid in full.

The real question in this case can best be understood—and the applicable rule of law be found—from a statement of the facts and circumstances out of which the question arose. They are these:

The firm of R. D. Wood & Company practically owned and actually operated Camden Iron Works, acting as its financial, purchasing, and selling agent for many years in the manufacture of iron and steel products. Of the 8,000 shares of preferred stock of Camden Iron Works, the firm and its partners owned 7,559 shares; of the 7,000 shares of common stock they owned 5,517 shares; and out of the corporation's issue of $750,000 bonds secured by mortgage, the firm held $660,000; and of its general debts the firm was a creditor for more than $400,000.

Because of occurrences which have nothing to do with the present controversy, the three concerns in 1914 became wholly insolvent and passed into the hands of receivers.

From insolvency in 1914, the firm of R. D. Wood & Company has today become solvent. The only pertinency of this fact to the present controversy is, that the payment or withholding of dividends on the indebtedness of the mortgage bonds of the Camden Iron Works will not affect the payment of the debts of R. D. Wood & Company to its creditors; it will affect only the payment of profits to the surviving member of that firm and to the personal representative of the deceased member.

From insolvency that appeared hopeless in 1914, Camden Iron Works has grown to affluence. This has been due to excellence of business management on the part of the receivers which is little short of remarkable, and also to a close and intelligent co-operation between the receivers and the court that is highly creditable to both.

Heulings Lippincott was first appointed sole receiver of Camden Iron Works, with authority to conduct the business. The funds in hand

were entirely inadequate. By able financeering, the receiver obtained money with which to resume operation. Alfred J. Major later was appointed co-receiver. Under their joint management, the business changed immediately from steady losses to mounting profits. During their incumbency, the receivers did a business of more than $10,000,000 and disbursed more than $9,000,000. They paid the bondholders $95,000 interest in arrears and maintained interest payments as they matured in sums aggregating $112,500. In June 1918, they paid a dividend of thirty per cent. on unsecured debts and thirty per cent. on interest that had accrued thereon, and now ask authority to pay a like dividend. These payments of interest and dividends were made possible by profits earned during the receivership in the large amount of $1,094,719.60.

The obligations of the estate as they stand today are, in round numbers, $750,000 first mortgage bonds, of which the receivers of R. D. Wood & Company hold $660,000; $52,000 other mortgages; and about $600,000 general claims, of which the receivers of R. D. Wood & Company have filed about $329,000. To meet these obligations, secured and unsecured, the receivers have current assets of cash, bills and accounts receivable, etc., amounting to $1,530,970, and current liabilities amounting to $153,827, leaving net assets of $1,377,142, to which is to be added the plant and its equipment at its appraisal in October 1914, of $1,356,431. It thus appears that the current assets are alone nearly sufficient to pay all debts of the receivership, secured and unsecured, and that current assets and the plant at its appraised figure would, if need be, pay the same twice over.

In the matter of business as distinguished from finances, it appears that the receivers have unfinished contracts presently in hand which amount to more than $1,000,000, with enough coal and iron in stock and paid for to cover the contracts.

This statement of the affairs of the receivership is made somewhat in detail for the purpose of showing that the condition of insolvency of Camden Iron Works, which brought about the receivership, has disappeared, and that the proposed dividend does not involve the liquidation of an insolvent corporation and the distribution of its capital assets, but concerns merely the distribution of earnings of the receivership which exceed its business requirements, a situation to which the law of the cases cited and previously adverted to is in no sense applicable.

If the distribution to be made by the proposed dividend is out of the ordinary, as the appellants believe, it is because the earnings out of which the dividend is to be paid are etxraordinary, and because it is justified by the history of the receivership and by the relation which the different creditors, secured and unsecured, bear to the corporation and to one another. R. D. Wood & Company, the principal secured creditor, owns four-fifths of the stock of Camden Iron Works, and holds six-sevenths of its mortgage indebtedness and three-sixths of its general indebtedness. With respect to the mortgage indebtedness, there are two questions yet to be determined. The first is, whether the original default in interest on the bonds prior to receivership brought

about the maturity of those obligations, and, if so, whether the situation was changed by the subsequent acceptance by the bondholders of all interest which was in arrear and which latterly was paid on interest dates. The second is, whether the bond issue is valid in amount, it being claimed that the security of $660,000 in bonds taken and held by R. D. Wood & Company was in excess of the indebtedness of Camden Iron Works to R. D. Wood & Company at the time the mortgage was made.

It would be inequitable to make general creditors await the determination of these questions before receiving dividends, when, manifestly, payment of the mortgage bonds in full cannot be made until these questions are determined, and when the payment of the proposed dividend would in no sense deplete the mortgage security.

Both concerns now being solvent, there is no question between general creditors of R. D. Wood & Company and general creditors of Camden Iron Works with respect to the payment of their debts. The question is simply this: Whether R. D. Wood & Company and members of the Wood family composing the firm, as holders of mortgage bonds of Camden Iron Works, which are in litigation as to their maturity and amount and which are abundantly protected not only by their original security but by an increase of assets derived from the administration of the receivership, shall now be paid a dividend from earnings produced largely on credits extended by others at their instance. As no contractual rights arising from the bond obligations are violated and no security of the bondholders is prejudiced by the payment of the proposed dividend to general creditors, we are not disposed to disturb this one of the many orders which the District Court has been called upon to make in the admirable administration of this estate.

The decree below is affirmed.

In re HELLER, HIRSH & CO.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 186.

INTERNAL REVENUE ⚷7—INCOME TAXES—LIABILITY OF TRUSTEE IN BANKRUPTCY.

A trustee of a bankrupt corporation, who is not carrying on its business, but has received funds as a result of a compromise made by him with a foreign corporation of a claim for nonpayment of salary and commissions, is not liable to pay an income tax under Act Sept. 8, 1916, § 13(c), being Comp. St. § 6336m, since under such section only net income earned by a trustee while operating the business of a bankrupt corporation is taxable.

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

In the matter of Heller, Hirsh & Co., a corporation, bankrupt. A petition by the United States attorney for an order directing the trus-

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

tee of the bankrupt to pay to the collector of internal revenue for the Second district of New York $2,400 as taxes on income under Act Sept. 8, 1916, as a preferred claim, was denied, and the government appeals. Affirmed.

Francis G. Caffey, U. S. Atty., of New York City (Ben A. Matthews and Vincent H. Rothwell, Asst. U. S. Attys., both of New York City, of counsel), for collector of internal revenue.

Rushmore, Bisbee & Stern, of New York City (Abraham Freedman, of New York City, of counsel), for trustee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. The United States attorney filed a petition for an order directing the trustee of the bankrupt corporation to pay to the collector of internal revenue for the Second district of New York the sum of $2,400 under Act Sept. 8, 1916, c. 463, 39 Stat. 756, as taxes upon income for the year 1916, as a preferred claim. The trustee was not carrying on the business of the bankrupt, and the funds said to constitute net income were the result of a compromise made by him with a foreign corporation of a claim for nonpayment of salary and commissions by the foreign corporation to the bankrupt corporation as its agents between the years 1910 and 1914. The referee, John J. Townsend, Esq., recommended that the prayer of the petition be denied, and his report, which is set out below, was confirmed without opinion by Judge Hough. We are quite clear that under section 13(c) of the act of 1916 (Comp. St. § 6336m) only net income earned by a trustee while operating the business of a bankrupt corporation is taxable.

The order is affirmed.

NOTE.—Referee Townsend's opinion, referred to in the opinion, here follows:

"Instead of making an order as referee on the present motion, I deem it more convenient to report to the judges the order I recommend should be made by them.

"On June 19, 1917, the United States attorney for the Southern district of New York filed with the referee the accompanying petition and notice of motion asking for an order directing Francis L. Kohlman, the trustee in bankruptcy of the bankrupt corporation, to pay to the collector of internal revenue for the Second district of New York the sum of $2,400 as a preferred claim against the estate of the said bankrupt corporation and against the said trustee in bankruptcy.

"The motion papers present the claim as an income tax for the year 1916, due and owing the United States of America by the trustee in bankruptcy; the tax being alleged to have accrued upon the income received by the trustee in bankruptcy during the year 1916, under the provisions of the act of Congress approved September 8, 1916. On June 19, 1917, the trustee in bankruptcy filed with the referee his affidavit denying any liability for the claim.

"On November 15, 1917, the parties filed with the referee the accompanying stipulation setting out the facts. This stipulation should be read at this point of my report. Among other facts set out in the stipulation the following appear:

"On April 23, 1915, the corporation (which had been engaged in business as a broker and dealer in fertilizing material) was adjudged a bankrupt after a petition in bankruptcy had been filed against the corporation (paragraph 2). At such date the bankrupt corporation was the owner of a claim or chose in

action against an association organized under the laws of the empire of Germany, known as the Kalliwerke-Solstedt, which claim, amounting to $396,-973.44 (for commission and salary), had accrued in the year 1914 and in prior years (paragraphs 3 and 4). On July 27, 1916, this claim, with certain claims against the International Agricultural Corporation, were compromised by the payment to the trustee in bankruptcy of $119,275 (paragraph 6). Paragraphs 8, 9, and 10 set out certain deductions with which the trustee in bankruptcy deems himself entitled to be credited, if it be determined that he is a taxable party. Paragraph 12 sets out certain deductions with which the trustee in bankruptcy claims that the bankrupt corporation is entitled to be credited, if the fund collected be regarded as deferred income of the bankrupt corporation for the years 1910 to 1914, both inclusive. Paragraph 13 sets out that during the years 1912 to 1915, inclusive, the corporation sustained losses in its business in excess of the amount of its gross profits.

"The view I take of the case renders the facts set out in the stipulation, in my opinion, in large part immaterial. The basis of the claim of the government is tabulated in paragraph 9 of the stipulation; the government in its brief claiming the balance of $26,789.41 to be net taxable income upon which the government claims an income tax against the trustee in bankruptcy for the year 1916. The claim is advanced by the government under the act of September 8, 1916. This act superseded the prior act of October 3, 1913 (38 Stat. 114, c. 16). Sections II, A, B, C, D, E, F, G.

"Carefully prepared briefs have been filed with the Referee by the parties. I find in the briefs no decisions which I deem decisive of the present motion, viz. no decisions where the government asserts a claim for an income tax against a trustee in bankruptcy of a corporation or individual adjudicated a bankrupt and therefore presumably insolvent. I refer below to certain decisions which in my opinion aid in deciding the present motion.

"In my opinion the present motion depends for its determination upon a judicial interpretation of the act of September 8, 1916, a copy of which act accompanies this report. Such interpretation should be a fair one. It is not the duty of this court or of the government authorities to resort to Procrustean methods of interpretation against the taxpayer.

"I find nothing in the act of September 8, 1916, to indicate that Congress intended to impose an income tax upon a trustee in bankruptcy in respect to the assets of a bankrupt corporation which he has taken over to be marshaled and distributed among the creditors of the corporation. To my mind the text of the act of September 8, 1916, does not indicate any such purpose. This view of the act does not deprive the government of its just due. The dividends declared and distributed to the creditors are presumptively income in the hands of the latter subject to an income tax to be assessed against the latter.

"Part I of the act of September 8, 1916 (Comp. St. § 6336a–6336iii), deals with the income tax on individuals: Section 1 (Comp. St. § 6336a) provides for a tax on 'the entire net income' of the individual. Section 5 and section 6 (Comp. St. §§ 6336e, 6336f) provide for certain deductions before the amount of the 'net income' is determined. Section 2(b) and 8(c) (Comp. St. §§ 6336b, 6336h) contemplate cases where the corpus of the individual's property (both after his death or during his lifetime) is in the possession of and the income received by persons acting in a fiduciary capacity.

"There is not the slightest suggestion in part I of the statute either that Congress intended to impose an income tax upon an insolvent individual liquidating his own estate or upon the liquidator of an insolvent individual's estate, nor is there any suggestion that it entered into the mind of Congress that such insolvent individual or his liquidator should be regarded as having a 'net income.'

"Such being my conclusion with respect to individuals dealt with in part I of the act, I pass to part II of the act (Comp. St. §§ 6336j–6336n), dealing with the income tax on corporations. I find nothing in part II to indicate that Congress intended to apply a different rule in the case of corporations from that enacted in the case of individuals. Section 10 (Comp. St. § 6336j) imposes an income tax upon the 'total net income' received by a corporation. Section 12

(a), being section 6336*l*, Comp. St., provides for certain deductions before such 'net income' is ascertained.

"Great stress is laid by the government on the provisions of section 13(c) of the act of September 8, 1916. The presence of subdivision (c) in the act of September 8, 1916, and its absence from the prior act of October 3, 1913, has to my mind no significance in the present case in view of the peculiar language of subdivision (c).

"The language used in subdivision (c) shows that the subdivision was not intended by Congress to apply in the case of receivers or trustees in bankruptcy or assignees who merely marshaled and distributed the assets of an insolvent corporation among its creditors. In terms subdivision (c) applies only in cases where receivers or trustees in bankruptcy or assignees 'are operating the property or business of corporations' and thus may be in the receipt of a 'net income' as defined in the prior sections of the act. I regard the quoted words as of marked significance.

"To my mind the subdivision was inserted in the act to meet the specified case of the profitable operation of the business of a corporation by the officers mentioned; for instance, the operation of the business of a railroad corporation by receivers or the operation of the business of a manufacturing corporation by a trustee in bankruptcy, etc.

"In either of such cases it is quite possible that the operation of the business might result in a net income, a result which Congress sought very properly to reach. See Scott v. Western Pacific R. R. Co., 246 Fed. 545, 548, 158 C. C. A. 515 (C. C. A. 9th Circuit, 1917). I repeat my conviction that in enacting subdivision (c) Congress had in mind the definite case so aptly described by the language used, and not the case of the officers mentioned when acting merely as liquidators.

"The decisions rendered in this circuit, where receivers were engaged in operating the business of street railroad corporations, give some support to the view I have expressed, although the cases arose under the so-called United States Corporation Tax Law of August 5, 1909, c. 6, 36 Stat. 112, and not under the Income Tax Acts of October 3, 1913, or September 8, 1916.

"It has been held that the Corporation Tax Law of 1909 imposed an excise tax upon the business of a corporation in a sum equivalent to 1 per cent. upon the 'entire net income' of a corporation above $5,000. It is to be noted that whether the tax imposed be termed an excise tax or a direct income tax, its imposition depended upon the existence of a 'net income.'

"The United States district attorney applied to the Circuit Court to compel the receivers of the Metropolitan Street Railway Company and the receiver of the Third Avenue Railroad Company to file returns for those corporations for the years 1909 and 1910.

"The Circuit Judge (Pennsylvania Steel Co. v. New York City Railway Co. [D. C.] 193 Fed. 286) held (bottom of page 287) that the statute was not intended to impose a tax upon the income realized from the assets of a bankrupt corporation whose property had been taken over by a court through its officers to be marshaled and distributed and that the language used did not indicate any such intent.

"This ruling, denying the application of the United States district attorney against the receivers, was affirmed by the Circuit Court of Appeals. 198 Fed. 774, 117 C. C. A. 556. The opinion states that such statutes are to be strictly construed, and that the act of 1909 (198 Fed. 775–777, 117 C. C. A. 557–559) manifested no intent to impose a tax except where a corporation is carrying on business, and not where it is insolvent and in the hands of receivers.

"The decision of the Circuit Court of Appeals was affirmed by the United States Supreme Court (United States v. Whitridge, 231 U. S. 144, 149, 34 Sup. Ct. 24, 25 [58 L. Ed. 159]), the court holding that receivers of insolvent corporations were not within 'the spirit' or 'the letter' of the act. Attention is also called to the recent decision by Hotchkiss, J., in Lathers v. Hamlin, 102 Misc. Rep. 563, 170 N. Y. Supp. 98.

"The decisions cited in the brief filed by the government, such as Edwards v. Keith, Collector, 231 Fed. 111, 145 C. C. A. 298, L. R. A. 1918A, 498 (C. C. A., 2d Circuit), and Towne v. Eisner, Collector, 245 U. S. 418, 38 Sup. Ct. 158,

62 L. Ed. 372, L. R. A. 1918D, 254 (January, 1918), turning as they do on what is and what is not taxable income, no question arising in those cases as to the status of the taxes, are not pertinent in my view of the case before me.

"For like reason I have not discussed the correctness of the amount of net income upon which the government claims a tax. This amount, as well as his liability for any tax, is challenged by the trustee in bankruptcy.

"I am of the opinion that the trustee in bankruptcy is entitled to an order denying the prayer of the petition filed by the United States attorney for the Southern district of New York, on behalf of the collector of internal revenue for the Second district of New York."

MEYER v. UNITED STATES. ASERSON v. SAME. SCHLOSS v. SAME.

(Circuit Court of Appeals, Seventh Circuit. March 15, 1919. Rehearing Denied May 6, 1919.)

Nos. 2411-2413.

1. CONSPIRACY ⚷28—CONCEALMENT OF BANKRUPT'S PROPERTY.
   Insolvent debtors can be guilty of conspiracy to hide their property, so that their creditors cannot reach it through bankruptcy proceedings, which the debtors are expecting to be instituted; it not being necessary that at the time of the conspiracy the proceedings should be pending and a trustee appointed.

2. INDICTMENT AND INFORMATION ⚷117—INFERENCES AGAINST PLEADER.
   The rule that inferences are to be taken against the pleader does not extend to imagining inferences that are contrary to the fair commonsense reading of the averments.

3. CONSPIRACY ⚷43(6)—INDICTMENT—INFERENCES.
   In indictment for conspiracy to hide property in view of expected bankruptcy proceedings against defendants, averments that in furtherance of the conspiracy defendants turned over the check of H., belonging to them, to A., *held* not to allow inference that they lawfully turned it over.

4. CRIMINAL LAW ⚷412(3)—CONCEALMENT OF BANKRUPT'S PROPERTY—EVIDENCE—DECLARATIONS.
   Statements of firm's business condition, made by partners a month before bankruptcy proceeding, *held*, on prosecution of them for conspiracy to conceal assets from the trustee, in connection with proof of relatively small amount of property found by trustee, to be material circumstances in relation to the concealing of firm's assets, and admissible as declarations against partners making them.

5. CRIMINAL LAW ⚷681(1)—ADMISSION OF EVIDENCE—SUBSEQUENT EVIDENCE.
   Value of exception to receiving in evidence, on prosecution for conspiracy to conceal assets from trustee in bankruptcy, telegrams purporting to be signed by defendants and addressed to S. at D., without proof that defendants or either of them had authorized their transmission, was destroyed when S. thereafter testified that he received and answered the messages, and that in response to his answer one of defendants came to D. on the matter to which the messages related.

6. CRIMINAL LAW ⚷1186(4)—REVERSIBLE ERROR—STATEMENT OF PROSECUTING ATTORNEY.
   Any misconduct of prosecuting attorney in making statement in argument, as matter of personal belief apart from the evidence, of there being no doubt of defendants' guilt, will not cause reversal; the record furnishing clear demonstration of guilt.

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

7. INDICTMENT AND INFORMATION ⚷119—SURPLUSAGE.
The unessential quoted words of an indictment, that the three defendants had conspired "with other persons to the grand jury unknown," may be ignored; there being no evidence of there having been more than the three conspirators.

8. CRIMINAL LAW ⚷814(3)—INSTRUCTIONS—REQUEST INAPPLICABLE TO ISSUE.
Requested instruction, though stating a correct principle, is properly rejected, where there is no evidence to which it is applicable, as giving it would only becloud the issue.

9. CRIMINAL LAW ⚷815(4)—INSTRUCTIONS—REQUESTS—IGNORING PART OF EVIDENCE.
Requested instruction, on prosecution for conspiracy to conceal assets from trustee in bankruptcy, that if defendants, in anticipation of bankruptcy, had agreed to make absolute transfers of some of their property, they could not be found guilty, though such transfers would be voidable preferences, was bad, as requiring an acquittal if transfers of "some" of their property were preferential only, in spite of clear evidence of concealment of other assets.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Gustave A. Meyer, Hyman N. Aserson, and Morris F. Schloss were convicted of conspiracy to conceal assets from a trustee in bankruptcy, and bring error. Affirmed.

Benjamin C. Bachrach and James H. Wilkerson, both of Chicago, Ill., for plaintiffs in error.

Charles F. Clyne and John H. Lally, both of Chicago, Ill., for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Plaintiffs in error were convicted of conspiracy to conceal assets from a trustee in bankruptcy.

Assignments of error challenge the indictment, the sufficiency of the evidence, the admission of evidence, the district attorney's argument to the jury, and the court's charge.

The indictment charged that plaintiffs in error expected that an involuntary petition in bankruptcy would be filed against them, and that adjudication of bankruptcy and appointment of a trustee would follow; that in anticipation of such proceedings they conspired to conceal from said trustee certain property which should belong at the time of such concealment to the bankruptcy estate, including, among many items, a certain check signed by one Morton Hill for $532.64; and that in pursuance and in furtherance of said conspiracy they turned over to one May Aserson a certain check signed by one Morton Hill for $532.64.

[1] One line of objections is based on the failure of the indictment to charge that the conspiracy included an intention on the part of plaintiffs in error to be thrown into bankruptcy and have a trustee appointed, or to charge that at the time of the conspiracy proceedings were pending and that a trustee had been appointed. These objections proceed on the erroneous theory that insolvent debtors cannot

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

properly be convicted of a conspiracy to hide their property, so that their creditors cannot reach it through bankruptcy proceedings which the debtors are expecting to be instituted.

[2, 3] Another contention is that the indictment does not show that the overt act was done to effect the object of the conspiracy. Invoking the rule that inferences are to be taken against the pleader, plaintiffs in error insist that we shall infer that they lawfully turned over the Morton Hill check to May Aserson. But the rule does not extend to imagining inferences that are contrary to the fair common-sense reading of the averments. The conspiracy is fully and clearly stated. It included the purpose to conceal the Morton Hill check, "which should belong at the time of such concealment to the bankruptcy estate." In charging the overt act the pleader averred that in furtherance of said conspiracy the plaintiffs in error turned over the Morton Hill check to May Aserson. This averment, taken in connection with the statement of the nature and scope of the conspiracy, makes it impossible to infer that the check was not the property of the bankrupts after it was turned over to May Aserson. And it is obvious that putting one's property in the possession of another may be an effective step towards concealing it from creditors. Many other overt acts are alleged, but the objection to them is precisely the same.

The evidence abundantly sustains the verdict. Among other things, the bankrupts shipped goods out of the state on pretended sales after the bankruptcy court had entered a restraining order against them. As to the formation of the conspiracy, though the evidence, as usual, is wholly circumstantial, it fully warrants the jury's finding.

[4] Schloss and Aserson were partners in a mercantile business. Meyer was their credit man. Over their objection evidence was admitted of statements of the business condition of Schloss & Aserson made by them a month before the petition in bankruptcy was filed. These property statements had no bearing on the question of conspiracy. In fact they were made before any conspiracy was formed; but, in connection with the proof of the relatively small amount of property found by the receiver and the trustee, they were material circumstances in relation to the concealing of the firm's assets. Against Schloss and Aserson they were admissible as declarations; and the court's charge to the jury excluded this evidence from operating against Meyer.

[5] Certain telegrams purporting to be signed by Schloss & Aserson, and addressed to one Siderman at Detroit, were identified by a Western Union agent as having been transmitted, and were then admitted in evidence, without any proof that Schloss & Aserson, or either of them, had authorized the transmission. But the value of the exception then taken was destroyed when Siderman subsequently testified that he had received the messages and had answered them, and that Aserson in response to his answer had gone to Detroit on the matter to which the messages related.

[6] In his closing address to the jury the district attorney said:

"Just one word more. Counsel has told you of an obligation that he has. I want to say that my obligation as a government official is to protect de-

fendants as well as to protect the rights of the government. Were there a doubt as to the guilt of these defendants, I would ask that the indictment be nollied."

Plaintiffs in error objected. The bill of exceptions does not contain what their counsel said respecting his official obligation. But the court, evidently having that statement in mind, remarked:

"I think the district attorney must have some latitude of that sort. It is his duty to do right toward the defendants as well as toward the government."

Exception was taken to the court's refusal to reprove the district attorney and admonish the jury. The reference to the district attorney's duty is true. But not every truth is relevant to the issue. His statement respecting there being no doubt of the defendants' guilt would be quite proper if the full context should show that it was the summation of his argument on the evidence, and not the expression of his personal belief apart from the evidence. But if we should grant that the small portion preserved in the bill of exceptions reaches the range of misconduct, we should still decline to reverse on this record which furnishes a clear demonstration of guilt. In a closely balanced case, even slight misconduct of counsel might require reversal.

[7] Many exceptions are predicated on the court's refusal to give written instructions tendered by counsel for plaintiffs in error. On this subject the court said:

"No, I don't think it is proper that you should read anything to me. My duty is to charge orally and counsel's to except orally."

After this position was taken by the court, and after the court had stated that he had intended to give in his oral charge the gist of all the requested instructions, except two on behalf of Aserson, no exceptions were taken by Schloss and Meyer, and none by Aserson, save as to the two which were explicitly refused. As an addendum suggested by Aserson, the court charged:

"You cannot find one man guilty and two not guilty under the testimony."

And Schloss and Meyer each excepted.

Against this addendum the objection is urged that the indictment charged that the three defendants had conspired "with other persons to the grand jury unknown." As there was no evidence tending to prove that there were more than the three conspirators, the court's statement was correct in fact. If it was erroneous in law, it would be because the law would defeat the whole case for the government's failure to prove the above-quoted portion of the indictment. But the statute, not the drafter of the indictment, measures the law. If the pleader omits an essential element, the case fails because the pleader cannot shorten the law. If he includes all the essential elements and more, again the pleader cannot enlarge the law, and the case will be sustained and the law vindicated by ignoring the unessential allegations. U. S. v. Vickery, Fed. Cas. No. 16,619; Wilson v. U. S., 190 Fed. 427, 111 C. C. A. 231.

[8] One of Aserson's rejected requests stated that, inasmuch as the indictment charged a conspiracy in anticipation of bankruptcy proceedings, a verdict of guilty could not be based on proof of a conspiracy which was not entered into until after bankruptcy proceedings had been instituted. Correct; but there was no evidence to which it was applicable and the giving of it would only have beclouded the issue.

[9] Aserson's other rejected request was that, if the jury should find that the defendants, in anticipation of bankruptcy, had agreed among themselves to make transfers of some of their property, and that said transfers were to be absolute, and that the defendants were not to conceal the proceeds of the property so transferred, the jury could not find the defendants guilty, even though such transfers would constitute voidable preferences. As the evidence showed some matters that might be only preferences, and not concealments of assets, it would have been error to refuse to give a proper instruction on this subject. But Aserson wanted the court to charge that, if transfers of some of their property were preferential only, the jury could not convict in spite of clear evidence of concealment of other assets.

The judgment in each case is affirmed.

MILLER v. WILLIAMS.

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

No. 1667.

1. JUDGMENT ⚷472—JUDGMENT OF FEDERAL COURT—COLLATERAL ATTACK.
   A judgment of a federal District Court having jurisdiction of the subject-matter, the parties thereto being in fact citizens of different states, which has not been challenged by appeal or writ of error, is binding upon the parties and their privies until reversed or otherwise set aside, and is not open to collateral attack.

2. REMOVAL OF CAUSES ⚷116—FEDERAL COURT—EQUITY JURISDICTION—CANCELLATION OF RELEASE—ATTACHMENT.
   Where a judgment at law, rendered by the federal District Court in West Virginia, was assigned to plaintiff's testator, and by plaintiff released through fraudulent misrepresentations, the release may be canceled in a suit brought in the state court of Virginia, sitting as a court of equity, and real estate may be attached to satisfy the judgment, and removal of such suit for cancellation and enforcement to the federal court by defendant therein does not deprive plaintiff of her rights, under Code Va. 1904, § 2964, providing that, when a person has a claim, legal or equitable, exceeding $20, he may have a bill in equity for an attachment to secure and enforce it.

3. JURY ⚷16(1)—RIGHT TO JURY TRIAL—CANCELLATION OF FRAUDULENT RELEASE OF JUDGMENT.
   In setting aside a fraudulent release of its own judgment, a law court is exercising equitable power, founded on its control of its own records or of its own processes, and a jury trial may not be demanded as of right.

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

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

Bill by Lucy Henry Williams, executrix of the estate of R. R. Henry, deceased, against R. B. Miller, which was removed from the state court. Decree for plaintiff, and defendant appeals. Affirmed.

John Kee, of Bluefield, W. Va. (Joseph M. Sanders and Russell S. Ritz, both of Bluefield, W. Va., on the brief), for appellant.

James S. Kahle, of Bluefield, W. Va., and S. W. Williams, of Roanoke, Va. (William E. Ross, of Bluefield, W. Va., on the brief), for appellee.

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

KNAPP, Circuit Judge. The facts which gave rise to this litigation are set forth in our opinion in the kindred case of Ross v. Miller, 252 Fed. 697, 164 C. C. A. 537, and need not be repeated. This is the equity action therein mentioned as begun in the circuit court of Bland county, Va., in July, 1917, and removed by defendant, because of nonresidence, to the United States District Court for the Western District of Virginia. The suit was brought to subject certain real estate of defendant to the payment of a judgment recovered against him in 1915, in the United States District Court for the Southern District of West Virginia, and to cancel a release of that judgment on the ground that it had been procured by fraud. The real estate in question was attached, under provisions of the Virginia Code, when the suit was commenced in the state court. After removal to the court below, the defendant moved to dismiss the bill for want of equity, and because "this court has no jurisdiction to set aside a release and discharge entered of record of the judgment of another court." The motion was denied (249 Fed. 495), the case tried, and a decree entered substantially as prayed for by the plaintiff. Defendant appeals.

[1] 1. It is argued that the judgment sought to be enforced is void, for the reason that the pleadings in the suit in which it was recovered do not show the requisite diversity of citizenship to give the court jurisdiction. The contention must be rejected. There is no question that the court had jurisdiction of the subject-matter, or that the parties were in fact citizens of different states, and the judgment has not been challenged by appeal or writ of error. It has long been settled that such a judgment is binding upon the parties and their privies until reversed or otherwise set aside, and therefore not open to collateral attack. Skillern's Executors v. May's Executors, 6 Cranch, 267, 3 L. Ed. 220; McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202.

[2] 2. It is also argued that the release could be canceled only by the court which rendered the judgment, and therefore the court below was without authority to decree its cancellation. The argument is not convincing. As above stated, the plaintiff filed a bill in equity in the state court and attached the real estate of the nonresident defendant, which was within the jurisdiction of that court, under the

provisions of section 2964 of the Code of Virginia, which reads as follows:

"When a person has a claim, legal or equitable, to any specific personal property, or a like claim to any debt, whether such debt be payable or not, * * * if such claim exceed the sum of twenty dollars, exclusive of interest, he may, on a bill in equity filed for the purpose, have an attachment to secure and enforce the claim," etc.

Even on defendant's theory that there was no judgment against him when the suit was commenced, because plaintiff had released it, manifestly she had a claim against him for the amount of the judgment, and the Virginia statute in express terms gave her a right of action in equity to enforce that claim. The property of defendant was seized by attachment, as the statute provides, and he was personally served with process in that state. It follows that the state court, sitting as a court of equity, had full jurisdiction to grant the relief sought by plaintiff, if the proofs sustained her contention, and to that end could set aside the release and order a sale of the attached real estate to satisfy the judgment. This was the right of plaintiff in the court in which her suit was brought, and the defendant should not be permitted to take away that right by removing the case to a federal court and there setting up the plea that the cause of action stated in the bill was not cognizable by a federal court of equity. It seems but reasonable to hold that on this ground the motion to dismiss was properly denied.

[3] As to the inherent and independent power of the court below to cancel the release in question, we are satisfied to adopt the views expressed by the learned trial judge in his opinion (249 Fed. 495) as follows:

"In setting aside a fraudulent release of its own judgment, the law court is, as has been said, exercising an equitable power. The relief is usually granted on motion. A jury could not be demanded as of right on such a trial. 1 Freeman on Executions (3d Ed.) § 54; 3 Freeman, § 361, p. 2048; Wilson v. Stilwell, 14 Ohio St. 464, 468; Laughlin v. Fairbanks, 8 Mo. 367, 370; Anderson v. Carlisle, 7 How. (Miss.) 408; Morton v. Walker, 7 How. (Miss.) 554; Union Pacific R. Co. v. Syas, 246 Fed. 561, 158 C. C. A. 531. There are many powers of the law courts which have been immemorially exercised without the aid of a jury. Trials on habeas corpus, contempt, mandamus, and prohibition are such. The equitable powers of law courts over their own judgments, illustrated by orders in respect to the execution of writs of possession, are also, as I believe, always exercised without a jury. The power that the law court has to set aside a fraudulent release of its judgment is founded on its control of its own records, or control of its own processes. Because in exercising this power it administers a relief which is equitable in nature, it seems to me to follow that no jury trial of the issue could be required. If the court were to lay such issue before a jury the verdict (as on an issue out of chancery) would be advisory only. I do not contend, of course, that an issue as to the validity of a release of a judgment (especially if not under seal) might not be so presented in a court of law as to raise an issue properly to be tried by a jury. If an action at law be brought on the judgment, and the defendant pleads the release, a replication setting up fraud in procuring the release would present such an issue. But the right of the plaintiff at bar in the law court in West Virginia would be presented by motion, and would, as I believe, be properly tried by the court without a jury. If I am right in so thinking, section 723 [Rev. St. (Comp. St. § 1244)] does not seem to present any obstacle to the jurisdiction here. The most important and fundamental object of the statute was to prevent the equity courts from depriving a party

of his constitutional right to a jury trial. As no right of jury trial would be here destroyed, and as the relief to be had in the law court is equitable, it would seem that the statute would be strained in holding it to apply here. It savors too much of technicality and mere literalness to hold that a plaintiff in equity must be sent to a law court to secure equitable relief. Such unnecessary circuity of action, delay, and expense for no legitimate purpose could hardly have been intended.

"Moreover, we have not here a case in which the remedy at law can be afforded by any law court having jurisdiction of the person or property of the releasee. There is only one law court that can cancel the release here in question. This fact, coupled with the further fact that that particular law court is in another jurisdiction, would seem to give some further weight to the assertion that the remedy at law here is not such as is within the intent of the statute. At any rate the remedy at law in this case does not seem to be as adequate as the remedy in equity; and the facts in each case must determine the question as to the adequacy of the remedy at law. * * *

"And again, if this court has jurisdiction to cancel the release, its further jurisdiction to do complete justice and enforce the attachment lien is not affected by adequacy of a remedy at law in this respect. Purely legal remedies are enforced in equity, in order to do complete justice, if there is also a right to grant equitable relief. This ground for dismissal was perhaps suggested by an erroneous belief that the plaintiff is here seeking to enforce a judgment lien. She has no judgment lien. She has a statutory lien of attachment only. If this court has an independent right to cancel the release, it has the further right to enforce this lien, and I cannot see that the existence of some other remedy at law, if it existed, could destroy this right."

3. On the merits it is enough to say that there was ample evidence to support the finding of the trial court to the effect that the release was procured by fraud, and the conclusion therefore follows that the decree should be affirmed.

THE SUFFOLK.

THE BRAZOS.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

Nos. 182, 183.

1. Collision ⟹83—Steamships on Crossing Courses—Violation of Rules.
   A collision at sea in a dense fog between two steamships on crossing courses *held* due to faults of both; one being in fault for excessive speed, and both for failure to obey the imperative requirement of article 16 of the International Rules (Comp. St. § 7854), to stop their engines on hearing the signal apparently forward of their beams.

2. Collision ⟹17—Fault—Presumption from Violation of Rules.
   A vessel which violates a statutory rule must be held in fault for a following collision, in the absence of proof that such violation did not contribute thereto.

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

Suit in admiralty for collision by the Mallory Steamship Company, owner of the steamship Brazos, against the steamship Suffolk, the Coastwise Transportation Company, claimant, with cross-libel. Decree holding both vessels in fault, and the claimant of the Suffolk appeals. Affirmed.

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

Burlingham, Veeder, Masten & Fearey, of New York City (Charles C. Burlingham and Chauncey I. Clark, both of New York City, of counsel), for Mallory S. S. Co.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass. (Edward E. Blodgett and Albert T. Gould, both of Boston, Mass., of counsel), for Coastwise Transp. Co.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. [1] January 22, 1916, about 3:30 p. m., in a dense fog, the twin-screw passenger steamer Brazos, proceeding at about 8 knots an hour, with her engines at slow, on a voyage from New York to San Juan, Porto Rico, heard the fog whistle of a steamer which proved to be the single-screw steamer Suffolk, about four points on the starboard bow.

At the same time the steamer Suffolk, bound from Newport News with a cargo of coal to Boston, proceeding with her engines at half speed, heard the whistle of the Brazos about 2 points on her port bow, whereupon she put her engines at dead slow.

At 3:34 the Suffolk heard a second and louder signal from the Brazos, still two points on her port bow, whereupon she ported two points and stopped her engines.

At 3:40 the vessels hove into sight, each having the other from three to four points on the port and starboard bows, respectively; the Suffolk heading almost at a right angle with the Brazos' starboard side.

The Brazos hard-astarboarded, put her starboard engine full speed ahead and her port engine full speed astern for the purpose of swinging away from the Suffolk, while the Suffolk blew three whistles and put her engines full speed astern. Nevertheless they came together, the bow of the Suffolk contacting with the starboard quarter of the Brazos at a point about 100 feet forward of her stern.

Judge Manton held the Brazos solely to blame for excessive speed in the fog, but subsequently, having had his attention drawn to the decision of the Supreme Court in Lie v. San Francisco & Portland Steamship Co., 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726, then lately handed down, modified his conclusion by holding the Suffolk also at fault for failing to stop her engines on first hearing the signal of the Brazos forward of her beam, as required by article 16 of the International Regulations.

International Regulations adopted by Congress March 3, 1885 (23 Stat. 441), contained the following provision:

"Art. 13. Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow go at a moderate speed."

The International Regulations of 1890 altered this provision as follows:

"Art. 16. Every vessel shall in a fog, mist, falling snow or heavy rain storm, go at a moderate speed and having careful regard for the existing circumstances and conditions. A steam vessel hearing apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over." Act Aug. 19, 1890, c. 802, 26 Stat. 326 (Comp. St. § 7854).

Congress, in adopting the present International Regulations of 1890, recognized that the provision of the regulations of 1885 was not sufficient, and expressly added the requirement that vessels proceeding at a moderate speed in a fog should stop their engines on hearing a signal forward of their beam.

The decision in the case of Lie v. Steamship Co., supra, conclusively determines that the duty to stop the engines is imperative, so far as the circumstances of the case admit, when a steamer proceeding at a moderate speed in a fog hears a fog signal forward of her beam. Mr. Justice Clarke said:

"The most cursory reader of this rule must see that, while the first paragraph of it gives to the navigator discretion as to what shall be 'moderate speed' in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him. The difficulty of locating the direction or source from which sounds proceed in a fog renders it not necessary to dwell upon the purpose and obvious wisdom of this second paragraph of the rule."

[2] We think it perfectly clear that the Brazos was at fault for excessive speed and that the District Judge was right in modifying his first opinion by holding the Suffolk also at fault for not stopping her engines when she heard the first signal of the Brazos ahead on her port bow. Nothing in the circumstances of the case prevented her from so doing, and in the absence of proof that the violation of the statute did not contribute to the collision, the Suffolk must be held also at fault. The Pennsylvania, 19 Wall. 125, 22 L. Ed. 148.

It is, however, obvious that if the Suffolk had stopped her engines when she first heard the signal of the Brazos, or even when she heard the second signal, the Brazos would have passed safely across her bows.

Apart from the fault of the Suffolk in failing to conform to this general requirement of care prescribed by the statute, she had particular notice in this case that the Brazos was approaching on a course involving danger of collision. At 3:30 p. m., when going at a speed of 8 knots, she heard the first signal of the Brazos two points on her port bow and reduced to slow. At 3:34 she heard the second signal, still two points on her port bow. This showed that the Brazos was approaching without any change of bearing, indicating to a competent navigator that the vessels were on converging courses. Thereupon the Suffolk ported two points, and at 3:38 heard the third signal of the Brazos four points on the port bow, which, allowing for the Suffolk's change of course of two points to eastward, indicated that the Brazos had not altered her course, and that the vessels were still approaching on converging courses, involving danger of collision. At 3:40 the vessels hove in sight of each other, and then they were so close that, although the Brazos hard-astarboarded, and put her starboard engine ahead and her port engine astern at full speed, so as to throw her out of the way of the Suffolk, and the Suffolk blew three blasts and went full speed astern, the starboard quarter of the Brazos, about 100 feet from her stern, struck the stem of the Suffolk at 3:41.

These times, taken from the log of the Suffolk, in connection with the testimony of her master and second officer, who were both in the

pilot house, make it perfectly apparent on her own story that when the vessels saw each other collision was unavoidable, even if she were barely moving in the water, as her witnesses say.

In the case of The Persian, 224 Fed. 441, 140 C. C. A. 135, much relied on by the appellant, the Persian heard the Millinocket's signal ahead at 12:12, and stopped her engines; at 12:14 she went full speed astern, and at 12:15 the collision happened. It will thus be seen that she complied strictly with article 16 as to stopping her engines. The fault charged against her was that she altered her course, but this we held not to have been a fault under the circumstances. In this case we have not thought it necessary to consider whether or not the Suffolk was at fault for porting two points.

Decisions in cases of collision happening before the present International Regulations of 1890 had been adopted by Congress should be read with that fact in mind.

The decree is affirmed.

THE KENNEBEC.

SEABOARD & GULF S. S. CO. v. BALTIMORE DRY DOCKS & SHIP BUILDING CO.

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

No. 1678.

WHARVES ⚷20(1)—DRY DOCKS—LIABILITY FOR INJURIES TO VESSELS UNDER REPAIR.

A dry dock company, employed to make repairs to the exterior of the hull of a steamship, *held* not required to furnish steam for heating the interior while the work was being done, nor liable for injury caused by freezing of the steam pipes, where the master and crew remained on board and in charge.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty by the Baltimore Dry Docks & Ship Building Company against the steamship Kennebec; the Seaboard & Gulf Steamship Company, claimant and cross-libelant. Decree for libelant, and claimant appeals. Affirmed.

For opinion below, see 252 Fed. 194.

Milton Roberts and Clifton S. Brown, both of Baltimore, Md. (Daniel H. Hayne, of Baltimore, Md., on the brief), for appellant.

L. Vernon Miller and George Weems Williams, both of Baltimore, Md., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The Baltimore Dry Docks & Ship Building Company, appellee here, libeled the steamship Kennebec for a repair bill of $2,988.90, and thereupon her owner filed a cross-bill for damages to the amount of some $23,000 for alleged neglect of duty, as will presently be stated, of which $4,329.65 was for direct injury

to the machinery of the vessel and the balance in the nature of demurrage. On the trial the correctness of the repair bill was admitted, and the cause proceeded on the allegations of the cross-bill. The decree appealed from dismissed the cross-bill and gave the libelant judgment for the amount of its claim.

The steamship was taken from the plant of the W. S. Cahill Company to the dry dock of appellee in Baltimore Harbor between 5 and 6 o'clock in the afternoon of December 27, 1917, for the purpose of having some work done on her hull. Prior to this she had been discharging sulphur at the Canton ore dock, and at the same time undergoing annual inspection by the steamship inspectors. While at Canton fires were drawn to permit the Cahill Company to repair her boilers, and that company supplied heat to the vessel from an electric welding plant moored alongside. Upon completion of the discharge of cargo at Canton the ship was moved to the Cahill plant for further repairs, to enable her to pass inspection; and while there a steam line was run from the plant's boiler to her deck line for heating purposes.

The Kennebec remained in appellee's dry dock until the work which it had undertaken to do was completed, which was some time on the 30th, when she returned to the Cahill plant. During that time the weather became extremely cold, and as the vessel was without heat some of her steam pipes and other apparatus bursted from freezing, causing the damage in question. The dock company is sought to be held liable on the theory of neglect of duty to furnish sufficient steam to prevent the damage, which is claimed to have been requested by the ship's captain. The dock company denies that any such request was made, or that it was otherwise under any obligation to protect the machinery from freezing.

To this brief outline is added the following from the opinion of the court below, which we accept as a fair and correct deduction from the testimony:

"The day after the ship arrived at the dry docks it was comparatively mild, the thermometer rising to about 40 degrees. At that temperature the pipes were in no danger, but the living quarters upon an unheated ship were very uncomfortable. Accordingly, in the forenoon of that day, the captain of the ship asked the superintendent of the dry docks to furnish steam, saying, unless he had it, he feared he could not keep his crew. He now thinks he had also in mind the protection of the pipes against the possibility of a cold wave. If he had, he kept it to himself, and said nothing to the dry docks superintendent about it. It would have been quite troublesome and inconvenient for the latter at that time to have furnished steam. I doubt not that it could have been done at a price, but it did not seem worth while, for the mere purpose of retaining the crew on board, instead of sending them to a boarding house on shore. Moreover, the superintendent then supposed that the repairs to the ship could be finished in 24 hours, or thereabouts, and that elaborate arrangements for so brief a time were unnecessary and so told the captain.

"In consequence of the refusal to furnish steam an application was subsequently made to the dry docks for oil stoves for the crew's quarters. It so happened that there were none available. When the engineer of the ship learned that steam would not be furnished, he had the pipes drained, so far as that could be done without breaking connections and taking apart certain portions of the machinery. To have done everything necessary to get all the water out of the pipes would have taken, with the force he had at hand, 24 hours and perhaps more. At least that much time would have been required to have put them back so that the engines could be operated.

"As the dry docks went on with the work, it perhaps found there was more to be done in the way of repairs than had originally been apparent, and for that or some other reason the work was not finished until December 30th. During the night of December 28th the temperature fell rapidly, and on the 29th and 30th went down nearly to zero. On the morning of the last-named day, it was discovered that the water left in the pipes and engines had frozen, and that the damage for which the ship seeks to recover by its cross-libel had been done."

It thus appears that whatever request for heat may have been made the dock company at once refused, and the captain without protest took measures accordingly. If, therefore, the dock company was under any obligation it was an obligation, not of contract, but imposed by law because of the relationship of the parties. Appellant says the law of bailment applies, and cites cases illustrating its familiar principles. But an essential element of bailment is delivery of possession to the bailee, and we think it plain that there was no such delivery in this case. The work undertaken by appellee was confined to the exterior of the hull, and had nothing to do with any other part of the vessel. The captain continued in command, and he and the crew stayed on board. In every substantial sense the ship remained in the control of her master, and the dock company certainly did nothing to interfere with that control, or to prevent him from doing whatever he thought necessary to protect the machinery of the vessel. The doctrine of ordinary care of a bailee has no application.

Moreover, it is not shown that the dry dock company was accustomed to furnish steam to vessels in its docks, or that it held itself out as prepared to furnish steam in cold weather. On the contrary, the record shows that it did so only for government vessels, when the contract for repairs contained such a provision. In short, there appears to us no aspect of the facts under which the dock company can be charged with liability for what happened to the pipes and machinery of the steamship.

The case was correctly decided by the trial court, and its decree must be affirmed.

MILLER, Internal Revenue Collector, v. GEARIN.*

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3281.

1. INTERNAL REVENUE ⟹7—INCOME TAXES—"INCOME."

Where, in 1907, the owner of land leased the same for 23 years, under an agreement requiring the tenant to construct an expensive brick building, and on the tenant's default the owner retook possession in 1916, the value of the building cannot be deemed income accruing in the year 1917, within Income Tax Law Sept. 8, 1916, § 2a (Comp. St. § 6336b), for under the lease the title to the building vested in the owner immediately upon construction, and the lessee's default caused the owner a loss.

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

2. INTERNAL REVENUE ⟹7—INCOME TAXES—INCOME TAX LAW—CONSTRUCTION.

Where an income tax law is doubtful, doubts should be resolved in favor of the taxpayer against the government.

3. STATUTES ⟹245—LEVYING TAXES.

Statutes levying taxes should be construed, in case of doubt, against the government and in favor of the citizen.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Action by Matilda M. Gearin against Milton A. Miller, Collector of Internal Revenue of the United States for the District of Oregon. There was a judgment for plaintiff, demurrer to the complaint having been overruled, and defendant brings error. Affirmed.

The defendant in error was the owner of a lot in the city of Portland, which was under a lease to Rothchild Bros., a corporation, which lease by its terms would expire on March 30, 1907. The rental under the lease was $1,-300 per month. On October 5, 1906, the parties to that lease entered into a new lease, in pursuance of which the lessee was to destroy and remove the frame buildings which they occupied on said lot, and erect a seven-story brick building thereon at a cost of not less than $85,000. The lessee erected the building and completed the same during the year 1907 at a cost, as the lessee claimed, of $140,000. The term of the lease was 23 years from April 1, 1907, and the agreed rental was $1,200 per month for the first 21 years of the term, and $1,450 for the last 2 years, and the lessee was to pay all taxes and street and sewer assessments levied against the property. The lessee paid the rent until March 15, 1916, whereupon it made default, and in consequence thereof the defendant in error, by means of an action for forcible entry and detainer, acquired possession of the property on December 2, 1916. Since that time the rentals have been insufficient to pay the expenses of maintenance, management, and taxes. The plaintiff in error, as collector of internal revenue, assessed the defendant in error for the value of said building, which he placed at the sum of $108,653.50, as income received in the year 1916; the tax thereon being $4,872.16. The defendant in error paid that sum under protest, and appealed from said assessment to the Commissioner of Internal Revenue, and the Commissioner affirmed the action of the collector. The present action was brought by the defendant in error to recover said sum of $4,872.16. To her complaint in the court below a demurrer was interposed and overruled, and thereupon judgment was entered for the defendant in error.

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

 *Certiorari denied 250 U. S. —, 40 Sup. Ct. 13, 64 L. Ed. —.

Bert E. Haney, U. S. Atty., and John J. Beckman, Asst. U. S. Atty., both of Portland, Or., for plaintiff in error.

Hugh C. Gearin, Dolph, Mallory, Simon & Gearin, and Hall S. Lusk, all of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The question here is whether the building which was placed upon the property of the defendant in error in the year 1907 under the lease was income received in the year 1916 by reason of the fact that in that year the lease was forfeited and the defendant in error resumed possession. Section 2 (a) of the Income Tax Law of 1916 (Act Sept. 8, 1916, c. 463, 39 Stat. 757 [Comp. St. § 6336b]) provides that—

"The net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

The lessor acquired nothing in 1916 save the possession of that which for many years had been her own. The possession so acquired was not income. It was not a gain, but was a loss. Assuming that the building was income derived from the use of the property, we think it clear that the time when it was "derived" was the time when the completed building was added to the real estate and enhanced its value. At that time it represented a prepayment to the lessor of a portion of the rental, distributable over a period of 23 years. The lease provided that the ownership of all buildings or improvements put upon the premises was to vest in the lessor immediately upon the construction of the same, subject to the provisions of the lease. The decision in Edwards v. Keith, 231 Fed. 111, 145 C. C. A. 298, L. R. A. 1918A, 498, is not contrary to this view. In that case the court held that the commissions of an insurance broker, earned before the Income Tax Law was passed, but received thereafter, constituted income taxable in the year in which they were actually received. The sole question in that case, as in this, was: When was the income received or derived?

[2, 3] We do not consider the question here involved a doubtful one; but, if there is doubt, it should be resolved in favor of the taxpayer. In Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211, it was said:

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

See, also, Haiku Sugar Co. v. Johnstone, 249 Fed. 103, 109, 161 C. C. A. 155.

The judgment is affirmed.

PREBENSENS DAMPSKIBSSELSKABET A/S v. MUNSON S. S. LINE.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 200.

SHIPPING ⟹40—TIME CHARTER—LENGTH OF TERM—OVERLAP.

Under a time charter for monthly hire for "about 36 months (term of charter party to be understood to mean a month more or less)," providing that, should the steamer be on a voyage toward the port of return delivery when a payment of hire becomes due, payment shall be made for such length of time as the parties estimate as necessary to complete the voyage, the difference to be adjusted on delivery as the case may require, the charterer has a permitted underlap or overlap of one month, and for a greater overlap must pay at the market rate.

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

Suit in admiralty by the Prebensens Dampskibsselskabet A/S, owner of the Norwegian steamship Falk, against the Munson Steamship Line. Decree for libelant, and respondent appeals. Affirmed.

Haight, Sandford & Smith, of New York City (Clarence Bishop Smith, of New York City, of counsel), for appellant.

Burlingham, Veeder, Masten & Fearey, of New York City (Roscoe H. Hupper, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. October 31, 1912, her owners chartered the steamer Falk to the Munson Line "for a period of about 36 calendar months (term of charter party to be understood to mean a month more or less)" from the time of delivery. The charter party was of the usual time charter form and contained the following articles:

"4. That the charterers shall pay for the use and hire of the said vessel nine hundred and fifty pounds British sterling (£950) per calendar month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery, with clean holds to the owners (unless lost) at a port in the United Kingdom or on the continent between Bordeaux and Hamburg, both inclusive (Rouen excluded), at charterers' option.

"5. That should the steamer be on her voyage towards the port of return delivery at the time a payment of hire becomes due, said payment shall be made for such length of time as the owners or their agents and charterers or their agents may agree upon as the estimated time necessary to complete the voyage, and when the steamer is delivered to owner's agents any difference shall be refunded by steamer or paid by charterers, as the case may require."

January 20, 1913, the steamer was delivered to the charterer and redelivered by it to the owners March 1, 1916, to which date the charterer paid hire at the charter rate.

The owners contend that the term ended January 20, 1916, with a permissible overlap or underlap of one month, so that the charterer was liable until February 20, 1916, at the charter rate of freight, and for the 10 days thereafter until redelivery at the market rate of freight; the same amounting to about $9,000, to recover which this

libel was filed. The charterer, on the other hand, contends that it is liable only at the charter rate of freight until the actual redelivery, March 1, 1916. Judge Mayer sustained the owner's contention and entered a decree for the libelant.

We think the construction of these articles is made clear by former decisions in this circuit. In the case of charters for a fixed time Judge Addison Brown held that the charterer was entitled to a reasonable overlap at the charter rate of freight. Straits of Dover S. S. Co. v. Munson (D. C.) 95 Fed. 690; Anderson v. Munson (D. C.) 104 Fed. 915. In the case of charters for "about" a named time, we have held that the charterer is entitled to a reasonable underlap as well as overlap. The Rygja, 161 Fed. 106, 88 C. C. A. 270; Trechmann S. S. Co. v. Munson Line, 203 Fed. 692, 121 C. C. A. 650.

Counsel for the charterer rely principally upon our decision in Ropner v. S. S. Co., 243 Fed. 549, 156 C. C. A. 247. In that case the charter was for a minimum period of 18 and a maximum period of 21 calendar months, at the charterer's option, and the charterer expressly exercised the option to take the steamer for the maximum period. Therefore the charter was regarded as for a fixed period of 21 months, and under the decisions supra the charterer was entitled to a reasonable overlap at the charter rate of freight. That was the ground upon which the decision rested. But an additional consideration was mentioned, viz. that the parties must have intended the overlap to be at the charter rate, because they said nothing to the contrary, and when an installment of hire fell due, payable before the estimated time for redelivery had expired, they could not estimate the future market rate of freight.

But we construe the charter in this case as being for a term of 36 months, with a permitted underlap or overlap of 1 month. It is an "about" term charter, with the "about" period defined to be 1 month. Accordingly for any overlap beyond 37 months the charterer must pay at the market rate. The owners contend that the reasoning as to the difficulty of estimating the market rate of freight at a time of redelivery in the future is the same in this case as it was in the case of Ropner v. S. S. Co. But this subordinate consideration, which was consistent with the primary ground of decision in that case, must yield to the primary ground of decision in this case, with which it is not consistent. The charterer being liable to pay the market rate of freight after the expiration of the term of 36 months and the permitted overlap of 1 month, and the last installment falling due before the time of actual redelivery, the natural estimate as to the rate of freight would seem to have been the rate prevailing at the time the installment fell due. Both the estimated time and the estimated freight were to be corrected, if necessary, at the time of redelivery.

The decree is affirmed.

In re MOTRIDGE.

SIMPSON v. LAFFOON.

(Circuit Court of Appeals, Ninth Circuit. May 29, 1919.)

No. 3232.

BANKRUPTCY ⚷223—REFEREE'S COMMISSIONS—STATUTE AND GENERAL ORDERS.

Under Bankruptcy Act, §§ 40, 48, as amended by Act Feb. 5, 1903 (Comp. St. §§ 9624, 9632), and General Order No. 35, § 2, the District Court improperly allowed the referee in bankruptcy commissions of 1 per cent. of the total amount of the bankrupt's estate, amounting to $6,582.08, of which $1,085.60 was paid out for expenses of administration, leaving in excess of $5,000 from which to pay referee's commissions and for distribution among creditors.

Petition for Revision and Stipulation as to Facts from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

In the matter of E. Motridge, bankrupt, wherein R. D. Simpson was appointed trustee, and petitions against R. F. Laffoon, referee in bankruptcy, to revise, in matter of law, a certain order of the District Court. Order reversed, and case remanded for further proceedings in accordance with the opinion.

Robert C. Saunders, U. S. Atty., of Seattle, Wash., and Frederick R. Conway, Asst. U. S. Atty., of Aberdeen, Wash., for petitioner.

R. D. Simpson and R. F. Laffoon, both of Tacoma, Wash., for respondent.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The amount involved in this case is trifling; the question important. There were no secured claims against the bankrupt, but claims of general creditors were approved against his estate, exceeding in the aggregate $10,000, exclusive of such as were exempt. The property of the bankrupt, when converted into money, amounted to $6,582.08, of which amount $1,085.60 was paid out for expenses incurred in the course of administration of the estate, leaving $5,496.48 out of which to pay the commissions of the referee, and for distribution among the creditors. In his final report and statement the referee claimed as commission 1 per cent. of the total amount of the estate, which commission the court below allowed, and to which ruling the trustee excepted, and by the present petition seeks a review of the ruling.

We are of the opinion that the court below was in error. Section 40 of the original act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 556) provided as compensation to referees "from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions," and section 48 of that act provided that trustees should receive "from estates which have been

administered such commissions on all moneys disbursed by them as may be allowed by the courts" (Comp. St. § 9632).

Both of those sections were amended February 5, 1903, the former being made to read as follows:

"Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition." Comp. St. § 9624.

We agree with the Court of Appeals of the Fourth Circuit in the case of Bray, Trustee, etc., v. Johnson, Referee, et al., 166 Fed. 57, 91 C. C. A. 643, that there is no mistaking that language. By it Congress not only specifically declared what referees should receive, namely, 1 per centum on all moneys disbursed to creditors by the trustee, but by section 72 of the same act of February 5, 1903, further expressly provided:

"That neither the referee * * * nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act." Comp. St. § 9656.

Moreover, by section 2 of the General Order No. 35, prescribed by the Supreme Court for the enforcement of the Bankruptcy Law, it is also declared that:

"The compensation of referees prescribed by this act shall be in full compensation for services performed by them under the Act or under these General Orders."

See, also, Matter of Lacey & Co., 35 Am. Bankr. Rep. 231, and Matter of C. J. McCubbin Co., 33 Am. Bankr. Rep. 277.

The order is reversed, and the case remanded for further proceedings in accordance with the views above expressed.

In re JARMULOWSKY et al.

In re SPECTOR.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 161.

1. BANKS AND BANKING ⊂⟹80(6)—SPECIAL DEPOSITS—NEW YORK STATUTE.
Banking Law N. Y. § 156, giving persons making deposits for safe-keeping or transmittal preferred claims against certain funds upon a private banker's insolvency, does not prevent such depositor from recovering money which he can trace and identify.

2. BANKRUPTCY ⊂⟹140(3)—ASSETS OF BANKRUPT—NEW YORK STATUTE.
Trustee in bankruptcy of a private banker cannot retain money given bankrupt for transmittal, although Banking Law, N. Y. § 156, gives depositors for transmittal preferred claims against certain of banker's assets and authorizes them to also share pro rata with general creditors.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of Harry Jarmulowsky and Louis Jarmulowsky, individually and as copartners under the firm name and style of S. Jarmulowsky. From an order granting the application of Leib Spector for payment of a preferred claim, the trustee appeals. Affirmed.

See, also, 249 Fed. 319, 161 C. C. A. 327, L. R. A. 1918E, 634.

The bankrupts were private bankers, a business in part regulated by statute in the state of New York. On the day before they suspended business and passed into the hands of the state superintendent of banking (and thence into bankruptcy), they received from the petitioner herein $288, for which they gave a receipt, setting forth that the money was to be forwarded to a definite person at a specified place in Europe "subject to conditions" on the back of said written receipt. Of these conditions the first was: "It is previously understood that we act as agents only for the sender."

Bankrupts never forwarded the money, and it was admittedly in possession of the bankrupts on the day of failure, and so ultimately passed to the trustee in bankruptcy.

Application having been made for the repayment of this money, the trustee set up as a defense section 156 of the Banking Law of New York, viz.:

"In case of the failure or suspension of any such private banker, the claims of persons for moneys on deposit or delivered for safe keeping or transmission shall be preferred against the proceeds of any securities deposited by such banker with the superintendent and against such assets as shall be shown by the books of such banker, or by other legal evidence, to have been derived from the investment of such deposits, or from the investment of any permanent capital segregated and set aside for employment in his business as such banker. The depositors shall also share pro rata with general creditors in the proceeds of any other assets belonging to such banker." Consol. Laws, c. 2.

The court below granted an order for repayment, and the trustee took this appeal.

Julius B. Baer, of New York City, for petitioner.

Samuel F. Hyman, of New York City (Jacob J. Lesser, of New York City, of counsel), for trustee in bankruptcy.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. [1] That the Jarmulowskys in receiving this money acted in a fiduciary capacity, and that the person intrusting such money to them may on tracing the same into the possession of the trustee in bankruptcy recover it in solido, is sufficiently shown by our recent decision in Re Bolognesi, 254 Fed. 770, — C. C. A. —.

As to the statute relied on, we may point out that there is in this record no evidence whatever that the bankrupts ever deposited any securities with the superintendent of banks or possessed any investments of the kind contemplated by the act; but, assuming the existence of such deposit or investment, we are of opinion:

1. The statute was not intended to and does not take away from persons dealing with a private banker as "depositors" or "transmitters" any rights or privileges, legal or equitable, which by general law they possessed prior to the passage of said act. It does exclude all creditors from participation in certain specified assets, until the claims of depositors and transmitters are satisfied.

The granting of such priority or preference is by statute made a condition for the lawful transaction of the business of private banking; but such preference cannot of itself deprive a man of the right of tracing and claiming his own money when found in the possession of an unfaithful fiduciary—which is all that has occurred in the present instance.

[2] 2. Assuming that this petitioner as a transmitter is entitled to the statutory preference, the granting of the application below removed him from competition with other creditors similarly situated in respect of the assets described in the statute.

In so far as the trustee represents such preferred creditors, he is benefited by the order complained of; in so far as he represents general creditors, neither they nor he, as their representative, have any right to keep funds which are identified as the very money of petitioner below.

Order affirmed, with costs.

SCHUMANN v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5275.

ARMY AND NAVY ⚷40—ESPIONAGE ACT—PROSECUTION FOR VIOLATION.

An indictment under Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), for obstructing the recruiting and enlistment service, *held* sufficient, the trial *held* without prejudicial error, and a judgment of conviction sustained by the evidence.

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 Wilhelm Schumann. Judgment of conviction, and defendant brings error. Affirmed.

C. H. Van Law, of Marshalltown, 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, for the United States.

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

CARLAND, Circuit Judge. The plaintiff in error (hereafter defendant) was indicted and convicted for a violation of section 3 of the Espionage Act, approved June 15, 1917 (40 Stat. 219, c. 30 [Comp. St. 1918, § 10212c]). The indictment contained two counts, the first of which was eliminated by demurrer. The second count charged that defendant, on or about November 11, 1917, at Pomeroy, Calhoun county, Iowa, did then and there willfully obstruct the recruiting and enlistment service of the United States, by delivering a sermon in a church of which he was then and there pastor, in which sermon in the presence of a large number of people, among them being registrants under the Selective Service Law of May 18, 1917 (40 Stat. 76, c. 15 [Comp. St. §§ 2044a–2044k]), he used the following language:

"That this war in which America is engaged is for the capitalists only and the Liberty Bond is a great humbug; by buying Liberty Bonds you buy yourself deeper into slavery; America went into this war to help England; that America had no right to go into the war against Germany and that Germany was right; that he was asked to take up a collection for the Red Cross, but we could raise our own money and send it to our own Germans and help them out; that it was a money war, and men were making money out of it; that he did not believe in the Y. M. C. A. at all; that it is gotten up by the Methodists, and I want my people to stay away from it and stay by the Lutheran Church; that our boys should not go over and shed their blood to help England."

The defendant has brought the case here by writ of error. The questions raised may be stated as follows: (1) The indictment is insufficient, in that it does not set forth any overt act, or that there was any obstruction as a matter of fact to the recruiting and enlistment service of the United States. (2) Error in the admission of evidence in regard to the statement made by defendant, for the reason that there was no evidence to show that the statement was directed toward the

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*Certiorari denied 250 U. S. —, 40 Sup. Ct. 10, 64 L. Ed. —.

enlistment or recruiting service of the United States. (3) Insufficiency of the evidence to sustain a conviction, in that the language used was nothing more than the expression of opinion, criticism, and argument, and in no way directed to the matter of the recruiting and enlistment service of the United States. (4) Error in the instructions of the court to the jury wherein the court defined the meaning of the word "obstruct" as used in the statute. (5) The unconstitutionality of the Espionage Act.

We have carefully read the record in this case, and find no merit in the contentions made by counsel for defendant. They have all been ruled upon adversely to him in the following cases: Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566 (March 10, 1919); Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470 (March 3, 1919); Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561 (March 10, 1919); O'Hare v. United States, 253 Fed. 538, — C. C. A. —; Doe v. United States, 253 Fed. 908, — C. C. A. —.

Judgment affirmed.

MORAN et al. v. MORGAN et al.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 193.

BANKRUPTCY ⟹165(2)—PROPERTY PASSING TO TRUSTEE—FRAUDULENT CONVEYANCE BY BANKRUPT.

A voluntary conveyance of property by a bankrupt to his wife when insolvent *held* not in execution of a parol trust imposed by his grantor, and fraudulent as to his creditors.

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

Suit in equity by William L. Moran, trustee in bankruptcy of Charles Hobart Morgan and Albert B. Morgan, individually, as composing the firm of Morgan Bros., against Charles Hobart Morgan, Harriet M. Morgan, and the Blue Bird Motor Cab Company. Decree for complainant, and defendants Morgan appeal. Affirmed.

See, also, 252 Fed. 719, 164 C. C. A. 559.

Michael J. Tierney, of New Rochelle, N. Y., for complainant.

Samuel F. Swinburne, of New Rochelle, N. Y. (Richard Leo Fallon, of New Rochelle, N. Y., of counsel), for defendants.

Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. The explanation given by Charles V. Morgan of his affidavit dated March 25, 1909, is not very convincing, but in view of the manner in which Harriet M. Morgan concealed the document, even from her own attorney, down to the trial, we can have no confidence in it, and lay it out of the case altogether.

The real issue is between the testimony of Charles V. Morgan, who says he did not intend to prefer his son Charles H. Morgan or his

wife and children over his son Albert B. Morgan, who had no children, and the testimony of his attorney, Samuel V. Swinburne, who says he did intend to provide for the four Morgan boys. Assuming Mr. Swinburne's account to be correct, we are quite satisfied that Charles V. Morgan did not intend the stable premises to become, as stated in the fourth article of the answer, "the property of the defendant Harriet M. Morgan and the children of said Charles H. Morgan and Harriet M. Morgan, subject to the use of the same by the defendant Charles H. Morgan and Albert B. Morgan, composing the firm of Morgan Bros., so long as they should remain in business and require the use of the same."

Mr. Swinburne, as attorney for Charles V. Morgan, drew the deed of the premises dated February 9, 1909, in fee to Charles H. Morgan, with a limited estate to Albert B. Morgan, saying nothing whatever about Harriet M. Morgan or the children, and when he subsequently, as attorney for Charles H. Morgan, drew his deed for the premises dated September 30, 1913, which should have effectuated the intention of Charles V. Morgan, he made it direct to Harriet M. Morgan in fee, without any mention whatever of the children.

We accordingly conclude that, if Charles V. Morgan intended to prefer Harriet M. Morgan and the children, he intended to do so through Charles H. Morgan, who as he thought was entirely solvent, relying upon his natural disposition as husband and father to dispose of the premises for the benefit of his wife and children. Such a conveyance would not be good against his creditors.

The decree is affirmed.

SMILING v. UNITED STATES.

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

No. 1666.

INTOXICATING LIQUORS ⚷236(1)—ILLICIT DISTILLING—SUFFICIENCY OF EVIDENCE.

Evidence that witnesses found whisky, molasses, meal, and an iron pot containing liquid which apparently had been boiled in defendant's house, etc., *held* to sustain a conviction for illicit distilling.

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

John Smiling was convicted of illicit distilling, and brings error. Affirmed.

John H. Clifton, of Sumter, S. C., for plaintiff in error.

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

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

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

KNAPP, Circuit Judge. Plaintiff in error, herein called defendant, was convicted of illicit distilling. The record shows no objection to any testimony offered by the government and no exception to the charge to the jury. The only assignment of error is based on the refusal of the trial court to direct a verdict in his favor.

Three witnesses for the government testified in substance that they went to defendant's farm in Sumter county, S. C., to look for a whisky still, and found him plowing in a field; that he accompanied them to his house, where they found a 20-gallon iron pot on the fire, "full of stuff which looked as if it had been boiled"; that in a corner of the room was a 60-gallon barrel half full of meal and molasses, and also a 10-gallon can with some molasses in it; that two bottles of a substance which smelled like whisky, and was admitted by defendant to be whisky, were found in his bureau; that they also found a wooden tub with an auger hole which had some clay around it, and that the tub had the appearance of recent use; that as they were about to examine the contents of the pot the defendant suddenly turned it over, so that they were unable to procure a sample. Some other circumstances of like import were detailed by the witnesses.

It is enough to say without argument that this testimony was ample to justify the jury in finding a verdict of guilty. As here presented, defendant's case is wholly without merit, and the judgment must be affirmed.

SULLIVAN et al. v. UNITED STATES.

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

No. 5144.

CRIMINAL LAW ⚷1048, 1130(2)—ERROR—ABSENCE OF EXCEPTIONS AND SPECIFICATIONS OF ERROR.

Where no exceptions were saved in the District Court as to the matters complained of on writ of error, and the brief for plaintiffs in error contains no specification of the errors relied on in the Circuit Court of Appeals, such as is required by rule 24 (198 Fed. xxiv, 115 C. C. A. xxiv). there is nothing before the Circuit Court of Appeals to support the writ of error.

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

Thomas R. Sullivan and others were convicted of a violation of Penal Code, § 37, by having conspired to violate the conscription act, and they bring error. Affirmed.

Redmond S. Brennan, of Kansas City, Mo., for plaintiffs in error.

Francis M. Wilson, U. S. Atty., of Kansas City, Mo. (Elmer B. Silvers, Asst. U. S. Atty., of Kansas City, Mo., on the brief), for the United States.

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

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

AMIDON, District Judge. Plaintiffs in error were convicted under an indictment charging them with violating section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]). The offense specified as the object of the conspiracy was a violation of the Conscription Act (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2044a–2044k]). No exceptions were saved in the trial court as to the matters now complained of. The brief for plaintiffs in error contains no specification of the errors relied upon in this court, such as is required by rule 24 (198 Fed. xxiv, 115 C. C. A. xxiv). There is before us, therefore, nothing to support the writ of error. Notwithstanding these grave omissions, we have examined the record sufficiently to satisfy us that the defendants were all rightfully convicted as the result of a fair and impartial trial. The matters discussed in the brief relate not to questions of law, but to questions of fact. Upon such a record we do not feel called upon to enter into a discussion of the facts to show that the evidence supports the verdict.

The judgment is affirmed.

HALLOWELL et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. June 6, 1919.)

No. 3141.

On rehearing.

Former opinion (253 Fed. 865, — C. C. A. —) adhered to.

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

PER CURIAM. A rehearing of the above-entitled cause was ordered, for the reason that one of the judges before whom the argument was made was disqualified, in that he had signed and allowed the bill of exceptions. Upon the rehearing of the case no reason is perceived for departing from the decision heretofore rendered by this court. All of the points in the case have been covered by the opinion heretofore filed.

The judgment is therefore affirmed.

*Rehearing denied October 14, 1919.

EGNER v. PARSHELSKY BROS., Inc.

In re FOOTE.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 207.

BANKRUPTCY ⚷166(3)—PREFERENCE—KNOWLEDGE OF INSOLVENCY.

A defendant *held* to have had knowledge that a bankrupt was insolvent at the time it took back property previously sold to him, which rendered the transaction a preference.

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

Suit in equity by Henry W. Egner, trustee in bankruptcy of George P. Foote, against Parshelsky Bros., Incorporated. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 254 Fed. 907.

H. S. & C. G. Bachrach, of Brooklyn, N. Y., for appellant.

Hastings & Gleason, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

THE ROSABEL.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 217.

TOWAGE ⚷11(9)—INJURY TO TOW—LIABILITY OF TUG.

Injury to a tow in rough weather *held* not due to violation or negligent performance of the towage contract, which rendered the tug liable.

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

Suit in admiralty by Nicola Capiello against the steam tug Rosabel; George W. Wilson, claimant. Decree for respondent, and libelant appeals. Affirmed.

John A. Anderson, of New York City, for appellant.

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

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

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

VACUUM CLEANER CO. v. THOMPSON MFG. CO.

(District Court, S. D. Iowa, C. D. April 15, 1919.)

1. COURTS ⚷96(1)—FEDERAL COURTS—RULINGS OF CIRCUIT COURT OF APPEALS —PRECEDENCE.
   A federal District Court will follow the ruling of the Circuit Court of Appeals of another circuit, where the matter has not already been before the Circuit Court of Appeals of the circuit in which the trial court is sitting.
2. PATENTS ⚷69—PRIOR ART—DISCLOSURES—SUFFICIENCY.
   In patent cases, any printing, writing, or illustration, relied on as part of the prior art, must be such as to make disclosure, not to an inventor, but to the ordinary individual skilled as a workman in the field involved; they must teach the art, and must be such that qualified persons, without the exercise of inventive genius, may produce the device from the disclosures.
3. PATENTS ⚷328—PRIOR ART—VACUUM CLEANER.
   The Kenney patent, No. 847,947, for a vacuum cleaner, *held* not anticipated by prior art.

In Equity. Suit by the Vacuum Cleaner Company against the Thompson Manufacturing Company. Decree for plaintiff.

Charles Neave and William G. McKnight, both of New York City, and James C. Hume, of Des Moines, Iowa, for plaintiff.

Ralph G. Orwig, of Des Moines, Iowa, for defendant.

WADE, District Judge. Counsel for defendant state the issue herein thus:

"Does the prior art disclose a so-called suction or vacuum having an inlet head characterized by a narrow inlet slot, so arranged that its boundaries are adapted to be brought into sealing contact with the surface to be cleaned?"

Answering this question in the affirmative, counsel rely principally upon three patents: McGaffey, Howard & Taite, and Westman.

[1] This case might well be disposed of upon the following adjudications: Vacuum Cleaner Co. v. American Rotary Valve Co., 227 Fed. 998; Vacuum Cleaner Co. v. Innovation Electric Co., 234 Fed. 942; Vacuum Cleaner Co. v. Innovation Electric Co., 239 Fed. 543, 152 C. C. A. 421; Vacuum Cleaner Co. v. Bissell Carpet Sweeper Co., 242 Fed. 649. Not that any of these cases constitute an adjudication as against this defendant, but as a rule a District Court will follow the ruling of the Circuit Court of Appeals of another circuit, where the matter has not already been before the Circuit Court of Appeals of the circuit in which the trial court is sitting.

Counsel recognize this rule, and ask the court to decide contrary to the above cases, upon the contention that in those cases the evidence now before this court was not presented, and that in those cases the courts were mistaken as to the facts of the prior art. Three of these cases were tried before Judge Mayer, whose ability and capacity for painstaking investigation will be conceded. The other case was before the Circuit Court of Appeals on appeal from the decision of Judge Mayer.

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

No one can read the opinions in these cases and not realize that the questions involved were given most careful consideration, and that the facts were presented most thoroughly—most minutely. As to the McGaffey disclosure, it appears that, in the first case tried, the original model from the Patent Office was before the court. In this case the McGaffey, Howard & Taite, and Westman disclosures, were all thoroughly and carefully reviewed.

In the Innovation Case, 234 Fed. 942, supra, Judge Mayer says:

"In view of the exhaustive and able manner in which the case was presented by counsel, I have again studied the history of the art and followed in minute detail defendant's elaborate analysis of the file wrappers."

In this case it appears that the experts had conducted "numerous demonstrations" at Columbia University, and at a shop known as Boucher's. It is shown that these demonstrations were in the presence of Judge Mayer. The opinion of Judge Hand for the Circuit Court of Appeals shows careful and earnest consideration of the points made in this case. Judge Mayer again in the Bissell Case, 242 Fed. 649, supra, reviews the prior art, including the McGaffey and Howard & Taite patents, and others. It does not seem possible that in these various cases the truth as to the prior art was not fully before the courts.

Counsel place much reliance upon an enlargement of the drawing presented to the Patent Office with the McGaffey application, and it is said:

"Hence no court that has heretofore passed on this question has ever had before it a copy of McGaffey's original drawing; nor has any court ever had before it a copy of the McGaffey drawing on an enlarged scale, like the Exhibit No. 7. Furthermore, no court has ever had before it a sample illustrating McGaffey's Patent Office drawing like Exhibit No. 6; but apparently all of the courts that have passed on this matter have had before them only the reduced reproductions of McGaffey's drawings, which are too small to be understood, and the McGaffey model. In view of this fact, the courts have been led into very serious errors in regard to McGaffey's disclosure."

Now, it must be borne in mind that the defense here is that of prior disclosure made in the application for patents, and in the patents granted. It must be conceded that, not only is the language of the patent to be considered in this defense, but also the drawings and illustrations.

[2] But the distinction between a patent relied upon as a patent by a person asserting a right thereunder, and relied upon as showing the state of the art, must be apparent. Any printing, writing, or illustration relied upon as part of the prior art must be such as to make disclosure, not to an inventor, but to the ordinary individual, skilled as a workman in the field involved. The documents relied upon must teach the art; must be such that the world has knowledge of the art; must be such that qualified persons, without the exercise of inventive genius, may produce the device from the disclosures. Of course, it is not necessary that the device involved shall be shown by any one publication; but the inventor, relying upon his patent, is presumed to have had before him all of the prior printed disclosures.

Now, it does not seem possible that through all of the foregoing litigation, with experts before the court, and a court expert in itself, the particular elements relied upon by counsel were overlooked. Certainly it cannot be assumed, if they were overlooked, that they were sufficiently disclosed, so as to teach the art to the ordinary skilled workman. If all these experts, earnestly interested in the questions presented in the case, and if the courts, seriously endeavoring to find out what was disclosed, could not find the disclosure contended for by counsel, then there was no disclosure defeating the Kenney patent.

Referring to enlarged drawings and present models, we must not overlook the fact that it is comparatively easy matter, in the light of new invention, to construct a drawing or model of a device with functions which the original inventor never dreamed of; especially is this true where the point involved may be so refined that, as in the Bissell Case, an attempt was made to evade the Kenney patent by having the cleaning tool adjusted so that the slot would be at the ends $^{20}/_{1000}$ of an inch above the surface and in the middle $^{45}/_{1000}$ of an inch.

To ascertain the truth as to what was invented and disclosed, I feel that any court would rather rely upon the model made by the inventor, and filed in the Patent Office, as Judge Mayer did in the McGaffey disclosure, than it would upon the drawing of a patent attorney. I think the record justifies the statement of Judge Mayer in the American Rotary Case, 227 Fed. 998, supra:

"In other words, Howard & Taite failed to realize the theory of close contact and the production of a vacuum, instead of an air current."

The Circuit Court of Appeals says:

"We do not find that Howard & Taite realized the value of the sealing contact between the cleaner and the carpet, which their device certainly did not show."

In the Bissell Case, Judge Mayer says:

"We may at once put out of view models such as those of McGaffey and Hall, because the forward lip is well above the surface, and the theory of these devices negative contact, and was in direct contradiction to Kenney's teaching. The Howard & Taite patent, with its arc-like shape, likewise clearly negatives contact."

A careful study of these prior patents justifies the statement of Judge Mayer that:

"Kenney, by accident or design, was fortunate enough to frame a claim which had to do solely with the cleaning tool, and the claim must be construed as having been framed in contemplation of the possibility that some one thereafter might be able to devise an instrumentality which would avoid claims 1, 2, and 3, and yet employ an operative cleaning tool, which would not stick, but would so contact as to localize at a narrow slot such vacuum as might be created; and this is what sealing contact means."

Counsel earnestly urge that the Westman patent disclosed a narrow slot; let it be granted, but, if so, it is apparent that the width of the slot had no significance to the inventor. It was purely "accidental." It had no functions, so far as the inventor knew. To the world what

was disclosed was a slot; whether it would be narrow or wide was not disclosed. Kenney was the first to disclose the narrow slot, and that this description is sufficiently definite is decided in the foregoing cases.

"Prior patents are part of the prior art only by what they disclose on their face. [Citing cases.] We are satisfied that Swain's air inlets did not have the effect of Frey's nonreturn valve referred to." Frey v. Marvel Co., 236 Fed. 916, 150 C. C. A. 178.

"The fact that the air as used in the Sparrow process may, or must, have had the same effect as in the Byerley process, is far from conclusive of anticipation, for it is settled law that novelty is not negatived by a prior accidental production of the same thing, when the operator does not recognize the means by which the result is accomplished, and no knowledge of it, or of the methods of its employment, is derived from it by any one. Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co. (C. C.) 55 Fed. 307 (in which case, see Judge Taft's statement of this principle); Chase v. Fillebrown (C. C.) 58 Fed. 377; Wickelman v. A. B. Dick Co., 88 Fed. 266, 31 C. C. A. 530; Tilghman v. Proctor, 102 U. S. 711, 26 L. Ed. 279." Byerley v. Barber Asphalt Co. (D. C.) 230 Fed. 995.

"The case falls rather within the rule that prior accidental production of the same thing, when the character and function were not recognized until the invention of the later patent, does not effect anticipation. Tilghman v. Proctor, 102 U. S. 707, 711, 26 L. Ed. 279. Topliff v. Topliff, 145 U. S. 156, 161, 12 Sup. Ct. 825, 36 L. Ed. 658; Wickelman v. Dick (C. C. A. 2d Cir.) 88 Fed. 264, 266, 31 C. C. A. 530; Canda v. Michigan Iron Co. (C. C. A. 6th Cir.) 124 Fed. 486, 492, 61 C. C. A. 194. And that anticipation is not disclosed by a drawing which incidentally shows a similar arrangement of parts, where such arrangement is not essential to the first invention and was not designed, adapted, and used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished by the second inventor. Brill v. Third Ave. Railroad Co. (C. C.) 103 Fed. 289; Gray Telephone Co. v. Baird Co. (C. C. A. 7th Cir.) 174 Fed. 417, 421, 98 C. C. A. 353. We think the defense of anticipation is not made out." Munising Paper Co. v. American Sulphite Co., 228 Fed. 700, 143 C. C. A. 222.

[**3**] Whatever there may be in the patents relied upon which in form may in a manner conform to the Kenney patent was without knowledge or disclosure of functional value, and no skilled workman without the exercise of inventive faculty, could take all of these patents, and intelligently produce a device, accomplishing the work for which the Kenney invention was devised.

There will be a decree for the plaintiff. Counsel for plaintiff will prepare decree, and submit it to counsel for defendant, who will have five days in which to file objections thereto.

UNITED STATES v. E. REGENSBURG & SONS.

(District Court, S. D. Florida. May 19, 1919.)

CUSTOMS DUTIES ⚷92—TREASURY DECISION—MANUFACTURING WAREHOUSE—REMOVAL OF CIGARS—CHARGE FOR STAMPS.

Treasury Decision 34659, July 22, 1914, instructing collectors to make an arbitrary charge of $10 per 1,000 for stamps furnished to manufacturers to be affixed to boxes of cigars made in bonded manufacturing warehouses, indicating their character, origin of tobacco, and place of manufacture, as required by Tariff Act Oct. 3, 1913, § 4m (Comp. St. § 5672), without regard to the cost of such stamps to the government or the reasonable cost of furnishing the same, is not within the powers conferred on the Secretary of the Treasury by the act, and cannot be enforced.

Action by the United States against E. Regensburg & Sons, a corporation. On demurrer to amended declaration. Sustained.

H. S. Phillips, U. S. Atty., of Tampa, Fla.
McKay & Withers, of Tampa, Fla., for defendant.

CALL, District Judge. This cause comes on to be heard upon the demurrer to the amended declaration. The suit is for a debt claimed to be due by virtue of T. D. 34659, July 22, 1914, prescribing the amount to be paid by the manufacturer for stamps to be affixed to the boxes of cigars, showing the country from which the tobacco was imported, place of manufacture, etc.

The only amendment to the declaration that need be noticed is to the effect that the charge for such stamps was required to cover expense to the plaintiff for furnishing same. It nowhere alleges that this was the expense, or that it was reasonable.

As I pointed out in my previous decision, the act of Congress approved October 3, 1913 (38 Stat. 114, c. 16), does not vest the Secretary of the Treasury with power to regulate the kind of stamps, or prescribe its terms; nor does the act itself undertake to say what kind of stamp is required, but does set forth how the stamp shall be worded, and its terms. Now, if the contention of the government is correct, the Treasury could have prescribed any other amount than $10 per 1,000 for said stamps, say $100 per 1,000, and thereby created by regulation a debt to be paid by the manufacturer, whether such sum was the reasonable cost of printing and distributing such stamps or not. It does not seem to me that the amendment cures the defect in the original declaration. Had Congress vested the Secretary with the power by regulation to prescribe the kind, contents, and charge for such stamps, a different question might arise; but I find no such power given in the act.

Were the suit based upon the implied promise raised by the law from the receipt and acceptance by the manufacturer of so many stamps, of the value of such a sum, an entirely different question would arise; but if the instant declaration could be construed in this light, it would still be defective, because it nowhere alleges the charge to be reasonable.

BALFOUR v. FIRST NAT. BANK OF THE DALLES.

(District Court, D. Oregon. May 26, 1919.)

No. 7037.

PRINCIPAL AND AGENT ⚷103(11)—AUTHORITY BY AGENT—SALE ON CREDIT.

Correspondence between the parties *held* to constitute defendant bank general agent for plaintiff in relation to a sale of land, and not merely a depositary of the deed in escrow, and defendant's action in accepting security for a deferred payment *held* within its authority as such agent, exercised in good faith.

At Law. Action by Thomas Balfour against the First National Bank of The Dalles. Judgment for defendant.

This is an action to recover against the defendant bank for failure to observe the conditions of an escrow agreement, which the plaintiff alleges he had with the bank, in relation to a sale of certain real property which plaintiff had agreed, upon compliance with the conditions imposed, to convey to one Nathan Whealdon. The complaint sets out in brief that, prior to December 29, 1910, plaintiff had bargained and agreed to sell the property to Nathan Whealdon for $35,000 cash upon delivery of a deed; that subsequently the plaintiff forwarded a deed to the property, duly executed, to defendant in escrow, with instructions that the defendant should deliver the same to Whealdon when he paid over to the bank for account of plaintiff the sum of $35,000; that subsequently plaintiff authorized defendant to deliver the deed to Whealdon upon receipt from him of $20,000 in cash, and a mortgage note and a first and paramount mortgage, executed by himself and wife, for $15,000 on the whole of the property conveyed, payable in 90 days, "to be amply and doubly secured"; but that defendant wrongfully and fraudulently omitted to observe the specific escrow instruction of plaintiff, in that the defendant delivered the deed, not to Whealdon, but to one Le Roy Park, to whom Whealdon and wife had conveyed the property, and accepted from Park the sum of $25,000 and a mortgage to secure the payment of $10,000, payable in 90 days, which said mortgage did not cover all the property conveyed by plaintiff to Whealdon. It is further shown that plaintiff foreclosed the mortgage and bid in the property covered thereby for the sum of $3,064.88. Wherefore plaintiff prays judgment for the difference between the amount bid and the mortgage note, with interest and accumulated taxes.

The answer of the bank in effect denies omission or failure to observe the instructions of plaintiff appertaining to the escrow agreement, and alleges that Mr. Malcolm A. Moody was the agent of the plaintiff, as it respects the sale of the land by plaintiff, and that what the defendant did, in delivering the deed to Whealdon and accepting the mortgage of Park covering the balance due plaintiff after the payment of the $25,000, was in obedience to the instructions of Moody acting in plaintiff's behalf, and that the transactions were carried out in good faith, without any purpose or intent to defraud plaintiff.

The cause was tried to the court, without the intervention of a jury.

Platt & Platt and Hugh Montgomery, all of Portland, Or., for plaintiff.

Martin L. Pipes, John M. Pipes, and George A. Pipes, all of Portland, Or., for defendant.

WOLVERTON, District Judge (after stating the facts as above). The matter for discussion rests mainly on correspondence between the plaintiff, Moody, and the defendant bank, and presents largely a question of interpretation of such correspondence. As a preface to

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

the opinion, it should be stated that the plaintiff and Moody had, for some time previous to the negotiations concerning the sale of the real property in question, been warm and intimate friends, and subsequent to the plaintiff's departure for England Moody had been the confidential agent of plaintiff in attending to his business here, which was, taking it altogether, of considerable moment.

Some time prior to July, 1910, one Charles Booth, of Butte, Mont., had written to plaintiff offering to take an option for the purchase of the land, which offer was accepted by plaintiff with a time limitation running until December 1, 1910. On July 25, 1910, plaintiff wrote the bank advising it of this option, and gave minute instructions for carrying it into effect. Among other things, plaintiff importuned the bank to undertake the "management" of his interests, whether the Booth offer should fall through or not, and to endeavor to dispose of his holdings on the "best terms possible." He further advised the bank:

"I will only sell my land in one block and for cash down. I have offered to continue leasing the farm to Mr. Moody if he cares to continue; if not, I must ask you, in the event of Mr. Booth not purchasing, to find another tenant on the best possible terms. In fact, I should like to leave in your hands the entire management of my interests."

On the same day plaintiff wrote Moody, withdrawing any document or letter written by him by virtue of which Moody could claim to act in his behalf in any matter respecting plaintiff's property at Lyle. Moody was also requested to hand over to the bank a certain decree by virtue of which the railroad company (the S., P. & S.) might claim a deed for certain land and any receipt that Moody might have signed in plaintiff's behalf for money received.

This shows the conditions that existed when the correspondence opened respecting the sale which was finally consummated by a delivery of the deed to Whealdon by the bank and the acceptance of an assignment of a mortgage, given by Park, on a portion of the property conveyed to Whealdon, to cover the balance due on the sale. I will now recite in essential detail the correspondence that took place between the parties.

Plaintiff testifies that about August 1st Moody, purporting to act as his agent, gave Nathan Whealdon an option to purchase all plaintiff's lands at Lyle for the price of $35,000, final payment to be made in November, 1910. On August 18, 1910, Moody cabled plaintiff at Cheswardine, England, as follows:

"Booth misrepresents not choked off wanted only portion defeating negotiations made for whole at price above option scheme to avoid probable result pending litigation all your interests safeguarded if settlements through bank preferred satisfactory."

On August 25th plaintiff cabled Moody:

"Cannot withdraw Booth unless you gave option some one previous."

Moody replied on August 26th:

"Gave previous option buyer has satisfied your bank will complete payments November."

On the same day plaintiff cabled:

"Cabled Booth to-day withdrawing option."

On August 31st the bank cabled plaintiff:

"Moody's sale first and best his buyer responsible payment through our bank final settlement November first."

On December 30, 1910, plaintiff wrote the bank as follows:

"I inclose you two deeds as from myself to Mr. N. Whealdon, duly executed before the United States consul, Burslem, England. I understand the arrangement made by you and Mr. Moody with reference to my property to be that on receipt of the purchase money, viz. $35,000, by your bank, you are to hand over the deed to Mr. Whealdon, which arrangement I take to be confirmed by your cable received November 2d reading as follows: 'Moody's buyer secures amount transfer complete when deeds mailing returned signed.' When the transaction is completed, and I trust there will be no delay, I shall be much obliged if you will send me the money in the form of a draft, as I do not see the necessity of going to the expense of cabling me the money."

Moody previously had a deed prepared, along with an agreement between Whealdon and plaintiff whereby plaintiff assigned to Whealdon any claim which he might have to compensation for railroad right of way across the land. The two deeds referred to in the letter must refer to the deed so prepared and the assignment, because it does not otherwise appear that two deeds were executed by plaintiff to Whealdon.

Matters stood in this way until April 9, 1911, when Moody cabled plaintiff:

"Twenty thousand being paid can I grant buyer ninety days on balance amply secured at six per cent. I favor because price higher than later sales and buyer inherits our strife with Lyleites."

Plaintiff replied:

"Yes provided draft twenty thousand mailed at once and presuming contract balance signed by you and deed remains bank till final payment cable if agreed to."

Moody again cabled April 11th:

"Will mail draft and sign contract but surrender deed depositing with bank note doubly secured by mortgage for balance answer."

Plaintiff replied:

"Agreed writing."

On the same day plaintiff wrote Moody as follows:

"Confirming my cable of this morning 'Agreed' and with regard to the former cables received, I cannot refrain from saying that it has come somewhat in the nature of a surprise that the whole amount should not be paid over—the more so as the basis of all the negotiations have so far been 'cash on delivery.' Also I think little of the plea that he inherits our strife with Lyleites, for that he knew about and deliberately took over—it is even mentioned in the deed, if I remember rightly—presuming that you mean the Lyle representatives of the railway. However, it seemed to me at this distance that it would be unwise of me to insist on a cash basis, without knowing the full and, I've no doubt, adequate reasons that prompted you to recommend $15,000 should be left for 90 days. As 90 days is specified in your cable, I presume that it is only a temporary mortgage, so to speak, and that you have reason to believe

he will pay up by then—say 10 July—and that if he does not we can sue him, and obtain the balance without difficulty. I must congratulate you on having brought this matter so nearly to an end. I am rather busy to-day, so will say no more than that, but will write again shortly."

Subsequently, namely, on April 14th, the bank delivered the plaintiff's deed to Whealdon, who deeded to Le Roy Park, and accepted from Park $25,000 in cash, Park's note for $10,000 payable in 90 days, and a mortgage from Park and wife on 677 acres of the land upon which Whealdon had the option, and thus closed the transaction. This is the final transaction of which plaintiff complains.

On April 18th Moody further cabled plaintiff:

"Bank remitting twenty five and holding note and mortgage for ten congratulations."

And the bank, on the following day, wrote as follows:

"Inclosed find London draft for £5126.12.6. in payment of your deed to Whealdon, $25,000.00 less mortgage and note for $10,000.00, which I have had placed on record and hold here for you. Mortgage is dated April 14th and runs for ninety days."

Later, through cable from Moody, an extension of 90 days for payment was granted by plaintiff. Plaintiff further testifies that he first learned that Park was interested in the transaction through a letter from the bank of date January 11, 1912, and first learned that Park was the real purchaser when, on November 13, 1913, he received the note and mortgage, which the bank had forwarded to plaintiff at his request, and did not until some time later discover that all the land included in his option to Whealdon was not covered by the Park mortgage. Then followed the foreclosure.

Plaintiff predicates his case upon the proposition that the bank was the holder of an escrow agreement, the terms of which it was bound to observe to the letter, and that it laid itself liable to the plaintiff for not observing the terms of such escrow, to his disadvantage and detriment.

It is no doubt a sound legal principle that one holding an escrow agreement acts at his peril in dealing with either party without the consent of the other. Such an agreement constitutes the holder of the escrow a stakeholder for both parties, and he is "bound above all things not to take sides between the parties, and answerable ultimately to the one or the other, according to their respective rights as between themselves." Citizens' Bank v. Davisson, 229 U. S. 212, 223, 33 Sup. Ct. 625, 629 (57 L. Ed. 1153, Ann. Cas. 1915A, 272).

I am impressed, from a reading of the cablegrams and correspondence between plaintiff and the bank, and the transactions had through Moody, that the bank was something more than a mere escrow holder. It was in a sense the general agent of plaintiff. Plaintiff's letter to the bank of July 25, 1910, constitutes the bank such agent, wherein he says, "I should like to leave in your hands the entire management of my interests." Previously in the same letter, in advising with reference to the Booth option, it being problematical whether the option would result in a completed sale, he said:

"It is impossible for me to negotiate all details at this distance, and I should like you to undertake the management of my interests in any event, * * * and to endeavor to dispose of my holdings on the best terms possible."

So that there is here a delegation of authority to the bank to take the management of his entire interests, and to endeavor to dispose of his holdings. It is hardly possible otherwise to create an agency so completely. Being such an agent, it was therefore not a wholly voluntary act on the part of the bank to cable plaintiff that Moody's sale was first and best, and that the buyer was responsible, etc. The bank was subserving the interest of the plaintiff by so doing.

At this time let us inquire whether Moody was also the agent of plaintiff with respect to the sale of the real property, as negotiated and finally consummated through the delivery of the deed by the bank and the acceptance of the Park mortgage. By his letter of July 25, 1910, plaintiff withdrew from Moody all authority he may previously have had in relation to plaintiff's property at Lyle. Later than this, but evidently before Moody received plaintiff's letter withdrawing authority, Moody, purporting, as plaintiff says, to act as his agent, gave Whealdon an option to purchase the land. When plaintiff was advised of this option by cable of August 18, 1910, he consented to a continuation of negotiations through Moody for a sale to Whealdon. This resulted in plaintiff's withdrawing his option to Booth, and his instructions to the bank to carry into effect Moody's arrangement. In his letter of instructions to the bank he says:

"I understand the arrangement made by you and Mr. Moody with reference to my property to be," etc., stating the arrangement.

This was a recognition that both the bank and Moody had been acting in his behalf with reference to this property, and thus far, at least, he was willing to ratify their acts by his instructions to the bank to close the transaction in pursuance of the terms agreed upon. It was necessary that the deed be transmitted to the bank to enable this to be done. But later Moody found that the transaction could not be closed without a modification of the terms of payment. He advised plaintiff of this, and plaintiff assented by cable, addressed to Moody, not to the bank. So far as the correspondence discloses, the bank was not otherwise advised of the modification except through Moody. Plaintiff at no time, by letter or cable addressed to the bank, modified the explicit instructions first given to the bank by his letter of December 30, 1910. Whatever further specific instructions the bank received respecting the matter were through Moody. Whatever may have been Moody's authority in acting for plaintiff, plaintiff has concededly ratified his acts, at least inclusive of the modification of the primary agreement authorizing the cash payment of $20,000 and acceptance of a mortgage for the balance, to be ample and double security for the payment of such balance. In other words, these later transactions were had directly between Moody and the plaintiff, and what the bank did in the premises must have been through instructions from Moody, or on its own account, having been advised through Moody what had taken place.

It can scarcely be questioned that thus far at least Moody, in doing what he did, acted as the agent of plaintiff, and plaintiff ought not to be heard to controvert his authority. The crucial question is whether either Moody or the bank was authorized to accept the payment of the $25,000 and a mortgage from Park on a portion of the land sold as security for payment of the balance due of $10,000.

As we have seen, Moody was the agent of plaintiff, acting under special instructions, and the bank was the general agent of plaintiff for the "entire management" of his interests, with directions to endeavor to dispose of plaintiff's holdings on the best terms possible. The determination of plaintiff, as voiced by his letter of July 25th, to sell "in one block and for cash down," had been modified by the instructions to sell for $20,000 cash and balance in deferred payment, with ample and double security.

The notion that the note and mortgage were to be given by Whealdon, and not Park, grows out of the fact that the original option to purchase was given to Whealdon. This was an option, it will be noted, that was given by Moody, acting as the agent of plaintiff. Park was, however, an interested party to the negotiations from the beginning. In reality, Whealdon, who was a real estate agent by occupation, was buying the property for Park, and this was completely understood by Moody, and no doubt by the bank also. The exact conditions were not fully disclosed to plaintiff, as they should have been; but the negotiations proceeded on that basis from the first, and were carried into effect in all substantial respects as it was purposed from the beginning, and as Whealdon and Park understood it, as well as Moody and the bank. It is a case of carrying out the substantial understanding of an agreement through agents, without a disclosure to the principal of all the conditions attending the transaction. It is hardly to be questioned that, if the principal had been advised of the true and exact conditions, he would have given his assent, just as he gave it with the limited knowledge he possessed. Moody and the bank were eventually co-operating respecting the transaction as agents of plaintiff, but it might be that the bank was not advised fully as to what information Moody had imparted to plaintiff as to the details of the transaction.

However this may be, it was evidently supposed that the exact details were not a vital factor, so long as the end was to be accomplished in substantial accord with the real understanding of the parties to the option. I say of the "parties," because it must now be conceded that Moody was the agent of plaintiff in negotiating the option, along with the modification that ensued, and I am impressed, considering all the circumstances and conditions attending the transaction and the relationship of the parties, namely, the plaintiff and his agents, Moody and the bank, in furthering the sale, that the bank, with its general authority for managing plaintiff's entire interests, along with his request to dispose of his property on the best terms possible, did not exceed its authority by accepting the note and mortgage of Park in the place of the note and mortgage of Whealdon. It is conceded by the pleadings that Whealdon was financially without personal re-

sponsibility. The mortgage was the real factor to which the parties were looking as security for the deferred payment, and it made no substantial difference to the plaintiff that he got Park's note and mortgage, instead of Whealdon's.

The next contention of counsel is that the mortgage was to have covered the entire property conveyed. This contention is not borne out by the correspondence. Moody's cable of April 9, 1911, says, "Balance amply secured," and in his cable of the 11th he advises, "Will mail draft and sign contract but surrender deed depositing with bank note doubly secured by mortgage for balance." This proposition was agreed to by plaintiff. The language used was of a character, considering the circumstances, to indicate that it was not designed that the mortgage should cover the entire premises. If the whole were to be covered, why indicate that the note would be amply or doubly secured by mortgage? It would have sufficed to say, "Note secured by mortgage on premises." But the saying so or its equivalent was carefully avoided, and plaintiff could not have been misled by these cables.

Another contention is that Moody agreed to sign a contract for the payment of the balance due, and this was not done. Assuming that it was the duty of the bank to have Moody perform his obligations in connection with the matter, the correspondence between plaintiff and Moody on the subject is so ambiguous that it is not susceptible of satisfactory interpretation. One thing is very clear, and that will suffice to answer the contention; that is, that it was not intended that Moody was to become surety for the payment of the note to be given for the balance due. The security for the payment of that note was to be otherwise provided for, namely, by mortgage. Moody agreed to sign the contract—what that was is not clear—but not the note. Nor did he agree to sign any obligation looking to the payment of the note. Moody was acting as agent of plaintiff without compensation, but not under a del credere commission to insure both the solvency of Park and punctual discharge of his debt.

Referring to the criticism that the note was not "amply and doubly secured," it is only necessary to add that this was a matter left to the judgment of Moody and the bank. They exercised their judgment in the premises. While the testimony tends to show that the land covered by the mortgage was worth at the time from $10,000 to $15,-000, there is no indication that they acted corruptly, or otherwise than in the utmost good faith, in accepting the security. It should be stated in this connection that Moody gave testimony as to the value of the land covered by the mortgage, and he was of the opinion that the land was worth far more than double the amount of the note, and he exercised his judgment accordingly. I do not think the bank can be charged with any dereliction of duty in this relation.

One other feature should be noticed. It is urged that the bank should have protested nonpayment of the note, so as to fix Whealdon's liability as indorser. I am of the view, considering that the bank was the general agent of plaintiff for managing his interests, that the bank owed a duty to plaintiff to see that nonpayment was duly protested. But, as the protest could not have resulted in any value to

plaintiff, on account of Whealdon's pecuniary irresponsibility, he should not be permitted to recover anything on that account.

The plaintiff is not entitled to recover in the action, and the finding of the court will be for defendant.

UNITED STATES v. SCHMAUDER.

(District Court, D. Connecticut. July 23, 1919.)

1. INTOXICATING LIQUORS ⚷216—WAR-TIME PROHIBITION ACT—INFORMATION.

An information under Act Nov. 21, 1918, charging that defendant sold for beverage purposes a malt product "commonly known as lager beer" and containing as much as one-half of 1 per cent. of alcohol, *held* good on demurrer, although it did not charge in terms that the article was intoxicating.

Criminal prosecution by the United States against Martin Schmauder. On demurrer to information. Overruled.

John F. Crosby, U. S. Atty., of Hartford, Conn.

C. S. Hamilton, of New Haven, Conn., for defendant.

CHATFIELD, District Judge. The defendant appeared in court upon the 12th day of July, 1919, to answer an information charging him with selling on the 8th of July, 1919, "a certain quantity of beer for beverage purposes, said beer being a malt product commonly known as lager beer and containing as much as one-half of 1 per cent. of alcohol by both weight and volume, and said beer not being then and there sold for export, sacramental, medicinal, or other than beverage purposes."

The act charged was alleged to have occurred "before the conclusion of the present war and before the termination of demobilization, the date of which is to be hereafter determined and proclaimed by the President of the United States." This act is alleged to be contrary to the laws of the United States, and the defendant demurred, claiming that the information did not constitute any crime against the United States government, or any violation of any lawful act or order of the same, and especially "in that the said information and complaint failed to allege that the supposed beer alleged to have been sold by the defendant was of such kind and quality as to be intoxicating, and failed to allege any facts which showed that the said supposed beer alleged to have been sold by the defendant contained such quantity of alcohol as to be within the prohibition of any act of Congress or of any proclamation of the President of the United States, and failed to allege that said beer contained a larger per cent. of alcohol than 2.75 per cent., and failed to allege that said beer contained a sufficient quantity of alcohol to render it intoxicating."

The information does not include the word "intoxicating," and the defendant seeks by this demurrer to obtain a ruling that no crime can be committed by the sale of a malt product containing alcohol and being of the general class which has been and is sold over the bar in

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

saloons as beer, but which is that sort of beer now manufactured by the brewers since the restriction upon the use of grain, and which does not contain so much as 2.75 per cent. of alcohol.

It was argued in support of the demurrer that such beer was not in fact intoxicating, for the reason that before a person could obtain a sufficient quantity of alcohol to intoxicate he would have to drink to such an extent as to make him ill, or to exceed the capacity of consumption at one time. Whether intoxication could be produced by taking the beer in small quantities over a longer period of time, or whether some individuals might be intoxicated by one quantity, while others would not be affected by the same quantity, cannot be ascertained from the information nor from the demurrer.

It is apparent that there is nothing in this record from which the court can determine in any way what amount of alcoholic content would make beer intoxicating and what would not. The demurrer has admitted the facts alleged in the information. The defendant has thereby admitted that he made a sale of beer, which is a product of malt and which is commonly known as lager.

A similar situation is presented by that portion of the statute which relates to the product of grapes produced by fermentation, and the mere statement of the proposition carries with it the answer that a demurrer cannot be used in order to serve the purpose of a trial upon the issue which would be raised if a person came in and denied that the product sold by him was intoxicating, or even if he came in and denied that the product sold by him was the substance known, when the act was passed, as lager beer.

Therefore the only point presented upon this demurrer to the information is whether it is necessary to allege in an information that the beer sold was intoxicating. The information does state that it contains alcohol and is a malt product, and to this extent and in this way the material is excluded from the class of nonalcoholic beverages, such as root beer and other varieties of home-made or harmless drinks which are not the product of malt.

The statute expressly limits the effect of this portion of the law to products of malt and of vinous fermentation. This of itself militates against the idea that the sole purpose of the statute was to conserve food, and indicates that a part of the purpose was to accomplish prohibition, with the incidental beneficial result upon the health of the nation and the increase in orderly behavior which the advocates of prohibition believe will follow restriction of the liquor traffic and the prohibition of alcoholic beverages.

But the statute in question is a part of a bill providing appropriations for the Department of Agriculture in carrying out the law "to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products." Certain sections of the law prohibit the use of grains, cereals, fruit, or other food product in the manufacture or production of beer, wine, or other intoxicating, malt, or vinous liquor for beverage purposes. It also prohibits the sale for beverage purposes of any distilled spirits. These provisions of the law are stated to be for the purpose "of conserving the man power of the nation and to increase efficiency in

the production of arms, munitions, ships, food and clothing for the Army and Navy." It is evident that the purpose of the sections of the law relating to alcohol is thus intended to produce conservation of food, and also to further the well-being or the health and the military strength of the nation, which in the opinion of Congress would be injuriously affected by the manufacture and sale of beer, wine, and other intoxicating, malt, and vinous products, and also distilled spirits.

The Commissioner of Internal Revenue is given authority to prescribe regulations under which alcoholic products from the island of Porto Rico may be admitted into the United States for use in industrial purposes in the arts and sciences, but no such alcoholic product is to be used as a beverage. There is in this no mention of alcoholic content. Other importation of distilled spirits, beer, wine, and other intoxicating liquor is prohibited, and all of the provisions are to be enforced until the determination of the present war and during the period of demobilization, which time shall be determined and proclaimed by the President of the United States.

It is apparent that the intent of the Congress was to prohibit the sale of those malt products which were commonly known as beer, which were also commonly supposed to be intoxicating, which had always been classified as intoxicating liquor, and which because of their alcoholic content had some effect upon the production and man power of the nation, while at the same time using in their manufacture some of the food products of the nation, which were needed for the purposes of the war and for the purposes of restoring conditions at the termination of hostilities, so far as Congress had power to regulate conditions after the war as a part of its military operation and conduct.

It is evident that if Congress, by making a tremendous drain upon the resources of the country for immediate war purposes, should thereby make it necessary to regulate the use of material immediately thereafter, in order to bring matters back to a normal base, the laws by which such restoration would be had can properly be made a part of the military measures which must be adopted in order to carry on the war and are therefore justified under the powers of the United States in waging war, as has been decided in the case of United States v. Minery, in this district, in an opinion filed upon this day. 259 Fed. 707.

We must therefore determine what Congress meant by the use of the words "beer or other intoxicating malt liquor." In the first place, the word "malt" is evidently generic, and covers the entire scope of the law. In the same way the word "intoxicating" is generic, and covers the entire scope of the law; but this does not determine the question as to what articles Congress intended by the statute to prohibit as "intoxicating" and classified as such in the statute.

The doctrine of ejusdem generis is too well known and too well established to need elaboration. The case of United States v. Chase, 135 U. S. 255, 10 Sup. Ct. 756, 34 L. Ed. 117, and many decisions following this construction, have settled its meaning. In the District Court of the United States in the Southern District of New York in the case of Hoffmann Brewing Co. v. McElligott et al., 259

Fed. 321, decision was rendered May 17, 1919, on a motion to dismiss. This action was brought to enjoin the collector of internal revenue and the United States attorney, upon an allegation that these officials were intending after the 1st day of June, 1919, to prohibit the sale of beer containing more than one-half per cent. of alcohol by volume, and to prevent the brewing of such beer after the 1st day of May, 1919.

It was alleged that the collector was intending after those dates to refuse the sale of stamps or to allow brewers to qualify for conducting their business. The United States attorney, it was alleged, was intending to institute prosecution under the Agricultural Law—that is, the law of November 21, 1918—and to proceed with actions to impress forfeitures upon the properties used in the brewing of the products referred to, under the revenue law.

The court discussed principally the question of the jurisdiction of the court to proceed by injunction against the collector and the United States district attorney. The law was upheld as constitutional, the jurisdiction of the court to restrain the United States attorney and the collector was upheld, and the motion to dismiss denied, on the ground that the complaint alleged the beer in question to be nonintoxicating, that this was admitted by the motion, and that the law did not prohibit nonintoxicating beer.

The court assumed that the threatened action was based entirely upon the so-called Prohibition Law of November 21, 1918 (40 Stat. 1045, c. 212). Upon appeal this decision was reversed, in so far as the jurisdiction to enjoin the United States attorney from instituting prosecution was concerned, and this made unnecessary any determination as to what he might prosecute as a crime. The injunction against the collector of internal revenue was affirmed, inasmuch as the collector might see fit to attempt enforcement of forfeitures under the revenue law, because of violations of the so-called Prohibition Law, which was in no sense a revenue statute. 259 Fed. 525, — C. C. A. —.

In a dissenting opinion one member of the Court of Appeals expressed the opinion that the injunction against the collector should also be vacated, on the ground that, no wrongful act being intended or threatened, no need of an injunction was shown. It will be noted that inasmuch as the Court of Appeals, through all of its members, decided that no injunction against the United States attorney for the prosecution of cases under the so-called Prohibition Law could lie, there was obviously no need of determining what was the meaning or intent of this Prohibition Law. But the court, at the request of counsel and in order to facilitate proceedings in future cases, expressed their opinion as to the meaning of the phrase "no beer, wine, or other intoxicating, malt or vinous liquor."

This was stated as a dictum on the part of the court, but is useful in so far as it explains the idea of all of the members of the Court of Appeals who sat in that case. They seem to be in agreement with the idea of the judge in the District Court, when he stated that the question as to what was intoxicating liquor was a question of fact; they agree with him that the words "intoxicating, malt and vinous"

are general words, applying to the words "wine and beer," and must have been so understood by Congress. Hence these words were intended to mean wine and beer of the class of intoxicating liquor. But the court says:

"The courts cannot undertake to say as a matter of law that liquor which contains 2.75 per cent. of alcohol is not intoxicating."

This idea is plainly in accord with the statute. Congress had it in mind to say "beer or any other product of malt of an intoxicating nature." The thought was that expressed in the Selective Service Law (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, § 2019a]), which says: "Any intoxicating liquor, including beer, ale or wine." But either statement would suggest that Congress classified, and intended to classify, beer as intoxicating, and merely made sure that it was covered by the law in case dispute arose. The law surely included beer, and showed that Congress understood it to be intoxicating.

On July 1, 1919, in the case of United States of America v. Standard Brewery, in the district of Maryland, Judge Rose held that the words "beer and wine" apparently were intended to mean what they have always been supposed to mean, as in the class of intoxicating liquor. He says if any one makes or if any one sells that which a jury shall find to be intoxicating, he will be liable to the penalty, but, inasmuch as he understands that five judges of the Second circuit have expressed the opinion that the law had no relation to anything which was not intoxicating, he sustained a demurrer to an information which did not contain the word "intoxicating," in order that the case might go directly to the Supreme Court of the United States, rather than to proceed to a hearing on the merits.

It has been brought to the attention of the court that in the Western Pennsylvania [1] and in the Eastern Pennsylvania districts [2] demurrers have been overruled which had been presented upon the sole ground that the indictment or information did not contain the word "intoxicating." It has also been brought to the attention of the court that in a case in the district of Massachusetts [3] a demurrer has been sustained to a similar information, but whether this is following the reasoning of Judge Rose or is based upon different grounds is not known to this court.

From the above cases it is apparent that no court has held that Congress did not intend at the time of passing this law to prohibit lager beer with an amount of alcoholic content sufficient to make it taxable by the revenue department, sufficient to bring it within the general definition of lager beer, as known from past experience, and sufficient to bring the act within the prohibition of the Selective Service Law, which prohibited the sale of "any intoxicating liquors including wine and beer."

In other words, the statute intended to conserve food, to increase the man power of the nation, and to protect the organization of the army, by prohibiting the sale of beer which has a tendency to intox-

[1] United States v. Pittsburgh Brewing Co., 260 Fed. 762.
[2] United States v. Bergner & Engel Brewing Co., 260 Fed. 764.
[3] United States v. Petts, 260 Fed. 663.

icate to such an extent as to interfere with the morals, the physical welfare, or the good order of the community. Whether or not the mere sale of malt beer, even though it have not sufficient alcohol content to fully intoxicate, is of itself detrimental, whether the sale of such liquor (even though it would not fully intoxicate) is disadvantageous from the standpoint of the conservation of food, are things with which the court has nothing to do. That is a question for the calm discretion of Congress, and it is evident that Congress intended by the act under consideration to prohibit the sale of such beer as it considered detrimental.

The period during which this law can be enforced must be more or less brief. Even if it should continue until the Prohibition Amendment to the Constitution shall take effect, the period is not long. But Congress has the power at any time to modify the statute, and Congress has also the power to pass a law interpreting the statute, if beer which has a tendency to produce intoxication (in the sense of affecting control over the sensibilities, muscles, or emotions of an individual, but will not fully intoxicate) is not the substance intended to be prohibited.

If on a trial on the merits it shall appear that the lager beer in question is not of an intoxicating nature, and is not what Congress evidently meant to prohibit, the matter can be disposed of as a question of fact; but the court must instruct the jury as to the meaning of the statute. Such a question could not be, however, raised by admitting that the beer sold is a product of malt containing over one-half of 1 per cent. of alcohol, and by objecting that the information, while following the language of the statute and the thought of Congress, does not also charge that such substance is "intoxicating."

Under the law intending to prevent the use of narcotics, if a person were charged with the sale of opium, a demurrer would not lie on the ground that the person receiving the opium was so accustomed to the drug that it would not act as a narcotic. No acquittal of the charge of selling liquor could be directed in case the jury found that the person receiving the liquor would not be intoxicated thereby. The only defense would be that no person could receive any intoxicating effect therefrom, or in other words that it was not beer of the sort which Congress had in mind in using the word "beer," in the meaning of that word as used at the time of passage of the act—in other words, any kind of malt beer, which was in the legal sense an "intoxicating liquor," as Congress and public usage understood the term. It could never have been intended to leave to each jury the right to decide what it considered intoxicating liquor, and, on the contrary, it was not intended to leave to a jury the right to say what Congress meant.

Under the internal revenue laws and all standards by which Congress could have viewed the matter, the beer described in the present information was of the class known as intoxicating liquor, and as such its sale was prohibited.

The demurrer will be overruled, and the defendant required to plead over.

UNITED STATES v. THOMPSON.

(District Court, E. D. Arkansas, Jonesboro Division. June 4, 1919.)

1. TREATIES ⟹2—POWER TO MAKE—CONSTITUTIONAL PROVISIONS.
The Constitution limits legislation by Congress to matters within the scope of the powers expressly delegated therein to the federal government, but treaties are not so limited; Const. art. 6, cl. 2, providing that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

2. TREATIES ⟹4—SCOPE AND VALIDITY—STATUTE TO GIVE EFFECT TO TREATY.
A treaty relating to a proper subject of international negotiation, which is not in conflict with any constitutional provision, nor subversive of fundamental rights, is valid, and may be made effective by appropriate legislation, although, if it were a statute, it would be unconstitutional, as affecting rights exclusively under control of the states.

3. GAME ⟹4—MIGRATORY BIRD ACT—CONSTITUTIONALITY.
Migratory Bird Act July 3, 1918 (Comp. St. 1918, §§ 8837a-8837m), enacted to give effect to the convention between the United States and Great Britain of August 16, 1916, *held* valid.

Criminal prosecution by the United States against E. D. Thompson. On demurrer to information. Overruled.

W. H. Martin, U. S. Atty., of Hot Springs, Ark., Wm. L. Frierson, Asst. Atty. Gen., and Wm. W. Williams, Solicitor of Department of Agriculture, for the United States.

S. W. Moore, of Kansas City, Mo., and E. L. Westbrook, of Jonesboro, Ark., for defendant.

TRIEBER, District Judge. The issue in this cause, raised by demurrer to an information filed by the United States attorney, charging the defendant with a violation of the Migratory Bird Act of July 3, 1918 (40 Stat. 755, c. 128, U. S. Comp. St. 1918, p. 1795), entitled: "An act to give effect to the convention between the United States and Great Britain for the protection of migratory birds, concluded at Washington, August 16, 1916, and for other purposes" (the treaty referred to will be found in 39 Stat. 1702), is whether the act is constitutional. This, of course, involves the power to make the treaty.

The contention of counsel for the defendant, briefly stated, is that a treaty or convention between the United States and a foreign nation is of no higher grade than an act of Congress, and if an act of Congress regulating migratory birds is beyond the constitutional powers of Congress a treaty on the same subject is also void.

The constitutional provisions relating to the treaty power are: Article 2, § 2, cl. 2, which, among the powers granted to the President, provides that:

"He shall have power, by and with the * * * consent of the Senate, to make treaties: Provided, two-thirds of the Senators present concur."

Article 1, § 10, cl. 1, provides that:

"No state shall enter into any treaty, alliance or confederation."

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

The Tenth Amendment to the Constitution provides:

"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."

It is now contended that as it was held by this court in United States v. Shauver (D. C.) 214 Fed. 154, by Judge Pollock in U. S. v. McCullagh (D. C.) 221 Fed. 288, and in State v. Sawyer, 113 Me. 458, 94 Atl. 886, L. R. A. 1915F, 1031, Ann. Cas. 1917D, 650, and State v. McCullagh, 96 Kan. 786, 153 Pac. 557, that the migratory bird section of the Appropriation Act for the Department of Agriculture of March 4, 1913, c. 145, 37 Stat. 828, 847 (Comp. St. § 8837), was unconstitutional, the same result must follow in this case; or, in other words, that the treaty power under the Constitution is no greater than the power of Congress to enact statutes. (The act of 1913 was not enacted to carry into effect a treaty.)

In construing the Constitution it is the settled canon of construction that every part of it must be given effect, and none of its provisions may be disregarded. Article 6, cl. 2, of the Constitution, provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

It will be noticed that this section, in speaking of the laws of the United States, limits the power to enact them to such laws as are "made in pursuance thereof." On the other hand, when referring to treaties, the only limitation is "which shall be made under the authority of the United States," omitting the words "in pursuance of the Constitution." It cannot be assumed that the framers of that instrument intended to make no distinction between laws and treaties, when using language differing so materially. The words, "laws made in pursuance of the Constitution," can have but one meaning, namely, when authorized by the Constitution, while as to treaties the limitation is when made "by authority of the United States." The reason for this distinction is obvious. In making laws, our own consent alone, is necessary, but in forming treaties the concurrence of the other power to the treaty is required.

Laws can only prescribe the conduct for the people within the jurisdiction of the lawmaker, while treaties are to affect rights and privileges of subjects of foreign countries and of our citizens in such countries. Treaties are reciprocal, and in all instances the same rights and privileges are granted to the citizens and subjects of each of the contracting parties in the respective countries.

Laws of a local nature, and which, under our dual system of government, are under the exclusive control of the states, frequently affect the most important rights of aliens, while the rights of our own citizens are similarly affected by the municipal laws of foreign nations. To protect these, treaties must be made, and as the states are expressly prohibited by the Constitution from entering into treaties with foreign nations, these rights can only receive the protection necessary for their

enjoyment by treaties made by the national government, clothed with that power by our Constitution. As held in the Chinese Exclusion Case, 130 U. S. 581, 604, 605, 9 Sup. Ct. 623, 629 (32 L. Ed. 1068):

"While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself, and considerations of public policy and justice, which control, more or less, the conduct of all civilized nations. * * * The control of local matters being left to local authorities, and national matters being entrusted to the government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

Attorney General Cushing, in Droit D'Aubaine, 8 Op. Attys. Gen. 411, 415, said:

"But can it be, is there any good reason to think, that the federal government has no power to make such a stipulation? It may be inconvenient, because involving conflict with, or abrogation of, the laws of one or more of the states. Granted; but inconvenience is not unconstitutionality, question of which depends on the text of the federal Constitution. The power, which the Constitution bestows on the President, with advice and consent of the Senate, to make treaties, is not only general in terms and without any express limitation, but it is accompanied with absolute prohibition of exercise of treaty power by the states. That is, in the matter of foreign negotiation, the states have conferred the whole of their power—in other words, all the treaty powers of sovereignty—on the United States. Thus, in the present case, if the power of negotiation be not in the United States, then it exists nowhere, and one great field of international relation, of negotiation, and of ordinary public and private interest, is closed up, as well against the United States as each and every one of the states. That is not a supposition to be accepted, unless it be forced upon us by considerations of overpowering cogency. Nay, it involves political impossibility; for, if one of the proper functions of sovereignty be thus utterly lost to us, then the people of the United States are but incompletely sovereign—not sovereign, nor in coequality of right with other admitted sovereignties of Europe and America."

Mr. Richard Henry Lee, writing under the pen name of "The Federal Farmer," in his letter IV, dated October 12, 1787, when the Constitution was before the people of the states for ratification, speaking of the treaty-making power in the Constitution, said:

"By the article before recited, treaties also made under the authority of the United States shall be the supreme law. It is not said that these treaties shall be made in pursuance of the Constitution, nor are there any constitutional bounds set to those who shall make them. The President and two-thirds of the Senate will be empowered to make treaties indefinitely, and, when these treaties shall be made, they will also abolish all laws and state Constitutions incompatible with them. This power in the President and Senate is absolute, and the judges will be bound to allow full force to whatever rule, article, or thing the President and Senate shall establish by treaty. Whether it be practicable to set any bounds to those who make treaties, I am not able to say; if not, it proves that this power ought to be more safely lodged." Scott's Federalist and Other Constitutional Papers, vol. 2, pp. 867, 868.

Mr. Iredell, later one of the Justices of the Supreme Court, and the only justice who dissented in Ware v. Hylton, 3 U. S. (3 Dall.) 199, 1 L. Ed. 568, in his answer to Mr. Mason's objections to the Constitution, referring to the treaty power said:

"Did not Congress very lately unanimously resolve, in adopting the very sensible letter of Mr. Jay, that a treaty, when once made pursuant to the sovereign authority, ex vi termini became immediately the law of the land? It seems to result unavoidably from the nature of the thing that, when the constitutional right to make treaties is exercised, the treaty so made should be binding upon those who delegated authority for that purpose. If it was not, what foreign power would trust us? And if this right was restricted by any such fine checks as Mr. Mason has in his imagination, but has not thought proper to disclose, a critical occasion might arise, when for want of a little rational confidence in our own government we might be obliged to submit to a master in an enemy." Scott's Federalist and Other Constitutional Papers, vol. 2, p. 903.

Mr. Calhoun, while the commercial treaty with Great Britain was being discussed in the House of Representatives, on January 8, 1816, said:

"This country within is divided into two distinct sovereignties. Exact enumeration here is necessary to prevent the most dangerous consequences. The enumeration of legislative powers in the Constitution has relation, then, not to the treaty-making power, but to the powers of the states. In our relation to the rest of the world, the case is reversed. Here the states disappear. Divided within, we present, without, the exterior of undivided sovereignty. The wisdom of the Constitution appears conspicuous. When enumeration was needed, there we find the powers enumerated and exactly defined; when not, we do not find what would be vain and pernicious to attempt. Whatever, then, concerns our foreign relations, whatever requires the consent of another nation, belongs to the treaty power, can only be regulated by it; and it is competent to regulate all such subjects, provided—and here are its true limits—such regulations are not inconsistent with the Constitution. If so, they are void. No treaty can alter the fabric of our government; nor can it do that which the Constitution has expressly forbidden to be done; nor can it do that differently which is directed to be done in a given mode, and all other modes prohibited." 4 Elliott's Debates, p. 464.

The power to make treaties has been frequently before the Supreme Court, and there is not a single instance in which a treaty has been declared unconstitutional, although many of them affect rights exclusively under the control of the states, and, if enacted as statutes by Congress, would have been void. The first time this question came before the Supreme Court was in Ware v. Hylton, 3 U. S. (3 Dall.) 199, 1 L. Ed. 568, decided in 1796. In that case the question before the court was the effect of the Paris Treaty of Peace, between the United States and Great Britain, made at the close of the war in 1783. The facts in that case were that the defendant, on July 7, 1774, became indebted on a bond, of which the plaintiffs became the owners. In 1777, before the Articles of Confederation had been entered into, the state of Virginia enacted a law to sequester the property of British subjects in the state. A part of this indebtedness was sequestered, and paid to the proper officers of the state. This was pleaded as a bar of so much of the debt as had been paid to the state. The plaintiff, to avoid this bar, pleaded the article of the Treaty of Peace which provided:

"That the creditors of either side should meet with no lawful impediment to the recovery of * * * all bona fide debts theretofore contracted."

It was held that while the state of Virginia had a right in 1777, being then a sovereign state, to enact this confiscation act, the Treaty of Peace nullified it, and the plaintiff was entitled to recover the full amount of the bond. Mr. Justice Chase, who delivered the principal opinion of the court, in the course of it said:

"There can be no limitation on the power of the people of the United States. By their authority, the state Constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the state Constitutions, or to make them yield to the general government, and to treaties made by their authority. A treaty cannot be the supreme law of the land—that is, of all the United States—if any act of a state Legislature can stand in its way. If the Constitution of a state (which is the fundamental law of the state, and paramount to its Legislature) must give way to a treaty, and fall before it, can it be questioned whether the less power, an act of the state Legislature, must not be prostrated? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only, by a repeal, or nullification by a state Legislature, this certain consequence follows: That the will of a small part of the United States may control or defeat the will of the whole. The people of America have been pleased to declare that all treaties made before the establishment of the national Constitution, or laws of any of the states contrary to a treaty, shall be disregarded."

In Hopkirk v. Bell, 7 U. S. (3 Cranch) 454, 2 L. Ed. 497, and 8 U. S. (4 Cranch) 164, 2 L. Ed. 583, which involved a state statute of limitations, a subject clearly within the exclusive jurisdiction of the states, in actions between individuals, it was held that the state statute must give way to the treaty.

In Chirac v. Chirac, 15 U. S. (2 Wheat.) 259, 4 L. Ed. 234, the question before the court was the effect of the Treaty of 1800, with France, on a statute of the state of Maryland, which provided:

"Whenever any French subject shall, by virtue of the act [which permitted French subjects to inherit real estate in the state] become seised in fee of real estate, his or her estate, after the term of ten years be expired, shall vest in the state, unless the person seised of the same, shall, within that time, either come or settle in and become a citizen of this state, or enfeoff thereof some citizen of this or some other of the United States of America."

The Treaty of 1800 enabled the people of each of the contracting parties to hold inherited lands in the other country, without being obliged to obtain letters of naturalization, and it was held that the treaty controlled, although the law is well settled that the laws of acquiring and owning lands are under the exclusive control of the states. Other cases to the same effect are Fairfax v. Hunter, 11 U. S. (7 Cranch) 603, 3 L. Ed. 453; Craig v. Radford, 16 U. S. (3 Wheat.) 594, 4 L. Ed. 467; Levy v. McCartee, 31 U. S. (6 Pet.) 102, 8 L. Ed. 334; United States v. Fox, 94 U. S. 315, 320, 24 L. Ed. 192; Clarke v. Clarke, 178 U. S. 186, 191, 20 Sup. Ct. 873, 44 L. Ed. 1028; Hutchinson Investment Co. v. Caldwell, 152 U. S. 65, 68, 14 Sup. Ct. 504, 38 L. Ed. 356.

In Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628, it was held that the statutes of Virginia, under which aliens were incapable of taking lands by descent or inheritance, must give way to the treaty with

Switzerland. One of the most important opinions is that of Mr. Justice Field, in Geofroy v. Riggs, 133 U. S. 258, 266, 267, 10 Sup. Ct. 295, 296, 297 (33 L. Ed. 642). It was there held:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. * * * The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. Ft. Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 541 [5 Sup. Ct. 995, 29 L. Ed. 264]. But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

It will be noticed that he expressed the opinion that some limitations on that power exist, and, although this was clearly obiter, it is entitled to high consideration.

In Baldwin v. Franks, 120 U. S. 678, 682, 7 Sup. Ct. 656, 657 (32 L. Ed. 766), one of the questions before the court was whether Congress could enact legislation for the protection of subjects of China, while in the United States, in order to secure to them the same rights and privileges, etc., as may be enjoyed by the citizens and subjects of the most favored nations, as the United States had obligated itself to do by the treaty with China although to do so it would have to enact laws ordinarily belonging exclusively to the states. Mr. Chief Justice Waite, speaking for the court, said:

"That the treaty-making power has been surrendered by the states, and given to the United States, is unquestionable. It is true, also, that the treaties made by the United States and in force are part of the supreme law of the land, and that they are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States."

In Re Ross, 140 U. S. 453, 463, 11 Sup. Ct. 897, 900 (35 L. Ed. 581), it was held:

"The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein."

In Re Parrott (C. C.) 1 Fed. 481, it was held that the provision in the Constitution of the state of California (article 19, § 2):

"No corporation now existing or hereafter formed under the laws of this state shall, after the adoption of this Constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolian. The Legislature, shall pass such laws as may be necessary to enforce this provision"

—and the statutes of the state in pursuance thereof, being in conflict with the treaty of the United States with China, are void. In that case it was claimed that the act attacked was within the reserved powers of the state, for the control of the corporations created by it; but the court held:

"Even if the reserved power of the state over corporations were as extensive as is claimed, its exercise in the manner attempted in this case would be invalid, because in conflict with the treaty."

The right of a state to discriminate against nonresidents to act as executors and administrators of the estates of deceased residents within the state is undoubted, yet it has been held that if, by a treaty of the United States with a foreign nation, the right to act as the administrator of the estate of a deceased person, who was the subject or citizen of the foreign treaty nation, is granted to the consul of that nation in this country, he may act as such administrator notwithstanding the prohibition of the state law. In Fattosini's Estate, 33 Misc. Rep. 18, 67 N. Y. Supp. 1119; In re Lobrasciano's Estate, 38 Misc. Rep. 415, 77 N. Y. Supp. 1040; In re Wyman, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 601; Carpigiani v. Hall, 172 Ala. 287, 55 South. 248, Ann. Cas. 1913D, 651; In re Scutella's Estate, 145 App. Div. 156, 129 N. Y. Supp. 20. In Rocca v. Thompson, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453, this question was mooted, but not decided, as the court construed the treaty as not granting that right. In Wildenhus' Case, 120 U. S. 17, 7 Sup. Ct. 390, 30 L. Ed. 565, the Chief Justice, delivering the unanimous opinion of the court, held:

"The treaty is a part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed [the offense charged was murder], within the territory of New Jersey, we see no reason why he may not enforce this right under the treaty by writ of habeas corpus in any proper court of the United States."

To subject the treaty power to all the limitations of Congress in enacting the laws for the regulations of internal affairs would in effect prevent the exercise of many of the most important governmental functions of this nation, in its intercourse and relations with foreign nations, and for the protection of our citizens in foreign countries. The states of the Union may enact all laws necessary for their local affairs, not prohibited by the national or their own Constitution; but they are expressly prohibited from entering into treaties, alliances, or confederations with other nations. If, therefore, the national government is also prohibited from exercising the treaty power, affecting matters which for internal purposes belong exclusively to the states, how can a citizen be protected in matters of that nature when they arise in foreign countries?

The same liberal construction has been applied to treaties made with Indians. In United States v. Forty-Three Gallons of Whisky, 93 U. S. 188, 197, 23 L. Ed. 846, article 3 of the treaty of October, 1863, between the United States and the Red Lake Band of Chippewa Indians, was involved. That article was:

"The laws of the United States now in force, or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect through the country hereby ceded, until otherwise directed by Congress or the President of the United States."

It was contended that the treaty was invalid, so far as it attempted to extend it to an organized county in the state of Minnesota; that the treaty provided regulations, which the national government could not constitutionally impose, and was to that extent unconstitutional. But the Supreme Court overruled this contention, saying:

"Besides, the power to make treaties with Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy, one of them relates to the disability of the citizens and subjects of either contracting nation to take, by descent or devise, real property situated in the territory of the other. If a treaty to which the United States is a party removed such disability, and secured to them the right so to take and hold such property, as if they were natives of this country, it might contravene the statutes of the states; but in that event the courts would disregard them, and give to the alien the full protection conferred by its provisions."

In United States v. Winans, 198 U. S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089, a treaty with the Yakima Indians, granting them certain fishing rights in the Columbia river, was held constitutional, and the law of the state authorizing the granting of exclusive licenses to place fish wheels at points on the Columbia river, notwithstanding the admission of the state upon an equal footing with the original states, was held void, so far as it applied to the Indians.

Even in matters of a purely local nature, Congress, if the Constitution grants it plenary powers over the subject, may exercise what is akin to the police power, a power ordinarily reserved to the states. Thus, under the commerce clause of the Constitution, many acts of Congress have been sustained. The White Slavery Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. §§ 8812–8819]), Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905; the Food and Drug Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [Comp. St. §§ 8717–8728]), Seven Cases v. United States, 239 U. S. 510, 36 Sup. Ct. 190, 60 L. Ed. 411, L. R. A. 1916D, 164; the Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699 [Comp. St. § 8739]), Clarke Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845. Under the taxing power, acts of Congress have been sustained which in effect deprived the states of some of their powers. Veazie Bank v. Fenno, 75 U. S. (8 Wall.) 533, 19 L. Ed. 482; McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

The power to control the laws of evidence in its courts ordinarily belongs exclusively to the states, but in Pugh v. McCormick, 81 U. S. (14 Wall.) 361, 372, 20 L. Ed. 789, it was held that as the acts of Congress of 1862, 1863, and 1864 required all notes to have affixed a revenue stamp, under penalty of their being, when sued on, held void, controlled state legislation, and to permit an unstamped instrument to be read in evidence in a court of the state, while these acts were in force, was held to be error.

Attorney General Griggs, in his opinion to the Secretary of State on the power of the United States to enter into treaty stipulations with

Great Britain for the regulation of fisheries in the waters of the United States and Canada, along the international boundary, said that, while "the regulation of fisheries in navigable waters within the territorial limits of the several states, in the absence of a federal treaty is a subject of state rather than of federal jurisdiction," it is no objection to the validity of a treaty, which supersedes and annuls the law of a particular state upon the same subject. Treaties—Fisheries, 22 Op. Attys. Gen. 214. See, also, the memorandum prepared by Mr. Charles Henry Butler, on the treaty power, relative to the protection of fisheries within the boundaries of the states, submitted to the Anglo-American Joint High Commission, October, 1898. 2 Butler on Treaty-Making Power of the United States, p. 315.

It is a well-known fact that the first 10 amendments to the Constitution were submitted and adopted to allay the fears expressed by many that, under the powers granted to Congress, it may exercise them so as to deprive the states from enacting legislation of a purely local nature, centralize all powers in Congress, and practically reduce the states to mere provinces. No such fears were expressed, either in the convention which framed the Constitution or in any of the state conventions called to act on it, so far as it affected the treaty power. This is all-important, for, as said in the Legal Tender Cases, 79 U. S. (12 Wall.) 457, 531, 20 L. Ed. 287:

"Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction, applied alike to statutes, wills, contracts, and Constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose, so as to subserve it. In no other way can the intent of the framers of the instrument be discovered. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by a Constitution than there are in construing a statute, a will, or a contract. We do not expect to find in a Constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines."

In the same case, Mr. Justice Bradley, in his concurring opinion, said:

"The United States is not only a government, but it is a national government, and the only government of this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, negotiations, and intercourse with other nations; all of which are forbidden to the state governments." 79 U. S. (12 Wall.) 555, 20 L. Ed. 287.

To hold that this amendment is a limitation on the treaty power to the same extent as it is on acts of Congress, acts purely local, would in effect nullify the treaty power.

We may well apply to the treaty power what was said by Mr. Chief Justice White in the Selective Draft Law Cases, 245 U. S. 366, 381, 38 Sup. Ct. 159, 162 (62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856):

"When the Constitution came to be framed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Con-

gress to raise an army and the dependence upon the states for their quotas. In supplying the power, it was manifestly intended to give it all, and leave none to the states, since, besides the delegation to Congress of authority to raise armies, the Constitution prohibited the states, without the consent of Congress, from keeping troops in time of peace or engaging in war. Article 1, § 10."

A careful analytical examination of the authorities cited in behalf of the defendant convinces that they are wholly inapplicable. In Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, the contention was that:

"All legislative power must be vested in either the state or the national government; no legislative powers belong to a state government, other than those which affect solely the internal affairs of that state; consequently all powers which are national in their scope must be found vested in the Congress of the United States."

This the court held to be "in direct conflict with the doctrine that this is a government of enumerated powers." No question of plenary power to Congress was involved in that case.

Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, Ann. Cas. 1918E, 724, involved the power of Congress to enact what was held to be an attempt to regulate child labor in the states, under the commerce clause. The Head Money Cases, 112 U. S. 580, 598, 5 Sup. Ct. 247, 254 (28 L. Ed. 798), merely held that a later act of Congress supersedes a treaty, a rule of law recognized in every case that question was before the courts. The court said:

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined; and when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

"But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.

"A treaty is made by the President and the Senate. Statutes are made by the President, the Senate, and the House of Representatives. The addition

of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war.

"In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."

In United States v. Jin Fuey Moy, 241 U. S. 394, 401, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, the act did not purport to be in aid of or in pursuance of a treaty, as was expressly held by Mr. Justice Holmes in the opinion.

In Ward v. Race Horse, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244, the court merely construed the treaty between the United States and the Indians, and held that the treaty did not grant to the Indians hunting privileges except "in hunting districts." The court said:

"Indeed, it may be further, for the sake of the argument, conceded that where there are rights created by Congress, during the existence of a territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the state, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the territory was essentially perishable and intended to be of a limited duration."

Patsone v. Pennsylvania, 232 U. S. 138, 34 Sup. Ct. 281, 58 L. Ed. 539, construed a treaty as granting no right to subjects of Italy, to hunt in any of the states of the Union.

Compagnie Française, etc., v. Board of Health, 186 U. S. 380, 395, 22 Sup. Ct. 811, 817 (46 L. Ed. 1209), held that the proper construction of the treaty invoked did not grant the rights claimed. It was held:

"But it is plain from the face of the treaty that the provision as to the certificate was not intended to abrogate the quarantine power, since the concluding section of the article in question expressly subjects the vessel holding the certificate to quarantine detention if, on its arrival, a general quarantine had been established against all ships coming from the port whence the vessel holding the certificate had sailed. In other words, the treaty, having provided the certificate and given it effect under ordinary conditions, proceeds to subject the vessel holding the certificate to quarantine, if, on its arrival, such restriction had been established in consequence of infection deemed to exist at the port of departure. Nothing in the text of the treaty, we think, gives even color to the suggestion that it was intended to deal with the exercise by the government of the United States of its power to legislate for the safety and health of its people, or to render the exertion of such power nugatory by exempting the vessels of the kingdom of Greece, when coming to the United States, from the operation of such laws. In other words, the treaty was made subject to the enactment of such health laws as the local conditions might evoke, not paramount to them, especially where the restriction imposed upon the vessel is based, not upon the conditions existing at the port of departure, but upon the presence of an infectious or contagious malady at the port of arrival within the United States, which, in the nature of things, could not be covered by the certificate relating to the state of the public health at the port whence the ship had sailed."

While this court is of the opinion that the power to declare treaties void, if clearly violative of some provision of the Constitution or for reasons mentioned in Geofroy v. Riggs, exists, it should, in the language of Mr. Justice Chase, in Ware v. Hylton, "never be exercised but in a very clear case indeed."

To make treaties is one of the highest attributes of every sovereign government, and if the United States does not possess it to the fullest extent it would not be invested with the powers which belong to independent nations, and the rights of our citizens in their intercourse with foreign nations, or their right to the protection of life, liberty, and the enjoyment of property in foreign countries would be at the mercy of foreign nations, as the states are without authority to enter into treaties. It is impossible to conceive that the framers of the Constitution overlooked a matter of such importance, and intended to deprive the people of protection in foreign lands, which can only be secured by treaty.

To say that by the exercise of that power the people of the states may be deprived of their liberties is to reflect, not only on those who by the Constitution are invested with that power, but on the people themselves, for a treaty can only be made by the President and the concurrence of two-thirds of the Senators, all elected by the people, and their servants.

Aside from this, a treaty may be repealed by Congress at any time, as there is no principle of law more firmly established by the highest court of the land than that, while a treaty will supersede a prior act of Congress, an act of Congress may supersede a prior treaty. The latest expression controls, whether it be a treaty or an act of Congress. Therefore, if it be conceivable that a President, with the concurrence of two-thirds of the Senators, should make a treaty subversive of the rights and liberties of the people, a Congress would be elected pledged to repeal it.

In the opinion of the court, the power to make the treaty in controversy exists, and the act of Congress to carry it into effect was in discharge of a moral obligation assumed by the nation, by the convention with Great Britain.

The demurrer to the information is overruled.

THE VAN.

THE BRANDON.

(District Court, S. D. Florida. May 21, 1919.)

1. COLLISION ⚷90—BOAT AT DOCK—NEGLIGENT NAVIGATION OF PASSING VESSEL.

   A steamship, which, while under way up a narrow stream, cast off the lines of a motor barge alongside, which was not then under power, the result being that she struck the stern of the barge and caused her to collide with a vessel at a dock, *held* solely in fault for the collision.

2. COLLISION ⚷135—MEASURE OF DAMAGES.

   When the cost of repairing a vessel injured in collision would be disproportionate to her value, the court may take the amount of depreciation in value caused by the collision as the measure of damages.

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

In Admiralty. Suit for collision by Nina F. Stokes and John C. Stokes, her husband, against the steamship Van and the gasoline barge Brandon. Decree for libelants against the Van.

A. J. Rose, of Miami, Fla., for libelant.
George C. Bedell, of Jacksonville, Fla., for respondent.

CALL, District Judge. In this cause the testimony is very conflicting as to the cause of the collision, the condition of the motorboat before and after the collision, and the damage resulting to the Joliet from the collision. It is impossible to reconcile the conflicts.

After carefully considering the testimony, I am of opinion that the following statement is established by the testimony:

[1] The Joliet was lying at the Seminole Dock, on the Miami river, her stern made fast with a one-inch manilla line, and her bow with a smaller line; that the Van was aground at the mouth of the river, some 200 yards from the Seminole Dock; that the Brandon, a motor barge 65 feet long and 20 feet beam, was lying on the starboard side of the Van, loaded with about 15 tons of freight, when the Van came off and started to her dock, some half a mile up the river, said dock being on the north side; that while the Van was under headway the line to the bow of the Brandon was cast off, and the Van proceeding on her way, the Brandon not being under power, the stern of the Brandon came in contact with the Van; that the force of the contact caused the bow of the Brandon to collide with the Joliet, striking some feet abaft the stern with sufficient force to part the one-inch line with which the stern of the Joliet was made fast to the dock.

It appears to me from these facts that the collision occurred through the Van casting off the line from the bow of the Brandon while under way, the Brandon at the time not being under power, so as to control her movements, in the narrow channel of the Miami river, and the resulting striking of the stern of the Brandon.

These acts, being the proximate and contributing causes of the collision, when the current of the river is taken into consideration, were such faults of navigation as entitle the libelant to recover.

[2] The matter of the amount of such recovery is also of much difficulty under the testimony. The libelant claims that the Joliet is virtually of no value; that it is impossible to repair her without an expenditure of a sum grossly disproportionate to her value prior to the collision. The claimant, on the other hand, claims that no appreciable damage was done; that such damage as resulted from the collision was repaired by it; that such list as was testified to exist after the collision existed prior thereto. Here I find the same conflict; most of the witnesses being interested or their positions being such as entitle their observations to little weight. However, there are one or two witnesses who apparently are not interested, and whose position and examination entitle their testimony to weight, and the preponderance of such testimony indicates to my mind that the list or twist now existing in the Joliet is the result of the collision, and I so find.

In arriving at the amount to compensate the owner of the Joliet, the following facts are shown by the testimony:

The Joliet is some 14 years old, yacht built, of oak ribs, white cedar

planking, mahogany decks, glass cabin, with mahogany finish, used by her then owner for 2 or 3 winters, and then stowed in a shipyard upon a cradle under shelter for some 8 or 9 years; that some 2 or 3 years ago she was purchased by a party and put in the water, where she remained without any repairs or use, so far as the evidence indicates, until she was bought by the present owners for $250; that the present owner and her husband removed the varnish of the decks and cabin and revarnished the same; had the boat put on the ways, stern changed from sharp to square, keel spliced, etc., costing $600; also estimate of the value of the husband's services and cost of material used.

This collision occurred on October 4th last, the owner still occupies the boat as she did before the collision, and no sufficient examination has been made to determine with certainty what damage to timbers and frame, if any, resulted from the collision. The burden to show the damage rests upon the libelant. The only damage attempted to be shown is that the boat, as the result of the collision, is twisted and out of line, and as a result of such twist lists to port. The testimony of the boatbuilders is that it is impossible to take out this twist, except by rebuilding, and the cost of this would be disproportionate to her value. For the court to allow any of the amounts testified to for doing this would in my judgment be inequitable. It appears to me that the true rule would be to allow the amount of depreciation in the value of the boat caused by the collision. It must be borne in mind, in fixing the value of the boat before collision, that here was a boat some 14 years old, yacht built, which I take to mean light timbers, etc., not intended for hard usage, which had been for some years stowed in a yard, and been for some 2 years in the water without being moved by her own power, and which in March, a year ago, was sold to the present owner for $250, since which time she had had repairs and changes amounting to some $600 or $700 expended on her, and used then and now as a place of residence. True, it is claimed she will not steer since the collision, and the testimony of the man who towed her up the river is produced to show this; yet the owner testified that the rudder stock was bent when she was pulled out of the ways after the collision and caulked. Was the sheer, testified about by the boatman, when towing her, the result of the twist, or the bent rudder stock? There might well be a difference of opinion as to this.

I therefore feel that the testimony of the value of the boat before the collision is unreasonable as to the amount. It seems to me that a boat of the age of the Joliet, selling a little more than a year ago for $250, and upon which some $600 or $700 has since been expended, now valued at $1,500, would satisfy any reasonable judgment, and I therefore find such sum as her value before collision. It seems to me that the testimony of the witnesses that she is in her present state without value equally unreasonable, and entitled to no weight by this court. If I allow one-third of the value for depreciation, in addition to what claimant has already done, it would amply compensate libelant, for the damage done by the collision.

I therefore find that libelant is entitled to a decree for $500 against the claimant.

It will be so ordered.

THE PURITAN.

(District Court D. Massachusetts. June 11, 1919.)

No. 1655.

1. MARITIME LIENS ⚷6—AGENT OR OWNER.
Ordinarily, agent or part owner of a vessel is not entitled to liens for advances or subrogation to liens of creditors whose claims he has paid.

2. MARITIME LIENS ⚷6—ADVANCES BY AGENT OR OWNER—EFFECT.
An agent or part owner of a vessel, making advances clearly upon vessel's credit, may be allowed a lien, when not unfair to co-owners or other lienors.

3. MARITIME LIENS ⚷6—AGENT AND OWNER—ADVANCES.
Libelants, who were agents of a schooner and stockholders in a corporation owning her, *held* entitled to liens for advances made to pay necessary repair and supply bills, where they specifically stated that advances were made entirely on vessel's, and not upon owner's, credit.

In Admiralty. Libel by Walter A. Norton and others against the schooner Puritan. Decree for libelants.

Hannigan & Fox, Geo. R. Farnum, and Homer B. Kelly, all of Boston, Mass., for libelants.

Louis L. Green, Geo. L. Dillaway, and Blodgett, Jones, Burnham & Bingham, all of Boston, Mass., A. S. Littlefield, of Rockland, Me., and L. G. Roberts, of Boston, Mass., for petitioner.

MORTON, District Judge. The facts on which this case is to be decided are contained in the "Stipulation as to Libelants' Evidence," no other evidence having been introduced. The Puritan was owned by a Maine corporation, and constituted its only property. The corporation was not organized until September 20, 1917, and had hardly begun the actual business of operating the schooner at the period here in question. She was proceeding from her home port, Machiasport, Me., to New York, "where she was to be registered upon her arrival." (Stipulation.) While in Massachusetts ports, "she became greatly in need of repairs, supplies, and funds." (Stipulation.) Her master applied to the libelants for advances, representing that, if they were not made, the vessel might have to be abandoned. The necessity which the master stated actually existed.

The libelants are in general shipping business in New York. They were the agents of the schooner and stockholders in the corporation owning her. They made the advances requested by the master, and also paid direct certain bills for necessary repairs and supplies furnished to her. In doing so the libelants "relied entirely on the credit of the vessel and on the security of the existing liens (which were to be paid off), and not upon the credit of the owner, and so advised the captain at the time of the advances." (Stipulation.) The question is whether, under such circumstances, the libelants have a maritime lien for the sums so advanced and paid by them.

[1, 2] As a general rule the agent of a vessel is not entitled either to a lien for advances or to be subrogated to the liens of creditors

whom he has paid in the regular course of his agency. The Gyda (D. C.) 235 Fed. 266, 269. Under ordinary circumstances, one part owner of a vessel cannot obtain a lien against his co-owners; and a stockholder in a company owning a vessel has been regarded as a part owner. The Cimbria (D. C.) 214 Fed. 131, 133. The question is essentially one of fact, the decisions referred to proceeding upon the presumption that in such cases the advance or the payment is made on the credit of the owner, not of the vessel. This presumption may be rebutted, and where it is clear that in fact the advance was made upon the credit of the vessel, and that it is not unfair to co-owners or other lienors to allow a lien, the lien is allowed. The City of Camden (D. C.) 147 Fed. 847. It is conclusively settled that for advances of money made to a master in a foreign port, to enable him to meet the necessities of the vessel in the way of repairs, wages, and supplies, a lien exists. The Emily Souder, 17 Wall. 666, 21 L. Ed. 683.

[3] In the present case it is agreed that the advances and payments by the libelants were made on the credit of the vessel and that the master was so informed at the time. In claiming a maritime lien for them the libelants do not seem to me to be acting unfairly, either towards their co-owners (i. e., other stockholders in the corporation) or subsequent lienors, nor to have taken advantage of the fiduciary position which they undoubtedly occupied towards the vessel and her owners. No money from operation of the vessel had apparently come into their hands; the emergency had arisen at the beginning of the enterprise; there was no certainty that the owner (the new corporation) ever would have funds with which to repay the libelants; it was for the interest of all parties that the schooner should be repaired, supplied, and kept going.

I therefore find and rule that the libelants are entitled to a lien for so much of their advances to the master as was used to pay claims on which the creditors would have been entitled to a lien against the schooner, and that the libelants are also entitled to a lien in respect to such payments as they themselves made directly to creditors whose claims would have entitled them to a maritime lien.

Neither the stipulation as to facts nor the oral agreements of counsel at the hearing are sufficient to enable the court to say which of the items of the account annexed to the libel come within the principle of decision just stated. Unless the parties agree, the case must go to an assessor upon this point. No objections being insisted on against the claims of the several interveners, each of said intervening claims is allowed. If any items in the claims of the interveners are objected to as not giving rise to a maritime lien, that matter also may be heard by an assessor.

The libelants may present a decree accordingly.

HARRISON v. WASHINGTON LOAN & TRUST CO.

(Court of Appeals of District of Columbia. Submitted March 6, 1919. Decided May 5, 1919.)

No. 3195.

1. COURTS ⟹37(3)—JURISDICTION—TRUSTEES—WAIVER OF OBJECTIONS.
Although a will was probated in Pennsylvania, the District of Columbia Supreme Court has jurisdiction to relieve a trustee under the will and substitute another for him, so as to bind a beneficiary of the trust, who, without objection, submitted to the court's jurisdiction and participated in the suit.

2. COURTS ⟹351½—FEDERAL COURT—DISMISSAL—PENDING ACTION.
Under equity rule 29 of the United States Supreme Court (33 Sup. Ct. xxvi, 226 U. S. 656), specifying how defenses shall be presented, a bill showing upon its face that another suit is pending involving the same subject-matter may be dismissed upon motion.

3. ABATEMENT AND REVIVAL ⟹8(5)—TRUST—PENDING SUIT.
Where the District of Columbia Supreme Court, on a bill filed therein, relieved a trustee under a will probated in Pennsylvania and appointed another trustee, a subsequent bill seeking to have the decree set aside as void, charging the substituted trustee with mismanagement, and showing complainant's participation in the first suit, will be dismissed upon ground that all rights asserted might be adjudged in the first suit.

Appeal from the Supreme Court of the District of Columbia.

Bill by Mary M. Harrison against the Washington Loan & Trust Company, trustee. From a judgment dismissing the bill, plaintiff appeals. Affirmed.

George F. Curtis, of Washington, D. C., for appellant.

Arthur Peter, of Washington, D. C., for appellee.

SMYTH, Chief Justice. Edmund C. Bittinger died testate in Philadelphia in 1889, leaving an estate, consisting largely of personal property, to his executors in trust for the benefit of certain persons, among them Mrs. Daniel O. Munson, mother of the appellant. His brother, Benjamin F. Bittinger, was one of the executors named in the will, but, owing to the fact that the others declined to act, he became sole executor. The will in due time was admitted to probate in the orphans' court for Philadelphia county, Pa., and letters testamentary were granted to Mr. Bittinger. How long he served in the dual capacity of executor and trustee does not appear, but in 1897 he, being a resident of this District, filed a bill in the Supreme Court of the District, asking for an accounting of his trust, that he be discharged as trustee, and some one else substituted for him. To this bill he made parties all the beneficiaries under the will, some of whom, including the appellant, resided here. The court granted the prayer of the bill, and substituted the appellee for Bittinger. Appellant says she "consented that a trustee should be substituted in the place of Benjamin F. Bittinger," but "did not consent" to the appointment of the appellee. Having qualified as trustee, the appellee entered upon the discharge of its duties in 1897 and has continued therein ever since. Until 1914 it

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

paid to Mrs. Munson what was coming to her from time to time out of the estate, and since then, she having died in that year, her share has been paid to the appellant.

The court in 1917, at the request of the appellee, referred its accounts to the auditor of the court for a statement. To this appellant objected on the ground that the court was without jurisdiction to do so, and soon thereafter instituted this suit. By her bill she discloses fully the pendency of the other suit and her participation in it, and asks that the decree in that suit be declared null and void, on the ground that the court was without jurisdiction to render it, and in addition prays for various forms of relief against the appellee, alleging that it has not managed wisely the trust committed to its care. The appellee filed a motion to dismiss the suit, because, as stated, it appeared upon the face of the bill that another suit was pending for the same things, the plaintiff was bound by the decree in that suit, and for other reasons. The motion was sustained, and the bill dismissed.

[1] In the brief the question of jurisdiction only was argued, but we shall consider all the questions necessary to a full disposition of the case. The Supreme Court of the District of Columbia has jurisdiction to relieve a trustee of his charge and substitute another for him. This, as we understand it, is not denied by the appellant. The court, then, had jurisdiction of the subject-matter of the first suit. It had also jurisdiction of the appellant, for she was a party to the suit, and, as we have already seen, appeared therein and consented that a trustee should be substituted for Mr. Bittinger. The court having jurisdiction of the subject-matter and also of the person of the appellant, her contention upon that point has no merit, and must be rejected.

Appellant urges that the state of Pennsylvania had exclusive jurisdiction in the matter of the probate of the estate of her testator, Edmund C. Bittinger. This may be conceded, but it in no wise affects the question before us. Counsel confuses the administration of the estate with the trusteeship. The Supreme Court of this District did not attempt by its decree to interfere with the administration of the estate by the courts of Pennsylvania. It in no way assumed to pass upon the rights or obligations of Bittinger, the executor. Its decree related to him as trustee only—something entirely apart from his obligations to the Pennsylvania court as an executor. Here lies the distinction between the principle announced in the cases cited by appellant, to the effect that a state has exclusive jurisdiction in the matter of probate of the estates of its citizens dying within its borders and leaving property therein to be administered, and the case at bar. The question here is whether the Supreme Court of this District had jurisdiction to relieve a trustee of his charge and substitute another one for him, so as to bind a beneficiary of the trust, who without objection submitted to the jurisdiction of the court and participated in the suit. We have no doubt of its authority to do so. Johns v. Herbert, 2 App. D. C. 485, 496; Massie v. Watts, 6 Cranch, 148, 160, 3 L. Ed. 181.

[2, 3] But this question and the others raised are all involved, as the bill shows, in the prior suit between the same parties, and could have been disposed of there without resorting to this one. Under the old

practice this was a sufficient ground for a plea in abatement. Express Co. v. Burdette, 7 App. D. C. 551, 560; Renner & Bussard v. Marshall, 1 Wheat. 215, 216 (4 L. Ed. 74); Spencer v. Johnston, 58 Neb. 44, 78 N. W. 482; Harvey v. Lord (C. C.) 10 Fed. 236. In the Renner Case Mr Justice Story said:

"A subsequent suit may be abated, by an allegation of the pendency of a prior suit."

This principle is general, if not universal. Under equity rule 29 of the Supreme Court of the United States (226 U. S. 656, 33 Sup. Ct. xxvi) it is provided that any infirmity of this character, when it appears on the face of the bill, may be taken advantage of by a motion to dismiss, as was done in this case. Since every right asserted against the appellee in the instant suit with respect to its management of the estate may be judged in the first suit, the maintenance of this suit would result in an annoying duplication of actions, and will not be permitted by the law.

The judgment of the lower court is affirmed, with costs.

Affirmed.

KNIGHTS OF PYTHIAS OF NORTH AMERICA, SOUTH AMERICA, EUROPE, ASIA, AFRICA, AND AUSTRALIA et al. v. GRAND LODGE OF KNIGHTS OF PYTHIAS OF NORTH AMERICA, SOUTH AMERICA, EUROPE, ASIA, AND AFRICA.

(Court of Appeals of District of Columbia. Submitted March 5, 1919. Decided May 5, 1919.)

No. 3193.

1. BENEFICIAL ASSOCIATIONS ⚷16—SUSPENSION OF LODGE BY GRAND LODGE—HEARING.

Assuming that the constitution of the Knights of Pythias entitles a subordinate lodge to notice before suspension, the requirement is sufficiently complied with where the Supreme Chancellor's suspension of the lodge was referred to a committee, which notified and heard the lodge before reporting its approval of the suspension to a convention which adopted the report.

2. BENEFICIAL ASSOCIATIONS ⚷16—SUSPENSION OF LODGE BY GRAND LODGE—GROUNDS.

The publication and general circulation by a subordinate lodge of the Knights of Pythias of a circular charging "shocking conditions," tyrannical usurpation of power, misappropriation of funds, etc., by the Supreme Lodge, *held* substantial ground for its suspension.

3. BENEFICIAL ASSOCIATIONS ⚷16—REVOKING CHARTER OF LODGE—SETTING ASIDE REVOCATION.

Where the constitution of the Knights of Pythias provides that the charters of subordinate lodges shall not be revoked, except after notice and hearing, action of a convention in revoking the charter of a lodge will be set aside, where no hearing was had on the question of revocation, although the lodge was notified of, and heard regarding, the suspension of its charter.

Appeal from the Supreme Court of the District of Columbia.

Suit by the Grand Lodge of Knights of Pythias of North America, South America, Europe, Asia, and Africa against the Knights of

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Pythias of North America, South America, Europe, Asia, Africa, and Australia, S. W. Green, Joseph L. Jones, and others. Decree for plaintiff, and defendants appeal. Reversed and remanded, with directions.

Henry E. Davis and James A. Cobb, both of Washington, D. C., for appellants.

James F. Minor, of Richmond, Va., and Clarence R. Wilson and Paul E. Lesh, both of Washington, D. C., for appellee.

ROBB, Associate Justice. This is an appeal from a decree in the Supreme Court of the District restraining appellants, defendants below, from giving further effect to a suspension of plaintiff, appellee here, and from making effective a resolution revoking plaintiff's charter. The decree further restrained the defendant order from attempting to collect any unpaid portion of a certain tax.

The Knights of Pythias of North America, etc., a District of Columbia corporation, hereinafter referred to as the order, consists of a Supreme Lodge, subordinate lodges, and individual members who for the time being are not attached to any Grand or subordinate lodge. The plaintiff, a Virginia corporation, is one of the Grand Lodges of the order, which is a fraternal beneficial association. The trouble between the order and the plaintiff lodge originated in a controversy as to the assessment and collection of a certain tax. It is claimed by the order that this tax was legally assessed and, moreover, that the plaintiff, having voted for its imposition and paid a part thereof, and promised payment of the balance, now is estopped from questioning its legality. The view we take of the case renders it unnecessary for us to consider these contentions.

The plaintiff, by unanimous vote, adopted a resolution which it caused to be printed in pamphlet form and copies thereof sent, not only to the order, generally, but to nonmembers, and also caused the resolution to be printed and circulated in its official organ, the Planet, having a large circulation among both members and nonmembers. The pamphlet contains the heading, "Shocking Conditions in the Supreme Lodge," and from the body of the pamphlet we reproduce the following:

"We have learned with profound regret, not unmixed with sorrow, of the violation of the fundamental laws which govern us and the tyrannical power exercised by the Executive Officers of the Supreme Lodge, of the political methods used upon the floor of the Supreme Tribunal to the end that flagrant violation of the constitutional rights and privileges of the knighthood, of the levying of onerous and unjust taxation, of the misrepresentations of facts and figures, of deception and of chicanery, of manipulation of figures, of misappropriation of funds as set forth in the financial statement of the Supreme Chancellor, Supreme Keeper of Records and Seal and the Supreme Master of Exchequer. * * * This constitutes a further charge of gross mismanagment, a charge of misappropriation of funds, a charge of a willul deception of a loyal and confiding knighthood on the part of certain Supreme Lodge officers including its official head. * * * The Supreme Lodge, under the erroneous advice of high salaried officials, has been misled to the extent of attempting to extend its power to levying taxes on members of the Order. * * * This action on the part of the Supreme officials constitutes an unwarranted, unlawful, tyrannical exercise of autocratic power. * * *"

This circular having come to the attention of the Supreme Chancellor of the order, on July 20, 1912, he issued his proclamation suspending the plaintiff Grand Lodge. After setting forth the "Shocking Conditions" circular, the Supreme Chancellor in the order of suspension said:

"These statements adopted by the Grand Lodge aforesaid are unwarranted, untrue, revolutionary and with no good intent. The published statements put in general circulation have a tendency to, and do engender feeling among the lodges and members which, if not discouraged or refuted by positive action, would disrupt the order. The preservation of the order is just as much at stake because of this unwarranted attack upon the Supreme Lodge and Supreme officers by a Grand Lodge or members within, as it were, because of the attack of strangers without."

The failure of the plaintiff "to pay the lawful taxes imposed when due" is mentioned as an additional reason for the suspension, but it is clearly apparent that the principal reason was the issuance of the circular in the circumstances mentioned.

The next convention of the Supreme Lodge of the order was held in Baltimore, Md., in 1913, and to that convention the Supreme Chancellor, in compliance with the constitution of the order, reported his action in suspending the plaintiff. An appeal already had been taken by the plaintiff from the action of the Supreme Chancellor and the matter was regularly referred to the Committee on Appeals and Grievances. Plaintiff appeared before that committee, was represented by counsel, and the committee reported to the convention that, "having examined the evidence and heard the arguments of counsel," it not only recommended that the action of the Supreme Chancellor in suspending plaintiff be approved, but that the charter of plaintiff be revoked. This report was adopted by the convention, and, in pursuance thereof, the proclamation was issued revoking plaintiff's charter.

Article 7, section 6, of the constitution of the order, which of course was binding upon plaintiff, provides that—

"Charters of Grand Lodges may be revoked by the Supreme Lodge, *and Grand Lodges suspended by the Supreme Chancellor* for nonconformity to the work, ceremonies or ritual adopted by the Supreme Lodge, for disobedience to its legal mandates, *and for improper conduct.*"

Article 8, section 9, provides that—

"Any Grand or subordinate lodge may be suspended or dissolved, and its charter or dispensation forfeited to Supreme or proper Grand Lodge: (1) For improper conduct."

After the second and third grounds are specified, it is further provided:

"But the charter or dispensation shall not be forfeited in either of the above cases until the lodge shall have been duly notified of its offense by the Supreme Grand Keeper of Records and Seal, and suitable opportunity given to answer the charges made against it."

The conventions of the order were to be held biennially, and for this reason, apparently, the Supreme Chancellor was given authority summarily to suspend Grand Lodges for specific reasons; but their char-

ters could not be revoked, except by the Supreme Lodge after notice and hearing. The difference between suspension and removal, which corresponds to suspension and revocation in the present case, is pointed out in Poe v. State, 72 Tex. 625, 10 S. W. 737. But, even if it be assumed that plaintiff was entitled to notice before suspension, the result is the same, for it had notice and opportunity to be heard before the order of suspension was approved and adopted by the convention. The constitution of the Order provides that such a hearing shall be had before the Committee on Appeals and Grievances, and that was the procedure in this case.

Was there substantial ground for the suspension of plaintiff, aside from its refusal to pay the tax in question? This is a fraternal association, and it must have been known to this plaintiff that the use of such intemperate language as was employed in this "Shocking Conditions" circular, even if confined to the membership of the order, would engender bitterness and discord and tend to disrupt the order. The general publication and dissemination of this circular by plaintiff could have sprung from but one motive, namely, the bringing of the order into contempt and ridicule. Every tenet of such an organization was violated in the sending broadcast of such a circular. If plaintiff had grievances, they might have been expressed at the proper time and place, and in temperate terms. Such a course would have accomplished any legitimate end and subjected plaintiff to no disciplinary measures. We are clearly of opinion that the suspension of plaintiff was justified and legal, but it does not appear that any hearing has been accorded it on the question of the revocation of its charter, and, since it was entitled to such a hearing, the decree of the court below in setting aside the revocation was correct.

The decree will be reversed, with costs, and cause remanded, with directions to enter a decree in conformity with this opinion.

Reversed and remanded.

CLOW et al. v. HOSIER et al.

(Court of Appeals of District of Columbia. Submitted March 6, 1919. Decided May 5, 1919.)

No. 3204.

1. WILLS ⟹436—CONSTRUCTION—WHAT LAW GOVERNS.

The law of Indiana will govern the interpretation of a will made in that state.

2. WILLS ⟹601(1)—CONSTRUCTION—ESTATE—FEE SIMPLE—REPUGNANT LIMITATIONS—"HEIRS."

Under a will governed by the Indiana Law, which left the residue of an estate to a daughter, with a subsequent provision that, if she should die without heirs, the residue in her hands should go to certain persons, *held*, that the subsequent provision did not cut down the absolute estate previously given, since the word "heirs" was not equivalent to "children."

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

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

Appeal from the Supreme Court of the District of Columbia.

Bill by Gloveania V. Clow, Marcellus R. Taylor, Clara E. Hodson, and others against Isaiah Hosier, Robert Lansing, Charles H. Butler, and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Charles H. Merillat and C. E. Breckons, both of Washington, D. C., for appellants.

W. W. Scott, E. F. Colladay, and H. S. Barger, all of Washington, D. C., for appellees.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District dismissing appellants' bill.

In 1865 Clara E. Port, a resident of the state of Indiana, died there, leaving a will, which was duly admitted to probate in Indiana. After directing payment of debts and other charges, the will provides:

"Second. Then I give and devise all of the residue of my estate to my daughter, Carrie E. Port.

"Third. And if my daughter, Carrie E. Port, should decease and at the time of her decease, leave no heirs, then I give and devise the residue of my estate that may be in the hands of my daughter, Carrie E. Port, or her guardian, to my brother, Isaiah Hosier, William Lewis Taylor, Enoch S. Taylor, David L. Taylor, Marselius R. Taylor, Francis F. Taylor, Clara E. Taylor, and Gloviana V. Ballinger, and said estate shall go into the hands of the said Isaiah Hosier, William Lewis Taylor, Enoch S. Taylor, David L. Taylor, Marselius R. Taylor, Francis F. Taylor, Clara E. Taylor, and Gloviana V. Ballinger. The same is to be equally divided between the eight named persons in said will.

"Fourth. I do hereby nominate and appoint my esteemed friend William (Ramsey) Hansey guardian of my daughter Carrie E. Port until she arrives at the age of twenty-one years and my said guardian is hereby enjoined to give my daughter Carrie E. Port, a good English education."

The beneficiaries named in the third paragraph of the will were the brother of testatrix and children of her deceased brothers and sisters. Caroline E. Port, referred to in the will as Carrie E. Port, was about three years of age when her mother died. Upon her arrival at majority in 1883, her then guardian turned over to her as the assets of the estate, after cost of administration and debts had been paid and deduction made for cost of the education and maintenance of the daughter, the sum of $7,394.59. She later became a resident of the District of Columbia, and so remained until her death in April of 1914, never having married. She left a will, which was finally admitted to probate.

Appellants in their bill allege that Caroline E. Port, through good management, so increased the value of the estate which had come into her hands from her mother that at her death it amounted to $31,000; that the estate was impressed with a trust in favor of the beneficiaries named in the third paragraph of her mother's will, which attached itself to all investments and reinvestments; and such is their contention here.

[1, 2] As this is an Indiana will, the law of that state must govern its interpretation. In Rogers v. Winklespleck, 143 Ind. 373, 42 N. E. 746, the first eight items of the will gave to each of the testator's chil-

dren a small bequest. By the ninth item there was given to the widow the residue of the estate, both real and personal, "subject to a division among the aforesaid heirs at her death, in accordance with their obedience to her as she shall deem proper." The court pointed out that the item devising the residue of the estate, standing alone, carried a fee simple absolute; that no estate was left in the testator; and that a conclusion to give the children an estate "must be reached from words deemed clearly repugnant to those devising the fee." The court said:

"We do not question the rule that a fee may be held in trust for future distribution, with discretion in the trustee as to the quantities into which it shall be divided and apportioned; but we do question the possibility of vesting a fee simple absolute in the first taker, and of ingrafting upon that estate an element which deprives it of every essential feature of a fee simple. The ingrafted clause must, in every instance, be of such clear and undoubted force as to cut down the first estate to an estate consistent with such clause, or it must fail for repugnancy, or because the testator has not made his intention manifest."

It was ruled that the widow took a fee simple absolute.

In Mulvane v. Rude, 146 Ind. 476, 45 N. E. 659, the court said:

"When real estate is given absolutely to one person with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void as repugnant to the absolute property first given."

In support of that ruling the court cited many authorities and expressly alluded to Ide v. Ide, 5 Mass. 500, wherein the testator in one clause of the will devised to a son Peleg a fee simple absolute. Following this devise were these words:

"And further it is my will that if my son Peleg shall die and leave no lawful heirs, what estate he shall have to be divided between my son John and my grandson Nathaniel," etc.

It was ruled that the intention of the testator that the devisee should have an unqualified power to dispose of the property devised to him at his pleasure rendered the limitation over void for inconsistency. The court said:

"If this construction required any support, it might be added that the limitation over is as well of personal property as of real estate; and there can be no doubt, from the nature of the personal estate, that the testator considered it liable to the disposition of Peleg, and that at his death no part of it might be in his possession, as the devise of it was absolute."

Langman v. Marbe, 156 Ind. 330, 58 N. E. 191, is very much in point. There an estate in fee simple was devised to a wife. Other clauses of the will then provided that when the youngest child should reach the age of 21 years the property should be divided equally between all the children, provided that if the wife remarried before that event the division should take place then. The court said:

"It is settled law that, when an estate in fee simple is clearly given a person, the estate so given cannot be cut down or modified by subsequent clauses in the will, unless the intention to do so is manifest from words as clear and certain as those which give the fee-simple estate. * * * It is evident, under the settled rule in this state, that it cannot be said that it was the clear intention of the testator, by clauses 3 and 4, to reduce the estate of the widow to one for life or years."

In the present case, it of course is conceded that, under second item of the will, Carrie E. Port was given an estate in fee simple. Under the third paragraph it is provided that, if the devisee should "at the time of her death, leave no heirs, * * * the residue of my estate that may be in the hands of my daughter Carrie E. Port, or her guardian," shall be equally divided among the eight persons named. Appellants contend that the word "heirs" is to be read as "children," and that, when so read, the provisions of the will are consistent and harmonious. That contention does violence to the twice clearly expressed intent of the testatrix: First, to the grant in the second paragraph of the absolute fee; and, second, to the words (in the very paragraph relied upon by appellants) giving the daughter unqualified control over and disposition of the estate during her life, with power to use it all. Paragraph 3, therefore, instead of clearly indicating an intent on the part of testatrix to cut down the estate previously given, quite clearly shows a contrary intent. In other words, it is confirmatory of and consistent with the second paragraph. Certainly, when the will is taken as a whole and considered with reference to the rule in Indiana, it may not be said that the testatrix manifested a clear intention, by clause 3, to reduce the estate of the daughter to one for life.

Among the cases cited by appellants is Granger v. Granger, 147 Ind. 95, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190. In that case, as the court found:

"The devise was distinctly: First, to Edwin, an estate for the term of his natural life, and nothing more; and this in a clause by itself. In the second clause, the devise, after Edwin's death, was 'to the heirs of his body by him begotten, if there be any such heirs him surviving,' " etc.

The difference between that case and this, therefore is too apparent to require further comment.

As to Hayes v. Martz, 173 Ind. 279, 89 N. E. 303, 90 N. E. 309, the provisions of the will there bear little analogy to those of the will before us, for in that case the first taker was prohibited from the sale or disposition of the property involved, and the language used by the testator left no doubt as to his intent.

Without further analysis of the other cases cited by appellants, it may be said that they are not in point.

The decree is affirmed, with costs.

Affirmed.

UNITED STATES ex rel. MILWAUKEE SOCIAL DEMOCRAT PUB. CO. v. BURLESON, Postmaster General.

(Court of Appeals of District of Columbia. Submitted March 3, 1919. Decided May 5, 1919.)

No. 3164.

1. WAR ⟹4—ESPIONAGE ACT—CONSTITUTIONALITY.
Espionage Act June 15, 1917, is constitutional.

2. CONSTITUTIONAL LAW ⟹318—DUE PROCESS—REVOKING MAILING PRIVILEGE.
A hearing given a newspaper by the Third Assistant Postmaster General before revoking its second-class mailing privilege for violating Espionage Act June 15, 1917, constituted due process of law.

3. POST OFFICE ⟹14—REVOKING MAILING PRIVILEGE—BLANKET ORDER FOR FUTURE.
The Postmaster General's authority to make a blanket order refusing second-class mailing privileges in the future to a newspaper whose previous publications had been found to violate Espionage Act June 15, 1917, is doubtful.

4. MANDAMUS ⟹7—DISCRETION IN GRANTING.
Mandamus is awarded, not as a matter of right, but in the exercise of a sound judicial discretion, and upon equitable principles.

5. MANDAMUS ⟹10—TO POSTMASTER GENERAL FOR REVOKING MAILING PRIVILEGE—ENEMY PUBLICATION.
Where a newspaper's settled policy had branded it as an enemy publication, the Postmaster General will not be required by mandamus to accord second-class mailing privileges to its future publications, although a different situation would arise if the newspaper should present, and the department refuse to receive, mailable second-class matter, as defined by Rev. St. § 3877.

Appeal from the Supreme Court of the District of Columbia.

Mandamus proceeding by the United States, on the relation of the Milwaukee Social Democrat Publishing Company, against Albert S. Burleson, Postmaster General of the United States. From a judgment dismissing the petition, relator appeals. Affirmed.

Chas. Poe, of Washington, D. C., and Henry F. Cochems and Hubert O. Wolfe, both of Milwaukee, Wis., for appellant.

John E. Laskey, U. S. Dist. Atty., and Henry W. Sohon, Sp. Asst. U. S. Dist. Atty., both of Washington, D. C., and Alfred Bettman, Sp. Asst. Atty. Gen., of Cincinnati, Ohio, for appellee.

ROBB, Associate Justice. Appellant, plaintiff below, petitioned for a writ of mandamus to require the Postmaster General, appellee here, to reinstate its newspaper, the Milwaukee Leader, to the privilege of transportation in the mails as second-class matter. An answer was filed, and appellant then interposed eight pleas. Appellee demurred, the demurrer was sustained, and plaintiff declined further to plead, but sought and received leave of court to demur to the answer. After hearing, the demurrer was overruled, the rule to show cause discharged, and the petition dismissed.

The Milwaukee Leader is a daily newspaper published at Milwaukee, Wis. (Its editor was recently convicted and sentenced for violation

of the Espionage Law [Act June 15, 1917, c. 30, 40 Stat. 217]). In September of 1917 the paper was notified by the Post Office Department that, in accordance with Act March 3, 1901, c. 852, 31 Stat. 1107, it would be accorded a hearing by the Department as to whether its second-class mail privilege should be revoked; the contention of the Department being that the publication was in conflict with the provisions of the Espionage Act of June 15, 1917 (40 Stat. 217). Appellant sent its editor to Washington, and a hearing was had before the Third Assistant Postmaster General. That official, before whom such hearings are held, reached a conclusion adverse to appellant Upon review by the Postmaster General, the decision was affirmed. The answer alleges that by the representations and complaints of loyal citizens, and from personal reading and consideration of the issues of the publication in question, from the date of the declaration of war down to the time of the hearing:

"It seemed to this respondent, in the exercise of his judgment and discretion and in obedience to the duty on him reposed, as well by the general statutes as by the special provisions of the Espionage Law, that the provisions of the latter act were systematically and continually violated by the relator's publication."

Included in the answer are many excerpts from appellant's publication between June 16, 1917, and September 27th of that year. The appellee, in his answer, says that in his judgment these and other articles in appellant's publication evince a purpose and intent on its part—

"to 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, to promote the success of its enemies during the present war, and willfully cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military or naval forces of the United States, and to willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service and of the United States."

[1, 2] The constitutionality of the Espionage Act has been sustained by the court of last resort. Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470, decided in the Supreme Court of the United States March 3, 1919; Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561; Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566, decided by the Supreme Court March 10, 1919. The hearing accorded appellant amounted to due process. Palmer v. McMahon, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772; Pittsburgh, C., C. & St. L. R. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; Londoner v. Denver, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103; Smith v. Hitchcock, 226 U. S. 53, 33 Sup. Ct. 6, 57 L. Ed. 119.

Under the provisions of the Espionage Act (title 12, §§ 1 and 2, [Comp. St. 1918, §§ 10401a, 10401b]), every newspaper or other publication, in violation of any of the provisions of the act, or containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is declared nonmailable. We shall not review the articles from appellant's publication set forth in the answer, for when they are taken as a whole, and considered in con-

nection with the circumstances under which they were printed, we think the conclusion reached by the Postmaster General as to their purpose and effect was warranted. No one can read them without becoming convinced that they were printed in a spirit of hostility to our own government and in a spirit of sympathy for the Central Powers; that, through them, appellant sought to hinder and embarrass the government in the prosecution of the war.

[3-5] There would be no question, in our view, as to the authority of the Postmaster General to refuse the privilege of the mail to many, if not all, of the issues of appellant's publication between the dates mentioned, because they fall within the inhibition of the statute. A more difficult question is presented, however, when we come to consider the right of the Postmaster General to make a blanket order refusing the second-class mail privilege to that publication in the future, which in practical effect is a refusal of mail privileges. The statute contains no express grant of such authority. This is significant, in view of the fact that Congress deemed it necessary to grant such authority in respect to "any fraudulent lottery, gift enterprise, or scheme for the distribution of money," etc. Section 3929, R. S. But if the authority of the Postmaster General in the premises be doubtful, it by no means follows that appellant is entitled to invoke this extraordinary remedy. For three months, at least, appellant's publication had been injecting subtle poison into the public mind, "with intent," as found by the Postmaster General, "to interfere with the operation or success of the military or naval forces of the United States." Mandamus, a remedial process, is awarded, not as matter of right, but in the exercise of sound judicial discretion and upon equitable principles. Duncan Town Site v. Lane, 245 U. S. 308, 38 Sup. Ct. 99, 62 L. Ed. 309; Arant v. Lane, 249 U. S. 367, 39 Sup. Ct. 293, 63 L. Ed. 650, decided by the Supreme Court on March 31, 1919. The settled policy of the appellant having been such as to brand it as a hostile or enemy publication, we are not disposed, in the circumstances of the case, to extend to it the benefits of this equitable remedy. Should it present for transportation in the mails "mailable matter of the second class" (section 3877, R. S.), and the Department should refuse to receive it, a different case would be presented. There is no showing here of such offer and refusal.

The judgment is affirmed, with costs.

Affirmed.

WEISBERG v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted April 1, 1919. Decided May 5, 1919.)

No. 3229.

1. EMBEZZLEMENT ⚷11(1)—LARCENY ⚷15(3)—DISTINCTION.

A transfer wagon driver, who wrongfully converted sugar while hauling it from a railroad station, *held* guilty of larceny, and not embezzlement.

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

2. LARCENY ⟹27—RECEIVING STOLEN GOODS ⟹6—PRINCIPAL.

Although, under Code of Law 1901, § 908, a defendant, persuading a transfer wagon driver to wrongfully sell him sugar and directing him to unload it at a nearby store, is made a legal principal in the larceny, yet, since he was not present when the actual unloading or theft occurred, he was merely an artificial and not an actual principal, and may be convicted for the distinct offense of receiving stolen goods.

Appeal from the Supreme Court of the District of Columbia.

Jacob Weisberg was convicted of receiving stolen goods, and appeals. Affirmed.

Henry E. Davis and Joseph B. Stein, both of Washington, D. C., for appellant.

John E. Lasky, U. S. Atty., and James J. O'Leary, Paul B. Cromelin, and J. B. Archer, Jr., Asst. U. S. Attys., all of Washington, D. C.

ROBB, Associate Justice. Appellant, defendant below, was convicted of the crime of receiving stolen goods and sentenced to imprisonment for three years.

For the government, John Chatt, a colored driver for the Jacobs Transfer Company, testified that upon one occasion, when he was passing defendant's grocery store, defendant came out and offered to buy anything he (witness) might get hold of, whether stolen or not; that upon the occasion in question witness got a consignment of 30 bags of sugar from Pennsylvania Depot, to be delivered at a place beyond defendant's place of employment; that—

"defendant stopped him before he went down to get the sugar, * * * and he got the sugar on [the 30 bags], and came by and sold 500 pounds of it; did not carry the sugar back to the Jacobs Transfer place and deliver it from there, did not carry it anywhere, except from the depot up to defendant's place, and told defendant he had this sugar and sold 500 pounds of it for $18."

Witness further testified that after he had sold the sugar to defendant—

"he took it to the alley between E and F, around back of the Continental Hotel, a little store on the corner of the alley; doesn't know whose store it is; defendant told him to take it there, and he took it there and put the sugar in the store. Defendant paid him for the sugar at the junk shop, after he took the sugar around, right after he delivered the sugar, about 20 minutes."

Defendant testified that Chatt—

"came over to the junk shop and brought a ticket, and said that witness' wife sent him for the sugar; that she had no money to pay for it, and he brought a slip for $19, and said witness' wife sent him. * * * Chatt said his (defendant's) wife didn't have any money, and sent him to the junk shop, and he paid Chatt over there."

On cross-examination defendant said:

"Chatt had the sugar with him; said his (witness') wife sent him over to where he (witness) worked; that witness should pay him for the sugar, and witness told him to carry it around to the store and he would pay him (Chatt)."

[1, 2] Under the evidence Chatt clearly was guilty of larceny and not embezzlement. Talbert v. United States, 42 App. D. C. 1. As

to the defendant, he contends that since the evidence shows he advised, incited, or connived at the offense (Code, § 908), he was a principal in the larceny, and therefore could not be convicted of receiving stolen goods in the theft of which he had participated.

The authorities are not in harmony upon this question. It has been held that a prosecution for receiving and concealing stolen goods may be maintained against one who was present and aiding in the commission of the larceny, and received the goods from the actual principal. Smith v. State, 59 Ohio St. 350, 52 N. E. 826; Jenkins v. State, 62 Wis. 49, 21 N. W. 232; Adams v. State, 60 Fla. 1, 53 South 451, Ann. Cas. 1912B, 1209. Other courts, however, have taken a less comprehensive view of the question, holding that, notwithstanding the defendant may have been an accessory before the fact and under statutory provisions a principal, if he was not present at the actual time of the conversion of the goods, he may be held for receiving them after theft. People v. Feinberg, 237 Ill. 348, 353, 86 N. E. 584; People v. Thompson, 274 Ill. 214, 219, 113 N. E. 322; People v. Rivello, 39 App. Div. 454, 57 N. Y. Supp. 420. The latter was the view of Wharton (Wharton on Cr. Law [9th Ed.] vol. 1, § 986), and has been adopted by us. While under the rule early prevailing in England the receiver of stolen property from the thief, where there was present the intent to assist the thief in depriving the owner of the property, was an accessory to the larceny (State v. Sakowski, 191 Mo. 635, 90 S. W. 435, 4 Ann. Cas. 751; State v. Weston, 9 Conn. 527, 25 Am. Dec. 46; Ex parte Sullivan, 84 Neb. 493, 121 N. W. 456, 28 L. R. A. [N. S.] 750), under the prevailing modern rule the crime of receiving stolen goods is a substantive offense, separate and distinct from the larceny itself (People v. Feinberg, 237 Ill. 348, 352, 86 N. E. 584; State v. Fred, 152 Mo. 100, 53 S. W. 416; 17 R. C. L. 84). The reason, of course, why one who actually participates in the conversion and asportation of the property may not be successfully prosecuted for receiving the stolen goods is that a single act may not constitute both a larceny and a receiving of the stolen goods. State v. Honig, 78 Mo. 249, 253. All who actually participate in the conversion are not mere accessories, or under statute artificial principals, but principals in fact as well as in law. Although one not actually present may be an artificial or indirect principal under statute, the fact that he was not present renders it possible for him, by receiving the goods from the actual thief, to commit the crime of receiving stolen goods. In other words, this crime of receiving stolen goods being substantive and independent, there is no inconsistency in holding that it may be committed by such an artificial principal, where his acts follow the actual commission of the larceny.

In the present case there was evidence warranting a finding that the defendant was not present when the actual conversion of the sugar took place. There was, therefore, no merger of the two offenses, for in fact and in law, when defendant thereafter paid Chatt for the sugar, knowing of the completed act of larceny by Chatt, he rendered himself liable to conviction for receiving stolen goods. Chatt testified that he got a load of 30 bags of sugar, drove by the junk shop

where defendant was employed, and was instructed by defendant to take 500 pounds, or 5 bags, around to defendant's store. This he did, and returned to the junk shop, where defendant paid him for the sugar. Defendant himself testified that his wife sent Chatt around to the junk shop, "and witness told him to carry it [the sugar] around to the store and he would pay him." In other words, all the evidence tended to show that the actual conversion of the sugar by Chatt took place after Chatt stopped at the junk shop with the load. The crime of larceny was not completed until the segregation of the sugar took place, and there is no pretense that defendant was present at that time. Under the statute, therefore, he was a mere artificial principal, and not an actual one; that is to say, he was subject to the same punishment as though he actually had assisted in the final act of larceny. But that does not prevent his prosecution for the distinct offense of receiving stolen goods.

We have carefully considered the other assignments of error but have found no merit in them. The judgment, therefore, must be affirmed.

Affirmed.

COGSWELL v. COGSWELL.

(Court of Appeals of District of Columbia. Submitted March 7, 1919. Decided May 5, 1919.)

No. 3205.

MARRIAGE ⚷60(7)—ANNULMENT—IMPROPER RELATIONS BEFORE MARRIAGE.

Where husband and wife sustained improper relations before marriage, the wife's written confession, made in anger, that plaintiff husband was not the father of her child, does not warrant an annulment decree, in absence of independent corroborating facts, in view of Code of Law 1901, § 964, providing that marriage shall not be annulled without proof, and that admissions in defendant's answer shall not dispense with necessity of other evidence, etc.

Appeal from the Supreme Court of the District of Columbia.

Suit for annulment of marriage by James W. Cogswell against Ruby A. Cogswell. From a decree dismissing his petition, complainant appeals. Affirmed.

R. F. Downing and M. A. Easby-Smith, both of Washington, D. C., for appellant.

Bruce Baird, of Washington, D. C., for appellee.

ROBB, Associate Justice. This appeal is from a decree in the Supreme Court of the District, dismissing appellant's petition for the annulment of his marriage with appellee.

At the time of the marriage appellee was 16 and appellant 19 years of age. The parties had sustained improper relations prior to the marriage, and, according to appellant's testimony, "about 7½ months" after these relations commenced, and subsequent to the marriage, ap-

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

pellee gave birth to a child. Appellant then accused his wife of unchastity, which she denied. He remained in the house with her until she recovered, but had no marital relations with her. Thereafter his wife frequently importuned him to return to her, which he refused to do, and finally, on one occasion, "she admitted in a moment of anger that the child was not his." At his request she thereupon wrote in pencil that he was not the father of her child. Thereafter an attempt was made by the wife to compel her husband to support her, and a hearing was had in the juvenile court. The statement her husband had procured from her relative to the parentage of her child was produced by appellant's counsel, she admitted its genuineness, and the case then was nolle prossed. Shortly thereafter this petition was filed, and there followed another attempt by the wife to compel appellant to support her. The result was the same as at the first hearing, and for the same reason. The wife did not testify in the present case, but, at the request of the court, there was introduced the original application for the marriage license, wherein appellant had made oath that he was 22 and appellee 19 years of age.

Section 964 of the Code provides that no decree for a divorce or decree annulling a marriage shall be rendered on default without proof; "nor shall any admission contained in the answer of the defendant be taken as proof of the facts charged as the ground of the application, but the same shall, in all cases, be proved by other evidence." In Mishalowicz v. Mishalowicz, 25 App. D. C. 484, it was ruled that this provision of the Code is declarative of the general rule of practice in such cases and was not intended to prohibit all evidence of confessions that may have been made by a party. "But," said the court, "to warrant a decree of divorce the confessions must be well established, direct, and certain, free from suspicion of collusion, and corroborated by independent facts and circumstances."

The confession in this case is in two lines, and was originally obtained under circumstances not at all persuasive of its verity. The husband and wife were alone, and he admits it was given "in a moment of anger." The wife's subsequent conduct in seeking to compel her husband to support her and the child was inconsistent with this confession. Indeed, one of appellant's witnesses testified that at the second hearing in the juvenile court—

"Mrs. Cogswell said that plaintiff had deserted her and had failed to contribute anything to the support of her and their child since the birth of the child."

We fail to find that this confession is "corroborated by independent facts and circumstances." It amounted to nothing more than would the testimony of appellee, had she taken the stand, and such testimony the statute in effect declares to be insufficient.

The decree is affirmed, with costs.

Affirmed.

PENNSYLVANIA R. CO. v. SWIFT & CO.

(Circuit Court of Appeals, Third Circuit. July 1, 1919.)

No. 2368.

1. CARRIERS ⚷211—LIVE STOCK—FEEDING—INTERSTATE SHIPMENT—LIABILITY FOR FEEDING.

Act Cong. June 29, 1906 (Comp. St. §§ 8651-8654), "to prevent cruelty to animals in transit," does not contemplate a divided, dual duty, but a single, unitary one to feed and water cattle in interstate transit, and the shipper may not escape liability for a part of the feed so furnished by the carrier under government inspection, because shipper placed a part of the required feed in the car without such inspection, prior to shipping.

2. CARRIERS ⚷211—INTERSTATE SHIPMENT OF LIVE STOCK—FEEDING.

A carrier cannot recover from shipper the price of feed placed in the cars by virtue of the provisions of Act Cong. June 29, 1906 (Comp. St. §§ 8651-8654), requiring feeding in transit.

3. CARRIERS ⚷211—LIVE STOCK—FEEDING IN INTERSTATE TRANSIT—CONTRACT—IMPLIED FROM CUSTOM—PLEADING.

A carrier cannot recover from shipper the price of feed furnished and placed in cars upon an implied contract from acquiescence in such practice, where no claim of implied contract was asserted in the statement of claim filed or submitted to the jury and not pleaded, although there was sufficient evidence to warrant the issue.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by the Pennsylvania Railroad Company against Swift & Co. Judgment for plaintiff, and defendant brings error. Judgment reversed, and cause remanded.

R. D. Rynder, of Chicago, Ill., and M. Hampton Todd, of Philadelphia, Pa., for plaintiff in error.

John Hampton Barnes, of Philadelphia, Pa., for defendant in error.

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

BUFFINGTON, Circuit Judge. In the court below the Pennsylvania Railroad Company sued Swift & Co., the owner and shipper of certain cattle, for food furnished said cattle at the stockyards in Pittsburgh while in interstate transportation. The cattle were received by the railroad at Chicago. At the end of a 28-hour run they reached Pittsburgh. Swift & Co., who were large shippers, had made no provision for feeding and resting their cattle at Pittsburgh. That duty, under the statute hereafter quoted, fell on the railroad, and it had provided proper pens in the stockyards at Pittsburgh for thus feeding, watering, and resting the cattle. Into this same yard came trains of cattle which had carried cattle for 28 hours from Chicago without being unloaded. There came also other trains of cattle which had been rested and fed at Crestline, Ohio, and which had been but 15 hours in transit without feeding. As both the 15-hour and the

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28-hour cattle were unloaded at any of the Pittsburgh pens indifferently, and as a larger feed had to be given the 28-hour cattle, the railroad, in order to better handle the feeding, unloading, and reloading of the cattle, placed in the feeding racks of the pens, in advance of the arrival of all cattle, 150 pounds of feed. In the case of the Crestline, or 15-hour, cattle, this was all they got at Pittsburgh. But in the case of the Chicago, or 28-hour, cattle, the railroad furnished at Pittsburgh an additional 100 pounds of feed. If this extra 100 pounds were placed in the racks of the resting pens, it would have occasioned great delay and inconvenience, because in that case the Crestline cattle would have to be kept out of the pens where this extra 100 pounds was placed for the Chicago cattle. The railroad company, therefore, instead of placing such extra 100 pounds in the racks of the resting place, placed it in the standing cars, where the Chicago cattle would eat it after they left the pens. In this way, the cattle had more time for rest in the pens, the railroad could better and more expeditiously handle the traffic, and the cattle had some food to eat in transit if they so desired. The government had its inspectors at Pittsburgh, to see that this humane statute was duly observed.

Before Swift & Co. shipped their cattle at Chicago, they placed 150 pounds feed for each animal in the cars, and, regarding such 150 pounds as a partial feeding of the 250 pounds, which all parties concede is a proper feeding for a 28-hour run, Swift & Co. notified the railroad company to feed only 100 pounds to the cattle in the Pittsburgh rest pens. Their contention was that the 150 pounds they themselves placed in the cars in Chicago and the 100 pounds placed by the railroad company in the pens at Pittsburgh under their order constituted the proper feeding of 250 pounds, which, as we said, all parties agree was the proper amount to be fed during or at the end of a 28-hour run. For this extra 100 pounds thus fed by the railroad company, Swift & Co. paid the railroad. The railroad company, on its part and as it appears in accordance with the requirements of the government inspectors at Pittsburgh, contended that, the duty of feeding the cattle during the entire trip not having been assumed by Swift & Co., said duty could not be divided, and that the entire duty was imposed on them, viz. to furnish the proper 250 pounds of feed to the cattle when they came to Pittsburgh. The railroad, therefore, instead of restricting itself to the 100 pounds of feed which Swift & Co. desired fed at Pittsburgh, fed 150 pounds additional, 50 pounds of which, in addition to the 100 pounds desired by Swift & Co., they placed in the pens, and the other 100 pounds of which they placed in the standing cars. Swift & Co. paid for 100 pounds of the 150 pounds placed in the pens, and denied their liability to pay the additional 50 pounds placed in the pens. For this 50 pounds, which we will call the "contested pen feed," the railroad brought this suit, and for the 100 pounds placed by the railroad in the cars, and which we will call the "contested car feed," the railroad also brought suit. Having recovered judgment for both these items in the court below, Swift & Co. sued out this writ of

error, and the fundamental question involved is the construction of Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (Comp. St. §§ 8651–8654), entitled "An act to prevent cruelty to animals while in transit." So far as pertinent to the present case, that act provides:

"That no railroad * * * transporting cattle * * * through another state * * * shall confine the same in cars * * * for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours."

It further enacts:

"The animals so unloaded shall be properly fed and watered during such rest either by the owner or person having custody thereof, or in case of his default in so doing, then by the railroad, * * * at the reasonable expense of the owner; * * * but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires."

There is a radical difference between Swift & Co. and the Department of Agriculture as to the proper construction of the statute, and therefore as to the proper performance of the statutory duty of feeding, but when their differences are analyzed it is clear that both Swift & Co. and the Agricultural Department are in substantial accord that the proper amount of feed for a 28-hour transit is 250 pounds, and it is on that theory that Swift & Co. had fed 150 pounds when they shipped the cattle at Chicago and directed the railroad to feed the 100 pounds additional at Pittsburgh. Where they differ in the construction and application of the statute is as to when, where, and by whom the 250 pounds should be fed to the cattle. It will thus be seen that the question in issue is really a test one between the shippers of cattle and the Department of Agriculture, and that the railroad's only course was to comply with whatever the law meant and its proper application.

[1] After careful consideration, we are of opinion the construction of the law contended for by the government is the proper one. The law gives the owner and shipper of cattle the option of performing the statutory duty of feeding his cattle in transit, but if he does not assume that statutory duty the act compels the railroad to perform it. Manifestly, the statute does not contemplate a divided, dual duty, but a single, unitary one, which the owner primarily has the right to perform; or, if he does not assume the duty, the railroad must. To hold the duty was a divisible one would result, not only in neglect of the cattle, but in the absence of that governmental inspection of the cattle in transit, which safeguards them from unnecessary suffering. From this it follows that if the duty is a unitary one, if the shipper does not assume that duty in its entirety, and if it is cast on the railroad, the shipper cannot hamper the railroad with conditions, or by any voluntary part performance on its part add to or detract from the railroad's obligation to perform the statutory duty in its entirety. Now, the statute compels the railroad, after a transit of 28 hours, to unload the cattle "in a humane manner, into properly equipped pens for rest, water, and feeding, for * * * at least five consecutive

hours," and that "the animals so unloaded shall be properly fed and watered during such rest." In carrying out that statutory requirement, the railroad has provided at Pittsburgh, at the terminus of a run which is approximately 28 hours from the great cattle shipping point of Chicago, suitable pens, with facilities for rest, water, and feed. The government has its inspectors at Pittsburgh, to see that the provisions of the law are complied with, and, as we have noted, the unquestioned fact is that a 250-pound feed given at Pittsburgh would comply with the statute and fit the cattle for the next long-hour run of the journey east. The railroad having thus provided water, food, and rest facilities at Pittsburgh, and the proper amount of food for the cattle at that point being 250 pounds, and the cattle owner not having exercised his primary right of assuming the duty in its entirety, it inevitably follows, in our judgment, that no voluntary act of the shipper in partially feeding, without governmental inspection, the cattle at other times and places can lessen the duty of the railroad to provide proper food at the rest pens at the end of the 28-hour transit. It follows, therefore, that when Swift & Co., who had volunteered to place 150 pounds of food in the cars before the cattle started from Chicago, sought to prevent the railroad from furnishing more than 100 pounds of food to the cattle at the end of the 28-hour run in Pittsburgh, this was an unwarranted effort to prevent the railroad from performing its full statutory unitary duty at Pittsburgh. Such being the case, it follows, therefore, in so far as the item of "contested pen feed" is concerned, namely, the 50 pounds additional which the railroad sought to recover, it was clearly entitled to recover, and to that extent the verdict and judgment of the court below was justified.

[2, 3] Turning next to the item of "contested car feed," it is quite clear to us that, if such 100 pounds of extra food could have been and had been placed in the pens and there fed to the cattle, the railroad company would have been entitled to recover therefor. But, in point of fact, it did not place it in the pens, but placed it in the cars, where the animals could get it after leaving the pens. Counsel for the railroad now concede at bar that the placing of this food in the cars was not justified by the statute, but assert that the railroad is entitled to recover the price of the food thus furnished, because of an implied contract of Swift & Co. to pay for it, which it alleges arose from its acquiescence in that practice. In other words, they claim the right of recovery upon an implied contract, and they contend that the existence of such a contract was submitted to the jury and determined in the railroad's favor. Had such been the case, this judgment would have been justified in its entirety, but, unfortunately for the contention of the railroad, this cannot be done, for two reasons: First, no claim on such an implied contract is asserted in the statement of claim filed; and, second, the question of the existence of such a contract was not submitted by the court to the jury. As to the first point, the statement of claim is based wholly on the right of the railroad to recover this "contested car feed" item as a performance of a statutory duty, and there is no reference whatever to any implied

contract arising from the acquiescence of Swift & Co. Therefore under the pleadings that fact was not in issue. As to the contention that such unpleaded issue was submitted to the jury and found in the defendant's favor, an inspection of the charge shows that this is not the case. It is true it was assumed by the court in its charge that there was such a contract, and virtually the jury was directed so to find; but, in point of fact, that issue was not submitted, and therefore such issue cannot be taken as a fact determined by the jury's verdict. It follows, therefore, that this portion of the verdict cannot be sustained. We deem it proper, however, to say that, in view of the fact that there was evidence on that subject which would have warranted the submission of that issue to the jury had it been raised by the pleadings, and as the case must go back for retrial, we see no objections to the railroad company, by proper amendment, asserting such grounds of recovery and raising this question, so that the liability of Swift & Co. on this implied contract, arising from acquiescence, may be determined. We also deem it proper to say we find no error in the court's admission in evidence of the departmental circular concerning proper feeding, and, moreover, there was really no dispute in the case but that 250 pounds was a proper feeding for a 28-hour run.

The judgment below is reversed, and the case remanded for further proceedings in accord with this opinion.

ISSENHUTH v. KIRKPATRICK.

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

No. 5279.

1. ACTION ⟹22—ACTION AT LAW—FRAUD.
   Action is one at law; the complaint, though alleging a sale of stock by plaintiff to defendant, in which defendant made fraudulent representations, which were relied on by plaintiff, not offering to return the stock nor seeking cancellation of plaintiff's notes given in part payment, but asking only for money judgment equal to money he had paid and his unpaid notes.

2. ELECTION OF REMEDIES ⟹3(2)—INCONSISTENT REMEDIES—SALES.
   It is an election between inconsistent remedies, preventing subsequent change, where one, defrauded in a purchase and knowing the facts, brings action for damages, instead of rescinding and suing for what he had paid.

3. ELECTION OF REMEDIES ⟹9—OPERATION—CHANGE BY STATUTE.
   The rule that one, having with knowledge of the facts made an election between inconsistent remedies, abandons the other and may not elect again, is not changed by Judicial Code, § 274a (Comp. St. § 1251a), authorizing a party to amend his pleading, to obviate objection that action was brought on the wrong side of the court.

4. JURY ⟹31(1)—DEPRIVATION OF RIGHT—TRANSFER TO EQUITY DOCKET.
   For the court to permit a transfer of action at law for fraud in a sale to the equity docket is an error affecting the substantial right of defendant to a jury trial, requiring reversal.

⟹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 District of South Dakota; Frank A. Youmans, Judge.

Action by R. H. Kirkpatrick against Charles C. Issenhuth. Decree for plaintiff, and defendant appeals. Reversed, with directions.

In the lower court the plaintiff, Kirkpatrick, filed a bill of complaint against the defendant, Issenhuth, alleging that Issenhuth had sold him, in June, 1912, 250 shares of the capital stock of the United Mercantile Agency, hereafter referred to as the company, and that he had made the purchase relying on false and fraudulent representations made by the defendant and known by him to be false. The plaintiff alleged that he had paid the defendant $3,000 in cash for the stock, had executed a series of notes for the remaining $2,000 of the purchase price, one payable each month after the sale, and had paid five of these notes. The representations alleged were, in substance, that Issenhuth had stated that the company was in a sound financial condition, doing a large and extensive business, and was a solvent and growing institution; that the stock, of the par value of $100 per share, was worth and was selling in the open market for $200 per share; that defendant had himself invested $26,000 in the company's stock, and desired more, but was unable to obtain it because the company had sold all of the stock that it wished to sell, and the only stock that could be obtained was stock reserved by the company for district managers of new offices, and that the Omaha office had had allotted to it $5,000 worth of the stock, which the person who was to be district manager must buy; that the company was not in need of money, and it would take $3,000 in cash and $2,000 in notes for the stock, which was not the stock of Issenhuth, but treasury stock of the company; that in consideration of the payment of the $5,000 for this stock the plaintiff would be made the district manager at Omaha, and would receive a salary of $150 per month for two years; that defendant claimed to be the district manager at Omaha, and that his position with the company required that he should go to new cities and open and establish offices of the company and find district managers to take sufficient stock to hold such positions.

The plaintiff averred that Issenhuth did not sell plaintiff treasury stock, but caused the company to take up the certificates for 250 shares that the defendant had owned, and to issue an equivalent amount of shares to the plaintiff, and that plaintiff turned over these shares to defendant as security for the payment of his notes for the unpaid $2,000 of the purchase price. He charged that the $3,000 he paid went directly to defendant and was kept by him, and that his notes which he made payable to the company were at once indorsed without recourse to the defendant, and still belonged to defendant and were in his possession. The plaintiff concluded by alleging that the company soon was declared bankrupt and ceased business; that he lost his position as district manager and his salary as such manager ceased; that the consideration for which plaintiff paid defendant the money and gave the notes had entirely failed. Whereupon he prayed judgment against the defendant for $5,000 and interest thereon from the date of the sale.

The answer denied generally the allegations of fraudulent representations, set forth some affirmative defenses, and alleged as a counterclaim the 19 notes signed by plaintiff, made payable to the company and assigned to the defendant, and prayed judgment for the amount thereof.

Plaintiff's reply admitted the execution of the notes, and that defendant was the owner and holder of them. The prayer of the reply was that the amount due on the notes be offset against the $5,000 and interest sought to be recovered in the plaintiff's complaint, and that plaintiff have judgment for the difference, and that the notes set forth in the defendant's counterclaim be deposited in court and canceled.

The case came on for trial, and a jury was impaneled, and the plaintiff produced evidence endeavoring to support the allegations of his petition. The defendant then requested the court to instruct the jury that a verdict should be returned in favor of the defendant. After a colloquy between court and counsel, in which plaintiff's counsel claimed that the action was not brought

as a suit for rescission, but as an action for deceit, and the court had indicated that the motion would have to be sustained, the plaintiff asked to have the case transferred to the equity docket, and an order was made, over the objections of the defendant, transferring the case, with leave to the parties to amend their pleadings. The jury was discharged from further consideration of the case, and the evidence of the defendant was produced, and further evidence was given on behalf of the plaintiff in rebuttal.

Afterwards amended pleadings were filed, the plaintiff adding to the allegations made in his former complaint an offer to restore and to return to the defendant the certificate for 250 shares of stock in the company which was then in defendant's possession. He also alleged that the defendant still retained the 19 promissory notes that he had given, that they could be assigned to different persons, and the prayer was that the contract of sale of the shares of stock be rescinded and canceled, that the notes be returned and canceled, that the certificate for shares of stock be returned to the defendant, and for judgment for $3,250, the amount that plaintiff had paid to the defendant and for equitable relief.

An answer was filed to this amended bill of complaint, and the findings and decree of the court were in favor of the plaintiff and in accordance with the prayer of the amended bill. The defendant has appealed.

A. K. Gardner, of Huron, S. D. (Irwin A. Churchill, of Huron, S. D., on the brief), for appellant.

A. B. Fairbank, of Sioux Falls, S. D. (R. H. Warren, of Sioux Falls, S. D., on the brief), for appellee.

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

MUNGER, District Judge (after stating the facts as above). Some of the errors assigned challenge the action of the court in withdrawing the trial of the case from the jury and in ordering its transfer to the equity docket, and the trial and determination of it thereafter as if it were a suit in equity. The defendant objected to this action of the court because the evidence showed that the plaintiff was not entitled to maintain a suit for rescission, and because he had elected to bring the action as one at law for deceit and was bound by such election. The court was of the opinion that section 274a of the Judicial Code (Act March 3, 1915, c. 90, 38 Stat. 956 [Comp. St. § 1251a]) authorized the transfer.

[1, 2] The plaintiff did not bring this action until 4½ years after he purchased the defendant's stock. Long before he brought his action he knew the substantial facts as to the fraud that he says was perpetrated upon him by the defendant. The plaintiff elected to sue at law for his damages. He did not offer to return the shares of stock which stood in his name. He did not seek a cancellation of his outstanding notes, but asked only for a money judgment of an amount equal to the money he had paid defendant and to the amount of his obligation on the unpaid notes. The action was therefore one at law. Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451; Curriden v. Middleton, 232 U. S. 633, 34 Sup. Ct. 458, 58 L. Ed. 765; White v. Boyce (C. C.) 21 Fed. 228; 1 Pom. Eq. Jur. § 237. He had a choice between two remedies—either to rescind the purchase and recover what he had paid, or to affirm the contract and to sue for the

damages he had sustained. The remedies were inconsistent, and an election of one was an abandonment of the other. Stuart v. Hayden, 72 Fed. 402, 18 C. C. A. 618; A. Klipstein & Co. v. Grant, 141 Fed. 72, 72 C. C. A. 511; In re Jacob Berry & Co., 174 Fed. 409, 98 C. C. A. 360; 2 Black on Rescission, § 612.

In the case of Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52, the court quotes with approval this statement of the rule from a decision of the Supreme Court of Michigan (Thompson v. Howard, 31 Mich. 309):

"A man may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again."

[3, 4] Has this rule changed by the enactment of section 274a of the Judicial Code? which reads:

"That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

There is no legal reason why the plaintiff should not have brought his action at law as he did, though there may have been practical reasons why an equitable suit would have been wiser. He had the right to consider the nature of the proofs he would be required to furnish, and the comparative advantages of the forms of relief offered and of the means of enforcing a judgment or decree; but, when he had elected between the institution of inconsistent remedies, it cannot be said that an action at law for deceit, which he properly brought, if he chose to bring it, should have been brought as a suit in equity. The transfer to the equity docket was not asked because of any claimed discovery that his action for deceit should have been brought in equity, but because there seemed to be a failure of proof of an essential element of his case. Section 274a of the Judicial Code permits one who is entitled to a remedy to retain it in the suit he has brought by a transfer of the case to the proper docket, although his suit may have been brought at law, when it should have been brought in equity, or vice versa; but it does not restore a remedy to one who is not entitled thereto, when he has abandoned and waived it in favor of an inconsistent remedy. The action of the court in permitting a transfer of this case to the equity docket was an error affecting the substantial right of the defendant to a jury trial in a law action (Ex parte Simons, 247 U. S. 231, 38 Sup. Ct. 497, 62 L. Ed. 1094), and requires a reversal of the decree and a new trial. As the remaining questions may

not be presented in the same form after a new trial, it is not necessary to consider them further.

The decree of the lower court will be reversed, with directions to vacate the order transferring the case to the equity docket and to grant a new trial in the action at law.

CHARLESTON & W. C. R. CO. v. ALWANG et al.

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

No. 1658.

1. RAILROADS ⚿350(7)—CROSSING ACCIDENT—SIGNALS FROM TRAIN—QUESTIONS OF FACT.
   In an action for injuries to soldiers riding in an army truck, struck by a train at a crossing, where there was evidence that defendant's employés had disregarded Code Civ. Proc. S. C. 1912, § 3222, requiring bell and whistle signals to be given on crossing highways, the issue of defendant's negligence was for the jury.

2. NEGLIGENCE ⚿93(1)—NEGLIGENCE OF ARMY TRUCK DRIVER IMPUTABLE TO OCCUPANT.
   The negligence of a sergeant, driving an army truck struck at a crossing, is not imputable to the soldiers riding in it; the sergeant running the truck at the command of the superior in one branch of the service, and the others being on the truck at the command of a superior in another branch of the service, so that they were not voluntarily riding together, and neither one having any authority over the other.

3. RAILROADS ⚿350(13)—CROSSING ACCIDENTS—QUESTION FOR JURY—WILLFUL NEGLIGENCE OF PERSON INJURED.
   Evidence that soldiers, riding in an army truck struck by a train at a crossing, were racing with another truck just before the collision, *held* not to show as a matter of law that they were guilty of "gross or willful negligence," within Code Civ. Proc. S. C. 1912, § 3230, so as to bar recovery for injuries caused by failure to give statutory signals.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Joseph T. Johnson, Judge.

Action by Andrew A. Alwang and others against the Charleston & Western Carolina Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

T. P. Cothran, of Greenville, S. C., and F. B. Grier, of Greenwood, S. C. (Grier, Park & Nicholson, of Greenwood, S. C., Nichols & Nichols, of Spartanburg, S. C., and Cothran, Dean & Cothran, of Greenville, S. C., on the brief), for plaintiff in error.

Jesse W. Boyd, of Spartanburg, S. C. (Frank L. Tyson, of New York City, and Ben Hill Brown, of Spartanburg, S. C., on the brief), for defendants in error.

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

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

KNAPP, Circuit Judge. In this grade crossing case the following facts appear: About a mile north of the town of Woodruff, S. C., the railway of plaintiff in error, hereinafter called defendant, crosses a public highway known as the Buncombe road. The crossing is elevated some 4 or 5 feet above the natural level of the highway, which is graded up to the rails on either side. At the time of the accident the crossing and approaches thereto were all in good condition. For several weeks before some army trucks, each with a complement of men, had been engaged in hauling wood from a point about 6 miles out on the Buncombe road to Woodruff, where the wood was loaded into cars for shipment to Spartanburg.

On the day in question, about 10 o'clock in the forenoon, two loaded trucks started for Woodruff, the first some three-quarters of a mile ahead of the other. The leading truck was operated by Sergeant Hurlbut, and on it were four privates. The second was operated by Sergeant Hoyt, with Corporal Alwang sitting at his left on the driver's seat, and Privates Martin, Keehner, Curtis, and O'Neals up on the load behind them. All the men were familiar with the crossing and had passed over it several times that morning. The Hoyt truck was traveling at greater speed, and overtook the Hurlbut truck about 300 feet from the crossing. Hurlbut presently kept to the left of the road, to allow Hoyt to pass, and they ran side by side for perhaps 100 feet, when Hurlbut slowed down and Hoyt went ahead, being then within a short distance of the crossing. At that moment a freight train running some 30 miles an hour, which probably had not been heard because of the noise made by the trucks, came to the crossing from the right; that is, from the direction of Woodruff. Hurlbut saw the train and stopped; but Hoyt, although he reduced speed going up the incline to the tracks, did not or could not stop in time to avoid a collision. The right front of the truck was struck by the locomotive, Martin was killed, and Alwang, Keehner, and Hoyt more or less severely injured.

The defendant claims that the trucks were racing but its testimony to that effect was contradicted by plaintiffs' witnesses. There was also some disagreement about the extent of obstructions to a view of the track as the crossing was approached. For a distance of approximately 30 feet from the rails the view was wholly unobscured, as all agree, and in that distance the truck, going at the speed described, could easily have been stopped. Further away, for a stretch of some 70 feet, the view was partially obstructed, or momentarily cut off, by a few scattering trees along the roadside or in the adjoining field. It is enough to say on this point that for a distance of at least 100 feet from the crossing Hoyt could have seen the train in question without much difficulty, if he had looked in that direction.

The plaintiffs rely upon sections 3222 and 3230 of the Code of South Carolina, the material parts of which read as follows:

"Sec. 3222. A bell * * * and a steam whistle shall be placed on each locomotive engine, and such bell shall be rung, or such whistle sounded * * * at the distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be

kept ringing or whistling until the engine has crossed such highway or street or traveled place. * * *"

"Sec. 3230. If a person is injured in his person or property by collision with the engine or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, * * * unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence * * * and that such gross or willful negligence * * * contributed to the injury."

[1] On the occasion under review the whistle was undoubtedly blown at the prescribed distance, giving the usual signal; but it was not blown after that, and the bell was not rung at all as the train came on to the crossing. This disregard of a statutory duty made a case for the jury on the issue of defendant's negligence, and their verdict for the plaintiffs is conclusive.

[2] In discussing briefly the remaining question, we shall assume that Hoyt, the driver of the truck, was guilty of such gross negligence as would bar recovery for any injuries he may have sustained. But his negligence, whatever its degree, was not imputable to the other men on the truck. They had no authority over him, nor he over them. All were soldiers under orders. Hoyt was running the truck at the command of a superior in one branch of service, and the others were on the truck at the command of a superior in another branch of service; that is to say, they were not voluntarily riding together, and therefore not under "mutual responsibility in a common enterprise," to quote a phrase from Schultz v. Old Colony Street Ry. Co., 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402, in which the subject is exhaustively reviewed. This peculiar relation, or want of relation, between Hoyt and the other soldiers, differentiates the instant cases, as we think, from such a case as Davis v. C., R. I. & P. Ry. Co., 159 Fed. 10, 88 C. C. A. 488, 16 L. R. A. (N. S.) 424, where the plaintiff was riding in a buggy with his friend, who drove the horse, for the purpose of visiting a point of mutual interest, or Brommer v. Penn. R. Co., 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924, in which it was held that Henderson, the guest of Brommer on a pleasure ride, was guilty of negligence which defeated his action, because, "being free from the engrossing work of operating the machine, and occupying a seat beside the driver, he was in an even better situation than Brommer to look out for the safety of the machine," or Hall v. West Jersey & S. R. Co., 244 Fed. 104, 156 C. C. A. 532, which was also the suit of a guest of the automobile driver and decided against the plaintiff on the authority of the Brommer Case, or the numerous state cases cited by defendant, in which persons voluntarily riding with the driver of a vehicle, for their mutual pleasure or advantage, and having equal opportunity to see and warn against the dangers of a railroad crossing, have been denied recovery on the ground of contributory negligence. But in our opinion the cases at bar are in a different category. These men were not on the truck for their own purposes or of their

own volition. They were there by compulsion, in obedience to military command, without freedom to act or direct, and it seems but reasonable to hold that they were not under the same obligation to be on the lookout or give needed warning as persons riding with a driver of their own accord, by his request or their desire, and at full liberty to take such action as emergency might require.

[3] Moreover, under the South Carolina statute above quoted, when a railroad company fails to comply with its provisions, the highway traveler injured at a crossing may recover compensation, unless it is shown that, "in addition to a mere want of ordinary care," he was "guilty of gross or willful negligence." And we are unwilling to say, taking into account all the circumstances of record, which need not here be recited, that the men for whom these suits are brought were guilty of gross or willful negligence as matter of law, even if it be true that Hurlbut and Hoyt were engaged in a race just before the accident. On the contrary, we think the jury had the right to find that they were wanting at most in ordinary care, and even to find that, as soldiers under orders, they were not wanting in such care as ordinarily prudent persons would exercise in like situation. From every point of view the facts are clearly more favorable to the plaintiffs than those appearing in the recent case of Southern Pacific Co. v. Wright, 248 Fed. 261, 160 C. C. A. 339, which holds that the question of the contributory negligence of an automobile passenger, injured by the reckless conduct of its driver, was properly submitted to the jury.

It follows that the rulings of the trial court, refusing to direct a verdict for defendant and rejecting certain requested instructions, were not erroneous, and the judgment will therefore be affirmed.

DODGE v. UNITED STATES.*

(Circuit Court of Appeals, Second Circuit. May 16, 1919.)

No. 212.

1. Criminal Law ⇐864 — Trial — Communication Between Judge and Jury.
   Any communication from trial court to jury in a criminal case, not made in open court, is improper.

2. Criminal Law ⇐1174(1)—Harmless Error—Communication Between Court and Jury.
   Trial court's improper action in privately advising jury that they might convict under a certain count is not reversible error, where no information was given which was not contained in original charge.

3. Indictment and Information ⇐159(2)—Surplusage—Power to Strike Out.
   Trial court's action in striking certain words in a count on motion by government, to which defendant made no objection, constitutes error fatal to a conviction on that count.

4. War ⇐4—Espionage Act—Instructions.
   In a prosecution under Espionage Act, instruction regarding defendant's right to freedom of speech, and power of Congress to enact laws abridging such freedom in time of war, *held* not improper.

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

*Certiorari denied 250 U. S. —, 40 Sup. Ct. 10, 64 L. Ed. —.

5. WAR ⟹4—ESPIONAGE ACT.
The Espionage Act is constitutional.

6. CRIMINAL LAW ⟹1159(4) — QUESTIONS REVIEWABLE — CREDIBILITY OF WITNESSES.
On appeal in a criminal case, the court cannot pass upon the veracity of witnesses.

7. CRIMINAL LAW ⟹991(2)—EXCESSIVE SENTENCE—EFFECT.
That the court exceeded its authority by providing that accused's imprisonment should be at hard labor does not invalidate the authorized portion of the sentence.

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

William Dodge was convicted of violating the Espionage Act, and he brings error. Judgment on third count affirmed.

Irving M. Weiss, of Buffalo, N. Y. (Eustace Reynolds, of Buffalo, N. Y., of counsel), for plaintiff in error.

Stephen T. Lockwood, U. S. Atty., and John H. O'Day, Asst. U. S. Atty., both of Buffalo, N. Y.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff in error, hereinafter called the defendant, comes into this court to reverse a conviction under Espionage Act June 15, 1917, c. 30, 40 Stat. 217, as amended by Act May 16, 1918, c. 75, 40 Stat. 553. The indictment was based upon section 3 of title 1 of the act (Comp. St. 1918, § 10212c) which is found in the margin.[1]

[1] "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, or shall willfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States, or the making of loans by or to the United States, and whoever, when the United States is at war, shall willfully cause, or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of anything or things, product or products, neces-

The indictment contains four counts. The first count in substance states that the defendant on June 22, 1918, at Buffalo, while the United States was at war with Germany and Austria-Hungary—

"* * * did then and there knowingly, wrongfully unlawfully, feloniously, and willfully utter and publish language intended to incite, provoke, and encourage resistance to the United States and promote the 'cause of its enemies,' by appearing upon the public streets in the presence and within the hearing of a large crowd of men forming part of the military forces of the United States, and capable of bearing arms, and, with the intent that they should hear, did then and there give utterance to words in substance to the effect that the United States should not be at war; that on July 3, 1918, there would be a meeting at the corner of Spring and Genesee streets, behind closed doors, at which things would be told about the war, and that his hearers were all invited to attend, and by inflection, tone of voice, and innuendo he, the said William Dodge, did then and there convey to his hearers the impression that things would be disclosed at said meeting about the present war that would bring the form of the government of the United States and the military and naval forces of the United States into contempt, scorn, contumely, and disrepute; and he, the said William Dodge, did furthermore then and there willfully utter, publish, and proclaim to the aforesaid crowd of men words and language in substance as follows:

"'Let us organize and follow the leaders, the agitators. Now they call us agitators pro-Germans. What right has the government to call us such now? If there was anything for us to fight for, we would do so, every one of us; but what are we fighting for? Nothing to our advantage; nothing for our good; nothing for our benefit. This war is not worth fighting for.'

"And at the same time and place the said William Dodge did enter into an argument with one of the audience, who stated that he was enlisted in the army of the United States, and the said William Dodge did then and there by word of mouth publicly heap scorn and contumely upon the said person because of his enlistment in the said army."

The second count states that—

"at the same time and place and by the same means the defendant did knowingly, wrongfully, unlawfully, feloniously, and willfully attempt to cause and incite insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States."

The third count states that—

"at the same time and place, and in the same manner and by the same means as set forth in the two previous counts, the defendant did * * * knowingly, wrongfully, unlawfully, feloniously, and willfully attempt to obstruct the recruiting and enlistment service of the United States."

The fourth count states—

"the manner and means of alleged violation, and charges that under the same circumstances and at the same time and place the defendant did in the same way by word and act oppose the cause of the United States in the aforesaid war."

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sary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

The defendant pleaded not guilty. After a trial which lasted for several days, the jury rendered a verdict acquitting him on the second and fourth counts, and convicting him on the first and third counts. The defendant was sentenced to be imprisoned in the Maryland state penitentiary at Baltimore, Md., at hard labor for a term of six years.

The defendant's father was born in England and his mother in France. He himself was born in Buffalo, and he is a member of the Socialist Labor Party and of the Workers International Industrial Union, which prior to 1915 had been called the I. W. W.

[1, 2] It appears that while the jury was deliberating on its verdict the bailiff in charge brought to the judge a communication from it. Upon its receipt he summoned the counsel for both sides to his chambers and informed them that he had received a communication from the jury, but that he did not think he should disclose its substance at that time. Thereupon counsel withdrew and the judge returned an answer to the jury's communication by the bailiff in charge. After the verdict was received the judge informed counsel that what the jury had asked was whether defendant could be convicted on the first count, and that he replied, "Yes;" and he stated that he had not at the time apprised counsel of the contents of the note, or of the reply, as it did not seem to him to be of enough importance, especially as he had in his instructions informed them that the defendant could be found guilty of one or all counts, or none at all; and it has been assigned as error that the court communicated with and instructed the jury, not in open court, and not in the presence and without the knowledge and consent of the defendant or his counsel, after the jury had retired to deliberate on their verdict.

It has been held in a few cases that after a jury has retired the court may give an instruction on a question of law in the absence of counsel. Bassett v. Salisbury Mfg. Co., 28 N. H. 438; Milton School District No. 1 v. Bragdon, 23 N. H. 507; Shapley v. White, 6 N. H. 172; Goldsmith v. Solomons, 2 Strob. (S. C.) 296, 300. In the case last cited the court said:

"The intercourse between the jury and the bench is, in many respects, very confidential. Often the communications from the jury are of that kind which ought not be communicated to the bar."

These cases are contrary to the clear weight of authority. In 38 Cyc. 1859, it is said:

"It is almost universally held that no communication ought to take place between the judge and the jury after the cause has been committed to them by the charge of the judge, unless in open court."

That is undoubtedly the law. The leading case on this subject is Sargent v. Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185, which was decided by the Supreme Court of Massachusetts in 1823. In that case, after a jury had been out for six hours, the foreman wrote to the judge, at his chambers, that they could not agree and that they waited for his directions. The judge replied in writing, saying that he was unwilling to permit them to separate, and gave such directions as would enable them to reconsider the cause in a more systematic man-

ner. And he directed the jury to bring his letter into court with them in order that it might be filed with the papers in the case. A new trial was ordered. The opinion was written by Chief Justice Parker, who said:

"As it is impossible, we think, to complain of the substance of the communication, the only question is whether any communication at all is proper, and, if it was not, the party against whom the verdict was is entitled to a new trial. And we are all of opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court, and, where practicable, in the presence of the counsel in the cause."

The courts are practically unanimous in holding that private communications between court and jury are improper, and that all communications should be made in public. They are not, however, unanimous in holding that a private communication between judge and jury will in any case in which it occurs nullify the verdict. In Moseley v. Washburn, 165 Mass. 417, 43 N. E. 182, the judge answered a written question from the jury as to the date from which to compute interest; it having been covered in the original instruction. This was held not to require reversal. In Whitney v. Commonwealth, 190 Mass. 531, 77 N. E. 516 (1906), a civil case, the judge communicated with the jury privately, the communication being a collateral direction as to the manner of using the papers supplied for the reception of a verdict, and the court held that this did not require the verdict to be set aside. The court said in the Whitney Case:

"There are grave objections to any communication with a jury made as this was. * * * But the facts stated in this case make it certain that no miscarriage of justice has resulted."

In Buntin v. Danville, 93 Va. 200, 24 S. E. 830, the judge answered a question of the jury, both question and answer being in writing, without informing counsel, who were in court engaged in another case. The court declined on that account to reverse, and declared that, while the better practice is to inform the counsel of any question asked by the jury, the irregularity would not vitiate the verdict, as the answer correctly stated the law and the verdict was plainly right. In People v. Kelly, 94 N. Y. 526, the judge answered a written communication from the jury. It did not appear what the communication was. The court held that the question was not properly raised by affidavit, and implied that the harmful nature of such communication should be shown, saying that the presumption is that there was no violation of duty on the part of the court.

The only case in the federal courts which has come to our attention is Fillipon v. Albion Vein Slate Co., 242 Fed. 258, 155 C. C. A. 98, decided by the Circuit Court of Appeals in the Third Circuit. The court held that under the circumstances of the case a written communication between the court and the jury, after the jury had retired, is not ground for reversal in a civil case, where no harm results; the question and answer being preserved of record. The question in that case concerned the applicable rule of contributory negligence. The

court found nothing to complain of in the answer, and the only question was whether there ought to be a reversal because the instruction was not given in open court. In its opinion the court said:

"Is there a compelling reason of policy why a trial fairly and accurately conducted must be always set aside, where such an irregularity has crept in, although it has done no actual harm, and is unlikely to do harm? We do not see our way to answer this question in the affirmative, and must therefore affirm the judgment."

And see Grabinsky v. Smit, 20 Mo. App. 50; State v. Nash, 51 S. C. 319, 28 S. E. 946.

In the instant case it is evident that no possible harm resulted or could result from the communication which passed between court and jury. The communication gave the jury no information which was not contained in the original charge. While the judge should not have done what he did, to reverse on that ground would under the circumstances be so extremely technical that it does not at all approve itself to our judgment.

[**3**] At the close of the case counsel for the government moved to strike out as surplusage a portion of the first paragraph of the first count of the indictment and the word "mutiny" from the first paragraph of the second count. Counsel for defendant at once said: "No objection." The court granted the motion. This is now assigned for error. That it was error of the most serious kind is not to be doubted. The rule is almost universally recognized, both in this country and in England, that an indictment cannot be amended by the court, and that an attempt to do so is fatal to a verdict upon the count.

The Supreme Court in Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849, declared that it was beyond question that in the English courts indictments could not be amended, and that no authority had been cited in the American courts which sustained the right of a court to amend any part of the body of an indictment without reassembling the grand jury, unless by virtue of a statute. In that case the trial court amended the indictment by striking out six words as being surplusage. The Supreme Court held that this deprived the court of power to try the prisoner. There was only one count in the indictment in that case. And the court said:

"The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered."

We therefore hold in the instant case that the amendment made in the first two counts deprived the court of power to proceed upon those counts; but this did not affect the right to try the defendant upon the third and fourth counts. As the jury acquitted on the fourth count, the question is as to the validity of the third count. That count is well drawn, and the conviction under that count must be sustained unless the Espionage Act is unconstitutional.

[**4-6**] It was claimed at the argument that the trial judge gave the impression to the jury that the defendant had no right to freedom of speech while the country was at war, and that Congress in time of war could enact laws in violation of the First Amendment, which pro-

vides that Congress shall make no law abridging freedom of speech. That portion of the charge complained of may be found in the margin.[2]

We see no error in the above instruction, which in effect amounted to what the Supreme Court said in the cases of Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470, Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561, and Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566. The act is constitutional and there is evidence which, if the jury believed it, justified the verdict. The evidence was very conflicting, and Dodge, who took the stand, denied flatly that he had said certain things which others stated he had said. But this court cannot pass upon the veracity of the witnesses, and determine whether Dodge or his accusers told the truth.

[7] It appears that, in sentencing the defendant to imprisonment, the court sentenced him to imprisonment for "hard labor," and that those words are not found in the act for the violation of which the conviction was obtained. But where a court has jurisdiction of the person and the offense the imposition of a sentence in excess of what the law permits does not render the authorized portion of the sentence void, but only the portion of it which is in excess. United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631.

Judgment on third count affirmed.

[2] "Another subject has been suggested during the course of this trial, in reference to which I conceive that I should give you instructions. You should understand, gentlemen, that it is a constitutional provision that a person has the right of freedom of speech, and Congress, true enough, has no right to enact laws abridging the freedom of speech; but, gentlemen, this is a much-abused term, and I instruct you that the guaranty cannot be successfully resorted to as a protection in time of war, where things that are said or uttered involve the integrity of the nation, or injure or tend to injure the United States—in other words, a citizen would not be permitted to speak or write in the time of war in a way that would interfere with the successful ending of the war. While citizens may fairly criticize the laws of Congress, and even the acts of the President, or of the army or navy, yet such criticism must be honest and based upon truth, and not with the intent to violate the Sedition Act in question. When the words uttered are accompanied by a willful intent to disobey the statute, and to obstruct the recruiting or enlistment service of the United States, or the purposes that the United States has in engaging in the war, or to induce disloyalty or insubordination, or attempt so to do, then, gentlemen, what was said becomes seditious and an infraction of the statute.

"In this respect, gentlemen, the Sedition Act, as amended in May, 1918, and under which this indictment is found, is very broad and comprehensive, and it will bear reading again. This is an extraordinary measure, limited to times when the United States is at war, and by that I mean to be understood as saying that very likely the things that are claimed to be said, if they were said, would not be a violation of the statute if we were not at war, but being at war, a different situation presents itself, and Congress has met the situation by enacting the statute to which I am now calling your attention."

SEARS, ROEBUCK & CO. v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2659.

1. TRADE-MARKS AND TRADE-NAMES ⚿80½, New, vol. 8A Key-No. Series—UNFAIR COMPETITION.
A finding by the Federal Trade Commission that a mail-order house doing an interstate business was guilty of unfair competition in selling sugars, teas, and coffees under representations that it had obtained special price concessions, because of the magnitude of its purchases, and that it purchased selected brands from abroad, *held* warranted.

2. TRADE-MARKS AND TRADE-NAMES ⚿80½, New, vol. 8A Key-No. Series—PROCEEDINGS BEFORE FEDERAL TRADE COMMISSION—INJUNCTIONAL ORDER.
An order issued by the Federal Trade Commission, commanding a mail-order house doing an interstate business to cease and desist from certain unfair practices in connection with the sale of sugar and other staple commodities, *held* not to have been improvidently issued because the mail-order house had discontinued such methods, where it was contending that Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), creating the Federal Trade Commission, was unconstitutional, or, if valid, had not been infringed, and the government's control of sugar sales and consumption had temporarily put an end to the objectionable practices in any event.

3. EVIDENCE ⚿23(1)—JUDICIAL NOTICE—GOVERNMENT CONTROL OF TRADE.
On petition to have a cease and desist order issued by the Federal Trade Commission vacated on the ground that the unfair practices of petitioner which related to sales of sugar, etc., had ceased, the court will take judicial notice of the government's control of the sale and consumption of sugar during the war, which temporarily at least put an end to the objectionable practice.

4. TRADE-MARKS AND TRADE-NAMES ⚿80½, New, vol. 8A Key-No. Series—UNFAIR COMPETITION—FEDERAL TRADE COMMISSION.
Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), giving the Federal Trade Commission authority over unfair methods of competition, and declaring the same unlawful, is not void for indefiniteness because the words "unfair methods of competition" were not defined; the trader being entitled to his day in court, where common-law principles would control.

5. CONSTITUTIONAL LAW ⚿62, 80(2)—UNLAWFUL DELEGATION OF LEGISLATIVE AND JUDICIAL POWER.
Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), giving the Federal Trade Commission power to stop unfair methods of competition in commerce and declaring the same unlawful, is not an unlawful delegation of legislative and judicial power; Congress having by the act declared the public policy applicable to the situation.

6. TRADE-MARKS AND TRADE-NAMES ⚿80½, New, vol. 8A Key-No. Series—POWERS OF FEDERAL TRADE COMMISSION—UNFAIR COMPETITION.
The Federal Trade Commission, under its authority to stop unfair methods of competition, cannot prevent a trader from selling a staple article as sugar below cost, although it may prevent such sales accompanied by representations which would injure other traders.

Alschuler, Circuit Judge, dissenting in part.

Original Petition to Review Order of Federal Trade Commission.

Original petition by Sears, Roebuck & Co. against the Federal Trade Commission, to review an order commanding petitioner to desist from certain unfair methods of competition in commerce. Commission directed to modify its orders, and petition in other respects denied.

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

Sidney Adler, of Chicago, Ill., for petitioner.
John Walsh, of Washington, D. C., for respondent.

Before BAKER and ALSCHULER, Circuit Judges, and CARPENTER, District Judge.

BAKER, Circuit Judge. This is an original petition to review an order entered by the respondent, the Federal Trade Commission, against the petitioner, Sears, Roebuck & Co., a corporation, commanding the petitioner to desist from certain unfair methods of competition in commerce. Respondent's order was based on its complaint, filed on February 26, 1918, on the petitioner's answer, and on a written stipulation of facts. Procedure before the commission and also before this court on review is prescribed in section 5 of the act to create a Federal Trade Commission, approved on September 26, 1914 (38 Stat. 719, c. 311 [Comp. St. § 8836e]). Respondent's authority over the subject-matter of its order is derived from the following provision in the same section: "Unfair methods of competition in commerce are hereby declared unlawful." Section 4 (Comp. St. § 8836d) is a dictionary of terms used in the act. "Commerce" means interstate or foreign commerce; but the general term, "unfair methods of competition," is nowhere defined specifically, nor is there a schedule of methods that shall be deemed unfair.

In its complaint respondent averred that petitioner is engaged in interstate and foreign commerce, conducting a "mail-order" business; that petitioner for more than two years last past has practiced unfair methods of competition in commerce by false and misleading advertisements and acts, designed to injure and discredit its competitors and to deceive the general public, in the following ways:

(1) By advertising that petitioner, because of large purchases of sugar and quick disposal of stock, is able to sell sugar at a price lower than others offering sugar for sale;

(2) By advertising that petitioner is selling its sugar at a price much lower than that of its competitors and thereby imputing to its competitors the purpose of charging more than a fair price for their sugar;

(3) By selling certain of its merchandise at less than cost on the condition that the customer simultaneously purchase other merchandise at prices which give petitioner a profit on the transaction, without letting the customer know the facts;

(4) By advertising that the quality of merchandise sold by its competitors is inferior to that of similar merchandise sold by petitioner, and that petitioner buys certain of its merchandise in markets not accessible to its competitors, and is therefore able to give better advantages in quality and price than those offered by its competitors.

Petitioner extensively circulated the following advertisements, among others:

"We can afford to give this guarantee of a 'less than wholesale price' because we are among the largest distributors of sugar wholesale or retail in the world. We sell every year thirty-five million pounds of sugar. And, buying

in such vast quantities, and buying directly from the refineries, we naturally get our sugar for less money than other dealers."

"For instance, every grocer carries granulated sugar in stock, but does he tell you which kind? There are two kinds—granulated cane sugar and granulated beet sugar—and they look exactly alike. Some people prefer the one and some the other. But beet sugar usually costs less than cane sugar, so if you are getting beet sugar you should pay less for it. Do you know which kind you are getting and which you are paying for?

"Our teas have a pronounced, yet delicate, tea flavor with an appealing fragrance because we spare neither time nor expense to get the very best the greatest tea gardens of the world can produce.

"First, because of the difficulty of getting in this country the exact character and flavor of certain teas, we do our own importing and critically test every tea. Our representative goes to the various tea-growing countries and makes the selection in person. Then, the greatest care is taken to get only first-crop pickings from upland soil.

"Also, by buying direct from the tea gardens, while the crops are being harvested, we are able to have them always perfectly fresh.

"It would be natural for you to conclude that all this care in buying and selecting would make our teas very high in price, but in reality, our prices are unusually low for such high quality. Here is a reason: By buying direct from the tea gardens we cut out the middleman's profit."

"Over land and sea, from the greatest coffee regions in the world we bring you the choicest of the crop, and make it possible for you to have that fresh, savory, and fragrantly tempting cup of coffee for your breakfast. You see, we buy direct from the best plantations in the world. We get the pick of the crop—upland coffees from rich, healthy soil and growers of unquestioned experience and skill. We buy enormous quantities and pay cash, thus making it possible to offer our customers the very best coffees at very low prices."

[1] Petitioner's sales of sugar during the second half of 1915 amounted to $780,000 on which it lost $196,000. Petitioner used sugar as a "leader" ("You save 2 to 4 cents on every pound"), offering a limited amount at the losing price in connection with a required purchase of other commodities at prices high enough to afford petitioner a satisfactory profit on the transaction as a whole, without letting the customer know that the sugar was being sold on any other basis than that of the other commodities. Petitioner obtained its sugar in the open market from refiners and wholesalers. Competitors got their sugar from the same sources,. of the same quality and at the same price. Sugar is a staple in the market. Price concessions upon large purchases are unobtainable. From the facts respecting petitioner's methods of advertising and buying and selling sugar respondent found, and properly so, in our judgment, that petitioner intentionally injured and discredited its competitors by falsely leading the public to believe that the competitors were unfair dealers in sugar and the other commodities which petitioner was offering in connection with sugar.

Petitioner purchased 75 per cent. of its teas from wholesalers and importers in the United States. The remainder it purchased through its representative Peterson in Japan; but there was no proof that Peterson made or was qualified to make "selections in person" or "first-crop pickings from upland soil." All of petitioner's coffees were purchased from wholesalers and importers in the United States. Respondent found that petitioner's advertisements of teas and coffees were false and designed to deceive the public and injure competitors.

By the order, issued on June 24, 1918, petitioner was commanded to desist from:

"(1) Circulating throughout the states and territories of the United States and the District of Columbia catalogues containing advertisements offering for sale sugar, wherein it is falsely represented to its customers or prospective customers of said defendant or to customers of competitors, or to the public generally, or leads them to believe, that because of large purchasing power and quick-moving stock, defendant is able to sell sugar at a price lower than its competitors;

"(2) Selling, or offering to sell, sugar below cost through catalogues circulated throughout the states and territories of the United States and the District of Columbia among its customers, prospective customers and customers of its competitors;

"(3) Circulating throughout the various states and territories of the United States and the District of Columbia, among customers, prospective customers and customers of its competitors, catalogues containing advertisements representing that defendant's competitors do not deal justly, fairly and honestly with their customers;

"(4) Circulating throughout the various states and territories of the United States and the District of Columbia, among customers, prospective customers or customers of its competitors, catalogues containing advertisements offering for sale its teas, in which said advertisements it falsely stated that the defendant sends a special representative to Japan who personally goes into the tea gardens of said country and personally supervises the picking of such teas;

"(5) Circulating through the various states and territories of the United States and the District of Columbia, among customers, prospective customers or customers of its competitors, catalogues containing advertisements offering for sale its coffees, in which it falsely stated that the defendant purchases all of its coffees direct from the best plantations in the world."

[2, 3] I. Petitioner insists that the injunctional order was improvidently issued because, before the complaint was filed and the hearing had, petitioner had discontinued the methods in question and, as stated in its answer, had no intention of resuming them. For example, no sugar offers of the character assailed were made after August, 1917. But respondent was required to find from all the evidence before it what was the real nature of petitioner's attitude. It was permissible for respondent to take judicial notice of the government's wartime control of sugar sales and consumption. It was also proper to note that petitioner was contending (and still contends) that the act is void for indefiniteness, that the act is unconstitutional, and that the act, even if valid, under any proper construction has not been infringed by petitioner's practices. In Goshen Mfg. Co. v. Myers Mfg. Co., 242 U. S. 202, 37 Sup. Ct. 105, 61 L. Ed. 248, which was a suit for infringement of a patent, the defendant company averred and introduced evidence to prove that six months before the bill was filed and with notice to complainant it had sold its factory, wound up its business, and had no intention of resuming. But throughout the intervening period and also in the answer to the bill the defendant company was attacking the validity of the patent and the right of the complainant to compel desistance. This conduct was held to be such a continuing menace as to justify the maintenance of the bill. So here, no assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course.

[4] II. Petitioner urges that the declaration of section 5 must be

held void for indefiniteness unless the words "unfair methods of competition" be construed to embrace no more than acts which on September 26, 1914, when Congress spoke, were identifiable as acts of unfair trade then condemned by the common law as expressed in prior cases. But the phrase is no more indefinite than "due process of law." The general idea of that phrase as it appears in Constitutions and statutes is quite well known; but we have never encountered what purported to be an all-embracing schedule or found a specific definition that would bar the continuing processes of judicial inclusion and exclusion based upon accumulating experience. If the expression "unfair methods of competition" is too uncertain for use, then under the same condemnation would fall the innumerable statutes which predicate rights and prohibitions upon "unsound mind," "undue influence," "unfaithfulness," "unfair use," "unfit for cultivation," "unreasonable rate," "unjust discrimination," and the like. This statute is remedial, and orders to desist are civil; but even in criminal law convictions are upheld on statutory prohibitions of "rebates or concessions" or of "schemes to defraud," without any schedule of acts or specific definition of forbidden conduct, thus leaving the courts free to condemn new and ingenious ways that were unknown when the statutes were enacted. Why? Because the general ideas of "dishonesty" and "fraud" are so well, widely and uniformly understood that the general term "rebates or concessions" and "schemes to defraud" are sufficiently accurate measures of conduct.

On the face of this statute the legislative intent is apparent. The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the government as parens patriæ, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases. But the restraining order of the commissioners is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes of the kinds hereinbefore recited are expected by Congress to control. This prima facie reading of legislative intent is confirmed by reference to committee reports and debates in Congress, wherein is disclosed a refusal to limit the commission and the court to a prescribed list of specific acts. Cong. Rec. 63d Cong. 2d Session, pp. 13, 18, 533, 12246. And this interpretation is not affected by the subsequent adoption of the Clayton Act, October 15, 1914 (38 Stat. 731, c. 323), condemning certain specific acts.

[5] III. But such a construction of section 5, according to petitioner's urge, brings about an unconstitutional delegation of legislative and judicial power to the commission. Grants of similar authority to administrative officers and bodies have not been found repugnant to the Constitution. Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; Union Bridge Co. v. United States,

204 U. S. 365, 27 Sup. Ct. 367, 51 L. Ed. 523; Penn. Rld. Co. v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915D, 315; National Pole Co. v. Chicago & N. W. Ry. Co., 211 Fed. 65, 127 C. C. A. 561.

With the increasing complexity of human activities many situations arise where governmental control can be secured only by the "board" or "commission" form of legislation. In such instances Congress declares the public policy, fixes the general principles that are to control, and charges an administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the Commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition by Congress may be deemed to be quasi legislative, it is so only in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity. And though the action of the commission in ordering desistance may be counted quasi judicial on account of its form, with respect to power it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court.

[6] IV. In the second paragraph of the order petitioner is commanded to cease selling sugar below cost. We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away. But manifestly in making such a sale or gift the owner may put forward representations and commit acts which have a capacity or a tendency to injure or to discredit competitors and to deceive purchasers as to the real character of the transaction. That paragraph should therefore be modified by adding to it "by means of or in connection with the representations prohibited in the first paragraph of this order, or similar representation."

Sufficient appears in this record and in the presentation of the case to warrant us in expressing the belief that petitioner's business standards were at least as high as those generally prevailing in the commercial world at the times in question, and that the action of the commission is to be taken rather as a general illustration of the better methods required for the future than a specific selection of petitioner for reproof on account of its conduct in the past.

Respondent is directed to modify its order as above stated; and in other respects the petition is denied.

ALSCHULER, Circuit Judge (dissenting in part). In my judgment the order of the commission should be further modified by striking out the third paragraph, which relates to alleged representation that petitioner's competitors do not deal fairly and honestly with their customers. In so far as the sugar, coffee, and tea advertisements ascribe petitioner's asserted lower prices and superior qualities to quantity purchases and special facilities and advantages for inspection, selection, and purchasing, they would tend to negative any im-

putation upon competitors of unfair dealing with their patrons. I believe the charge of imputing to competitors unfair dealing with their patrons rests wholly on petitioner's so-called "Caveat Emptor" advertisement in its catalogue of March and April, 1916, wherein the public is cautioned in regard to white sugar, stating that some is cane and some beet sugar, alike in appearance, but the former usually higher in price; that petitioner plainly designates which of the two it offers, and the query is suggested, where else are goods so plainly described, and whether the customer gets elsewhere what he thinks he is buying. It seems to me that this does not amount to more than a statement or boast that petitioner, without being asked, describes the white sugars it proposes to sell, and the intimation is carried that competitors do not volunteer such description, but it is not suggested that they actually misrepresent the truth.

The facts before the commission appear by stipulation, and those concerning this advertisement, aside from the advertisement itself are as follows:

"When Mr. A. M. Daly, the attorney in charge of the investigation in these proceedings, was in Chicago, in March, 1916, he submitted to Mr. A. V. H. Mory, chief chemist of Sears, Roebuck & Co., and Mr. Joseph Scott, manager of the grocery department, a copy of the advertisement entitled 'Caveat Emptor' hereinbefore mentioned, and hereto attached, and requested them to state their views as to this particular advertisement and what it meant. They stated that this advertisement was for the purpose of calling attention to the distinction between beet sugar and cane sugar and laying stress upon the point of the facilities that Sears, Roebuck & Co. have for marking everything plainly so that the customer would know better from description the exact nature of what he was buying. After this explanation Mr. Daly went to his hotel. In a short time Mr. Mory called on him there and stated in substance that he had submitted the above-mentioned advertisement to Mr. A. H. Loeb, the vice president of Sears, Roebuck & Co., and that Mr. Loeb said that this course of advertising was unfair and unjust and declared that it must be discontinued, and further that it was against the policy of the house to send out such advertisements. Thereupon, on March 28, 1916, Mr. A. V. H. Mory, chief chemist, wrote to the commission in part as follows: 'The young man who wrote this was in to-day and I pointed out to him wherein he had made a mistake and acted against house policy. He promised to use the soft pedal on all references to the dealer in the future. He tells me that this is an angle that had not occurred to him. He had not thought of the write-up in the light of a criticism of the dealer, so intent was he on pointing out that with our system of marking everything plainly and our facilities for knowing what we are selling the customer would know better from our description the exact nature of what he was buying, in the case of those things difficult to judge than if he had them placed before him—which of course is true.'"

But assuming, as did petitioner's vice president, that this advertisement does carry the imputation that competitors deal unfairly with their customers, under the circumstances indicated by the quotation ought this advertisement to be the basis of a finding and order? The publication was in the catalogue for March and April, 1916. The complaint was filed nearly two years afterwards. The act authorizes the commission to proceed when it shall have reason to believe that unfair methods of competition are or have been used, "and if it shall appear to the commission that a proceeding by it in respect thereof would be of interest to the public." In a monitory proceeding such

as this seems to be, it could hardly be said that it would be "of interest to the public" to predicate action on a transgression for which due amends had long before been made, without remotest cause to believe there would be a repetition. To revive a stale advertisement of this nature which the advertiser immediately after the publication distinctly disavowed as having been unintentionally and inadvertently unfair to competitors, and ordered discontinued, without directly or indirectly repeating or renewing it for so long an interval, far from subserving the public interest, might, in my judgment, have the contrary tendency of raising an imputation of oppressive or at least uncalled-for action, in predicating any proceeding or order on this advertisement.

Nor am I impressed with the authoritative relevancy here of decisions respecting injunctions. In a proceeding such as this, neither remedial nor punitive, decisions of courts respecting injunctional relief in equity are not more analogous than are common-law decisions defining unfair trade practices, arising out of controversies between individuals, as fixing thereby the limitation of the commission's authority or scope.

The suggested modification would necessitate corresponding modification of the commission's findings of facts, eliminating paragraphs numbered 4 and 5 thereof. Paragraphs 2, 6 and 7 (as well as paragraphs 4 and 5) of the findings state the circulation of the several advertisements to have been in each case for "more than two years last past," indicating thereby the two years next before the date of the findings, which is June 24, 1918. This is no contravention of the stipulated fact that none of the advertisements were more recent than August, 1917—some of them even antedating the passage, September 24, 1914, of the Trade Commission Act itself. These findings should, in my judgment, be modified to comply with the stipulated facts.

FEDERAL TRADE COMMISSION v. GRATZ et al.*

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 236.

TRADE-MARKS AND TRADE-NAMES ⟹80½, New, vol. 8A Key-No. Series—UNFAIR COMPETITION—POWERS OF FEDERAL TRADE COMMISSION.

Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), giving the Federal Trade Commission power to investigate unfair methods of competition, does not contemplate the prohibition of unfair methods of competition between individuals, there being no authority given to individuals to present grievances, hence where defendants, who engaged in selling ties and bagging for cotton bales, refused to sell to persons with whom they had had previous unsatisfactory relations, and refused to sell ties without bagging when there was fear that, owing to the scarcity of ties and the prospect of large crops, the marketing of the cotton crop might be endangered by creating corners in ties, the commission is not authorized to make any order compelling such sales. The unfair methods contemplated by the act are such as affect the public generally.

Petition to Revise Order of the Federal Trade Commission.

Petition of Warren, Jones & Gratz, by Anderson Gratz, for an order for the review of the findings and order of the Federal Trade

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

*Certiorari granted 250 U. S. 657, 40 Sup. Ct. 13, 63 L. Ed. 1193.

Commission, and for an order setting the same aside, in a proceeding against Anderson Gratz and Benjamin Gratz, copartners doing business under the firm name and style of Warren, Jones & Gratz, and others. Order reversed.

T. F. Magner, of Brooklyn, N. Y., for petitioner.
John Walsh, of Washington, D. C., for respondent.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a petition of Anderson Gratz, a member of the firm of Warren, Jones & Gratz, under section 5 of the Act of September 26, 1914, c. 311, 38 Stat. L. 719 (Comp. St. § 8836e), creating the Federal Trade Commission to review the following order of the commission:

"Therefore, it is ordered, that the respondents, Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz, P. P. Williams, W. H. Fitzhugh and Alexander Fitzhugh, copartners, doing business under the firm name and style of P P. Williams & Co., and C. O. Elmer, their officers and agents, cease and desist from requiring purchasers of cotton ties to also buy or agree to buy, a proportionate amount of American Manufacturing Company's bagging, and, further, that the respondents cease and desist from refusing to sell cotton ties unless the purchasers buy or agree to buy from them corresponding amounts of American Manufacturing Company's bagging, or any amount of cotton bagging of any kind.
"By the Commission, [Seal.] L. L. Bracken, Secretary."

If Anderson Gratz has not sufficient standing to file this petition, counsel for the commission has very fairly waived the objection and invited the court to dispose of the questions raised.

The first count of the complaint served on the respondents, which is the only one involved is as follows:

"Paragraph 1. That the respondents Anderson Gratz and Benjamin Gratz are copartners, doing business under the firm name and style of Warren, Jones & Gratz, having their principal office and place of business in the city of St. Louis, and state of Missouri, and are engaged in the business of selling, in interstate commerce, either directly to the trade, or through the respondents hereinafter named, ties made and used for binding bales of cotton, and which steel ties are manufactured by the Carnegie Steel Company of Pittsburgh, Pa., and also selling, in the same manner jute bagging, used to wrap bales of cotton and which jute bagging is manufactured by the American Manufacturing Company, of St. Louis, Mo.

"Paragraph 2. That the respondents P. P. Williams, W. H. Fitzhugh, and Alex. Fitzhugh are copartners, doing business under the firm name and style of P. P. Williams & Co., having their principal office and place of business in the city of Vicksburg, and state of Mississippi, and the said last-named respondents and the said respondent Charles O. Elmer, who is located and doing business at the city of New Orleans, and state of Louisiana, are the selling and distributing agents of the said firm of Warren, Jones & Gratz, and sell and distribute the ties and bagging, manufactured as aforesaid, in interstate commerce, principally to jobbers and dealers, who resell the same to retailers, cotton ginners and farmers.

"Paragraph 3. That with the purpose, intent and effect of discouraging and stifling competition in interstate commerce in the sale of such bagging, all of the respondents do now refuse, and for more than a year last past have refused, to sell any of such ties unless the prospective purchaser thereof would also buy from them bagging to be used with the number of ties proposed to

be bought; that is to say, for each six of such ties proposed to be bought from the respondents the prospective purchaser is required to buy six yards of such bagging."

The respondents filed an answer admitting the facts stated in paragraphs 1 and 2, but denying the facts stated and the conclusion therefrom contained in paragraph 3. They appeared and offered testimony before the commission.

The commission's material findings of fact and its conclusions of law are as follows:

"Paragraph 2. That within three years last past respondents, Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz, P. P. Williams, W. H. Fitzhugh, and Alexander Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Co., and C. O. Elmer, adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished to buy them from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging. * * *

"Paragraph 4. * * * The dominating and controlling position occupied by said respondents in the sale and distribution of ties made it possible for them to force would-be purchasers of ties to also buy from them bagging manufactured by the American Manufacturing Company, and in many instances, said respondents refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging, and such purchasers were oftentimes compelled to buy bagging manufactured by the American Manufacturing Company, from said respondents, in order to procure a sufficient supply of steel ties used for the purpose aforesaid.

"Conclusions of Law.

"That the methods of competition set forth in the foregoing findings as to the facts, in paragraphs 1, 2, 3 and 4, and each and all of them are, under the circumstances therein set forth, unfair methods of competition in interstate commerce, against other manufacturers, dealers and distributors of jute bagging and against other dealers and distributors in the material known as sugar bag cloth, and against manufacturers, dealers and distributors of the bagging known as rewoven bagging and secondhand bagging, in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and that there is not sufficient proof submitted in the hearings to sustain the paragraph in the complaint charging a violation of section 3 of an act of Congress known as the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 731 [Comp. St. § 8835c])."

By agreement between the parties the commission filed a transcript of the entire record in the proceeding before it. This court is given power by the act to affirm, modify or set aside such an order, the commission's findings of fact to be conclusive if supported by testimony.

There is testimony to support the findings of fact, and therefore the question before us is whether they do support the commission's conclusion of law that the method of competition forbidden is unfair within the meaning of section 5 of the act of September 26, 1914.

It seems to us that unfair methods of competition between individuals are not contemplated by the act. Congress could not have intended to submit to the determination of the commission such questions as whether a person, partnership or corporation had treated or bribed the

employés of a competitor for the purpose of inducing them to betray their employer. We think the unfair methods, though not restricted to such as violate the Anti-Trust Acts, must be at least such as are unfair to the public generally. It seems to us that section 5 is intended to provide a method of preventing practices unfair to the general public and very particularly such as if not prevented will grow so large as to lessen competition and create monopolies in violation of the Anti-Trust Acts. Such a preliminary inquiry and determination constitutes a most important supplement in carrying out the public policy which those acts are intended to vindicate. This view is confirmed by the language of the section:

"Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and a place therein fixed at least thirty days after the service of said complaint."

No authority is given to any individual to present his grievances, and the commission is to interpose only in the interest of the public.

That the commission did not find sufficient proof to sustain the second count in the complaint, viz. that the method of the respondent found to be unfair violated section 3 of the act of October 15, 1914, known as the Clayton Act, which makes unlawful any condition, agreement or understanding that may lessen competition or tend to create a monopoly, shows that the method found to be unfair must have been unfair in certain individual transactions. And we discover no evidence to support the finding in paragraph 2 that the respondents "adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished to buy them from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging." It is the natural and prevailing custom in the trade to sell ties and bagging together, just as one witness testified it is to sell cups and saucers together. Such evidence as there is of a refusal to sell is a refusal to sell at all to certain persons with whom the respondents had previous unsatisfactory relations and a refusal to sell ties without bagging at the opening of the market in 1916 and 1917, when there was fear that, owing to the scarcity of ties and the prospect of large crops, the marketing of the cotton crop might be endangered by speculators creating a corner in ties. The evidence is that with these exceptions the respondents sold ties without any restrictions to all who wanted to buy, and indeed made extraordinary efforts to induce the manufacturers of ties to increase their output so that all legitimate dealers and all cotton raisers should get enough ties and bagging at reasonable rates to market their cotton. It is only these exceptional and individual cases, which established no general practice affecting the public that can sustain the findings in paragraph 4.

Counsel for the commission calls our attention to the opinion of the Circuit Court of Appeals for the Seventh Circuit, Sears, Roebuck &

Co., Petitioners, v. Federal Trade Commission, Respondent, 258 Fed. 307, — C. C. A. —. The practice there prohibited as unfair was extensive advertising containing false and misleading statements calculated to deceive all purchasers and to discredit all competitors. It was clearly a method unfair to the public generally.

As we think there is no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of the American Manufacturing Company's bagging, and that the commission has no jurisdiction to determine the merits of specific individual grievances, the order is reversed.

THE WINFIELD S. CAHILL. THE JOHN L. WADE. THE IRA M. HEDGES.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 190.

1. COLLISION ⚷95(2)—FAULT OF TUG WITH TOW.
   Steam tug towing 12 boats in three tiers, with a boat tailing on the last tier, which on rounding the Battery, in turning from the channel between the Battery and Governor's Island, to go into East River at New York, was swept away by the tide because she had not enough power for her tow, and so presented the end of her tow to a steamship skirting the shore of Governor's Island in a position that rendered collision inevitable, *held* at fault.
2. COLLISION ⚷95(2)—FAULT OF TUGS.
   Tugs in charge of a steamship, which collided with starboard boat in the last full tier of another tug's tow through the fault of such other tug, *held* to have done all they could, and as soon as they should have, to avoid collision, having had no reason to anticipate the lack of power of the other tug, which caused the collision in conjunction with the tide, and having reversed as soon as they saw the tow swing down upon them.
3. COLLISION ⚷125—DAMAGE—PROBABILITY OF EARNINGS.
   Evidence *held* to show that there was not even a reasonable probability of a steamship injured by a collision earning any charter money under the charter in question, either when she was in collision, or during the three-day period of her repairs; her owner having been "blacklisted" by the United States for reasons of state during the war with Germany and Austria.
4. COLLISION ⚷136—DAMAGES—LOSS OF USE.
   Damages for loss of use of a vessel injured in collision cannot be awarded because she might have made some profit. The question is not of the possibility of employment, but of actual loss; not what possibly could have been made, but what would have been made.

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

Libel in admiralty by the Seguranca Steamship Corporation against the steam tug Winfield S. Cahill and James Brooks, its claimant, and the steam tug John L. Wade and William J. Wade, its claimant, and Edward M. Timmins and the Cornell Steamboat Company, and by Robert M. Woodburn against the steam tug Ira M. Hedges and the Cornell Steamboat Company, wherein William J. Wade, as owner of the steam tug John L. Wade, petitions for limitation of liability

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

against the Cornell Steamboat Company, and James Brooks, owner of the steam tug Winfield S. Cahill, petitions for limitation of liability also against the Cornell Steamboat Company. From the decree, the Cornell Steamboat Company appeals. Decree modified and affirmed.

In daylight and fair weather, with the tide running strong ebb, the steamship Seguranca started, without motive power of her own, and in charge of three tugs (the Wade, the Cahill, and the Timmins) from the anchorage near Bedloe's Island to a point in the East River. The master of the Timmins was in charge of this operation, his owners having made a contract on the subject with the steamship's agents. The Cahill went ahead on a short hawser; the Wade and Timmins were placed one on each side of the steamship. The master of the Timmins was on the bridge of the Seguranca. In this manner steamship and tugs proceeded across the Upper Bay until they were as near to Governor's Island as was safe, and were skirting the shore of said island slightly below Castle William when the tug Hedges with a tow of about 12 boats, in at least three tiers and a boat tailing on to the last full tier, all upon a hawser of at least 30 fathoms, was seen coming down the North River. The Hedges belongs to a well-known line, and any man experienced in the navigation of this harbor knew that she was intending to round the Battery into the East River.

Against the tide the Seguranca and her tugs were making not over a knot and a half, and probably less. For her, backing was not only difficult, but dangerous, owing to the proximity of the shore on the starboard side. The Hedges had the tide with her, but had no helper; another tug had been in attendance, but had gone away with a boat taken from the tow. When these two flotillas observed each other, the Hedges (had it been night) would have shown the Seguranca her green light only, while the Seguranca had the Hedges at least 2½ points on her port bow.

The Hedges had proceeded approximately halfway across the channel between the Battery and Governor's Island before she turned to go into the East River. The moment she did so and became broadside to the tide, she was helplessly swept down by the same; and even after getting headed squarely into the tide she could do no more than stand still by the land, and even that is doubtful. Thus the tail of her tow was in the Seguranca's way. The tugs alongside the latter vessel reversed, and the Cahill for her own safety ceased towing and got out of the way. Collision ensued between the steamship's stem and the starboard boat in the last full tier of the tow.

Both vessels in collision received injury, and actions were begun by the Seguranca against the owners of the Timmins and Hedges and the tugs Cahill and Wade, and by the owner of the injured barge against the Hedges alone. By invoking the fifty-ninth rule all the parties were ultimately brought in, in respect of all the damage claimed, and the Wade and Cahill, denying all liability, nevertheless took proceedings in limitation. All these matters were tried at one hearing, and one decree entered, in which the court below held the Hedges at fault (apparently) for obstructing the path of the Seguranca, but allotted one-fourth of the damages against the Cahill and one-fourth against the owners of the Timmins, upon the ground that they should have sooner perceived the difficulties and dangers arising from the inability of the Hedges to control her tow in the tideway. From this decree the Hedges alone appealed. In this court, however, both the Cahill and the owners of the Timmins claimed freedom from fault, and all parties against whom any share of loss had been assessed objected to the allowance of "demurrage" or damages for loss of use of the Seguranca.

Kirlin, Woolsey & Hickox, of New York City (Robert S. Erskine, of New York City, of counsel), for the Hedges.

Burlingham, Veeder, Masten & Fearcy, of New York City (Chauncey I. Clark and George W. Whip, both of New York City, of counsel), for owners of the Timmins.

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

Park & Mattison, of New York City (Henry E. Mattison, of New York City, of counsel) for owner of injured barge in tow.

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

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] On the facts above recited we agree with the court below that the fault of the Hedges is entirely plain. When the vessels were in such position that they were bound to navigate with due regard to each other's rights, they were admittedly on crossing courses, with the Seguranca the privileged vessel. It may be assumed as plain that the Hedges did not intend to continue such crossing course, but to turn into the East River in such manner that she would be either parallel with the Seguranca or ahead of her according to the rapidity of such turn. It is argued that she did make the turn, became the leading vessel, and put the Seguranca in the position of one overtaking. It is a sufficient answer to this to say that the steamship was proceeding so slowly that she could not overtake the Hedges, if that vessel had been able to navigate across or against the tide in the common and accepted sense of that term.

We find that this disaster occurred solely because, when the Hedges ported to go into the East River and presented the broadside of herself and her tow to the tide, she was helpless, because she had not enough power for the business in hand. Before collision actually happened she had turned herself so as to be heading almost, if not quite, toward the Battery, but whether in this position she was able to hold the tow against the tide is a point not worth discussion, for by that time (and events occurred with great rapidity) she had presented the end of her tow to the Seguranca in a position that rendered collision inevitable.

[2] As for the tugs in charge of the Seguranca, we think they did all they could, and did it as soon as they should. They were not apprised of and had no reason to anticipate the feebleness of the Hedges. As soon as they saw how the tow was swung down upon them, the Cahill ceased to haul ahead and the tugs alongside reversed, but it was too late; and the Hedges had made it too late by not trying to port and go into the East River as soon as she could—she never turned at all until unnecessarily near to Governor's Island.

The difficulties of navigating in the narrow waters between Governor's Island and the Battery are well known; the necessity of having sufficient power to meet contingencies reasonably to be expected was adverted to in The Concho (D. C.) 58 Fed. 812, affirmed 63 Fed. 1023, 12 C. C. A. 4. The dangers there alluded to have assuredly grown no less in the quarter century that has elapsed since that case was decided.

[3] The Commissioner awarded to the Seguranca damages for three days' loss of use while undergoing repairs caused by this col-

lision. When injured the Seguranca was under charter; she never entered upon the performance of that engagement because (as we find from the record) it was obvious that the governmental authorities of the United States and of the nations associated with it in the war with Germany and with Austria would not permit the steamship to get a cargo; her owner was "blacklisted" for reasons of state. It is argued that, while all this is true, it was not obvious that it was to be true during the three days for which damages for loss of use has been awarded. It is said that, if the Seguranca had not been injured, she would have entered upon the performance of this charter party. In point of fact she made no attempt so to do, but after being repaired for damage stayed at the repair shop and was extensively overhauled for reclassification; meanwhile she was sold, so as to get rid of the "blacklisted" owner, and the charter party was ultimately canceled.

[4] We hold it established as matter of fact that there was not even a reasonable probability of the Seguranca earning any charter money under the charter in question, either when she was in collision or during the three day period of her repairs. On this finding the law is not doubtful. Damages for loss of use cannot be awarded because the injured vessel might have made some profit. The question is not of the possibility of employment, but of actual loss; not what possibly could have been made, but what would have been made. The North Star, 151 Fed. 168. 80 C. C. A. 536.

The fact, that a tort had been committed only calls in play the rule of restitutio in integrum; so that, where injured cargo nevertheless brought the full market value, the tort-feasor was not called upon to pay damages in respect thereof. The Dunbritton, 73 Fed. 352, 19 C. C. A. 449. The view we entertain of the facts herein renders unnecessary any discussion of the unusual manner in which the damages were in the court below allotted or apportioned.

Let the decree appealed from be modified, and the Seguranca and Woodburn recover their full damages, with costs of the District Court, against the Hedges. Let the proceedings in limitation on the part of the Wade and the Cahill be sustained, and both tugs exonerated from liability. As against the answering claimants, let the petitioners recover trial costs (but not expenses of limitation) in the District Court. Let the libels as against the owner of the Timmins be dismissed, with costs of the District Court. There will be no costs in this court, because the parties whom we have released altogether took no appeal, and the single appellant has prevailed only partially; i. e., in respect of the so-called demurrage claim. The Anna W., 201 Fed. 62, 119 C. C. A. 396.

HOTEL WOODWARD CO. v. FORD MOTOR CO.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 210.

1. DISMISSAL AND NONSUIT ⚷44—NATURE—"NONSUIT."
A dismissal not upon the merits is a "nonsuit."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Nonsuit.]

2. TRIAL ⚷169—DIRECTING VERDICT—DUTY OF COURT.
In an action in the federal District Court for New York, where the trial judge reaches a correct conclusion in favor of defendant after hearing all the evidence, the jury should be directed to enter a verdict in defendant's favor, and it is improper to merely enter an order dismissing the complaint.

3. APPEAL AND ERROR ⚷927(3)—REVIEW—NONSUIT.
On appeal from an order dismissing the complaint, after hearing all the evidence, it must be assumed, the order being one of nonsuit, that plaintiff's testimony is true, and he is entitled to every inference therefrom.

4. PLEADING ⚷258(3)—AMENDMENT OF ANSWER—DURING TRIAL—SURPRISE.
In an action brought in New York against a Michigan corporation for breach of a contract to lease premises in New York, where the defendant corporation pleaded the New York statute of frauds as required, defendant's motion to amend at trial by pleading the Michigan statute of frauds, which would bring into the case the question whether its agent, who signed the memorandum relied on, was authorized in writing, should be denied because of surprise, although defendant was entitled to amend after motion on due notice.

5. DEEDS ⚷1—WHAT LAW GOVERNS.
The law of the state in which land is situated must alone be looked to for the rules governing its alienation and transfer, and for the effect and construction of conveyances of all kinds.

6. COURTS ⚷366(5)—DECISIONS—FEDERAL COURTS.
In construction of local statutes, the federal courts must follow authoritative state decisions if found of sufficient clearness in the judgments of the courts of last resort.

7. FRAUDS, STATUTE OF ⚷120—WHAT LAW GOVERNS.
In an action against a Michigan corporation for breach of contract to lease for a term of years property located in New York, the New York statute of frauds (Real Property Law, § 259), which does not require an agent who signs a written memorandum to be authorized in writing, applies, instead of the Michigan statute of frauds, which requires the agent to be authorized in writing; this being so notwithstanding both the New York and Michigan statute of frauds declare a contract not evidenced by a written memorandum to be void, instead of providing, as did the original statute, that no action should be maintained thereon, in which case it was held that the law of the forum applied.

8. LANDLORD AND TENANT ⚷22(4)—LEASES—AGREEMENTS.
In an action against a Michigan corporation for breach of an agreement to lease New York property for a term of years, the question whether the minds of the parties had met *held* for the jury.

9. FRAUDS, STATUTE OF ⚷159—CONTRACTS—MEMORANDUM IN WRITING.
In an action against a Michigan corporation for breach of a contract to lease New York property for a term of years, the question whether the attorney and agent of the Michigan corporation who executed the written memorandum relied upon by plaintiff was authorized to do so, *held*, under the evidence, for the jury.

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

10. CORPORATIONS ⚷398(1)—OFFICERS—AUTHORITY.
The president or other general officer of a corporation has prima facie power to do any act which the directors could authorize or ratify.

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

Action by the Hotel Woodward Company against the Ford Motor Company. There was a judgment dismissing the complaint, and plaintiff brings error. Reversed and new trial directed.

Writ of error to judgment entered in the District Court for the Southern District of New York.

Very little of an unnecessarily voluminous record was necessary to present the legal questions involved. Plaintiff here and below is a corporation of New York; it keeps a hotel, and will be hereinafter called "hotel company."

Defendant here and below is a corporation of Michigan, hereinafter called "motor company," and primarily engaged in the manufacture and sale of motor cars, but its corporate powers and the laws of New York enable it to purchase and improve (in the manner giving rise to this litigation) real property in this state.

By the early part of 1916 motor company had decided to buy land in New York City and erect thereupon a salesroom and warehouse. Several officials of motor company knew the president of hotel company, and negotiations ensued looking toward the erection above the New York warehouse and salesroom of motor company of many additional stories to be rented for a long term of years to hotel company, whose already existing hostelry was contiguous. Most of these negotiations took place in Michigan. Building plans were made, expenses considered, and the talk of at least three high officials of motor company with hotel company's president was offered in evidence.

Mr. Robertson, a member of the bar, was exclusively in the employment of motor company, having his office with and in those of the corporation. In August, 1916, under instructions from at least one of the vice presidents of motor company, he received from the president of hotel company a form of lease, and in Michigan and by said vice president was instructed to "fix it up." Having examined this draft, Mr. Robertson (as was testified on behalf of plaintiff) "said he would go ahead and prepare this lease and later on we would execute it." Thereupon, at the request of hotel company's president (Green), and in Michigan, Mr. Robertson wrote, and delivered to Mr. Green, the following letter:

"Ford Motor Company.
"Detroit, U. S. A., August 31, 1916.

"Hotel Woodward Company, 55th Street & Broadway, New York City—Gentlemen: Attention of Mr. Green: Confirming our conversation, will say that draft of lease as discussed is entirely acceptable to us and same will be prepared immediately for execution. We have consented to the alterations suggested by your attorney, as they do not seem in any manner to have changed the intent of the lease.

"We leave the question of limitation of assignment of equity as security until lease is signed, but think this can be arranged to your entire satisfaction.

"As soon as the lease is ready we will come on to New York and close up the entire matter of the execution of the lease and the security as agreed. In the meantime you may go ahead with any plans you have in connection with this proposition, so that there will be no delay when the architects' plans are ready.

"Trusting this will be entirely satisfactory, we are.
"Yours very truly, Ford Motor Company,
"L. B. Robertson, General Attorney."

Shortly thereafter, Mr. Robertson did prepare and send to hotel company in New York a form of lease. The form thus prepared was a revision of the draft received by him as above stated. The lease was to run for 21 years;

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

the rental was to depend upon the cost of construction, which at the time was evidently estimated at approximately $700,000; but the document provided that any excess expense should cause a rise in rental amounting to five per cent. per annum on such excess.

This form of lease prepared by Mr. Robertson was submitted to motor company's counsel in New York, and some changes suggested. New York counsel for hotel company likewise made some suggestions, as to all of which there was evidence of acceptance by hotel company. On November 2d, 1916, motor company's board of directors met in Michigan and at that meeting the following resolution was offered:

"Whereas, this company owns a parcel of land on Broadway and Fifty-Fourth street, New York, suitable for New York offices and salesrooms.

"And whereas, the land is very valuable, and to construct simply an office and salesroom, would result in an exorbitantly high cost for offices and salesroom.

"And whereas, the management of this company, on account thereof, has entered into preliminary negotiations with the Hotel Woodward to occupy part of a suitable building on such site:

"Therefore, resolved, that this company proceed with the erection of the proposed building suitable to that site, for the use of this company as offices and salesroom, and that the negotiations of the management looking to the lease of the balance thereof to the Hotel Woodward Company for a period of twenty-one years be and they are hereby ratified and confirmed, and the management is authorized to erect the building at an approximate cost of $740,000, and enter into said lease.

"After some discussion further consideration of this resolution was deferred until the next meeting."

At the next meeting of the board the matter was thus treated:

"It was moved by Mr. Rackham and supported by Mr. Klingensmith, that the resolution pertaining to the building on the property owned by the Ford Motor Company at the corner of Fifty-Fourth street and Broadway, New York, as outlined in the resolution of the meeting of November 2, 1916, and at which time the resolution was deferred, be ratified, and that officers be given authority to proceed."

Hotel company gave evidence tending to show that, after receipt of Mr. Robertson's letter of August 31st, both parties had assumed that the matter was closed, except for details to be adjusted by attorneys for each party and the formal execution of a written lease.

On the part of motor company, evidence was given tending to show that, so far as the talk between the officers of the two corporations went, it had at all times been made plain by motor company that the making of any lease, and not only the renting, but even the construction of what was to be rented, depended upon the making of satisfactory and reasonably economical contracts for physical construction of anything more than motor company needed for its own business in New York City.

In the early part of 1917 it was discovered (according to evidence given for motor company) that the cost of construction would be not approximately $700,000, but about a half million more than that. When this possible enormous excess was communicated to hotel company, it declared its willingness to pay by way of additional rental, 5 per cent. per annum, even on such enormous excess; but motor company was either not willing, or not able, to spend the additional money, and refused altogether to proceed with the matter.

This action at law was then brought by hotel company against motor company to recover damages for breach, not of a lease (for no document called a "lease" was ever delivered or even executed), but to obtain compensation for the breach of a contract to make a lease.

The defenses pleaded were, in substance, that there never was any such meeting of minds as could be called a contract; but that, if there were, the same was voided under the statute of frauds.

The language of the answer in setting up the statute plainly referred to the New York Act, i. e. section 259 of the Real Property Law (Consol. Laws, c. 50) which is as follows:

"*When contract to lease or sell void.*—A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest

therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the lessor or grantor, or by his lawfully authorized agent."

The case having come on for trial, and plaintiff having rested, the motor company moved to amend by pleading the Michigan statute of frauds, reading as follows:

"Sec. 8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized by writing." Comp. Laws, § 11977.

To this amendment hotel company objected on the ground of surprise, but over due exception the amendment was granted.

At the close of the whole case the trial judge dismissed the complaint, holding in substance that, if the minds of the parties had met in an agreement to make a lease in the form shown in evidence, such agreement or contract was voided by the statute of frauds, but gave no intimation as to whether he deemed the New York or Michigan statute applicable to the matter in hand.

Judgment having been entered upon this direction, this writ was taken, and, though plaintiff in error insists upon all duly taken exceptions, two principal questions have been argued:

(1) To the transaction shown, is the statutory law of Michigan or of New York to be applied?

(2) If the applicable statute does not bar the suit, was plaintiff below entitled to go to the jury?

Holm, Whitlock & Scarff, of New York City (Charles H. Tuttle, of New York City, Stephen C. Baldwin, of Brooklyn, N. Y., and Victor E. Whitlock, of New York City, of counsel), for plaintiff in error.

Crisp, Randall & Crisp, of New York City (Alfred Lucking, of Detroit, Mich., and W. Benton Crisp, of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1, 2] One matter of procedure justifies preliminary attention. The trial judge dismissed the complaint after having heard all the evidence adduced by both parties. It is clear from the record that the court ordered a dismissal instead of directing a verdict for the defendant because plaintiff's trial counsel insisted that nothing more than a dismissal was proper under the New York Code of Civil Procedure.

This was a mistake in form; a dismissal (not upon the merits) is a nonsuit, but where, after hearing all the evidence, the trial judge reaches a correct conclusion in favor of the defendant, the jury should be directed to enter a verdict in that defendant's favor. Stumpf v. Hallahan, 101 App. Div. 383, 91 N. Y. Supp. 1062; affirmed 185 N. Y. 550, 77 N. E. 1196. The rule in the federal courts we stated in Re Iron Clad Manufacturing Co., 197 Fed. 281, 116 C. C. A. 642.

[3] The case being before us, however, on a nonsuit, we "must assume * * * that plaintiff's testimony is true, and that they are thus entitled to the benefit of every fair inference therefrom." Davis v. Carnegie Steel Co., 244 Fed. at page 933, 157 C. C. A. at page 283.

[4] Another trial matter must be noted: The amendment pleading the Michigan statute of frauds should have been denied. It has been often held that the statute may be availed of under a general denial

(e. g. Third National Bank v. Steel, 129 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119); but this defendant had specifically pleaded the New York statute, as required by Crane v. Powell, 139 N. Y. 379, 34 N. E. 911, and Matthews v. Matthews, 154 N. Y. 288, 48 N. E. 531. Doubtless it is "common form" to object to amendments as surprising; but, when the distinction between these two statutes, and the course of this trial is considered, the truth of this plea of surprise is manifest, and its result is to produce a legal question that might have been wholly avoided.

One effect of the amendment made after plaintiff rested was to raise the question whether Robertson's authority (if he had any) was oral or written, if the Michigan statute applied. We search the record in vain for any evidence that testimony on this point had been sought for; certainly none is presented to us, and it was going too far to insert this issue in a case actually on trial in New York, when such written authority as might exist certainly sprang into existence and remained of record in Michigan.

As, however, defendant (so far as we can see) was entitled to amend after motion on due notice, and the question intended to be raised is of importance upon any future trial herein, we shall consider it now.

[5-7] It is not doubted that we must look only to the law of the state in which land is situated for the rules governing its alienation and transfer and for the effect and construction of conveyances of all kinds. Olmsted v. Olmsted, 216 U. S., at page 393, 30 Sup. Ct. 292, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1292, and cases cited. If, therefore, this action related to land title, there would be no doubt that the contract transferring the same would be governed and interpreted by the law of New York alone; for the proposed 21-year lease is an estate in lands, and real property under the law of this state. But the plaintiff herein is not suing to establish a title, nor is it seeking to procure one by way of specific performance or otherwise. The action is personal and transitory and asserts liability in the defendant for breach of a personal obligation only; there is no effort to obtain an interest in the res; indeed, inability to obtain such interest is presupposed, and relief in personam only is demanded.

Reduced to its simplest legal form, the question here is whether the lex loci contractus (or, more accurately, the lex loci conditionis), or the lex rei sitæ applies when a statute of frauds is invoked as a defense. The diversity of judicial opinion revealed by endeavors to discover what law governs the validity of a contract is a most extensive subject, and the results of exhaustive research were stated by Prof. J. H. Beale in 1909.[1] The manifest inclination of the courts has usually been toward treating statutes of frauds like other statutes regulating or limiting the right of contract and to find "the law of the contract" (as it is called in St. Louis R. R. v. Terre Haute R. R., 145 U. S. at page 405, 12 Sup. Ct. 953, 36 L. Ed. 748) in the law of the place where the contract was made. But mingled with this current of decision (turbid as it is) is plainly discernible the conflicting inclination to identi-

1 Harvard Law Review, vol. 23, pp. 1, 79, 194, and 260.

fy all contracts relating to land and all actions for breach of such contracts with conveyances of title to interests in land, to which, as above stated, the lex rei sitæ always applies.

Thus the inquiry at bar is narrowed to the following question: What is the law of a contract made in Michigan for the conveyance of an interest in New York realty when the action is to recover money damages only in a personal and transitory suit for the breach of such contract, and action is brought in a court of the United States sitting in New York?

This comparatively small fraction of the larger subject may be, and has been, treated in several different ways.

One view has been compendiously and authoritatively stated by Mr. Dicey substantially as follows: All rights over or in relation to an immovable are governed by the law of the country where the immovable is situate: the effect of a contract with regard to an immovable is governed by the proper law of the contract—and "proper law of the contract" means the law by which the parties may be fairly presumed to have intended the contract to be governed. Dicey's Conflict of Laws (Ed. 1908) pp. 500, 510, and 529. This may be regarded as the prevailing, or at least most often stated, English view, and of it Prof. Beale notes that it almost invariably results in finding that the law of the contract is the law of England. This method of statement has often been chosen by our federal courts (Pinney v. Nelson, 183 U. S. at page 148, 22 Sup. Ct. 52, 46 L. Ed. 125, citing Wayman v. Southard, 10 Wheat. 48, 6 L. Ed. 253); and it has likewise at times obtained favor in the courts of New York (Stumpf v. Hallahan, supra). Whether this view is wholly consistent with Bank of Africa v. Cohen (1909) 2 Ch. 129, may be doubted, for it was there held that a married woman's capacity to contract concerning her own land in the Transvaal was governed solely by the law of the Transvaal, although she had assumed to contract in England, and an action to compel specific performance was promoted in Great Britain.

Another and often prevailing view is that a statute of frauds is a law concerning evidence, not affecting the inherent validity of contracts nor the capacity of the contractors to enter into obligation, but merely prescribing stringent rules by which alone the intent and purpose of the parties shall be made manifest; wherefore the lex fori applies. This doctrine, commonly thought to rest on Leroux v. Brown, 12 C. B. 801, has been apparently approved in Pritchard v. Norton, 106 U. S. 134, 1 Sup. Ct. 102, 27 L. Ed. 104.

But the distinction has been drawn in respect of the differing language of the statutes of different sovereignties. Many acts, like the original of 29 Car. II, c. 3, declare in substance that no action shall be brought except it be supported by a written contract or a note or memorandum thereof. Others (like the present statutes of New York and Michigan) declare that contracts not so supported shall be void. Statutes in the earlier form have been regarded as rules of evidence in Heaton v. Eldridge, 56 Ohio St. 87, 46 N. E. 638, 36 L. R. A. 817, 60 Am. St. Rep. 737; Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29; and Third National Bank v. Steel, supra. The matter is well dis-

cussed in Obear v. First National Bank, 97 Ga. 587, 25 S. E. 335, 33 L. R. A. 384, and it is pointed out that where the statute merely forbids suit it is matter of evidence or remedy, and the lex fori applies. But Wolf v. Burke, 18 Colo. 264, 32 Pac. 427, 19 L. R. A. 792, rests upon the proposition that the statute of that state, like that of New York, renders the oral contract void, wherefore the doctrine of the Leroux Case is inapplicable; and this view of the New York statute has received the approbation of the late Prof. Dwight, sitting as referee in Marie v. Garrison, 13 Abb. N. C. (N. Y.) 258. The whole doctrine of Leroux v. Brown is disapproved in Wharton's Conflict of Laws (3d Ed.) § 689, et seq. Nevertheless support can be found for the view that even the New York statute is a rule of evidence. Crane v. Powell, supra; Matthews v. Matthews, supra.

When the inquiry is narrowed to discovering judicial pronouncements in respect of personal actions brought for breach of contract regarding land, made in a state other than that of the land itself, the results are equally varied. The view that in such an action the lex rei sitæ has no application is thought to have obtained vogue largely (though not wholly) from the decision of Holmes, J., in Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452. This judgment is approved by Wharton, supra (section 276d), and in Minor's Conflict of Laws (1901) p. 416 et seq. In Finnes v. Selover, 102 Minn. 334, 113 N. W. 883, it was decided that where a contract was made in one state for the purchase of lands in another, and the money was to be paid in the state where the contract was made, lex rei sitæ governed as to title, and lex loci contractus as to the rights of the parties. This doctrine was followed in a litigation which as Selover v. Walsh reached the Supreme Court in 226 U. S. 112, 33 Sup. Ct. 69, 57 L. Ed. 146 (decided below 109 Minn. 136, 123 N. W. 291). While the highest court took pains to state that they were not concerned with the applicability of any given statute of frauds to the contract in hand, but only with an alleged violation of the federal Constitution, by such application, occasion was taken apparently to approve the doctrine of Polson v. Stewart, supra. See, also, the converse of the situation in Kryger v. Wilson, 242 U. S. 171, 37 Sup. Ct. 34, 61 L. Ed. 229. In the latter cause the courts of North Dakota had applied the lex rei sitæ, and the Supreme Court held that such application was "purely a question of local common law" and not a matter with which the Supreme Court of the United States was concerned.

While the writer of this opinion yields individual assent to the reasoning of Polson v. Stewart, it is the duty of this court to ascertain, if possible, what the law of New York is on this subject, and whether this court of the United States is bound to follow the same. In cases not legally distinguished from the present, it has been asserted (though without discussion of principle) that the statute of New York is not applicable to a personal and transitory suit there brought to recover damages for breach of a contract affecting foreign land; but that in such action, brought and tried in New York, lex rei sitæ is applicable. Abell v. Douglass, 4 Denio (N. Y.) 309; Burrell v. Root, 40 N. Y. 496.

This view has been similarly asserted or assumed in Siegel v. Robin-

son, 56 Pa. 19, 93 Am. Dec. 775; Bissell v. Terry, 69 Ill. 184; Baird, etc., Co. v. Harris, 209 Fed. 291, 126 C. C. A. 217; and more fully in Meylink v. Rhea, 123 Iowa, 310, 98 N. W. 779. This is probably the rule generally prevailing down to date.[2] Yet so fluid is the discussion that Cardozo, J., in Reilly v. Steinhart, 217 N. Y. 553, 112 N. E. 469, can refer to the whole matter here discussed as one "often debated and with varying conclusions."

But so far as the pronouncements of the highest court of this state are concerned, while authority can be found for the dogmatic rule of Burrell v. Root, for the doctrine of Leroux v. Brown, and for that of Prof. Dicey, no judicial support can yet be discovered for the only view that makes the Michigan statute applicable in this litigation, i. e. that lex loci conditionis must be applied.

In the construction of local statutes the national courts must follow authoritative state decisions, if found of sufficient clearness in the judgments of the courts of last resort. Re Seward Dredging Co., 242 Fed. 229, 155 C. C. A. 65. The "laws of the several states" to which the courts of the United States yield obedience comprise, not only state statutes, but the decisions of the highest courts. Nashua Bank v. Anglo-American Co., 189 U. S. 228, 23 Sup. Ct. 517, 47 L. Ed. 782; cf. Chicago, etc., Co. v. Kendall, 167 Fed. 66 et seq., 93 C. C. A. 422, 16 Ann. Cas. 560. That a federal court sitting in a given state will follow the statute of frauds of that state, see Buhl v. Stephens (C. C.) 84 Fed. 922. It may be said that, while the federal courts are bound to follow the authoritative state interpretation of a local act, the rule does not apply to the application of the statute. We think the distinction is not one of substance, and Farley v. Carey, etc., Co., 249 Fed. 476, 161 C. C. A. 434, was substantially a case of following the New York Court of Appeals in respect of the application of a very important statute as to which great differences of opinion had existed. We conclude that by the law of New York, which this court is bound to follow, the New York and not the Michigan statute, the lex rei sitæ or lex fori, and not the lex loci conditionis, is the law by which the validity and enforceability of this contract is to be adjudicated so far as it is affected by a statute of frauds.

[8, 9] Assuming now the exclusive applicability of the New York statute, it was error to take the case from the jury. The plaintiff's evidence tended to show that the minds of hotel company, acting through its president, and of motor company, operating through its president, vice president, and secretary, had met and united in an agreement that motor company would build and lease what it built to hotel company, in a form agreed upon in every essential and reduced to writing in and by the intended lease prepared for execution by Mr. Robertson.

We express no opinion on this point of fact, further than to say that it was for the jury to pass on. There were some details to be arranged. How unimportant they were (on this record) is shown by the fact that no differences about them have ever been assigned as reasons

[2] It is summarily stated in 39 Cyc. p. 1295, and approved in Story, Conflict of Laws (8th Ed.) §§ 363, 364.

for refusing to proceed with the matter. This branch of the case should have been given to the jury with instructions in accordance with the rules well stated and summarized in Scholtz v. Northwestern, etc., Co., 100 Fed. 573, 40 C. C. A. 556. See, also, Morse v. Tillotson, 253 Fed. 340, —— C. C. A. ——, 1 A. L. R. 1485. Cf. Sanders v. Pottlitzer, etc., Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757.

Throughout the trial and in this court, plaintiff has rested upon Mr. Robertson's letter of August 31st, as being the note or memorandum satisfying the statute of frauds.

That this document, if subscribed by motor company's "lawfully authorized agent," was sufficient under the statute, has not been denied; but there was at least a question for the jury as to Mr. Robertson's authority.

Doubtless this gentleman had no power whatever to make the contract here alleged, but that is immaterial. The point is: Did he have authority to make the note or memorandum of August 31st? And the solution of this matter depends upon the authority of the officer or officers of motor company who told him in respect of this particular lease to "fix it up"; or (to paraphrase Mr. Robertson's own testimony) "to prepare as a lawyer or put in legal shape the understanding that existed between" motor company and hotel company. If there was an understanding or mind-meeting and the lessor's attorney was told to put that understanding in legal shape, or words to that effect, we have no doubt that such authority included the power and duty of telling the truth about it, which (if plaintiff's version of the contractual arrangements is the truth) is just what Mr. Robertson did.

Thus we reach the question of the authority of motor company's officers.

[10] Here we need go no further than to indicate adherence to the rule that the president or other general officer of a corporation has power prima facie to do any act which the directors could authorize or ratify. Hastings v. Brooklyn, etc., Co., 138 N. Y. 479, 34 N. E. 289.

It would be idle to recite evidence which, if regiven at another trial, may be quite different in effect by reason of other testimony not now before us. It suffices, therefore, to say that on this record there was enough to take to the jury the question whether Mr. Robertson was authorized to do what he did by officers of motor company themselves acting with authority.

We may mention that no question of damages is presented by this writ; by agreement of counsel such matters were eliminated from the proceedings below.

For these reasons, it is ordered that the judgment be reversed, with costs, and a new trial directed.

SIMONITSCH v. BRUCE et al.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5333.

1. JUDGMENT ⚿423, 429—EQUITABLE RELIEF—GROUNDS.
It is not ground for equitable interference with a judgment that the defendant by his own act or omission failed effectually to avail himself of a defense, or that the court decided questions of law or fact erroneously.

2. JUDGMENT ⚿407(1)—SUIT TO ENJOIN ENFORCEMENT—ADEQUATE REMEDY AT LAW.
An injunction will not be granted to restrain enforcement of a judgment at suit of a third person, on the ground that he will be liable over to the defendant therein, where the matter alleged as basis for the injunction would be available to complainant as a defense in an action against him.

3. APPEAL AND ERROR ⚿1241—APPEAL BOND—ESTOPPEL OF SURETY TO DENY PRINCIPAL'S LIABILITY.
The surety on an appeal bond, conditioned for payment of the judgment, if affirmed, and one indemnifying such surety, are each concluded by the terms of the bond from denying the defendant's liability to pay the judgment.

Appeal from the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Suit by B. Simonitsch against Alexander Bruce, administrator of H. H. Jenkins, deceased, the Northern Trust Company, Eva M. Jenkins, Hallett H. Jenkins, Jr., and L. L. Twichell, guardian of Hallett H. Jenkins, Jr. Decree for respondents, and complainant appeals. Affirmed.

This appeal is taken from a decree sustaining a motion to dismiss the plaintiff's bill and dismissing the case. The relief asked by the bill was an injunction against the collection of a sum adjudged to be due by a judgment of the county court of Cass county, N. D., upon the settlement of the accounts of an administrator, pursuant to a determination of the legal rights of the parties by the Supreme Court of that state. See Macfadden v. Jenkins, 169 N. W. 151. It appears from the plaintiff's bill that a partnership existed under the firm name of Ellsworth & Jenkins, the principal place of business being at Fargo, N. D. The members of the partnership were J. H. Ellsworth and H. H. Jenkins, each having an equal interest, and its chief business was the ownership and management of lands and dealing in mortgage securities. Ellsworth was a nonresident partner, and, pursuant to an agreement to dissolve the partnership and to wind up its affairs, Jenkins had been for several years endeavoring to close up its transactions. Before this was fully accomplished, Jenkins died. Macfadden was appointed as his administrator by the county court of Cass county, N. D. Jenkins died intestate. His heirs were a widow and a posthumous son. A guardian was appointed for the son by the proper probate court. Under the laws of North Dakota a surviving partner succeeds to all of the partnership property in trust for the purpose of liquidation and the interest of the deceased partner in the ultimate distribution of the partnership assets passes to those who succeed to his other personal property. Sections 6425, 8711, 8717, Compiled Laws North Dakota 1913. Notwithstanding these statutory provisions, the administrator proceeded upon the theory that he should manage and dispose of Jenkins' share of the partnership property. Ellsworth was not active in managing the affairs of the firm, the property belonging to it was somewhat incumbered, and the property was not then readily salable. The widow and the guardian agreed that it was for the best

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

interests of the estate that a corporation then known as the Ellsworth Jenkins Company, but since known as the Ellsworth Land Company, and hereafter called the Ellsworth Company, be requested and induced to purchase Ellsworth's interest in the partnership property. The stockholders of this Ellsworth Company were the plaintiff, who owned a majority of the stock, the widow of Jenkins, and Macfadden, the administrator of Jenkins. The widow, the child's guardian, and the administrator requested and induced the Ellsworth Company to purchase Ellsworth's share in the partnership property, and he made a transfer of his interest accordingly to the Ellsworth Company. Shortly thereafter the Ellsworth Company entered into negotiations looking to the purchase of the Jenkins interests in the partnership estate.

It is alleged that it was agreed between the administrator, the widow, the guardian, and the Ellsworth Company, represented by the plaintiff in this transaction, that the Ellsworth Company should buy from the administrator what was supposed to be the Jenkins undivided half of the partnership property, and thereafter it should manage all of the property and should account to the Jenkins heirs for any profits accruing, as if the heirs had continued to be the owners of such share. In accordance with this arrangement the administrator sold at private sale to the Ellsworth Company an undivided half of the personal and real property. The Ellsworth Company then continued the management of the property for several years. An accounting by the administrator was then demanded in the probate court, and the widow and guardian made claim that the Ellsworth Company was disqualified from purchasing Ellsworth's share in the partnership assets because Macfadden, the administrator, was also a stockholder and director in the Ellsworth Company. After an order was entered, an appeal was taken to the District Court, and that court decided that Macfadden was liable in a large amount to Jenkins' estate, because all the property the Ellsworth Company had purchased, both from Ellsworth and from Macfadden, as administrator, was, as a matter of law, purchased for the benefit of the estate. This decision was modified and affirmed by the Supreme Court in the case heretofore cited, and a final order has been made by the county court in pursuance thereof, directing Macfadden to pay over to Bruce, his successor in the administration, the amount found due. It is averred that Macfadden is not financially responsible, but that the Northern Trust Company, the surety on his bond as administrator, intends to pay the amount found due to Bruce, as administrator, unless it is enjoined from doing so. After the decision by the District Court against Macfadden, and in order that he might appeal to the Supreme Court, the Ellsworth Company and the plaintiff procured the Northern Trust Company to execute a supersedeas bond on behalf of Macfadden, and indemnified it against loss by reason of its execution of such a bond. Some time before this bill was filed the Ellsworth Company sold and conveyed all its property, accounts, and rights of action to the plaintiff, and the plaintiff assumed all of the debts and obligations of the corporation. The plaintiff avers that Macfadden, while administrator, paid all the claims against the Jenkins estate, except two claims held by the widow, and that he turned over to the new administrator property of the estate much exceeding in value the amount due to the widow on these claims. From the decree dismissing the bill, an appeal is prosecuted by the plaintiff.

Edward Engerud, of Fargo, N. D. (Engerud, Divet, Holt & Frame and Fowler & Green, all of Fargo, N. D., and Ueland & Jerome, of Minneapolis, Minn., on the brief), for appellant.

E. T. Conmy, of Fargo, N. D. (Watson, Young & Conmy, of Fargo, N. D., on the brief), for appellees.

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

MUNGER, District Judge (after stating the facts as above). [1] The foundation of plaintiff's claim, as made in his argument and as

claimed in his bill, is that the Northern Trust Company, as surety on Macfadden's bond, as soon as it pays the amount found due by the county court's decree, will become subrogated to whatever rights Macfadden has against the Ellsworth Company. It is said that Macfadden was held to be liable to the estate, because he permitted the Ellsworth Company to acquire the property of the estate, and that, if he or his surety must pay its value to the estate, then the Ellsworth Company, as the recipient of the property, is liable to reimburse him. On this hypothesis plaintiff contends that he, as the purchaser of all the property of the Ellsworth Company and having assumed all of its obligations, will in fact be the one ultimately liable to pay the amount found due to Bruce. He claims an estoppel against the widow, the guardian, and the present administrator, because the widow, the guardian, and the former administrator agreed to and induced the purchase by the Ellsworth Company of the property from Ellsworth and from Macfadden, as administrator, and therefore that the widow, the guardian, and the new administrator may not now assert that that corporation did not lawfully acquire the property. It is obvious that the availability of this defense on the part of Macfadden was a matter for the consideration of the state courts of North Dakota, when Macfadden was called upon to account to the estate, and that the final judgment rendered against him may not be reviewed in this proceeding to determine the correctness of the conclusions on which it was based. No fraud, accident, or mistake is alleged as a ground for avoiding that judgment. It is not a ground for equitable interference with a judgment that a defendant by his own act or omission failed effectually to avail himself of a defense at law, or that the court decided a question of law or fact erroneously. 4 Pom. Eq. Jur. 1361: Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013: Hendrickson v. Hinckley, 17 How. 442, 15 L. Ed. 123; Walker v. Robbins, 14 How. 584, 14 L. Ed. 552; Creath's Administrator v. Sims. 5 How. 192, 12 L. Ed. 111; Embry v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346.

The plaintiff contends that, as he was not a party to that suit, he is not concluded by the adjudication, and that he may assert this claim of estoppel against the widow, guardian, and present administrator, because, as successor of the Ellsworth Company and guarantor of its obligations, he will be obliged to respond to any claim against it.

[2] The theory of plaintiff's bill is that the widow, the guardian, and the new administrator are estopped to claim that there was an invalid purchase by the Ellsworth Company, that that defense has not been availed of by the Ellsworth Company in any litigation to which it was a party, and that it would have been a complete defense for Macfadden, if he had presented it in the suit against him. If this theory is well founded, and it is the only one presented by the bill, then the plaintiff is not entitled to an injunction, because if there shall be a suit brought by Macfadden or his surety against the plaintiff as the successor of the Ellsworth Company he can urge this claim of estoppel, and if it would have been a sufficient defense in the suit against Macfadden it will be a sufficient defense in a suit by Macfadden or his

successor in interest against the plaintiff. An injunction is not granted as a matter of course, but only in the sound discretion of the court, when necessary to prevent irreparable injury, for which there is no adequate remedy at law, and not to enforce a right that is doubtful, or to prevent an act the injurious consequences of which are doubtful. Parker v. Winnipiseogee Lake Cotton & Woollen Co., 67 U. S. (2 Black) 545, 17 L. Ed. 333; Consolidated Canal Co. v. Mesa Canal Co., 177 U. S. 296, 20 Sup. Ct. 628, 44 L. Ed. 777; Parcher v. Cuddy, 110 U. S. 742, 4 Sup. Ct. 194, 28 L. Ed. 312; Bliss v. Washoe Copper Co., 186 Fed. 789, 109 C. C. A. 133; Hunnewell v. Cass County, 22 Wall. 464, 22 L. Ed. 752.

On the theory presented by plaintiff's bill he needs no injunction against the enforcement of the final judgment against Macfadden, in order to protect his rights as the successor to the property and obligations of the Ellsworth Company, so that he may present this defense of estoppel.

[**3**] There is another reason why plaintiff is not entitled to enjoin the collection of the judgment against Macfadden. He voluntarily indemnified the surety on the appeal bond given by Macfadden when the appeal was taken to the Supreme Court of North Dakota. He thereby agreed that he would pay the judgment against Macfadden, if it was affirmed. The surety on the bond and the plaintiff, as the surety's surety, are each concluded by the terms of the bond from questioning the liability of Macfadden to pay the judgment resulting in that case. Stovall v. Banks, 77 U. S. (10 Wall.) 583, 19 L. Ed. 1036; Wm. W. Bierce, Ltd., v. Waterhouse, 219 U. S. 321, 31 Sup. Ct. 241, 55 L. Ed. 237; Commonwealth of Pennsylvania v. Fidelity & D. Co. (C. C.) 180 Fed. 292; Seymour v. Smith, 114 N. Y. 481, 21 N. E. 1042, 11 Am. St. Rep. 683; Krall v. Libbey, 53 Wis. 292, 10 N. W. 386; Freeman on Judgments, §§ 176, 180; 4 Corp. Jur. 1269. In the case of Stovall v. Banks, supra, the court said:

"It has been argued on behalf of the defendants in error that the decree of the superior court, if admitted, would have been only prima facie evidence against the sureties in the bond. Were that conceded, it would not justify the exclusion of the evidence. But the concession cannot be made. The decree settled that the administrator of the intestate, Alfred Eubanks, held in his hands sums of money belonging to the equitable plaintiffs in this suit, as distributees of the intestate's estate, which he had been ordered to pay over by a court of competent jurisdiction, and the record established his failure to obey the order. Thereby a breach of his administration bond was conclusively shown. Certainly the administrator was concluded; and the sureties in the bond are bound to the full extent to which their principal is bound. A principal in a bond may be liable beyond the stipulations of the instrument, independently of them; but so far as his liability is in consequence of the bond, and by force of its terms, his surety is bound with him. There may be special defenses for a surety arising out of circumstances not existing in this case, but, in their absence, whatever concludes his principal as an obligor concludes him. He cannot attack collaterally a decree made against an administrator, for whose fidelity to his trust he has bound himself."

These conclusions require an affirmance of the decree, and an order to that effect will be entered.

GRATZ v. McKEE et al.*

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5285.

1. TRESPASS ⚷11—CONVERSION OF "REALTY"—STATUTES—"MUSSEL."

The fresh water "mussel," a shellfish capable of locomotion, usually living in the bed of streams partially covered with mud, being a live animal, cannot be deemed part of the "realty," within Rev. St. Mo. 1909, § 5448, allowing treble damages in certain cases for digging up and carrying away any substance or material, being a part of the realty.

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

2. FISH ⚷1—CONVERSION—ACTION FOR VALUE—TITLE—"PEARL FISHING."

In view of Rev. St. Mo. 1909, § 6508, declaring that title to all "birds, fish and game" shall be in the state, and one taking or killing them shall be deemed to have consented that title thereto shall so remain for the purpose of regulation and control, and section 6551, prohibiting pearl fishing at certain times, title to fresh-water mussels taken from a non-navigable river could not be acquired by the owner of the bed of the stream, so as to support an action for the value of the shells; the mussels being animals feræ naturæ, title to which remained in the state, the term "fish" including shellfish, and "pearl fishing" referring to the capture of fresh-water mussels.

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

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

Action by Benjamin Gratz against James S. McKee and others. Judgment for defendants on a directed verdict, and plaintiff brings error. Affirmed.

S. Mayner Wallace and Shepard Barclay, both of St. Louis, Mo., for plaintiff in error.

Frank H. Sullivan, of St. Louis, Mo. (Hoffman & Hoffman, of Sedalia, Mo., and Jones, Hocker, Sullivan & Angert, of St. Louis, Mo., on the brief), for defendants in error.

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

CARLAND, Circuit Judge. The plaintiff in error (hereafter plaintiff) sued the defendants in error (hereafter defendants) to recover the value of 307½ tons of mussel shells alleged to have been taken from the lands of plaintiff's assignors in Pemiscot county, Mo., and converted to defendants' use. A second count of the complaint alleged that the shells were a part of the realty and were dug up therefrom. The language used in the second count was for the purpose of bringing the case within the provisions of section 5448, Rev. Stat. Mo. 1909, allowing treble damages in certain cases for digging up and carrying away any substance or material, being a part of the realty. The trial court, at the close of the evidence, directed a verdict for the defend-

⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Rehearing granted November 17, 1919.

ants, for the reason that the plaintiff had shown no title to the shells in his assignors.

Upon the question of title the evidence tended to show that in the years 1913 and 1914 the St. Louis Union Trust Company owned approximately 1,314 acres of land in Pemiscot county, Mo., in township 20, range 12; that the Himmelberger-Harrison Lumber Company owned 125 acres in the same county, in township 20, range 11; that Little river is a stream about 200 miles in length, flowing in a southwesterly direction through a portion of the above-described lands. The river empties into the St. Francois river, and thus finds its way to the Mississippi river and the Gulf of Mexico. The stream is nonnavigable, except in a very restricted sense. Near Wardell, located near the center of section 25, township 20, range 11, of the lands aforesaid, prior to the years 1913 and 1914, there came or grew in the bed of Little river mussels. The shells of live mussels are valuable for use in making so-called pearl buttons. The mussel is boiled for the purpose of removing the meat from the shell. The fresh water mussel is one of the group of mollusks. It is a shellfish capable of locomotion, but disinclined to exercise this power if its supply of food is sufficient where it is. It sometimes floats upon the water, but usually lives in the beds of streams partially covered with mud. The defendants took from the bed of Little river, at a place where plaintiff's assignors were the owners of both banks of the stream, sufficient mussels to produce the number of tons of shells sued for. The plaintiff, by assignment from the owners of the land, became the owner of the claim for damages arising from the taking of the mussels.

[**1, 2**] So far as the second count of the complaint is concerned, we are of the opinion that it needs no consideration, for the reason that in no view of the case could the live animal called "mussel" be deemed real estate, any more than a ground hog. The question for decision is: Did the owners of the land through which Little river flowed own these shellfish, and hence their shells, so that the plaintiff, as assignee, can maintain an action for their conversion? It appears that the mussels were in their natural state; that is, the owners of the land through which the stream flowed had taken no measures to reduce them to private ownership, nor were they planted where they were found by such owners. As Little river is nonnavigable, we assume that the owners of both banks thereof also owned the bed of the stream. The flowing waters of the stream, however, were public waters, and fish, whether swimming or shell, found therein, could not become, under the laws of Missouri, the subject of private ownership. Sections 6508 and 6551, Rev. Stat. of Missouri 1909, read as follows:

Section 6508: "The ownership of and title to all birds, fish and game, whether resident, migratory or imported, in the state of Missouri, not now held by private ownership, legally acquired, is hereby declared to be in the state, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession, except the person so catching, taking, killing or having in possession shall consent that the title of said birds, fish and game shall be and remain in the state of Missouri, for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or

killing. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state, for the purpose of regulating the use and disposition of the same, and said possession shall be consent to such title in the state."

Section 6551: "It is hereby declared unlawful for any person to engage in what is commonly known as 'pearl fishing' in any of the waters of this state at any time during the months of March, April, May and June. Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense."

At the time section 6508 was enacted neither plaintiff"s assignors, nor any other private individual or corporation, had legally acquired an ownership of the mussels in question. It is no doubt true that the above sections were enacted for the purpose of regulating the capture and sale of the animals therein mentioned. We also understand that "pearl fishing," as used in section 6551, refers to the capture of fresh-water mussels such as are described in this case. It therefore appears that the state of Missouri claims the right of regulating the capture of mussels in the public waters of said state. To hold that plaintiff's assignors owned the mussels in controversy would be to decide that said assignors had the exclusive right of fishing in the waters of Little river, where these mussels were found. Such a grant would not be presumed, in the absence of express words, in a grant conveying the exclusive right of fishery. It is very doubtful, also, as to whether any such grant would be valid under the Constitution and laws of Missouri. In the case of McKenzie's Executors v. Hulet, 4 N. C. 613, it was decided that a grant of land covered by an arm of the sea only at high water, would entitle the grantee to an action of trespass for taking oysters from the rocks within the grant. The court also said:

"The right of taking fish in the sea, or the arms thereof, belongs to every one as a common of piscary; but even this may be restrained, where an individual hath gained exclusive property. Hale, De Jure Maris, 11. And this may be acquired by grant or prescription. Ibid. 43. But it being considered as a royalty, it would not pass without special and express words." 2 Bl. 39.

As we understand the record, the grant to plaintiff's assignors did not mention Little river or the waters thereof; neither does it appear from the report of the case above cited what the words of the grant were in that case. The record shows that the lands of plaintiff's assignors were first granted by the United States to the state of Missouri by the act of Congress approved September 28, 1850 (9 Stat. 519, c. 84 [Comp. St. §§ 4958–4960]), relating to swamp lands, then by the state to the county of Pemiscot, from which plaintiff's assignors obtained their title. We find no reason for holding that plaintiff's assignors had by grant or otherwise an exclusive right of fishery in the waters of Little river at any point. These mussels cannot be separated from the waters of Little river, so far as their ownership is concerned. It is true they were found in the bed of the stream, but they could not live without the stream, and plaintiff's assignors could have no exclusive ownership in them independent of the ownership of the water in the stream. The elementary authorities, in our judgment, sustain the views above expressed, and seem to be in line with the statute of

the state of Missouri in regard to the public waters of said state. The term "fish" includes the different kinds of shellfish, such as oysters, clams, and lobster. Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57; Caswell v. Johnson, 58 Me. 164; note, 60 L. R. A. 516; 11 R. C. L. 1015. Fish, generically speaking, on account of their migratory character and want of a fixed habitat, are classified as animals feræ naturæ. Their ownership while they are in a state of freedom is in the state, not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common, and the ownership thereof may not be claimed by any particular individuals. 11 R. C. L. 1015, 1016; State v. Heger, 194 Mo. 711, 93 S. W. 252; State v. Weber, 205 Mo. 36, 102 S. W. 955, 10 L. R. A. (N. S.) 1155, 120 Am. St. Rep. 715, 12 Ann. Cas. 382.

The difference in the locomotive powers of swimming fish and shellfish, however, justifies a distinction as to their ownership. In their natural state shellfish, like swimming fish, are classified as feræ naturæ, and their ownership is vested in the state in its sovereign capacity. 19 Cyc. 988, B; R. C. L. 1017. Oysters and clams, however, which are planted where they do not naturally grow, and the location of which is marked by posts or otherwise, are the subjects of private ownership. R. C. L. 1018. In Parker v. People, 111 Ill. 588, 53 Am. Rep. 643, the Supreme Court of Illinois said:

> "From the wild and wandering nature of fish, they are not, nor can they be, the subject of ownership in running streams, like animals and fowls which have been domesticated. The nature of fish impels them periodically to pass up and down streams for breeding purposes, and in such streams no one, not even the owner of the soil over which the stream runs, owns the fish therein, or has the legal right to obstruct their passage up or down, for to do so would be to appropriate what belongs to all to his own individual use, which would be contrary to common right, and all having a common and equal ownership, nothing short of legislative power can regulate and control the enjoyment of this common ownership."

In Peters v. State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114, the Supreme Court said:

> "Fish in streams or bodies of water have always been classed by the common law as feræ naturæ, in which the riparian proprietor, or the owner of the soil covered by the water, even though he may have the sole and exclusive right of fishing in said waters, has, at best, but a qualified property, which can be rendered absolute only by their actual capture, and which is wholly divested the moment the fish escape to other waters."

The above language of the Supreme Court of Tennessee was fully approved in State v. Theriault, 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695.

We are of the opinion that, under the facts of this case, the mussels in controversy were animals feræ naturæ, and no private property existed in regard to them while they remained in a state of nature. From the earliest traditions, the right to reduce animals feræ naturæ to possession has been subject to the control of the law-giving power. Geer v. Conn., 161 U. S. 519–522, 16 Sup. Ct. 600, 40 L. Ed. 793. Speaking generally, and without reference to the rights and legislation of Missouri, the defendants, by killing the mussels and reducing them

to possession, obtained title to the same. 3 C. J. 18. The plaintiff, however, invokes the rule of the common law that, where title to animals feræ naturæ is obtained by taking possession thereof, the taking must not be wrongful and if the taking is effected by one who is at the moment a trespasser, no title to the property is created in him but it vests in the owner of the soil. 3 C. J. 20. And as it appears in evidence in this case that the mussels were taken and boiled on the lands of plaintiff's assignors, the title to the same vested in the plaintiff as the defendants were mere trespassers. We are of the opinion, however, that, whatever might be the effect of the rule stated in general, we think that the legislation of Missouri as hereinbefore quoted would vest the title of the killed mussels in the state, and not in the plaintiff. Plaintiff has cited some English decisions as to the right of fishery in the waters of England, but the difference as to what are private and public waters in England and the United States make the cases cited inapplicable. The public waters of England, so far as the right of fishing is concerned, are separated from private waters by the ebb and flow of the tide. This rule has never obtained in this country, either as to fishing or as to the navigability of streams. In this country, if a stream is navigable in fact, it is so in law.

Our judgment is that the trial court was right in directing a verdict for the defendants, and that the judgment below should be affirmed.

It is so ordered.

THOMPSON et al. v. BOMAR et al.*

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5276.

ATTORNEY AND CLIENT ⚷141—FEES—ALLOWANCE.

Where, in a suit in which the minority stockholders were successful, the final decree provided that the compensation fund reserved should be apportioned between the various solicitors, *held*, that the counsel who first protested against the action of the majority and brought suit in the state courts were entitled to compensation for their services in connection with such suit, though the litigation in which the minority shareholders were finally successful was in the federal courts, so that such counsel were entitled to $45,600 out of the entire fund of $104,299.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

William B. and Ford W. Thompson appeal from a decree in favor of Anna E. Bomar and others, assessing attorney's fees among counsel for the minority stockholders of the Missouri-Edison Electric Company and others in the case of Jones v. Missouri-Edison Electric Co. et al. Reversed and remanded, with instructions.

Ford W. Thompson and Paul Bakewell, both of St. Louis, Mo., for appellants.

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

*Rehearing denied October 30, 1919.

Daniel G. Taylor, of St. Louis, Mo. (Jacob Chasnoff and George C. Willson, both of St. Louis, Mo., on the brief), for appellees.

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

SANBORN, Circuit Judge. This is an appeal from a decree of the District Court, which determined the distribution of $104,299.15 among the counsel for the minority stockholders of the Missouri-Edison Electric Company, according to the value of their respective services in the litigation which those stockholders have had with the Union Electric Light & Power Company and others, which first appeared in this court in 1905 under the title of Jones v. Missouri-Edison Electric Co. et al., 144 Fed. 765, 75 C. C. A. 631, and which resulted in a final decree in their favor in the court below for $609,400.80 in 1916. The purpose of that litigation was to avoid the practical consolidation of the Missouri-Edison Electric Company, a corporation, together with the Union Electric Light & Power Company, another corporation, into the Consolidated Union Electric Light & Power Company; or to secure and recover from the defendants the value of the stock of these minority stockholders. This litigation was commenced by Mr. W. B. Thompson on behalf of his client, Mr. Frank A. Ruf, and all other minority stockholders similarly situated, on September 8, 1903. On that day at the meeting of the stockholders of the Edison Company, he protested on behalf of his client against the proposed consolidation, and on the same day brought a suit for Mr. Ruf, the owner of 1,160 shares of the preferred stock of the Edison Company, to prevent the consolidation by an injunction, and for other appropriate relief. That suit was brought in one of the state courts in the state of Missouri. An amended complaint therein was filed in November, 1913, depositions were taken, and it was prosecuted until after the decision of this court on April 17, 1916, overruling the demurrer to the complaint in the subsequent suit brought by Mr. Jones. After that decision Mr. Ruf dismissed his suit in the state court and intervened in the Jones suit in the court below. About the time Mr. Thompson commenced the Ruf suit, Mr. Morgan Jones, the owner of 1,002 shares of the preferred stock of the Edison Company, employed Mr. Eleneious Smith of St. Louis, and Mr. David T. Bomar and his brother, J. E. Bomar, of Texas, to examine his rights in this matter, and to take such action as they should advise in view of the practical consolidation, which the majority of the stockholders of the Edison Company were effecting. Messrs. Smith and Bomar, or one of them, consulted with Thompson immediately after he commenced his Ruf suit, and he gave them copies of his pleadings in that case and all the facts and law he knew, with reference to the rights of these minority stockholders. In April, 1904, after repeated consultations between Mr. W. B. Thompson and counsel for Mr. Jones, the latter brought the Jones suit in the federal court. The theory of the latter suit was the same as was that of the suit brought by Mr. Thompson for Ruf in September, 1903. Each suit rested upon the same facts and the same law, and each suit

was brought by the plaintiff therein on behalf of himself and all others similarly situated.

Mr. W. B. Thompson and his son, Mr. Ford W. Thompson, had law offices and were practicing law in the city of St. Louis in 1903, and they are still so doing, and from the commencement of the Ruf suit to the entry of the final decree in the Jones suit they were active and efficient in the conception, commencement, and conduct of this litigation to its successful result. From the early autumn of 1903, when they commenced the Ruf suit, until the final decree, they and the solicitors for Mr. Jones consulted together, searched out, and proved the necessary facts, and demonstrated the law which brought them success. In the autumn of 1904 Mr. Smith invited Mr. Ford W. Thompson into the Jones suit, and he accepted the invitation and served therein. In the course of the litigation many solicitors were employed on behalf of Mr. Jones for portions of the time, but the Thompsons served from its beginning to its end.

By the final decree, and pursuant to the agreement of all parties and their solicitors, there was retained in the court below for solicitors' fees, in addition to the sum of $4,209.15 that had been paid by Mr. Jones and some of the interveners to his solicitors, and in addition to the sum of $4,320, that had been paid by Mr. Ruf to his solicitors, the Thompsons, $95,770, making an aggregate of $104,299.-15, which was agreed to be the fair and reasonable compensation for the services of all the solicitors in the case and the court in its final decree further found:

"That counsel for complainant and interveners have agreed that the amount retained in court for solicitors' fees and said sum of $8,529.15 shall be apportioned between William B. and Ford W. Thompson, Eleneious Smith, Douglas W. Robert, and David T. Bomar, according to the amount and value of the services by them herein rendered, respectively."

No controversy arose between Messrs. Smith, Robert, and Bomar under this agreement and finding as to the relative amount and value of the services rendered as between themselves, nor as to their rights as against each other to share equally in the funds, but they argued that the amounts and values of their services were such that they were entitled to 75 per cent. and the Thompsons to 25 per cent. of the fund, while the Thompsons insisted that the services of Messrs. Smith, Robert, and Bomar were relatively of no greater value than their own, and that a just distribution of the fund would send 50 per cent. of it to them and 50 per cent. of it to the Thompsons. This controversy was referred to Hon. F. L. Schofield, the special master, who made a report, which the court below confirmed, and upon which it founded the decree which is here challenged by the appeal of the Thompsons.

In reaching his conclusions the master divided the time during which the services of counsel were rendered into three periods and found: (1) The percentage of the amount and value of all the services rendered during the entire litigation that was rendered in each of these periods; and (2) the percentage of all the services rendered in each period that was rendered by the Thompsons, on the one hand, and by the other solicitors, on the other.

His first period extends from the employment of counsel in September, 1903, until the overruling of the demurrer to the complaint in the Jones suit by this court on April 17, 1906, and he found that 28 per cent. of the amount and value of the services of all the solicitors was rendered in this period, and that the Thompsons rendered 18 per cent. of this 28 per cent. and the other solicitors rendered 82 per cent. thereof.

The second period extends from April 17, 1906, to April, 1913, and includes the services rendered in procuring the decisions of this court disclosed in its opinions in 199 Fed. 64, 117 C. C. A. 442, and 203 Fed. 945, 122 C. C. A. 247, and he found that 38 per cent. of the amount and value of all the services of all the solicitors was rendered in this period, and that the Thompsons rendered 37 per cent. of this 38 per cent. and the other solicitors rendered 63 per cent. thereof.

His third period extends from the end of the second period to the entry of the final decree, and includes the services rendered in procuring the decisions of this court set forth in its opinion in 233 Fed. 49, 147 C. C. A. 119, and the final decree pursuant thereto; and he found that 34 per cent. of the amount and value of the services of all the solicitors was rendered in this period, that the Thompsons rendered 31 per cent. of this 34 per cent. and the other solicitors 69 per cent. thereof.

At the end of his report the special master added the statement that in his opinion the Thompsons were not entitled to receive credit in the accounting for services performed by Mr. W. B. Thompson in the preparation of the pleadings and in the conduct of the Ruf Case in the state court, that he had given them no credit therefor, and that if he was in error in this conclusion the Thompsons would be entitled to a larger proportion of the compensation set apart for the first period.

The question in this case is a narrow one. It is: What proportion of the amount and value of all the services of all the solicitors engaged in the litigation, which resulted in the final decree in the Morgan Jones suit, did W. B. and Ford W. Thompson render? For it goes without saying, that they ought to receive the same proportion of the fund of $104,299.15 reserved to pay for those services. The length of time this litigation continued, the importance of some of the questions of law argued and adjudged, the multitude of the issues of law involved, the vast volume of evidence adduced and of briefs and arguments presented in the long course of the litigation, make it impossible to state or review them within the permissible limits of an opinion of this court. Nor would such a review serve any good purpose, for there is no question of law involved now, and the decisions of the questions of fact can never form precedents for future decisions, because no later case will present the same or similar facts. Moreover, the right answer to the question at issue is not susceptible to such an exact determination or demonstration as is an answer to a solvable mathematical problem. It is, after all the evidence, the arguments, and briefs have been read, analyzed, and thoughtfully considered, a matter of opinion or judgment. In view of this situation, no attempt will be made to state the facts or arguments which condition the conclu-

sion in this case. Suffice it to say that each of the members of this court, after a thoughtful and careful examination of the evidence, briefs, and arguments, without consideration or discussion with each other, concluded, and at the first consultation reported, that in his opinion the Thompsons ought to receive a certain amount out of the $104,299.15, and neither of these amounts differed more than $2,500 from either of the others. Subsequent conferences, discussions, and deliberations have resulted in these conclusions of the court.

The entire litigation, from September, 1903, when W. B. Thompson filed his complaint in the Ruf suit until the final decree in the Jones suit, was one case, upon one cause of action, the case of the minority stockholders of the Edison Company against the majority stockholders thereof and the Consolidated Union Company they used to deprive the minority of the real value of their stock. Ruf and Jones each brought his suit, not only for his own benefit, but also for the benefit of all the other minority stockholders similarly situated. W. B. Thompson first conceived and commenced this litigation on behalf of his client, Ruf, on September 8, 1903. On that day, at the meeting of the stockholders of the Edison Company, he protested for Ruf against the passage of the resolution for the consolidation, and filed the Ruf complaint for an injunction against this consolidation and for other appropriate relief. On October 6, 1903, he had prepared his amended petition in that suit. On October 13, 1903, Mr. Bomar and Mr. Jones obtained from him a copy of that amended petition. On November 11, 1903, Mr. Thompson filed Ruf's amended petition. During the time between October 13, 1903, and the final decree in 1916, the other solicitors in this litigation consulted with the Thompsons and worked together with them, gathering proof of the facts and legal precedents, to sustain this case. On April 1, 1904, Jones' solicitors filed his complaint in the court below. A demurrer was filed and sustained in the state court to the complaint of Ruf, and a demurrer was filed and sustained in the United States District Court to the complaint of Jones. From the order sustaining the demurrer in the latter case an appeal was taken to this court. Mr. Smith and Mr. Ford W. Thompson together prepared the brief, and Mr. Smith opened and Mr. Ford W. Thompson closed the argument on that appeal in this court, and this brief and these arguments resulted in the reversal of the order below and the declaration of the equitable principles upon which the case of the minority stockholders was won.

It is by no means certain that Mr. Jones would ever have brought his suit, or taken any effective steps toward bringing it, if he and his solicitors had not been awakened and encouraged to do so by Mr. W. B. Thompson's protest, his suit for Mr. Ruf, his knowledge of facts, and his confidence in the law, which he communicated to Mr. Jones and his solicitors. It was Mr. W. B. Thompson who first conceived, commenced, and led in the beginning of this litigation, while Jones and his solicitors followed.

Mr. Ruf had 1,160 shares and Mr. Jones had 1,002 shares of the stock of the Edison Company, and they contributed to the fund for the compensation of all the solicitors $107.50 per share. As Ruf had

more shares than Jones, he contributed more to the fund. Ruf had paid the Thompsons $4,320 on account of their services in the Ruf and the Jones suits before the agreement and decree regarding the compensation fund were made, and the Thompsons contributed $4,320 to the fund of $104.299.15. Jones and some of the interveners had paid $4,209 to their solicitors, and those solicitors contributed that amount to this fund. By the final decree Ruf received $220,632 and Jones $190,580.40. So it appears that the interest of Mr. Ruf, the client of the Thompsons in the litigation, and his contribution to the compensation fund, were not less than the interest and the contribution of Mr. Jones and the interveners with him. The finding of the court in the final decree was that this compensation fund should "be apportioned between Wm. B. and Ford W. Thompson, Eleneious Smith, Douglas W. Robert, and David T. Bomar, according to the amount and value of the services by them herein rendered, respectively." The record in this case discloses the fact that the master, in his consideration and determination of the proportions of the fund which Messrs. Smith, Robert, and Bomar had received under this agreement and finding, credited them with the services of Mr. J. E. Bomar and Mr. Edward Robert, who rendered services for the minority stockholders during the litigation, although their names are not mentioned in the agreement or finding, and in view of the facts which have now been recited, and upon a consideration of all the evidence, no doubt remains that the master and the court fell into an ereror in their refusal to consider or give any credit to the Thompsons in this accounting on account of the amount and value of the services of Mr. W. B. Thompson and Mr. Ford W. Thompson in the Ruf suit. It is clear to our minds that it was the intention of the counsel who made the agreement of apportionment that all the services of all the counsel who served in this litigation, including the services of Messrs. W. B. and Ford W. Thompson in the Ruf suit, should be considered in the accounting and apportionment, and when this agreement and the finding of the court in which it is embodied are read in the light of the circumstances surrounding the parties when they made it, this intention is clearly expressed in the contract.

The crucial period in this litigation was the first period. Then it was that all was at stake. After that the only question was how much should be recovered. The extent of the fiduciary relation and liability of the majority stockholders and those claiming under them to minority stockholders was not as well known and as clearly set forth in the decisions of the courts in 1903 as it is in 1919. The trial courts in this litigation held that the complaints in the Ruf and Jones suits stated no cause of action. The product of the ability, learning, and labor that persuaded a reversal of that conclusion and established the law which assured a recovery for these minority stockholders was little, if any, less valuable to them in this case than all the services of counsel subsequently rendered. Nor, in view of the facts which have been recited, and especially of the facts that W. B. Thompson first conceived and commenced the litigation, that he led where others followed, that Smith and Bomar constantly counseled and labored with

him and with his son throughout this first period, that they never succeeded in obtaining a decision that their suit could be maintained until Mr. Smith and Mr. Ford W. Thompson together, after each searching and reviewing the authorities and then combining their knowledge and their ability, prepared the brief and made the arguments which gave them the decision of this court of April 17, 1906, can the conviction be resisted that the amount and value of the services of the Thompsons, during this period, were equal to those of Mr. Smith and the Bomars. A careful study of the records, briefs, and arguments relating to the two other periods were necessary and were made before reaching these conclusions, and the other requisite changes in the apportionment of the fund that in the opinion of the court are deemed just.

The sum of the whole matter is that this court is of the opinion that the following changes in the percentages and proportions used by the special master and the court below should be made: First, that the percentage of the amount and value of the services of all the solicitors rendered in the first period should be 45, instead of 28, and that the percentage of this 45 per cent. rendered by the Thompsons during this period should be 50 per cent., instead of 18 per cent., making the Thompsons' share of the compensation fund for their services during the first period $23,467.30; second, that the percentage of the amount and value of the services of all the solicitors rendered in the second period should remain 38 per cent., and that the percentage of this 38 per cent. rendered by the Thompsons during this period should be 42 per cent., instead of 37 per cent., making the Thompsons' share of the compensation fund for their services during the second period $16,646.14; third, that the percentage of the amount and value of the services of all the solicitors rendered in the third period should be 17 per cent., instead of 34 per cent., and that the percentage of this 17 per cent. rendered by the Thompsons should remain 31 per cent. as it is, making the Thompsons' share of the compensation fund for their services during the third period $5,496.56, so that the Thompsons' share of the entire fund of $104,299.15 shall be $45,610.01, while the share of all the other solicitors shall be $58,689.14.

Let the decree below be reversed, and let this cause be remanded to the court below, with instructions to enter a decree in accordance with the views expressed in this opinion.

MISSISSIPPI VALLEY TRUST CO. v. RAILWAY STEEL SPRING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 19, 1919.)

No. 5131.

1. INJUNCTION ⚷157 — PRELIMINARY INJUNCTION — ORDER—IRREGULARITY—STATUTE AND EQUITY RULE.
In suit to marshal the assets of a railway company and distribute them, and for injunction restraining the company and others from interfering with, transferring, etc., any part of the railroad's assets, wherein receiver was appointed, order directing payment of interest by receiver on certain notes held by banks, and also enjoining such payees from selling or attempting to sell any collateral securing the notes, *held* irregular and invalid, as not conforming to Comp. St. § 1243a, or to new equity rule 73 (198 Fed. xxxix, 115 C. C. A. xxxix).

2. APPEAL AND ERROR ⚷100(2)—ORDER DENYING PETITION TO VACATE INJUNCTION—JUDICIAL CODE.
Under Judicial Code, § 129 (Comp. St. § 1121), order denying petition to vacate a preliminary injunction was appealable.

3. INJUNCTION ⚷163(1)—PRELIMINARY INJUNCTION—PETITION TO VACATE—DENIAL.
Order denying trust company's petition to dissolve preliminary injunction restraining it from disposing of collateral securing notes of railroad, whose assets a steel spring company was seeking to marshal and have distributed, a receiver having been appointed, *held* not necessarily erroneous, despite irregularities in the order to the receiver to pay interest on the notes, which order embodied the preliminary injunction.

4. INJUNCTION ⚷175—PRELIMINARY INJUNCTION—APPLICATION FOR DISSOLUTION—PRACTICE.
It is well-recognized practice, on application for dissolution of restraining orders or preliminary injunctions on the ground of irregularities, to deny such petition if at the time of the hearing the court is of opinion such restraining order or preliminary injunction should issue, in view of all the facts and circumstances then existing.

5. CONTRACTS ⚷101(1)—LOCAL LAW.
The validity of a transaction whereby a trust company became the holder of a railroad's bonds as security for the railroad's note, and the status of the trust company as such holder, are to be determined by the law of the state of Missouri; the transaction having been a Missouri transaction.

6. RECEIVERS ⚷74—CONTROL OF PROPERTY—INTERFERENCE.
Property in the hands of a receiver appointed by a court may not be interfered with, even to carry out private agreements, contracts, or trusts.

7. RECEIVERS ⚷77(1)—CONTROL OF PROPERTY BY COURT—JURISDICTION OF LIEN DISPUTES.
A court, administering property already in its hands through a receivership, may properly draw to itself all disputes as to liens and other rights upon or pertaining to such property.

8. RECEIVERS ⚷77(4)—PROPERTY PLEDGED—INJUNCTION AGAINST SALE OF COLLATERAL—JURISDICTION.
In view of the controlling Missouri rule, District Court, on March 1, 1918, when it denied petition of trust company to vacate temporary injunction against its disposing of a railroad's bonds pledged as collateral to secure the note of the railroad, which was in the hands of a receiver for the marshaling of assets and their distribution at the suit of a steel spring company, *held* to have had jurisdiction to issue an injunctional or-

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

der against the trust company, restraining it from the sale of the collateral, so that the order denying the petition to vacate the prior injunction was proper.

Appeal from the District Court of the United States for the Eastern District of Missouri; William C. Hook, Judge.

Petition by the Mississippi Valley Trust Company against the Railway Steel Spring Company and others, to vacate an order in the Steel Spring Company's suit against a railway for marshaling and distribution of assets. From an order denying the petition, petitioner appeals. Affirmed.

Loomis C. Johnson, of St. Louis, Mo. (J. D. Johnson, Breckenridge Jones, and A. H. Roudebush, all of St. Louis, Mo., on the brief), for appellant.

Joseph M. Bryson, of St. Louis, Mo., for appellee, Schaff.

C. S. Burg, of St. Louis, Mo., for appellee Missouri, K. & T. Ry. Co.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

BOOTH, District Judge. This is an appeal from an order, made after a hearing, denying a petition by the trust company to set aside a restraining, or injunctive, order, theretofore issued against it without a hearing. The salient facts are as follows:

September 27, 1915, two creditors' bills were filed in the court below against the Missouri, Kansas & Texas Railway Company. One of these bills was filed by the Railway Steel Spring Company. The bill prayed for a marshaling of the assets of the railway company and a distribution of the same, and also for an injunction against the railway company "and all persons, firms, and corporations whatsoever and wheresoever located, situated or domiciled, from interfering with, transferring, selling, or disposing of, attaching, levying upon, or in any manner whatsoever disturbing any part of the railroad's assets, moneys, and property now or hereafter in the possession of any receiver appointed in this cause." On the same day, answer was filed by the railway company admitting the allegations of the bill. A receiver was thereupon appointed to take possession and administer all of the properties and assets of the railway company. In the order appointing the receiver was the following provision:

"The Missouri, Kansas & Texas Railway Company and the officers, directors, agents, attorneys, and employés of said railway company, and all other persons claiming to act by virtue of or under said railway company, and all other persons, firms, and corporations whatsoever, and wheresoever situated, located, or domiciled, be and they are hereby restrained and enjoined from interfering with, attaching, levying upon, or in any manner whatsoever disturbing any portion of the assets, goods, moneys, and property and premises of which receiver is hereby appointed, or from taking possession of, or in any way interfering with, the same or any part thereof, or from interfering in any manner to prevent the discharge by said receiver of his duties or the operation of said property and premises under the orders of this court."

Among the mortgages upon property of the railway company was the consolidated mortgage, being, in general, a fourth lien upon the properties. Under this mortgage, bonds in the amount of $30,292,000

were outstanding; $24,516,000 of these were in the hands of the Central Trust Company, pledged to secure $19,000,000 of two-year gold notes of the railway company under a collateral trust agreement dated April 29, 1913. Of the bonds outstanding, but not thus pledged to the Central Trust Company, $250,000 of said bonds were held by the Mississippi Valley Trust Company to secure a note of the railway company, amount $125,000, due May 1, 1916; $800,000 held by the Mercantile Trust Company, to secure a note, amount $240,000; $250,-000 held by the National Bank of Commerce, to secure a note, amount $125,000; $600,000 held by Speyer & Co., to secure a note, amount $243,750. The Mississippi Valley Trust Company also held $100,000 of the two-year gold notes above mentioned.

October 23, 1915, the receiver presented a petition to the court, setting forth among other things the facts above stated, and that the interest on the notes held by the Mississippi Valley Trust Company, Mercantile Trust Company, National Bank of Commerce, and Speyer & Co. would presently fall due. He also set forth in his petition that upon default upon maturity of said notes the holders might under the terms of their contracts sell the bonds held as security, and that in some one or more of the contracts it was provided that the appointment of a receiver, or insolvency, should immediately effect the maturity of said notes. Receiver prayed that he be allowed to pay the interest on the notes held by the four companies above mentioned, and further prayed that said four companies and each of them be enjoined until the further order of the court from selling or attempting to sell, or otherwise dispose of, any of the collateral respectively held by them.

Upon said petition the court made its order, October 23, 1915, directing the payment of interest on the notes held by the four companies above mentioned, and included in said order the following:

"The Central Trust Company of New York, as trustee in the collateral agreement dated April 29, 1913, and the National Bank of Commerce, of St. Louis, the Mercantile Trust Company, of St. Louis, the Mississippi Valley Trust Company, of St. Louis, and Speyer & Co., of New York, as payees and holders of the notes hereinabove referred to, be and each of them are hereby enjoined until the further order of this court from selling or attempting to sell, or otherwise dispose of, any of the collateral referred to in the above and foregoing petition and respectively held by them."

On the 1st of November, 1915, the receiver transmitted to the Mississippi Valley Trust Company the payment of interest on the note held by it, and stated in the letter of transmittal:

"This payment is made pursuant to order of the court dated October 23, 1915, a certified copy of which is herewith inclosed."

Attention was also called in the letter to the last clause of the order, enjoining the sale of the collateral.

March 31, 1917, Mississippi Valley Trust Company filed its petition to vacate the order of October 23, 1915. In its petition the trust company stated:

"Your petitioner, Mississippi Valley Trust Company, appearing herein only for the purpose of this motion and strictly limiting its appearance thereto, states: * * *

"(7) Your petitioner respectfully states that it had neither notice nor knowledge of the filing of the said petition of the said receiver on the 23d day of October, 1915; that it had neither notice nor knowledge of the hearing on said petition; that neither at the time of the entry of said order, nor for a long time thereafter, had it the power or the intention to sell the said bonds aforesaid; that, the premises considered, the said injunction or restraining order, having been made and entered without notice to your petitioner as aforesaid, was made and entered improvidently, in violation of the provisions of rule 73 of the Rules of Practice in Equity [198 Fed. xxxix, 115 C. C. A. xxxix] and further of section 718 of the Revised Statutes of the United States [Comp. St. § 1243a], and without jurisdiction in this court to make and enter the same; and that because thereof your petitioner unjustly and unlawfully is deprived of its rights and the power to assert the same."

The prayer of the petition was as follows:

"Wherefore, your petitioner prays that said order made and entered October 23, 1915, may be vacated and set aside, and by an order entered of record be declared to be void and of no effect."

After full hearing the court, on the 1st of March, 1918, filed the following order:

"Upon consideration of the petition of the Mississippi Valley Trust Company for the vacation of the order of October 23, 1915, restraining the sale of certain collateral, and of the briefs for the petitioner and the briefs and affidavits for the receiver and the railway company, it is ordered that the petition be and it is hereby denied."

The present appeal is from the last-named order.

Among the questions raised by the appeal are the following:

(1) Was the original order of October 23, 1915, irregular and invalid?

(2) If so, does the order of March 1, 1918, of necessity fall with the original order?

(3) Or was the order of March 1, 1918, valid and justified?

[1, 2] 1. It is plain from the record that the order of October 23, 1915, did not conform to the provisions of the Act of October 15, 1914, c. 323, § 17, 38 Stat. 737 (Comp. Stat. 1243a), or to new federal equity rule 73. Many irregularities are pointed out by counsel for appellant: Lack of notice of hearing to the appellant trust company; lack of opportunity to be heard; that the trust company was not a party to the suit in which the receiver had been appointed; that no bond was required; that the order did not define the injury, and state why it was irreparable; that no definite time was fixed for the continuance of the order.

Some of these objections proceed on the assumption that the order of October 23, 1915, was a restraining order; others, that it was a preliminary injunction. It has some of the features of both, and lacks some. But, whatever its precise nature, it failed in several particulars to conform to the statute and the rule above cited.

Without discussing at length its exact character, we shall assume that it was a preliminary injunction. The order of March 1, 1918, was therefore appealable. Section 129, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. § 1121]); Western Union Tel. Co. v. Trust Co., 221 Fed. 545, 137 C. C. A. 113; Davis v. Hayden, 238 Fed. 734, 151 C. C. A. 584. In view of the irregularities accom-

panying the issuance of said order of October 23, 1915, we are of opinion that, if timely and proper application had been made by the trust company for the vacation of said order, either the irregularities would have been cured, if curable, or the order would have been vacated.

[**3, 4**] 2. Was the order of March 1, 1918, necessarily erroneous, in view of the irregularities attending the order of October 23, 1915?

It is claimed by the appellees that the receiving of the interest by the trust company November 1, 1915, with notice that the interest was paid under and by virtue of the order of court which contained the injunctional order, a copy of which was inclosed to the trust company, and the retention by it of the interest so transmitted, was a waiver.

It is also contended by the appellees that the petition of the trust company filed March 31, 1917, and praying for the vacation of the order of October 23, 1915, is of such character that it waived any irregularities attending the last-mentioned order. The trust company stated in its petition that it entered an appearance solely for the purpose of the motion to vacate the order of October 23, 1915, yet it nevertheless proceeded to attack the validity of that order, not only for irregularities attending the making of the same, but also as to the merits, and it has followed the same course in this court upon appeal. It might well be held, under the circumstances, that the trust company had waived its right to object to the order of October 23, 1915, on the ground of irregularities. St. Louis & S. F. Ry. Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; Western Loan & Savings Co. v. Mining Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; Thames & Mersey Ins. Co. v. U. S., 237 U. S. 19, 24, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087. See, however, Salt Lake City v. Smith, 104 Fed. 457, 471, 43 C. C. A. 637; Southern Pac. Co. v. Fruit Co., 191 Fed. 101, 111 C. C. A. 581. However this may be, it seems certain that the trust company, by attacking the order of October 23, 1915, upon the merits, has at least opened the door to a discussion of the merits of an injunctional order, viewed not merely from the standpoint of facts existing on October 23, 1915, but viewed from the standpoint of facts as they appeared to the court at the time of the filing of the petition by the trust company, and at the time of the filing of the order denying said petition, viz. March 1, 1918.

It would be a useless procedure for the court to set aside the order of October 23, 1915, for irregularities, and at once issue a like order based upon the merits. It is a well-recognized practice, upon applications for dissolution of restraining orders or preliminary injunctions on the ground of irregularities, to deny such petition, if at the time of the hearing the court is of opinion that such restraining order or preliminary injunction should issue in view of all the facts and circumstances then existing. 22 Cyc. Law & Proc. 978; 1 Joyce on Injunctions, § 291a; Warren v. Pim, 65 N. J. Eq. 36, 55 Atl. 66; Savoie v. Thibodeaux, 28 La. Ann. 169; Henderson v. Maxwell, 22 La. Ann. 357.

We reach the conclusion, therefore, that the order of March 1. 1918, was not necessarily erroneous, although the order of Octo-

ber 23, 1915, would probably have been set aside for irregularity, if timely and proper application had been made.

[5-8] 3. This brings us to the consideration of the merits of the question, whether upon all the facts and circumstances existing on March 1, 1918, the court had jurisdiction to issue, and might properly issue, an injunctional order against the trust company, restraining it from the sale of the collateral in question.

The situation on March 1, 1918, had numerous features which were absent from the situation on October 23, 1915. The Central Trust Company on November 13, 1915, had filed its bill for foreclosure of the consolidated mortgage. The railway company had answered, asking that those parties who held consolidated bonds as collateral to notes should be enjoined from selling the collateral, and asking further that the holders of such bonds, including the Mississippi Valley Trust Company, be made parties to the consolidated foreclosure suit. In its answer the railway company had also raised the question as to the legal status of the consolidated bonds in the hands of those parties who held them as collateral to notes, including those held by the Mississippi Valley Trust Company. It was alleged that said bonds had never been sold by the railway company and had never passed out of its possession, except as they were placed in the hands of the several companies heretofore mentioned, as collateral security to the notes.

On December 22, 1916, the Central Trust Company had filed its bill to foreclose the collateral trust agreement of April 29, 1913. The railway company had answered, asking an injunction against the holders of the collateral bonds, and also asking specifically for a continuance of the order of October 23, 1915. On April 30, 1917, the Mercantile Trust Company, standing in substantially the same position as the Mississippi Valley Trust Company, filed its petition of intervention in the consolidated foreclosure suits, and asked for the adjudication of its rights. The notes had matured which were held by the Mississippi Valley Trust Company and by the other companies, and to which the bonds were being held as collateral. The receivership had been extended to the foreclosure suits.

Such were some of the additional facts to be taken into consideration by the court in determining, March 1, 1918, the question whether the Mississippi Valley Trust Company should be restrained from selling the collateral bonds held by it. And the court also had to consider and determine the question of the status of the Mississippi Valley Trust Company as holder of the bonds in question. These questions were and are vital questions in the case. If the status of the trust company as holder of these bonds was such on March 1, 1918, in view of all the facts and circumstances then existing, that the court upon an application then made would have had jurisdiction, and been justified in issuing an injunctive order against the sale of said collateral, then the order of March 1, 1918, should be sustained; otherwise, not.

The validity of the transaction by which the trust company became the holder of the bonds in question as security for the note which it held of the railway company, and the status of the trust company as such holder, are to be determined by the local law, that is, of the state

of Missouri, inasmuch as the transaction was a Missouri transaction. (The note and contract of pledge appear in margin.[1]) Hiscock v. Bank, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945; Taney, Trustee, v. Bank, 232 U. S. 174, 180, 34 Sup. Ct. 288, 58 L. Ed. 558; Dale v. Pattison, 234 U. S. 399, 404, 34 Sup. Ct. 785, 58 L. Ed. 1370, 52 L. R. A. (N. S.) 754; Fourth St. Bank v. Trustee Millbourne Mills Co., 172 Fed. 177, 187, 96 C. C. A. 629, 30 L. R. A. (N. S.) 552; First Nat. Bank v. Lanz, 202 Fed. 117, 119, 120 C. C. A. 271; Dibert v. Wernicke, 214 Fed. 673, 131 C. C. A. 109.

[1] $125,000.00 St. Louis, Mo., May 1st, 1915.

May 1st, 1916, after date, we promise to pay to the order of Mississippi Valley Trust Company, one hundred twenty-five thousand dollars, for value received, at Mississippi Valley Trust Company, at St. Louis, Mo., with interest at the rate of six per cent. per annum from date, interest payable semiannually. Missouri, Kansas & Texas Railway Company,

C. N. Whitehead, Vice-President.

F. Johnson, General Treasurer.

Having executed our note as above, and being desirous of securing the same, as well as all other debts and liabilities for which we are now bound or may become bound to said Mississippi Valley Trust Company, of St. Louis, Mo., we do hereby pledge to said trust company, as collateral security for the payment of this note as well as for the payment of all other debts and liabilities for which we are now bound or may become bound to said trust company, the following described property, to wit:

Two hundred fifty thousand dollars ($250,000), face amount, consolidated mortgage five per cent. thirty-year gold bonds, series A, of Missouri, Kansas & Texas Railway Company in temporary form Nos. 407 to 516 inclusive, 659, 660, and 664 to 666, inclusive, for $10,000 each, of which we are in good faith the owners, the same being fully paid for and free from liens or claims of any kind whatever, and agree to give additional security whenever the market value of the above collateral should decline and on notification of said Mississippi Valley Trust Co., by any of its officers to us. In default of payment of said note at maturity, or the payment of any such other obligations, or in default of our giving such additional security, when so notified within twenty-four hours after such notice, we hereby authorize said Mississippi Valley Trust Co., or any one of its officers, or agents, to sell said collateral at public or private sale, or otherwise, at its option, without notice, and to apply the proceeds to the payment of said note, with all damages, interest, charges and costs and such other debts and liabilities; and in case the proceeds of such sale are not sufficient to cover the amount of said note as well as such other obligations, we agree to pay the balance thereof on demand, and in case there is any surplus left from such sale, such surplus shall be applied by said Mississippi Valley Trust Co., to the payment of any other debt or liability for which we are now bound or may become bound to said Mississippi Valley Trust Co.

Said Mississippi Valley Trust Co. shall also have the right, at any such sale, to bid for and purchase the said pledged property or any part thereof, in its own name, and for its own use and benefit.

Said Mississippi Valley Trust Co. is also authorized to use, transfer, or hypothecate said collateral, at its option, it being required on the payment of said note and all other debts and liabilities for which we are now bound or may become bound to said Mississippi Valley Trust Co., at any time before sale has been made of said collateral, to surrender same; and in case of any exchange of or additions to the collateral above specified, the powers and rights above granted shall extend to such additional or new collateral.

Notice sent to our place of abode or business shall constitute legal notice for additional security. Missouri, Kansas & Texas Railway Company,

C. N. Whitehead, Vice President.

F. N. Johnson, General Treasurer.

It is necessary, therefore, to inquire whether the courts of Missouri have passed upon the questions involved. In case of Dibert v. D'Arcy, 248 Mo. 617, 154 S. W. 1116, where unissued corporate bonds, secured by mortgage on the corporate property, had been put up as collateral to the corporation's notes, under a contract very similar in terms to the contract in the case at bar, the court in its opinion said:

"Considering them (the collateral bonds) in the light of a mere additional promise of the maker of the notes to pay money, they cannot, from the very nature of the transaction, be considered as collateral security for the debt, for this would lead to the absurd result that one might make his promissory note for $1 with a collateral note for $2, so that, if he should be unable or fail to pay, the sale of the collateral would have simply the effect to double the amount of his indebtedness, without affording any additional security for the debt, other than a penalty for its nonpayment. Should he, however, secure the second note by mortgage upon property, a different proposition would be presented. Under such circumstances the note and mortgage may be treated as collateral to the indebtedness so far as is necessary to give the creditor in the first note the benefit, with respect to his indebtedness, of the lien upon the mortgaged property, nominally created as security for the collateral note. * * *"

Again:

"* * * As between the pledgor and pledgee, and those having notice of the character of the transaction, its only effect is to give the pledgee the benefit of the lien of the mortgage for the collection of his own debt. The amount of the mortgage obligations that he may have as collateral is only important in determining the extent to which his own debt may participate in the proceeds of the mortgage securities."

And again:

"* * * In so far as these bonds constitute a personal liability of the Hardwood Export Company they have no force whatever, otherwise than as an evidence of the pledge of an interest in the lands mortgaged to secure them. The pledgee becomes the holder of them for the purpose of enforcing his lien by the foreclosure of the mortgage. This lien constitutes the pledge and is collateral to the principal debt in the same sense as if it were a horse or the note of a third party or any other article of personal property."

It was further held that the holder of the collateral bonds held them as a trustee, and was subject to all the duties and liabilities of a trustee in acting with reference to said collateral bonds. This holding of the Missouri court is controlling here, and, though it is opposed to the views of a number of other courts, yet it is not without support of high authority. In re Waddell Entz Co., 67 Conn. 324, 327, 35 Atl. 257; Jno. Matthews v. Knickerbocker Trust Co., 192 Fed. 557, 113 C. C. A. 29; Third Nat. Bank v. Railroad, 122 Mass. 240.

The case of Wade v. Railroad, 149 U. S. 327, 13 Sup. Ct. 892, 37 L. Ed. 755, is not opposed. What that case held was that—

"Negotiable securities once put in circulation for value may be transferred for less than their face, but the maker and those claiming under him cannot limit the right of a subsequent holder to a recovery of what he may have paid therefor."

In the case at bar the bonds had not been "put in circulation for value."

It is true, as claimed by counsel for appellant, that the collateral bonds in question cannot properly be considered either as assets of the railway company or as property of the railway company, within the meaning of those terms as used in the order appointing the receiver; and, from this, counsel draw the conclusion that when the trust company takes steps to realize upon the collateral bonds it is not interfering with any assets or property of the railway company. The argument is not entirely sound. The bonds have a twofold character and purpose: When properly sold by the railway company they become evidence of a debt owed by the railway company to the amount indicated by the face of the bonds; second, they are evidence that the holder of the bonds has a right to share in the proceeds of the security covered by the mortgage accompanying the bonds. The trust company, in taking these bonds as collateral, did not acquire any right in them whatever as evidence of a debt owed by the railway company. They evidenced no debt, for they had not been sold. But it did acquire an interest in the bonds as evidence of a right on the part of the holder to participate in the mortgage security. The debt owed by the railway company to the trust company was evidenced by the note in the hands of the trust company, and by that alone. The property covered by the consolidated mortgage was made the security for that note by the pledging of the bonds, and the extent to which the trust company might participate in the proceeds of that mortgaged property was determined by the amount of the bonds so held as collateral, limited, however, by the amount of the note itself. Any attempt on the part of the trust company to sell the bonds as evidencing a debt of the railway company might very possibly result in increasing the outstanding indebtedness of the railway company. This would diminish pro rata the value of each existing creditor's right to participate in the assets of the railway company, and would be in substance and effect an interference with those assets. Those assets were the res in the hands of the court. There was no necessity for the trust company to take steps to foreclose the mortgage secured by the bonds, because such foreclosure suit was already pending; and if the bonds were also collateral to the two-year secured gold notes, the same is true, because a suit to foreclose the collateral trust agreement was also pending.

This is not a case of attempting to force the holder of a lien to come into court by summary proceeding and have the validity of such lien determined. Such were the cases of Andrews v. Paschen, 67 Wis. 413, 30 N. W. 712; American, etc., Bank v. Ruppe, 237 Fed. 581, 150 C. C. A. 463; In re Rathman, 183 Fed. 913, 106 C. C. A. 253, and the cases therein exhaustively reviewed. Nor is it a case of interfering by summary proceeding with the possession of specific personal property held by a pledgee or other party claiming adverse rights. Such were the cases of Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; Marshall v. Knox, 83 U. S. (16 Wall.) 551, 21 L. Ed. 481; Wheaton v. Teleg. Co., 124 Fed. 61, 59 C. C. A. 427; Horn v. Railway (C. C.) 151 Fed. 626; Bd. of Educa-

tion v. Leary, 236 Fed. 521, 149 C. C. A. 573. But it is a case that comes within well-established principles.

Property in the hands of a receiver appointed by a court may not be interfered with, even to carry out private agreements, contracts or trusts. Wiswall v. Sampson, 14 How. 52, 66, 14 L. Ed. 322; In re Tyler, 149 U. S. 164, 181, 13 Sup. Ct. 785, 37 L. Ed. 689; Hitz v. Jenks, 185 U. S. 155, 22 Sup. Ct. 598, 46 L. Ed. 851; High on Receivers (4th Ed.) §§ 136, 138, 140. Furthermore a court which is administering property already in its hands through a receivership may properly draw to itself all disputes as to liens and other rights upon or pertaining to such property. Morgan's Co. v. Railway, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 626; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; Farmers' Loan & Trust Co. v. Railway, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; Wabash Ry. Co. v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379; Central Trust Co. v. Railway (C. C.) 57 Fed. 3; Toledo, etc., Ry. Co. v. Trust Co., 95 Fed. 497, 36 C. C. A. 155.

This is a case where the court, through its receiver, having taken possession and control of the properties of the railway company, saw the trust company in possession of certain bonds of the railway company, by the sale of which the res in the hands of the court might be interfered with. The court further saw that those bonds did not evidence any debt owed by the railway company, but that the trust company had a valid interest in the bonds only as evidence of its right to participate in the mortgage security to the extent of a certain note held by it; under these circumstances in order to prevent sale of the bonds which might wrongfully increase the claims against the property in the hands of the receiver, to the detriment of other creditors, the court in its discretion concluded that the trust company should be enjoined from making such sale, without, however, denying or interfering with the right of the trust company to participate in the security under the mortgage.

The court was justified in its conclusion, and the order appealed from is affirmed.

COHN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 22, 1919.)

No. 169.

1. INDICTMENT AND INFORMATION ⚷139—MOTION TO QUASH—TIME FOR MAKING.

   A motion to quash an indictment on the ground that it does not charge facts sufficient to constitute an offense may be made at any time, even after verdict.

2. RECEIVING STOLEN GOODS ⚷7(2)—SUFFICIENCY OF INDICTMENT—INTENT.

   An indictment under Cr. Code, § 48 (Comp. St. § 10215), for receiving property stolen from the United States, which does not charge that the accused received or retained the property "with intent to convert to his own use or gain," is fatally defective.

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

3. CRIMINAL LAW ⚷400(3), 430—SECONDARY EVIDENCE—COPIES OF "OFFICIAL DOCUMENTS."

Documents used as evidence in a naval court-martial, and required by statute to be transmitted to the Navy Department and there kept on file for two years, are "official documents" while so kept, and under Comp. St. § 1494, authenticated copies of such documents are admissible in evidence equally with the originals, and unauthenticated copies are inadmissible as secondary evidence.

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

Criminal prosecution by the United States against Samuel A. Cohn. Judgment of conviction, and defendant brings error. Reversed.

Robert H. Elder, of New York City (Charles E. Russell, of Brooklyn, N. Y., and H. Goldstein, of New York City, of counsel), for plaintiff in error.

James D. Bell, U. S. Atty., of Brooklyn, N. Y. (Vine H. Smith, Sp. Asst. U. S. Atty., of New York City, of counsel).

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The defendant below has been tried and convicted under an indictment the substance of which is stated in the margin.[1]

The court refused to set aside the verdict and sentenced the defendant to imprisonment in the federal prison at Atlanta for a year and three months.

The evidence discloses that the father of the defendant, at the time of the commission of the offense charged, conducted a tailoring shop in Brooklyn, and that the defendant was in charge of it for the father.

It appears that the custom among tailors was, when cloth of the type in question came into their possession to be made up into uniforms, before cutting into it, to send same to spongers to be sponged. In the process of sponging, if the spongers found any defect or flaw in the cloth, they indicated it by drawing a small white piece of cloth through the selvage of the material opposite the place where the defect existed and notified the manufacturer of the cloth of the defect, giving to the manufacturer, at the same time, the name of the supposed purchaser thereof from the manufacturer. Certain cloth, but whether it was part of that which was the subject of controversy on this trial or not was not developed, was sent from the shop of the accused's father

[1] The indictment charges that the defendant "did unlawfully receive certain property and valuable things, to wit, about 180 yards of cloth intended to be used in the making of United States Navy uniforms, of the goods and property of the United States, which said 180 yards of cloth had theretofore been embezzled, stolen, and purloined by another to the grand jurors unknown, and who cannot theretofore be more definitely stated herein, he, the said Samuel A. Cohn, then and there knowing at the time he so received the said 180 yards of said cloth that the same had been so embezzled, stolen, and purloined, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States in such case made and provided."

to the spongers to be sponged. They found some defects in the cloth and notified the manufacturer and reported the name of Herman Cohn as that of the original purchaser of the cloth. The manufacturers replied that they had sold no such cloth to Cohn. They had sold cloth to the Navy Department and they took the matter up with the department. This led to investigation, and the laying of charges to the effect that one A. W. Meade, who was Chief Yeoman on the United States Steamship Arkansas, had stolen various quantities of navy blue cloth from the department and caused same to be delivered at the shop of Herman Cohn, and which defendant was accused of having bought. Officers made a visit to the tailoring shop and there some cloth, which was put in evidence, was found. Conversations were had with the defendant, some letters were taken out of the business files, and later were used as evidence. The result of the investigation which ensued was the indictment and conviction of the defendant.

The first question to be considered by this court is as to the sufficiency of the indictment. The indictment is based on section 48 of the Criminal Code, which may be found in the margin.[2]

The objection alleged against the indictment is that it does not charge in the words of the Criminal Code that the defendant received the property "with intent to convert to his own use or gain." This objection was not raised until after the jury was impaneled and sworn. It appears that after the jury was sworn counsel for defense moved that the United States Attorney be required to declare of record under what section of the Criminal Code the indictment was found and upon which he purposed to prosecute the defendant. The reply was:

"There are two sections, 35 and 48, and we have proceeded and will now proceed under 48."

Thereupon the defendant's counsel moved to quash the indictment on the ground that it did not state facts sufficient to constitute a cause of action under section 48 of the federal Penal Code. The court took the objection under consideration and announced on the next morning that he had examined the authorities with some care and denied the motion. An exception was duly taken and the matter has been assigned as error.

[1] A motion to quash ordinarily must be made before arraignment or plea; but, if an indictment does not charge facts sufficient to constitute a crime, the objection may be raised even on a motion in arrest of judgment, the defect not being cured by verdict. The defect alleged in this case is one of substance. The suggestion that the omis-

[2] "Sec. 48. *Receiving, etc., Stolen Public Property.*—Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined, by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender." Act March 3, 1875, c. 144, § 2, 18 Stat. 479; Act March 4, 1909, c. 321, § 48, 35 Stat. 1098 (Comp. St. § 10215).

sion relates to a matter of form and so came too late is clearly untenable.

[2] The trial judge apparently thought that, because there was no comma in the statute between the phrase "in his possession" and the phrase "with intent to convert," the intent clause was intended to modify the verbs "have" and "retain" only. That construction of the statute does not conform to the construction which appears to have been placed upon it by the Supreme Court in Kirby v. United States, 174 U. S. 47, 53, 19 Sup. Ct. 574, 43 L. Ed. 890. In that case it was held incumbent upon the government to prove beyond a reasonable doubt: (1) That the property was in fact stolen from the United States; (2) that the defendant received or retained in his possession with intent to convert to his own use or gain; (3) that he received or retained it with knowledge that it had been stolen from the United States. And Mr. Justice Harlan, who wrote the opinion of the court, said that—

"The act of Congress upon which the present indictment rests makes the receiving of stolen property of the United States with the intent by the receiver to convert it to his own use or gain, he knowing it to have been stolen, a distinct, substantive felony."

The indictment now under consideration charges: (1) That the property was stolen; (2) and that it was the property of the United States; (3) that the defendant unlawfully received it; (4) that defendant knew at the time he received it that it had been stolen. But the allegation that defendant received or retained the property with the intent to convert to his own use or gain is not to be found. And we are obliged to hold upon the authority of Kirby v. United States, supra, that the failure to allege that defendant received it "with intent to convert to his own use" is a fatal defect.

[3] While there must be a reversal on the ground mentioned and we might conclude our decision at this point, we deem it important to state our opinion as to the inadmissibility of certain evidence admitted over objection and exception in order that a repetition of the error may be avoided on the second trial if one takes place. It appears that one of the pay inspectors of the United States Navy visited the shop prior to defendant's arrest and asked to see his correspondence. This the defendant consented to, and the correspondence was produced. Carbon copies of letters addressed to Meade, the Chief Yeoman of the Arkansas, were found which the defendant stated he had written. The inspector had defendant write on these carbon copies that they were true copies of the originals. There were also found original letters written by Meade. These with carbon copies of the replies the inspector took away with him. He had two typewritten copies made of them, and of some of them photographic copies were made. The originals were not produced at the trial, neither were the original carbon copies. The inspector was asked what became of the file of correspondence which he had taken from the shop, and he replied that the last time he saw them they were in evidence in the court-martial case (of Meade) in the Brooklyn Navy Yard. He was asked what the naval routine would be with respect to documents used in a court-

martial, and he replied that they would be filed with the record of the court-martial in the office of the Judge Advocate General of the Navy in Washington, as a part of the records of the United States government. The inspector having identified the carbon copies, the typewritten copies and the photographic copies which he had made, the government offered them in evidence. The defense objected on the ground that they were not originals, were incompetent, and not the best evidence. Counsel for the government in reply offered to take the stand and testify that the papers came from the Judge Advocate in Washington, but counsel for the defense said he would not put him to that trouble and that the quality of the evidence would not be altered by their coming from the Judge Advocate's office. The admission that the originals were in that office showed, he said, that—

"They are not lost, strayed, or stolen, and it must be either one to make this secondary evidence in the case."

No evidence had been introduced to show that the files had been withdrawn from the Judge Advocate's office, or that it was impossible or even difficult to produce the originals, or that a request had been made upon any one to produce them. And there was no evidence that the typewritten and photographic copies were accurate reproductions of the originals. That photographic copies may be received in evidence under some circumstances is no doubt the law.

In Wigmore on Evidence, vol. 1, § 797, that writer considers the question whether photographic copies may be used at all for the purpose of identifying handwriting, and states that a photograph of a writing may be made to falsify like other photographs and like other kinds of testimony, so that especial care should be taken to secure positive testimony as to the accuracy of reproduction, and he also states that it is generally conceded that a photographic copy of handwriting may be used instead of the original; that if the original is obtainable a photograph is inadmissible; and if the original is not obtainable a copy may be used. In the present case, the photographic copies were admissible in evidence only after it had been shown that they were accurate reproductions of the originals, and the absence of the originals had been satisfactorily accounted for.

The best evidence rule, of course, does not mean that secondary evidence cannot be received if the original is in existence. The rule simply requires that the best evidence that the nature of the case is susceptible of must be produced. The rule has its origin in a suspicion of fraud. If there is better evidence of the fact which is withheld, the presumption is that the party has some sinister motive for not producing it. But as the Supreme Court declared in United States v. Reyburn, 6 Pet. 352, 366 (8 L. Ed. 424):

"Rules of evidence are adopted for practical purposes in the administration of justice, and must be so applied as to promote the ends for which they are designed."

In that case it was charged in the indictment that the defendant had "issued" a commission for a certain vessel that it might commit hostilities against Brazil with which country the United States was at

peace. A witness was asked whether he had seen the commission. It was objected that no evidence as to the character or contents of the commission could be received because the United States had not produced the commission and had not obtained a copy of it from the archives at Buenos Ayres, nor shown that the government had made any effort to obtain a copy. The court held that, when the nonproduction of the written instrument is satisfactorily accounted for, secondary evidence of its existence and contents may be shown; the rule being applicable to criminal as well as civil suits. And the court went on to say that—

"If it should be admitted that a record is there [at Buenos Ayres] to be found of this instrument, and that on application a copy of it might have been procured, it would be carrying the rule to pretty extravagant lengths to require the application to be made."

In the pending case this court takes judicial notice of the acts of Congress and of the fact that articles for the government of the Navy require the proceedings of summary courts-martial to be transmitted to the Navy Department "where they shall be kept on file for a period of two years from date of trial, after which time they may be destroyed in the discretion of the Secretary of the Navy." U. S. Comp. St. 1916, Ann. vol. 4, § 3002. The provision requiring the record to be kept on file for a period of two years, etc., was added to the law by an amendment by Act February 16, 1909, c. 131, § 14, 35 Stat. 622. In the view we take of this case, we do not find it necessary to decide whether a trial court has the right to compel by a subpœna duces tecum the production in any part of the United States of any document or paper which an act of Congress says shall be kept on file in one of the departments at Washington. If the department is compelled to produce it in court in New York or San Francisco, it certainly is not kept on the files of the department during the time required for its production and return. But however that may be, there can be no doubt that if the departments at Washington can be compelled to produce in any part of the country the originals of any documents or papers they may have on file, the greatest embarrassment and confusion to the department would be the consequence of such a decision. And at the same time a great and unnecessary financial burden might be imposed upon the litigants. We may say in this case, as was said in the Reyburn Case, supra, that to say that the court, even if it possessed the power to compel the production of the originals, should be required to exercise it under the best evidence rule, would be to carry the rule to pretty extravagant lengths.

In Leathers v. Salvor Wrecking Co., 15 Fed. Cas. 116, No. 8,164 (1875), Mr. Justice Bradley, of the Supreme Court, sitting in the Circuit Court for the Second District of Mississippi held that photographic copies of public documents on file in the War Department at Washington were properly received in evidence; their genuineness having been authenticated in the usual way. The case was in admiralty, a libel having been filed to recover damages for wrecking a steamboat which the defense claimed had been sunk while in the service of the Confederate States and which on the surrender of the Confederate forces was said

to have become the property of the United States. Mr. Justice Bradley, citing no cases, said:

"It is objected by the counsel for the libelant that the documentary evidence in question is not properly authenticated. We think it is sufficiently authenticated to make it competent. The original papers are on file in the War Department, and cannot, without public detriment and inconvenience, be removed. Photographic copies are the best evidence that the case admits of. The wonderful art by which they are reproduced gives us, as we may say, duplicate originals; and in the case of public records or documents properly deposited in the public archives of the country, and which the public interest requires should be there kept and preserved, no better evidence of their character and authenticity can be had than such a reproduction of them by the operation of natural agencies, and an authentication of their genuineness in the usual way, by proof of handwriting. We think the evidence entirely competent and entirely conclusive."

Congress has provided that—

"Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof." U. S. Compiled Statutes 1916, Ann., vol. 3, § 1494.

Congress began to legislate on this subject at the very beginning of the government, the first act being passed in 1789, when it was provided that all copies of records and papers in the office of the Department of State should be evidence equally as the original record or paper. Act Sept. 15, 1789, c. 14, § 5, 1 Stat. 69 (Comp. St. § 1494). In 1797 a similar statute was passed in respect to records and papers in the Treasury Department. Act March 3, 1797, c. 20, 1 Stat. 512. And from time to time similar statutes were passed respecting records and papers in all the different departments. In Block v. United States, 7 Ct. Cl. 406, 413, the statutory provision above referred to was considered, and the court declared that—

"The words 'documents and papers,' used in the several acts of Congress, cannot be held to mean every document or paper on file in the Department, but such only as were made by an officer or agent of the government in the course of the discharge of his official duty. Any other rule of interpretation would defeat the reason on which all public writings are admissible as evidence, i. e., that they have been made by authorized and accredited agents, appointed for the purpose, and that the subject-matter of such writings is of a public nature.

"Official documents, duly certified, need no further proof; but other documents, so certified, do not, by the mere fact of certification, become so authenticated as to entitle them to be received as evidence if they are objected to; but the originals must be produced and proved according to the course of the common law."

But if the "originals" above referred to happen themselves to be on file in one of the departments, there must be power in the courts to compel their production when needed in a judicial proceeding, or else transcripts or copies of them certified under the seal of the department must be admissible in evidence. And if the statute applies only to such writings as "were made by an officer or agent of the government in the course of the discharge of his official duty," then, of course, it has no application to letters by this defendant to the Chief Yeoman of the battleship Arkansas, although it would extend to any letters

written by the latter to the defendant or to the defendant's father. We are not inclined to put so narrow a construction upon the statute, and we can see no substantial reason for thinking that copies of such letters as are on file in the record of the proceedings of the court-martial, and which are authenticated by the Department of the Navy as provided in the act, may not be introduced in evidence at the trial of the defendant. The statute authorizes the introduction in evidence of copies of any documents or papers which are required by law to be kept on file in the departments, provided such copies are authenticated under the seal of the department in which the document is kept. It is the opinion of the majority of this court that the statute was intended to apply at least to any document or paper which is by law required to be filed and kept on file in any of the Executive Departments of the government. A document or paper which is required to be so filed and kept on file is in the opinion of the majority of the court an official document as much so as one which is written or published by an officer in his official character or in the performance of an official duty. The word "official" is defined in the New Standard Dictionary as follows:

"1. Of or pertaining to an office or public trust; as official duties.
"2. Derived from the proper office or officer, or from the proper authority; authoritative; as, an official report."

A paper which must be kept on file in a designated office and which cannot be removed therefrom, pertains to that office, and so becomes official. And we are unable to see why the statute is not as applicable to that class of official papers as well as to the other class. The one class is as much within the letter of the statute as is the other, and it is also as much within the reason and the spirit of the statute.

The introduction in evidence of copies of letters on file in the Department of the Navy at Washington, and which are required by law to be kept there, and which were not authenticated under the seal of the department, was error. Copies so authenticated would have been as admissible as the originals; copies not so authenticated were not as admissible as the originals.

In what has been said we are not to be understood as intending to lay down the proposition that copies of official papers on file in an Executive Department can be received in evidence only when they are authenticated under the seal of the department. It is not our understanding that the provision of the statute under consideration was intended to be exclusive. But if copies not authenticated as provided in the statute are to be introduced in evidence, it is certainly necessary that a proper foundation for their admission should be laid, having in mind the general rule that no evidence shall be received which presupposes that the party who offers it can obtain better evidence.

Judgment reversed.

AGENCY OF CANADIAN CAR & FOUNDRY CO., Limited, et al. v. AMERICAN CAN CO.

(Circuit Court of Appeals. Second Circuit. April 21, 1919.)

No. 148.

1. AMBASSADORS AND CONSULS ⚷5½, New, vol. 8A Key-No. Series—AUTHORITY OF GOVERNMENT REPRESENTATIVES—CHANGE OF GOVERNMENT.
The Russian Supply Committee in America, created in 1915 to have charge of the purchase of supplies and munitions for the Russian government, certified in 1917 by the recognized Russian ambassador to have power to act in that behalf, *held* to have authority to make a settlement of contracts relating to purchase of munitions.

2. CONSTITUTIONAL LAW ⚷68(1)—RECOGNITION OF FOREIGN GOVERNMENT.
Who is the sovereign de jure or de facto of a country is a question for the political department of the government, and the decision by that department in this country is conclusive upon the courts.

3. INTERNATIONAL LAW ⚷9—EFFECT OF CHANGE OF GOVERNMENT.
The rights and liabilities of a state are not affected by a change in the form or the personnel of its government, however accomplished.

4. INTEREST ⚷37(1)—RATE—CONTRACT FIXING RATE "TO DATE OF PAYMENT."
An agreement to pay interest at a specified rate "to the date of payment of the amount" means to the date of actual payment, and not to the date when payment should have been made, and the contract rate governs to the date of entry of judgment or decree in equity for the amount.

5. INTEREST ⚷46(1)—RIGHT TO INTEREST—MONEY WRONGFULLY WITHHELD.
Where different claimants to an admitted indebtedness of defendant made a valid settlement of their differences, fixing the part due each, which settlement defendant refused to recognize, in the absence of any agreement respecting interest, defendant *held* chargeable with interest at the legal rate from the date of demand after the settlement.

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

Suit in equity by the Agency of Canadian Car & Foundry Company Limited, and the Recording & Computing Machines Company, against the American Can Company. Decree for complainants, and defendant appeals. Modified.

For opinion below, see 253 Fed. 152.

This cause comes here on appeal from a decree entered in the United States District Court for the Southern District of New York, on August 14, 1918. The Agency of Canadian Car & Foundry Company, Limited, hereinafter called the "Agency Company," is a corporation organized under the laws of the state of New York, and is a citizen of that state, having its principal place of business in the city of New York. The Recording & Computing Machine Company, hereinafter called the "Recording Company," is a corporation organized under the laws of the state of Ohio, and is a citizen of that state, having its principal place of business in the city of Dayton, in that state. The American Can Company is a corporation organized under the laws of the state of New Jersey, and is a citizen of that state, having its principal place of business in the city of New York. The Canadian Car & Foundry Company, Limited, hereinafter referred to as the "Canadian Company" is a corporation under the laws of the Dominion of Canada.

On respectively, February 27, 1915, and March 8, 1915, two contracts were entered into at Petrograd, Russia, between the Chief Artillery Board of the

Russian government and the Canadian Company. The first contract was for 2,500,000 high explosive shells and 500,000 shrapnel shells. The second contract was for 2,000,000 shrapnel shells. The 2,500,000 shrapnel shells so contracted for required 2,500,000 time fuses. This caused the Canadian Company in March, 1915, to enter into a contract with the Recording Company, in which the latter company agreed to manufacture for the former company 2,500,000 time fuses. In pursuance of these contracts the Russian government, through its attorney, advanced to the Canadian Company between April 20, 1915, and November 8, 1915, $9,904,997.

In October, 1915, there was organized the Russian Supply Committee in America, which took charge on behalf of the Russian government of all matters arising out of the contracts; and between November 22, 1915, and January 5, 1917, the attorney for this Committee, acting under its instructions, turned over to the Canadian Company, on account of the purchase price stipulated in the contracts, various amounts aggregating $64,000,000, which with the advances made prior to November 22, 1915, aggregated $74,000,000. On March 8, 1916, the contract of February 27, 1915, and the contract of March 8, 1915, were amended, and as amended were assigned with the consent of the Russian government to the Agency Company. After March 8, 1916, the performance of the contracts was carried on exclusively by the Agency Company.

Under date of August 23, 1916, an agreement was made between the Recording Company and the defendant for the manufacture by the Recording Company of 1,250,000 "22-second Russian combination fuses." Under date of October 31, 1916, an agreement was made between the Agency Company, the Recording Company, and the defendant, whereby the Agency Company waived any claim or lien which it had upon the time fuses manufactured by the Recording Company for the defendant under the contract of August 23, 1916. In the contract of October 31, 1916, the defendant agreed to pay to the Agency Company $1 of the purchase price of each fuse delivered "until all sums which may now or hereafter be due from and payable" by the Recording Company to the Agency Company should be adjusted or otherwise satisfied. This agreement is one of especial importance in this case. The Agency Company claimed that as a result of the dealings between the Recording Company and itself the latter was indebted to it in a large amount, and under date of November 17, 1916, what is known as the "Arbitration Agreement" was entered into between these two companies. They therein agreed to adjust and settle all accounts and claims arising under the agreement between them.

On January 2, 1917, the Agency Company assigned, among other things, to the Chief Artillery Board of the Imperial Russian government, which was referred to in the assignment as "the government," "all debts, accounts, and sums of money now due and owing, or accruing due from the manufacturer to the Agency Company up to, but not in excess of," $2,352,315.63. The agreement also assigned to the (Russian) government the agreement of October 31, 1916, "with full right and authority on the part of the government to receive from the American Can Company all sums of money payable to the Agency Company under the terms of said agreement." And the agreement expressly provided that the government would pay to the Agency Company "the aggregate amount of the sum or sums that may now be due or hereafter ascertained to be due or accruing due from the manufacturer to the Agency Company, under the terms of said agreements first above referred to, and to make such payments to the Agency Company as and when such sums respectively are ascertained, or are admitted by the manufacturer to be due or accruing due: Provided, however, that the government shall not be liable to pay any sum or sums due or accruing due from said the Recording & Computing Machines Company in excess of the aggregate amount of two million three hundred and fifty-two thousand three hundred and fifteen dollars and sixty-three cents ($2,352,315.63), and that for any sum or sums due or hereafter accruing due from the manufacturer to the Agency Company, in excess of the amount paid by the government in respect thereof, the Agency Company shall retain its rights to receive payment for the same from the manufacturer and the said Ohmer: And provided, also, that the rights of the

Agency Company to issue execution on any judgment recovered by it against the manufacturer and/or the said Ohmer in respect of the same shall not be exercised by the Agency Company until after the government has been reimbursed by the manufacturer and the said Ohmer for any and all sums paid and/or credited to the Agency Company hereunder, nor until all contracts which the manufacturer now has or may hereafter have for the manufacture of Russian time fuses have been completed by the Recording & Computing Machines Company."

On January 11, 1917, the Recording Company agreed with the Russian government that each firm or corporation having a contract with it for time fuses (including thereby the defendant) should deduct $1 from the purchase price of each fuse and pay the same to the government until payment should be made in full of the amount which the government was required to pay to the Agency Company under the agreement referred to in the preceding paragraph. On September 14, 1917, the defendant by letter acknowledged that it held $1,500,000 (or $1 per fuse upon the fuses manufactured for it) for account of the Agency Company or the Imperial Russian government as their interests might appear, and it agreed to retain the same "until such time as there shall have been made a final settlement and adjustment of accounts" between the parties interested, to wit, the Recording Company, the Agency Company, the Imperial Russian government, and the defendant, "or until their interests shall be finally determined by law." The agreement of September 14, 1917, also contained an important agreement as to the payment of interest, to which more specific reference is made in the court's opinion.

On December 18, 1917, an agreement was made between the Agency Company, the Recording Company, and the Russian government acting through Gen. Khrabroff, the president of the Russian Supply Committee in America, which it is claimed was a complete and final settlement, adjusting and determining all matters of account including the amount due from the Recording Company to the Agency Company; and on that day the Recording and Agency Companies by a separate instrument stated and adjusted their accounts, and the Recording Company conveyed to the Agency Company an interest, constituting a prior claim, to the extent of $713,176.07 in the fund of $1,500,000 held by the defendant; and on the same day last above named the Russian government assigned to the Agency Company and to the Recording Company all its right, title, and interest either in law or in equity in and to the sum of $1,500,000, and such interest as may be payable thereon, held by defendant, in such proportion that the Agency Company "shall have and enjoy the sum of $713,176.07 out of said moneys and the Recording Company shall have and enjoy the balance of $786,823.93 of said moneys and such interest as may be payable upon said moneys to be divided equally between said companies."

This suit is brought to compel the defendant to pay to the plaintiffs the moneys which they claim are improperly withheld from them by the defendant. The defendant admits that it is indebted in the amount of $1,500,000, and declares that it has been ready and willing to pay the same as soon as payment thereof would relieve it from possible liability to pay the same again in whole or in part to some other claimant or claimants. The defendant denies that the governments referred to in the various averments of said bill of complaint as "the Russian government" were the same governments; and it declares that it is without knowledge whether any rights or property alleged in said bill of complaint to have been acquired or vested in any Russian government have been acquired or vested in any other or subsequent Russian government in said bill of complaint mentioned, or in the complainants, or either of them, or whether any person, natural or corporate, or persons or body of persons, referred to in said bill of complaint or in any exhibit thereto as acting or purporting to act on behalf of any Imperial Russian government or any other Russian government had authority or power to so act. The court below has entered a decree in favor of complainants.

Simpson, Thatcher & Bartlett, of New York City (Graham Summer, of New York City, of counsel), for appellant.

T. Ludlow Chrystie, of New York City (Arnold Wainwright, K. C., of Montreal, Can., and Francis K. Raynor, of New York City, of counsel), for appellee Agency of Canadian Car & Foundry Co., Limited.

Walter C. Noyes, of New York City (H. A. Toulmin and H. A. Toulmin, Jr., both of Dayton, Ohio, of counsel), for appellee Recording & Computing Machine Co.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the above facts). This is a suit in equity brought for the recovery of $1,500,000 with interest. The general rule of course is that, where the cause of action is for the payment of a sum of money merely, there is no reason why a court of equity should be resorted to. Raton Waterworks Co. v. Raton, 174 U. S. 360, 19 Sup. Ct. 719, 43 L. Ed. 1005. An action at law is regarded as the appropriate remedy in such cases; the remedy at law being full, adequate, and complete. The Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163) in section 267 (Comp. St. § 1244) expressly declares that suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. The bill of complaint in this case, however, alleges that the plaintiffs have no adequate remedy at law and that the fund which they seek to recover is held by the defendant in trust. Whether there is or ever has been a specific trust res, or anything more than an ordinary indebtedness, payment of which the plaintiffs might have obtained in an action at law, and whether such an action would have been fully adequate, has not been raised by motion or answer, or on the argument. We observe, however, that counsel for defendant states in his brief as a fact that "there is no fund in a proper sense; there is merely an indebtedness of $1,500,000 owing by the defendant." Although an appellate court may, and not infrequently does, sua sponte, take the objection and dismiss the bill (Southern Pacific R. R. Co. v. United States, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507), it will not in all cases pursue that course. We see no reason why in the present situation we should enter upon that inquiry, but we will assume that, if the plaintiffs are entitled to the money for which they have filed their bill, they may maintain their suit in a court of equity.

We may, however, add that the complainants derive through an assignment, and that the assignee of a chose in action under the decisions of the Supreme Court cannot proceed in equity merely on the ground that his interest is an equitable one, but must proceed at law. New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484; Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271. We are not unaware that, where a part only of a chose in action has been assigned, the assignee has been allowed to sue in equity, upon the theory that courts of law would not recognize the right to split up a single cause of action into many

actions without the assent of his debtor, since it might subject him to many embarrassments not contemplated in the original contract. Mandeville v. Welch, 5 Wheat. 277, 5 L. Ed. 87. But even in case of partial assignments it is not necessary to sue in equity if the debtor consents to the assignment. 5 C. J. 1000. In this case the whole interest was assigned by the same instrument to two assignees, although in unequal shares, and these two assignees are the complainants, and the whole chose, and not a part of it, is the subject-matter involved. If there are equitable grounds why the assignees should not have proceeded at law, they do not suggest themselves. The defense has not interposed objections, and none were made by the District Judge, and under the circumstances we are not now inclined to dispose of the case otherwise than upon the merits.

[1] We start with the proposition that there is conceded to be $1,500,000 in the possession of the defendant which it is not entitled to withhold, provided the Russian government has through its proper officials effectively transferred and assigned all the right, title, and interest it may at any time have had therein to the plaintiffs in this suit, so that upon payment being made to the plaintiffs in the proportions to which they may be respectively entitled the defendant can be compelled to pay twice, because some Russian government at some time in the future may repudiate the action taken by those who signed the agreement of December 18, 1917, and deny their authority to act as the official representatives of Russia. We also find that this fund belongs to the complainants in the following proportions: $713,176.07 to the Agency Company; $786,823.93 to the Recording Company. What interest, if any, on these respective sums the complainants may be entitled to will be considered in a subsequent part of the opinion.

We come, then, to consider first whether the Russian government has surrendered effectively any interest it may have had in the $1,500,000 owing by the defendant; and it is to be observed in respect to this phase of the case that the agreement of December 18, 1917, by which the Russian government is said to have transferred to complainants all its interest in the fund was by Khrabroff as president of the Russian Supply Committee in America, "acting for and on behalf of the Russian government," which reads as follows:

"Whereas, by agreement dated the 8th day of March, 1916, made between the parties hereto and * * * as voting trustees, two hundred (200) shares of the capital stock of * * * the Agency Company, were assigned and pledged to the said voting trustees as security for the performance by the Agency Company of the two contracts mentioned in said agreement; and

"Whereas, all matters and questions arising out of or in connection with the performance of said contracts have now been adjusted and settled and it is desired to dissolve the voting trust created by said agreement and to reassign said shares:

"Now, therefore, this indenture witnesseth: The parties hereto hereby consent and agree to the cancellation of the said hereinabove recited agreement, dated the 8th day of March, 1916, and to the dissolution of the voting trust thereby created and the reassignment of the shares of the capital stock of the Agency Company mentioned in said agreement and the delivery of the certificates of said shares to the holders of the voting trust certificates issued under the provisions of said agreement."

Whatever rights the Russian government may at any time have had in the fund of $1,500,000, they came to an end with the execution of the above document, provided General Khrabroff had authority to act on behalf of the Russian government. The claim that he had no authority to act for the government of Russia is not taken seriously by us. His authority is conclusively shown. General Khrabroff was president of the Russian Supply Committee. That committee as previously said was created in October, 1915. Associated with General Khrabroff on the committee were the commercial attaché, the naval attaché and the financial attaché to the Russian embassy at Washington, the official character of all of whom had been duly recognized by the government of the United States, as appears from a diplomatic list issued by the Department of State and also from the certificate of the Russian ambassador to the United States, Boris Bakhmetieff, all of which are in the record.

On July 5, 1917, the United States government recognized Boris Bakhmetieff as the Russian ambassador. The record contains a certificate, signed and sealed on May 8, 1918, by Robert Lansing, Secretary of State of the United States of America, stating that Boris Bakhmetieff presented his letter of credence to the President and was officially received by the President as ambassador extraordinary and plenipotentiary of Russia on July 5, 1917, and that he has since that date been recognized by the Department of State as the ambassador of Russia. The certificate of the ambassador declared the official character of the Russian Supply Commission, and that it was organized to purchase supplies in the United States for Russia, and to accept supplies purchased or manufactured in the United States for Russia, and that it had power to settle all matters relating to contracts for supplies so purchased or manufactured during the time herein involved.

[2] Who is the sovereign de jure or de facto of a country is a question for the political departments of the government. It is not a judicial question. The decision of the matter by the political departments is in this country conclusive upon the judges. Jones v. United States, 137 U. S. 202, 212, 11 Sup. Ct. 80, 34 L. Ed. 691.

The same principle is the established law of England. Republic of Peru v. Dreyfus, 38 Ch. Div. 348, 356, 359. In the same way the question who represents and acts for a foreign sovereign or nation in its relations with the United States is determined, not by the judicial department, but exclusively by the political branch of the government. In re Baiz, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. So that the certificate of the Secretary of State, above referred to, certifying to the official character of Boris Bakhmetieff as the Russian ambassador to the United States is not only evidence, but it is the best evidence, of Mr. Bakhmetieff's diplomatic character, and is to be regarded by the courts as conclusive of the question, and the court could not proceed upon argumentative and collateral proof. And the certificate of Mr. Bakhmetieff, given under his hand and seal as Russian ambassador, concerning the membership and powers of the Russian Supply Committee, must be regarded in like manner as an

authoritative representation by the Russian government on that subject, and as such binding and conclusive in the courts of the United States against that government on the matters to which it relates.

In the Goods of Anne Dormoy, 3 Hagg. Ecc. 767 (1832), the court held that the certificate of the French consul general was sufficient proof of the law of France, the doubt being whether the French ambassador himself should not have certified, instead of the consul general. In the Goods of Klingman, 3 Swabey & Tristram, 18 (1862), the ambassador to Great Britain of the King of Hanover gave a certificate under the seal of the legation that a will executed in accordance with law of England was a valid will under the law of Hanover, and the court held that such a certificate was sufficient evidence of the foreign law. In the Goods of Prince Oldenburg L. R. 9 Prob. Div. 234 (1884), the question was as to the law of Russia concerning the validity of a will of a deceased member of the royal family. The court received in evidence a certificate under the hand and seal of the Russian ambassador in England to the effect that by the law of Russia no testamentary dispositions of any member of the royal family could have any effect unless approved by the Emperor. The certificate was accepted as sufficient proof of the law of Russia.

[3] The court has no doubt as to the validity of the settlement made in December, 1917. The principle of law is well established that the rights and liabilities of a state are not affected by a change in the form or the personnel of a government, no matter how that change may be effected. The obligations of a state, the debts due to and from it, are not affected by any transformation in the internal organization of its government. In Taylor's International Public Law, § 161, he says:

"As the people as a whole were bound at their creation by the acts of organized agents, each new government succeeds not only to the fiscal rights but to the fiscal obligations of its predecessor."

And in section 160 he says:

"It is the privilege of every state to adopt any form of government it deems best suited to its internal wants and conditions, and its identity is never lost so long as its corporate existence survives. While that is preserved neither internal revolutions, nor alienations of parts of its territory can diminish any of its rights or discharge it from any of its obligations."

The question at issue being, on this phase of the case, whether the Russian government has effectually divested itself of all interest in the moneys now in the hands of the defendant, this court holds that the certificate of the personal representative of that government, duly accredited to and recognized by the government of the United States, certifying that the official who assumed to assign and release any such interest as his government might have was authorized to act in behalf of his government in making such assignment and release, is competent and conclusive evidence, which the court below properly held to be decisive.

[4] This brings us to the question as to the rate of interest which the defendant should be required to pay to the complainants. In the agreement of September 14, 1917, the defendant agreed that, in the

event of any portion of the $1,500,000 fund becoming payable to the Recording Company from the defendant, the latter—

"will allow a charge by you [the Recording Company] for interest at the rate of 2 per cent. per annum, or such other rate as the Can Company [defendant] may actually receive from its banking house on the deposit of the aforesaid sum upon such sum as may be paid to you from the aforesaid sum; said interest to be figured from November 1, 1917, to the date of payment of the amount. It is furthermore understood that no charge for interest prior to November 1, 1917, shall be allowed."

At the time that agreement was made there were, as we have seen, disputes pending between the Recording Company, the Agency Company, and the Russian government, and also between those parties and the defendant. As this fund was withheld pending the settlement of the disputes, it was agreed that interest was "to be figured from November 1, 1917, to the date of payment of the amount," and it was also expressly agreed, as above appears, that "no charge for interest prior to November 1, 1917, shall be allowed." The District Judge accordingly has held, rightfully, that the Recording Company was entitled to interest only from November 1, 1917.

Then the agreement was that interest was to be allowed at the rate of 2 per cent. per annum, or such other rate as the defendant received from its banking house on the deposit of the $1,500,000 fund; and the testimony in the record shows that defendant has not received from any banking house interest on any deposit at a higher rate than 2 per cent. per annum since November 1, 1917. The District Judge accordingly has held that the Recording Company is entitled to interest at the rate of 2 per cent. per annum from November 1, 1917, to December 28, 1917, and that from December 28, 1917, it is entitled to interest at the rate of 6 per cent. per annum. His theory evidently was that the Recording Company on December 28, 1917, was entitled to receive the $786,823.93, a final settlement having been arrived at, but as the defendant declined to pay when the time for payment arrived on December 28, 1917, and stated that it would not pay except "pursuant to the judgment of a court," it was from that time on in default, and therefore bound to pay interest at the legal rate of 6 per cent. per annum. We have no doubt that the defendant would be rightfully chargeable with that rate from the time of the default if the parties had not expressly agreed that the rate of interest should be 2 per cent. per annum "to the date of payment of the amount." If those words mean to the date when the money should have been paid, the District Judge was right in charging the defendant with interest at the rate of 6 per cent. per annum from December 28th. If the words, however, mean to the date when payment is made, he committed an error. If the parties meant the words to have the former meaning, they certainly did not say so; and the court is not at liberty to say so for them. In Ex parte Fewings, 25 Chan. Div. 338, Fry, L. J., said, "'Paid' refers to an actual receipt of money." And we say that in the same way "to the date of payment of the amount" means to the date of the actual receipt of the money.

The question of interest was little discussed at the argument. We derived from it no assistance as to the rights of parties to interest who are situated as are the parties to this litigation. The court below cited no authorities upon the question of interest, and neither of the counsel for the complainants have cited any in their briefs. This court approached this subject of the right of interest in sympathy with the holding of the lower court, thinking, though perhaps without justification, that the conduct of the respondent in withholding payment was influenced by the low rate of interest upon which the parties had agreed. On this branch of the case the court entertained much the same feeling as that which Lord Chancellor Herschell expressed in London, C. & D. Ry. Co. v. Southeastern Ry. Co., [1893] App. Cas. 429, 437, when he said:

"I confess that I have considered this part of the case with every inclination to come to a conclusion in favor of the appellants * * * of giving them interest * * * for this reason: that I think that when money is owing from one party to another, and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party, who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld, from the time of action brought, at all events. But I have come to the conclusion, upon consideration of the authorities, agreeing with the court below, that it is not possible to do so, although, no doubt, in early times the view was expressed that interest might be given under such circumstances by way of damages."

The English and the American law on the subject of interest differ, or did differ, at the time Lord Herschell wrote. The courts of this country generally allow interest at the legal rate by way of damages from the time of the maturity of an obligation, where the parties have not made an express agreement for interest after maturity. We have not in this case that difficulty to encounter. The difficulty here is that we do not see our way to sustaining the decree of the District Judge in allowing interest at the rate of 6 per cent. from December 28, 1917, on the sum due the Recording Company. That interest we might have allowed, were it not for the express agreement of the parties that the fund should bear interest at the rate of 2 per cent. until payment.

Prior to St. 37 Hen. VIII, c. 9, the taking of interest for the use of money was unlawful in England. That statute authorized the taking of interest, and fixed the lawful rate at 10 per cent. per annum, and punished any one who received more with forfeiture and imprisonment. The history of the right to interest in England is a matter of curious interest until 1854, when St. 17 & 18 Vict. c. 90, abolished all usury laws and established "free trade in money," largely through the influence of Jeremy Bentham. In this country the courts from the beginning viewed the allowance of interest with greater favor than the courts of England. There was never any doubt with our courts about the right to interest when expressly contracted for, or where an undertaking to pay it might be implied from the usages of trade;

and from a very early date the American courts recognized the fact that the English common law was not suited to the conditions existing in this country and they declined to follow it. In Selleck v. French, 1 Conn. 32, 6 Am. Dec. 185, Chief Judge Swift, speaking for the Connecticut Supreme Court of Errors, specified nine classes of cases in which interest was allowed in that state, and concluded by saying: "Such are the principles which have been long established in this state." And the fifth of the propositions it is interesting to note was the following:

"5. Where one has received money for the use of another, and it was his duty to pay it over, interest is recoverable for the time of the delay; but if the holder of money for another is guilty of no neglect or delay, he will not be chargeable with interest."

The principle that one who has not agreed to pay interest is nevertheless chargeable with it from the time of his default in making payment is undoubtedly the law in this country. In Chicago v. Tebbetts, 104 U. S. 120, 125, 26 L. Ed. 655, the principle was recognized and applied that a party guilty of unreasonable and vexatious delay in making payment is chargeable with interest from the time the debt became due, and is not relieved by offering to pay interest from the time when the delay began to be unreasonable and vexatious. In that case the delay was accompanied by litigation; as the court put it, the city had litigated and contested the demand year after year and in court after court.

In 22 Cyc. 1498, it is said to be the rule that interest is allowed as damages where there has been unreasonable and vexatious delay in making payment.

We do not, however, have to consider what limitations, if any, attach to the doctrine above announced in so far as the Recording Company's claim to interest is concerned; for we are dealing with an express agreement which the parties made as to the payment of interest. In 16 Am. & Eng. Encyc. of Law, p. 1053, it is laid down that—

"As a matter of course, where the interest of the parties as to the rate after maturity is expressed in the contract, such rate, if not illegal, will in general control."

This is the law of New York; the courts holding that, when a contract provides that interest shall be paid at a specified rate until the principal is paid, the contract rate governs until the payment of the principal, or until the contract is merged in a judgment. Taylor v. Wing, 84 N. Y. 471; O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64.

In Holden v. Trust Co., 100 U. S. 72, 25 L. Ed. 567, the maker of a note agreed to pay it, with 10 per cent. interest. The court held that interest should be computed at that rate up to the maturity of the note, and thereafter at 6 per cent. After calling attention to the fact that the agreement of the parties extended no further than to the time fixed for the payment of the principal and was silent as to everything beyond that, the court said:

"If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has

been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation, such an intendment cannot be inferred."

And see Brewster v. Wakefield, 22 How. 118, 16 L. Ed. 301; Bernhisel v. Firman, 22 Wall. 170, 22 L. Ed. 766. If the local law is different, the federal courts will follow it. Cromwell v. County of Sac, 96 U. S. 51, 61, 24 L. Ed. 681; Ohio v. Frank, 103 U. S. 697, 26 L. Ed. 631. In New Orleans v. Warner, 175 U. S. 120, 147, 20 Sup. Ct. 44, 44 L. Ed. 96, the agreement was that if the warrants were not paid upon the date fixed for presentation they should bear interest at the rate of 8 per cent. until paid. The court, after referring to Holden v. Trust Co., supra, and the other cases cited, said:

"These very cases, however, recognize the principle that, if the parties themselves have fixed a rate to be paid up to the time of payment, that rate will be respected. In this case both the statute and the warrants provided that such warrants shall bear interest at the rate of 8 per cent. 'until paid,' and we are therefore of opinion that complainant is entitled to that rate from November 26, 1894, the date of filing the bill and issuing the subpœna."

The commencement of the suit was a sufficient demand to charge the defendant with interest from that day.

When the agreement is for the payment of interest at a certain rate until the note is paid the parties have agreed upon the amount of the damages to be paid because of the nonpayment of the principal at maturity. Reeves v. Stipp, 91 Ill. 609. In Browne v. Steck, 2 Colo. 70, the note sued on provided for interest at the rate of 10 per cent. per month from maturity until paid. The court regarded the rate specified as prima facie sufficient to establish the measure of damages for the breach of the contract. This was followed in Buckingham v. Orr, 6 Colo. 587, 591, 592. In Daniel on Negotiable Instruments (6th Ed.) vol. 2, § 1458, that authority says:

"And if the note runs with a certain rate of interest until paid that rate, if legal, runs after maturity as before."

And see Augusta National Bank v. Hewins, 90 Me. 255, 38 Atl. 156; Jennings v. Moore, 189 Mass. 197, 75 N. E. 214; Seymour v. Continental Life Ins. Co., 44 Conn. 300, 26 Am. Rep. 469. We conclude therefore that in an action at law if the parties agree upon the rate of interest until the money is paid, or until date of payment, that agreement is controlling and fixes the measure of damages upon default.

But this is not an action at law. It is a suit in equity, and the question arises whether the same rule is to be applied that would be applicable if the action had been at law. The courts of equity have long had certain rules which they applied to certain classes of cases. If a trustee was guilty of unreasonable delay in investing the trust fund or in transferring it to those destined to receive it he was compelled to pay interest to the cestui que trustent even where it was not prayed by the bill. An executor or administrator whose duty it was to pay the testator's obligations as soon as he had assets collected which were

sufficient for the purpose was himself charged with interest at the same rate the obligations bore. And if he failed to account promptly to the residuary legatee for the surplus of the estate he himself had to pay interest for the balance improperly retained. So if a trustee of a bankrupt's estate neglected to pay a dividend to the creditors, equity required him to pay interest from the time when the breach of duty commenced. A trustee could not make a profit out of his trust, and if in breach of his duty he used the trust fund in trade, the cestui had the option of taking either interest or the actual profits which might have been realized. Sometimes he was charged in England with 4 per cent. and sometimes with 5 per cent. interest, and sometimes with compound interest, according to the circumstances of the case. In this country the trustee who has been guilty of misconduct has been usually charged the legal rate of interest. But the class of cases to which reference has been made have been cases where interest has not been derived from any contract or agreement or statute, but in accordance with the well-established principles of equity jurisdiction. And we are dealing here with an actual agreement fixing the rate of interest to be paid from a specified date "to the date of payment."

We are not aware that equity will construe such an agreement differently from the construction placed upon it at law. The construction to be placed on the language of contracts is the same both at law and in equity. Jersey City v. Flynn, 74 N. J. Eq. 104, 70 Atl. 497; 13 C. J. 521. And contracts for interest are governed by the same rules of construction and interpretation as are other contracts. 16 Am. & Encyc. of Law, p. 1001. In 22 Cyc. 1475, it is said:

> "The courts of equity, in decreeing or refusing interest, generally follow the law; but interest is sometimes allowed by courts of equity, in the exercise of a sound discretion, when it would not be recoverable at law."

We find no reason and no authority for saying that equity will not follow the law in giving effect to the agreement of the parties as to the rate of interest with which the defendant was to be charged "to date of payment." In Ex parte Fewings, supra, the agreement was to pay at the rate of 5 per cent. per annum so long as the principal or any part thereof remained unpaid. The claim was reduced to judgment, and in England judgments carry interest at the rate of 4 per cent. The Chief Judge in Bankruptcy held that, where the parties had expressly agreed that the rate should be 5 per cent. until paid, the creditor would be entitled to that rate after judgment and until paid. The Lords Justices of the Court of Appeal reversed the holding, and held that the true construction was that interest at the rate of 5 per cent. should be paid so long as any part of the principal remained due under the contract, so long as the contract for payment remained in force, but that the contract came to an end when judgment was entered and the liability under it was gone, being merged in the judgment, so that it could not therefore be said that there was an agreement to pay 5 per cent. So in the case now under discussion the rate of 2 per cent. continues until the decree is entered.

We must conclude from what has been said that the decree was

erroneous in so far as it awarded to the Recording Company interest at the rate of 6 per cent. per annum on the sum of $786,823.93 from December 28, 1917, to the entry of the decree. The Recording Company would have been entitled under the agreement of September 14, 1917, to interest at the rate of 2 per cent. per annum from November 1, 1917, to the entry of the decree, if it had not been for the agreement of December 22, 1917. By that agreement the Recording Company assigned to the Agency Company one-half of the interest it should receive upon the moneys withheld by the defendant. The decree should have provided for the payment to the Recording Company of one-half the interest on the sum of $786,823.93 at the rate of 2 per cent. per annum from November 1, 1917, to the entry of the decree.

[5] We now come to the interest the Agency Company was entitled to receive. Upon the trial the Agency Company urged (1) that it was entitled to interest on the entire $1,500,000 from the time the several installments thereof fell due to December 22, 1917, and thereafter on $713,176.07 to the date of decree, at the rate of 6 per cent. per annum, and also one-half of any and all interest which the Recording Company might be entitled to receive from the defendant; or (2) if that be denied, that defendant be required to account to the Agency Company for the profits realized by the defendant from the use of the funds in its business and that the plaintiff should also receive one-half of any and all interest which the Recording Company might be entitled to receive from the defendant; or (3) if neither of these contentions should be upheld, that it was entitled to interest at the rate of 6 per cent. per annum on $713,176.07 from December 28, 1917, to the date of the decree, and, further, one-half of any and all interest which the Recording Company might be entitled to receive from the defendant.

The District Judge held that the Agency Company was not entitled to interest on its $713,176.07 until after the December settlement and the Agency Company's demand on December 28, 1917. From that date he held the Agency Company entitled to interest from the defendant on its $713,176.07 at the rate of 6 per cent. per annum. He also held that it was entitled, in pursuance of the terms of the agreement of December 22, 1917, between the Agency Company and the Recording Company to one-half of the interest on the Recording Company's $786,823.93 from November 1, 1917, to December 28, 1917, which defendant was under obligation to pay to the Recording Company at the rate of 2 per cent. per annum, and the decree so provided. Neither of the plaintiffs have appealed, but the defendant in its appeal disputes the allowance of interest.

From what has been said it appears that the Agency Company was entitled to one-half of the interest which the Recording Company is to receive on $786,823.93 from November 1, 1917, to the entry of the decree, instead of to December 28, 1917, as the lower court directed. But with that question determined there remains to be settled the question concerning the interest on $713,176.07, which we have seen is due to the Agency Company out of the $1,500,000 retained by the

defendant. While the defendant agreed to pay interest at the rate of 2 per cent. per annum on the sum of $786,823.93 due to the Recording Company, it never expressly agreed to pay any interest on the $713,-176.07 due to the Agency Company; and in the agreement of December 22, 1917, wherein the Agency Company and the Recording Company adjusted matters as between themselves, it was stated that there was due to the Agency Company "a balance of $713,176.07 and one-half of any and all interest which the Recording Company may receive upon the moneys withheld by the American Can Company" the defendant herein. It is evident for reasons we are not concerned with that it was not contemplated that interest should be paid by the defendant to the Agency Company on the balance of $713,176.07. Under these circumstances the defendant was not chargeable with interest until it placed itself in default, but from that time it was chargeable with interest at the legal rate.

We have pointed out in an earlier part of this opinion that the High Court of Chancery from early days compelled trustees to pay interest when they withheld the trust fund. That practice our equity courts followed. In Gray v. Thompson, 1 Johns. Ch. 82, Chancellor Kent charged a trustee with interest on a trust fund which he had failed to distribute, because he rendered no sufficient excuse for not distributing it as it was his duty to have done. Other cases in equity might readily be cited. And in this country our courts have applied the principle in actions at law. The general rule is stated in 22 Cyc. 1505, where the authorities are collected. It is there said:

"Where money belonging to another is not paid over to the person entitled to receive it at the time it should be paid over, interest is generally allowed as damages for such wrongful withholding thereof."

And in 22 Cyc. 1514, it is also said, citing the authorities, that:

"Where the amount of the demand is sufficiently certain to justify the allowance of interest thereon the existence of a set-off or counterclaim which is itself unliquidated will not prevent the recovery of interest on the balance of the demand found due from the time it became due."

And where the amount of a demand is definitely agreed upon by the parties, interest will be allowed from the date of such liquidation. Thomas v. Wells, 140 Mass. 517, 5 N. E. 485; Clark v. Dutton, 69 Ill. 521; Hoagland v. Segur, 38 N. J. Law, 230.

We do not overlook the fact that, where the amount demanded is disputed on reasonable grounds and in good faith, interest will not be allowed on the demand until the right thereto is authoritatively determined. We think, however, that it was the duty of the defendant to pay when it was properly informed that the parties "had arrived at a final settlement" and demand of payment was made on December 28, 1917. The defendant's refusal to pay without a lawsuit is not to be excused by any of the circumstances of the case. We therefore agree with the court below that the Agency Company is also entitled to interest on its $713,176.07 at the rate of 6 per cent. per annum from December 28, 1917.

In what has been said concerning interest we have pointed out the principles which should have been applied to the case by the District Judge at the time the decree was entered. The situation is not now what it was at that time, because of the failure of either of the complainants to appeal from the decree. The result is that neither of the complainants is entitled to ask the court to increase the amount of interest which it is entitled to receive from the defendant up to the entry of the decree. This court has made no calculation for the purpose of determining the exact amount of interest the complainants would have received under the decree as entered and under the decree as it should have been entered if the correct principle had been applied. We have indicated in what the error consisted; and if it appears that the rectification of the error will reduce the amount of interest due from the defendant the decree must be modified accordingly.

As the Agency Company did not appeal, it is strictly entitled to claim only one-half of the 2 per cent. interest which the Recording Company will receive from the defendant on $786,823.93 from November 1, 1917, to December 28, 1917; that being the amount awarded to it under the decree below. But the counsel of each complainant has asked the court to settle the question of interest as between the two complainants as though each had appealed. In compliance with that suggestion the Recording Company must be directed to pay over to the Agency Company one-half of the 2 per cent. interest to be received from defendant on $786,823.93 from November 1, 1917, to the entry of the decree.

The case is remanded to the District Court, which is directed to proceed in accordance with this opinion.

THE ADAH.

Appeal of BEER, SONDHEIMER & CO. et al.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 156.

1. SHIPPING ⚷126—DISCHARGE OF CARGO—NEGLIGENCE OF CONTRACTING STEVEDORE.
   A stevedore, contracting to discharge a ship into lighters or scows, although his contract does not include trimming cargo, is bound to stop work, if and when it becomes unsafe to continue loading without trimming, and is liable to third parties injured, if he proceeds.
2. SHIPPING ⚷126—NEGLIGENCE IN DISCHARGING—LIABILITY FOR INJURY TO VESSEL.
   A cargo owner, who has agreed to discharge the vessel, is not liable as principal for negligence of a stevedore with whom he contracts for such discharge, but is liable on his contract with the vessel for any injury to her resulting from such negligence.
3. SHIPPING ⚷209(1)—PROCEEDING FOR LIMITATION OF LIABILITY—PERSONS BOUND BY DECREE.
   Parties to a proceeding for limitation of liability, who voluntarily ap-

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

pear or, after they are brought in, whether rightfully or not, join issues with petitioner and between themselves, and litigate questions of liability, are bound by the decree.

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

Petition of Charles A. Fox, owner of the deck scow Adah, for limitation of liability. From the decree Beer, Sondheimer & Co. and Brady & Gioe, Incorporated, appeal. Affirmed.

In April, 1915, the petitioner, Fox, owned the scow Adah. This vessel is the usual type of harbor deck scow, 94 feet long on the flat bottom, 112 feet over all, 33 feet beam, 10 foot side, and 22 inches sheer. She was to carry all her load on deck, and was calculated to be "decks to" with about 765 tons aboard. The scow herself displaced (i. e., weighed) 193 tons light (this is the average of experts' calculations) on a draught of 26 inches. The Adah was launched in December, 1914, and lay at the builder's yard until the latter part of April, 1915, when Fox chartered her to Jacobus et al., knowing that she was to be used to lighter ore, from alongside a steamer.

Beer et al. owned a large lot of ore or "copper concentrate" (a sticky clayey substance that will not run and distribute itself like sand or crushed stone) on the steamship Uller. With them Jacobus contracted to transport this ore, from alongside the Uller to its ultimate destination, but he did not undertake either the loading, discharging, or trimming of the cargo. Beer et al. contracted with the stevedoring concern of Brady et al. to load the lighters furnished by Jacobus, but the stevedores were not paid for trimming. They had offered to load at 20 cents a ton, or load and trim at 23 cents. The lower figure was accepted, and work began with no bargain or arrangement as to trimming, specifically or explicitly made with anyone by Beer, who made all the contracts looking to the transport of the concentrate from alongside the Uller to its delivery point.

Jacobus put the Adah alongside the Uller, and Brady began loading at 2 p. m. April 22d. Work proceeded night and day until 3 a. m., April 24th, when the scow had not over 743 tons on board. She was then started (stern first) from her berth alongside, and toward the bulkhead, by a line from the Uller's winch, and then hauled clear of the steamer by a line from the bulkhead. Almost as soon as her stern got into the tideway (from which the Uller previously protected her) she careened to port (or toward the tide), dumped her cargo, and turned over, striking and injuring the Uller in the process. The cargo was, of course, lost, and the Adah herself greatly damaged.

Litigation over this disaster was begun by the owners of the Uller, who sued Brady, alleging that the capsizing and consequent damage was due to negligent loading. Into this suit (in admiralty) Jacobus, Fox, and Beer were all summoned (or intended so to be) under the fifty-ninth rule, on the theory that either Beer or Jacobus was responsible as principal for whatever negligence in loading existed, or that Fox, or the Adah, or both, were liable because the loss was proximately due to unseaworthiness of the scow.

Thereupon Fox began this limitation proceeding, in which all the other enumerated parties appeared, filed claims and answered. They all joined issue with Fox by declaring the Adah unseaworthy, but Beer by answer thrust liability on Jacobus by asserting that he should have trimmed the cargo—something Jacobus denied, alleging that Brady had "assumed entire charge" of the loading, so as to keep the boat "at all times on an even keel," and further urging that in respect of proper loading Brady was Beer's agent or servant, and did load negligently.

The Uller also averred that Brady had unskillfully placed the cargo, and so contributed to disaster, while Brady denied all allegations of such negligence contained in Fox's petition, and averred that the sole cause of injury was the negligence of Fox or his agents. In some form, also, every answer contested Fox's right to limit.

The decree below (read with the opinion) holds: (1) That the Adah was seaworthy, and not negligent, wherefore neither she nor her owner is responsible for any part of the loss or damages; (2) that negligent loading by Brady was the sole cause of disaster; (3) that Beer, as the employer of Brady, was liable to the Uller; and (4) that Jacobus was not chargeable with any duty or fault in the premises. Wherefore Brady primarily, and Beer secondarily, are declared liable for "the loss of or damage to the said cargo and to the steamship Uller." Nothing is said regarding the Adah's own damages, nor is any recovery in money decreed for or against any party, except in respect of costs.

From this decree Brady and Beer appealed, both substantially demanding a new trial, and the former specifically complaining (by assignment of error) that the court below, not only found the Adah guiltless, but "held this claimant (Brady) responsible for the damages arising out of said disaster."

Geo. V. A. McCloskey, of New York City, for petitioner.

Mark Ash, of New York City, for Jacobus and others.

Chauncey I. Clark, of New York City, for the Uller.

Harrington, Bigham & Englar, of New York City, for Beer, Sondheimer & Co.

Kirlin, Woolsey & Hickox, of New York City (Robert S. Erskine and John M. Woolsey, both of New York City, of counsel), for Brady and others.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The relation of Jacobus to the other parties presents no question of law. The statement of fact prefixed to this opinion sufficiently indicates that on this point we agree with the court below. Nor does the contention that Fox has no right to limit liability require discussion. Let it be admitted that, if he had chartered to Jacobus an unseaworthy boat, he could not limit, under Benner Line v. Pendleton, 217 Fed. 497, 133 C. C. A. 349, affirmed Pendleton v. Benner Line, 246 U. S. 353, 38 Sup. Ct. 330, 62 L. Ed. 770. But that does not mean that he could not, while asserting seaworthiness, petition for the benefit of the statute; nor can it be contended that, if seaworthiness be established, he may not be declared free of liability for the injury and loss complained of.

Appellants lay much stress on the duty of petitioner affirmatively to prove seaworthiness, inasmuch as a presumption contra is said to have arisen by the admitted occurrence of accident. We do not find it necessary to consider the matter. Decision below was not reached by dealing with presumptions, nor was it rested on burden of proof or evidence. The record is very ample, and we have no difficulty in ascertaining therefrom, by a fair preponderance of credible evidence, why the Adah capsized.

We hold it proven that the scow was well built, new, of approved design, and did not leak. More particularly it is proved that lying light in winter weather at the yard did not cause her seams to open. It follows that, until she took it in over her rail, there was no more water in her than is usual in a new and well-built boat of her class.

When a tight boat capsizes in calm water, the inference is almost irresistible that her action is due to the disposition of her load. But we do not rest on the inference; it is positively proven, and by Mr. Brady himself, that no trimming was done, the material was dumped

approximately amidships, and left to "run when it got piled high enough," but only the "dry part would run." And by other witnesses it is shown that before a full load was put on the Adah the deck was awash on the port side, and she was heavy by the stern. We find that this was the reason why the 25 tons additional that she ought to have carried were never put aboard, and why she was removed from the Uller's side. We also accept the testimony that this combination of longitudinal and transverse unevenness is peculiarly dangerous, and find that the Adah was in such a condition of instability that the oscillations caused by hauling her across the tide (slight as they must have been) were enough to tip her over.[1]

[1] Under Boret v. Robert R., 255 Fed. 37, — C. C. A. —, the stevedores were held primarily liable for the damage resulting from such bad loading. It was there held that a stevedore, under exactly the same contract as is here admitted, was bound to stop work when and if it became unsafe to continue loading without trimming. He may call on his principal or employer to do the necessary work (in The Robert R., the steamship; in this case, the cargo owner), but he proceeds in a work endangering others at his individual peril; and the fact that his paymaster, when engaging him, economized by refusing to pay for trimming, does not relieve the stevedore who loads badly (i. e., out of trim), and though it may emphasize it does not cause any liability to third parties, on the part of the economic employer.

[2] In this case Brady (like the stevedores in The Robert R., supra) is an independent contractor, the relation of principal and agent does not exist, nor was the work contracted for inherently or necessarily dangerous. The ship in The Robert R. was liable for lost cargo as a carrier; i. e., in contract. In this case Beer is responsible contractually to the Uller for negligence in carrying out his agreement to remove the cargo from her hold and safely put in overside.

1 The record contains much scientific or mathematical evidence which has not been overlooked. The effort was to demonstrate that such a vessel as the Adah, with no greater inclination than was testified to by extremely unscientific observers, could only capsize through action of free water in the hold—because her metacenter, when careened as stated, must have remained several feet (calculations vary) above the center of mass or gravity. The witnesses doubtless testified fairly from the data furnished. But we think it was always assumed that the load was symmetrical (i. e., that on an even keel the center of mass was in the same vertical as the center of buoyancy), and no allowance was made for the effect of water coming over the deck—though one witness (Mr. Kindlund) admitted that such event would make against stability. Any water over the deck edge "diminishes resistance to inclination." The Royal Sceptre, 187 Fed. 228.

As this vessel was loaded heavily to port, it is obvious that misplaced weight on deck could produce the same result as free water in the hold, while as soon as the cargo began to slide the situation would be aggravated. It may be true, as estimated by Mr. Rodemund, that the entire cargo would not spill until a heel of 45 per cent. was reached, but, with one side under water, that inclination would speedily be reached, through partial slides of cargo and the downward pressure of water above deck level.

For a simple statement of the problems of buoyancy and stability (with special reference to vessels of rectangular cross-section), see "Naval Construction" by R. W. Meade, U. S. N.

We have before us no pleading or decree claiming or adjudging liability on Beer's part for the Adah's damages. For them on this record Brady is responsible; further we express no opinion.

[3] Appellants finally allege error in decree below, because it not only absolves the Adah from blame, but fixes upon Brady and Beer responsibility for the loss and injury in respect of which the Adah filed this petition.

Whether it was necessary, in absolving the Adah, to fix blame on some one else, is a question we need not decide. Nor are we concerned with the inquiry whether the court could have compelled some of the parties to this appeal to come into the limitation proceedings. It is enough that they did come in, and made parties of themselves. Some of them (perhaps) came in voluntarily, but (as hereinbefore shown) all deliberately raised issues with each other, as well as with the petitioner, Fox, and litigated those issues at great length.

Having become parties, they are bound by the decree entered in the suit wherein they are parties.

> "Parties in the larger legal sense are all persons having a right to control the proceeding, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision if an appeal lies."[2]

All the persons, firms, and corporations before this court in this matter fully respond to this definition. How or why they became parties is immaterial; they have had their day in court, and their relative rights have in substance been properly adjudicated.

The decree appealed from is affirmed. The only costs allowed will be the costs of this court to the petitioner, Fox, and against the appellants.

[2] This definition from Greenleaf on Evidence has been approved in Green v. Bogue, 158 U. S. 503, 15 Sup. Ct. 975, 39 L. Ed. 1061, and substantially adopted in Ashton v. Rochester, 133 N. Y. 193, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619.

The action brought by the Uller is still pending in the Southern district of New York. If the action of some of the parties there impleaded in appearing and answering to this limitation in the Eastern district be thought voluntary, see Straus v. American Publishers' Ass'n, 201 Fed. 310, 119 C. C. A. 544.

MONTGOMERY et al. v. PACIFIC ELECTRIC RY. CO.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1919.)

No. 3236.

INJUNCTION ⚿101(3)—GROUNDS—STRIKES—ORGANIZATION OF LABOR UNIONS.

Where the contracts of employment between an electric railroad company, in part engaged in transporting war material and munitions workers, and its employés, provided that employés shall not be members of a labor union, and the grand officers of certain railroad brotherhoods attempted to unionize such employés and order a strike, not by recommending or advising or persuading the members to breach their contract in which they were engaged by any peaceful or lawful means, but by threats, opprobrious epithets, and insults, to such an extent that it became necessary for the commanding officer of the United States submarine base in the neighborhood to give proper warning against interference with traffic, and to station naval guards on each car, a bill for an injunction will lie, in view of Act Oct. 15, 1914.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Suit by the Pacific Electric Railway Company against M. E. Montgomery and others for an injunction. A preliminary injunction was granted, and defendants appeal. Affirmed.

Herbert D. Gale and D. L. Cobb, both of Los Angeles, Cal., for appellants.

Oscar Lawler, Frank Karr, R. C. Gortner, and E. E. Morris, all of Los Angeles, Cal. (W. R. Millar, of Los Angeles, Cal., of counsel), for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The learned counsel of the appellants says in his brief that the questions involved on this appeal are:

"Whether or not men who labor have the right to organize, and when so organized to collectively leave the service of the employer, for the purpose of improving working conditions, obtaining more pay, and the adjustment and redressing of grievances, and at the same time to induce and persuade others, by lawful means, to refuse to work under such conditions. Perhaps it would be more to the point to say that the question involved is whether or not labor, in its strife for betterment, is protected by the Clayton Act, every provision of which is violated by the temporary injunction issued by the District Court. * * *

"So plainly are the terms of the restraining order and temporary injunction at variance with the provisions of the Clayton Act and the decisions of our appellate courts that it was apparently conceded before the District Court that the order and injunction would be erroneous, were it not for the decision in the case of Hitchman Coal & Coke Co. v. Mitchell et al., 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1912C, 497, Ann. Cas. 1918B, 461, the form of the order in which case was followed in the present case. At first glance the action of the District Court in the case at bar, although a death blow to the legitimate aspirations of organized labor, seems, in a measure, justified by the decision in the Hitchman Case; but a closer study of that case fails to bear out that first impression. The injunction approved by the Supreme Court

in the Hitchman Case does the same violence to the provisions of the Clayton Act as does the order at bar, but the Hitchman Case was originally begun in the District Court in October, 1907, while the Clayton Act did not become a law until October 15, 1914. No mention is made of the Clayton Act in either the majority or dissenting opinions in the Hitchman Case, and it seems, therefore, fair to conclude that the Supreme Court decided that case upon the condition of the law existing at the time of its commencement, and not upon the condition existing at the time of the decision, after the passage of the Clayton Act. It seems highly improbable that the Supreme Court intended to nullify an act of Congress, and to substitute its own arbitrary rule for legislative provisions. Certain it is that the provisions of the Clayton Act and the decision in the Hitchman Case cannot be reconciled."

The preliminary injunction here appealed from was preceded by a temporary restraining order, based upon a verified bill, which, in substance, alleges among other things that the complainant, appellee here, is a common carrier of persons and property over its lines of railroad in the counties of Los Angeles, Orange, San Bernardino, and Riverside, and is engaged in interstate commerce, carrying a large number of passengers and handling a large tonnage of freight between points in the state of California and points in other states and territories of the United States and foreign countries, employing upwards of 1,500 men in and about its business, and having a daily gross income of more than $20,000; that the defendants Brotherhood of Railroad Trainmen and Brotherhood of Locomotive Engineers are unincorporated associations, having headquarters at Cleveland, Ohio, the defendants Montgomery and Farquharson, appellants here, being residents of that city, and respectively grand officers of the brotherhoods mentioned, and that the other appellants are the officers and agents at Los Angeles; that during the war the United States established posts and encampments at Arcadia and Ft. McArthur, on the appellee's railroad lines in Los Angeles county, to and from which troops and supplies are being constantly transported, and that the maintenance and operation of the appellee's said railway systems unimpaired is essential; that during the war large shipyards engaged in emergency shipbuilding for the government have been established at Long Beach and San Pedro, on the lines of the appellee, and because of lack of housing facilities at those places it is necessary for upwards of 5,000 workmen, employed at such yards, to travel daily between the cities of Long Beach and Los Angeles and their places of employment; that without the constant, continuous, and adequate service of the complainant for the transportation of such labor to and from such shipyards their activities would be seriously impaired; that at El Segundo, on the complainant's line of railway, there is a large oil refinery, the products of which are required for the operation of steam railroads under the control of the government, and engaged primarily in serving urgent war needs, and that the appellee is being urged by the government to expedite deliveries of such oil from said refinery for the use of such steam roads; that for more than five years prior to, and at the time of the filing of the bill, it had been and was the fixed policy of the appellee to prevent unionizing its employés, and that by the terms and conditions of the contract of employment with each of its employés it

was agreed that the latter should deal directly with its employer, and not through any union or alleged representative body; that the appellants, well knowing such terms of employment, had by false representation, coercion, threats, inducements, and persuasions conducted a campaign among the employés of the appellee for the purpose of creating a union or organization of the latter, taking over all rights of said employés in dealing with their employer and denying to the latter its right to deal with each employé individually; that as a result of such campaign more than 1,200 of the employés of the appellee had been induced to unite themselves with the appellants Montgomery and Farquharson in an agreement to the effect that they would thereafter refuse to deal with the appellee as individuals, and only as an organization, and that upon any refusal of the appellee to accept such new status, or to recognize their said organized form, or to accede to any of their demands, such employés would strike and withdraw from the service of the appellee, and from the performance of the public duties in which, by, through, and with the aid of said employés, appellee had been and was engaged; that the appellants had accomplished the organization and unionizing of more than 1,200 of the appellee's employés, and had procured a vote by which it had been resolved and determined between the appellants and the said employés that unless the appellee would discontinue its said policy of dealing only with its employés directly, and unless it would agree to recognize such organization, and treat and deal with the latter regarding contracts of employment between itself and its individual employés, the said employés would on the 2d day of July, 1918, at 7 o'clock p. m., strike and withdraw from the service of the appellee; that the withdrawal of the said employés, or any considerable number of them, from such service as so threatened, would interfere with and obstruct the performance of the appellee's duties as a common carrier and the transportation of federal troops and supplies for war purposes, and would interfere with the service of appellee as a war utility, and inflict great and irreparable injury; that the appellants in furtherance of their said plan had used coercion, threats, and various persuasions upon the said employés of the appellee, and had by and through their agents, during the 30 days preceding the filing of the bill, interfered with and attempted to interfere with such employés of the appellee for the purpose of organizing and unionizing them, without the consent of the appellee, by representing and causing to be represented to such employés, and to persons who might become such, that they would be likely to suffer some loss or trouble in continuing in or entering the employment of the appellee, because the latter would not recognize the union and was running a nonunion railroad; that the appellants had, during said 30-day period, in aid of their purpose to cause the employés of the appellee to break their contracts of service, enticed them to leave the service of the appellee for the reasons stated, and had entered upon the grounds and premises of the appellee, and into its cars, for the purpose of interfering with and hindering and obstructing the said business of the appellee, and had there and elsewhere by threats, intimidation, and persuasion, and by abusive lan-

guage, attempted to compel and induce such employés to refuse and fail to perform their duties, and to leave the service of the appellee, and to compel persons seeking employment with the appellee not to accept such employment; that all of the said acts of the said appellants were designed and would have the effect of preventing the said employés of the appellee from peaceably or otherwise prosecuting their work.

In response to an order to show cause why a preliminary injunction should not be granted, the matter came on for hearing, at which time there was presented to the court an affidavit of the defendants Montgomery and Farquharson, setting forth, among other things, that in the early part of May, 1918, the employés of the complainant company commenced to organize themselves into unions as divisions and lodges of the brotherhoods that have been mentioned, which work was cerried on with the assistance of the brotherhoods and their representatives until suspended by the temporary restraining order of the court issued July 2, 1918, and during which time about 1,300 of such employés had joined the brotherhoods freely and voluntarily and without any threat or coercion; that each and every place mentioned in the complaint as the location of military camps, posts, and shipyards is reached and served by the Southern Pacific Railroad, the officials and superintendents of which road the affiants caused to be notified of the impending strike at least six hours before such strike was called; that during the month of June, 1918, the complainant discharged from its employ more than 30 men, specifically named, who had joined one of the brotherhoods mentioned, in each case refusing to give such employé a hearing, and in respect to many of them saying or intimating that the discharge was because they joined the brotherhood; that on the 25th of June, 1918, the affiants, as representatives of the said 1,300 employés, requested a conference with the president of the complainant company upon the subject, which conference was, on June 27, 1918, refused, and that—

"because of the refusal of plaintiff corporation to recognize and deal with said 1,300 employés through the representatives of their respective organizations, and because of the discharge without just cause or hearing of said mentioned members, and because of other grievances and for the purpose of obtaining such recognition and redress of grievances, there was submitted to said 1,300 members and other operative employés the question of whether or not they would leave in a body the employment of the plaintiff corporation; that between June 29, and July 2, 1918, more than 90 per cent. of said membership voted in favor of leaving the employment of plaintiff in a body, and in accordance with such vote a strike was declared and called, to take effect on July 2, 1918, at 7 o'clock p. m., on which date and hour said 1,300 members withdrew from the service of the plaintiff corporation in a body; that the restraining order issued herein was served on affiants and some of their codefendants at about 9:30 p. m. July 2, 1918, and that by reason of such restraining order, and pursuant to the policy of said brotherhoods, the strike already voted, called, declared, and effective, was ordered to be suspended until the further order of the court; that upon the suspending of said strike a considerable number of said membership reported to the plaintiff for duty, and in a large number of instances were not allowed to return to work; that upon the voting and declaring of said strike, instructions were issued to the membership of said two brotherhoods regarding their conduct during such strike, a

copy of which instructions is hereto attached and marked Exhibit B and made a part of this affidavit."

The affidavit above referred to also stated that on July 3, 1918, the defendants, as representatives of the 1,300 employés mentioned, offered through a committee appointed by the Governor of California to submit the controversy to the arbitration of any federal board and to abide the award made by such board, which offer was refused by the complainant; that on July 4, 1918, the affiants as such representatives offered to United States Commissioner of Conciliation, C. T. Connell, to submit the controversy to the United States War Labor Board, and to that end delivered to him a letter which is set out in the record.

The refusal by the complainant of the requested conference with it was made by a letter of its president and general manager, Paul Shoup, of June 25, 1918, addressed to the defendants Montgomery and Farquharson as representatives of their respective brotherhoods, in which it was stated by the president and general manager of the complainant as follows:

"No benefit can be derived from conference such as you suggest, you representing the Brotherhood of Locomotive Engineers and Brotherhood of Railway Trainmen, and accompanied by committees representing employés of this company, for the reason that this company does not recognize your organizations, or any other outside organizations, in connection with its relations with its employés, which have been agreeably maintained for many years, and any such conference would therefore merely lead to misunderstandings.

"The inclosed circular, issued to our employés under date of June 5, 1918, expresses the position of the company."

On the hearing and in support of the application for a preliminary injunction the affidavit of Mr. Shoup was introduced, in which it was shown, among other things, that he then was and since 1910 had been the principal executive in charge of operations of the complainant company, during which time he had never declined to meet its employés and discuss with them any subject of mutual interest; that no demand had ever been made upon him for increase in their wages, but that increases had been voluntarily made, without request, from time to time, and in amounts specifically stated in his affidavit; that no controversy over question of hours of employment had been brought to him for consideration, and that the complainant was not then and never had been one of the federal controlled roads, but, on the contrary, was expressly excluded therefrom by act of Congress (Act March 21, 1918, c. 25, 40 Stat. 451, § 1 [Comp. St. 1918, § 3115¾a]), notwithstanding which it had—

"voluntarily raised the wages of its motormen and conductors, all of whom are paid by the hour, to the extent prescribed by the hourly wage basis set forth in Director General's Order No. 27 of May 25, 1918, controlling wages on the lines under federal control, and that in addition, where such employés less than five years in service received additional compensation under the Pacific electric scale through added years of service since 1915, the wage increase had been allowed on the basis of the increased scale, though the same position in work be occupied."

That affidavit proceeds as follows:

"And further that he has by circular told every employé of the company if in doubt to check the increased wages allowed against the scale given in Director General's Order No. 27, to see that the promise that increase should be on that basis is carried out, and that copy of Order No. 27 has been filed at the information bureau of the Pacific Electric Railway Company at Sixth and Main streets accordingly; and with reference to statement made in letter by Messrs. Farquharson and Montgomery, that said promise is not being lived up to by the Pacific Electric Railway Company, alleging certain action by the Council of National Defense having bearing upon the situation, states that he has telegraphed W. V. Hill, Assistant Manager, American Electric Railway Association, War Board, Washington, D. C., as per copy of telegram attached, and received reply from Mr. Hill as per copy of telegram attached, showing that the action referred to had no bearing whatsoever upon the wage scales of electric railways.

"And, further, that the Adamson Act, to which reference has been made in correspondence by Messrs. Farquharson and Montgomery, specifically excludes interurban and street railways.

"And, further, that there is no question as to wages or hours between the employés of the Pacific Electric Railway Company and the company, and that he has not declined to mediate cases of certain employés, numbering 25 or more, dismissed from service in the months of May and June, but, on the contrary, these dismissed employés did not come to him, but instead through channels unknown to him applied to the Secretary of Labor, and on June 22d he received a letter from Charles P. Connell, United States Commissioner of Conciliation (copy attached) in relation to these cases; that Mr. Connell had then to go to San Francisco, and on Thursday afternoon, June 27th, telephoned that he had returned, but would have to leave that night for Salt Lake City, and to wire him of any developments, and that on June 29th he wired Mr. Connell at Salt Lake that he had completed investigations and would be ready to discuss each of them with Mr. Connell on the latter's return, and that Mr. Connell made an appointment by wire from Salt Lake, July 2d, stating he would call on Friday, July 5th, at 10:30 a. m., for such discussion, which he did, and that each and every case was gone over thoroughly at that time, with all of the evidence leading up to the dismissal of each man presented to Mr. Connell for his consideration, and that decision will in a very few days be reached as to the disposition of these cases.

"And, further, that none of these dismissed employés have called upon the president to consider their cases, with the exception of three, who made appointment for 2 o'clock, Thursday, June 27th, and were at that time received by him and their cases discussed, with the conclusion, expressed by Mr. Shoup, to which there was no objection made by the employés, that inasmuch as the cases generally were up for consideration with Mr. C. F. Connell, it would probably be best to take care of all of them through that channel.

"And that the only other question before him at this time, dealing with the relations of the employés to the company, is a request, not from the employés, but from the vice president of the Brotherhood of Railroad Trainmen and vice president of the Brotherhood of Locomotive Engineers, claiming to represent a large number of the motormen and conductors of the company, and demanding under date of July 2d, said demand being presented by letter to the office of affiant shortly after noon of that day, and later delivered to affiant personally about 1:20 p. m., that the organizations of the Brotherhood of Railroad Trainmen and Brotherhood of Locomotive Engineers be recognized, together with certain other demands concerning members of such brotherhoods, and that, if not, the motormen and conductors of the Pacific Electric Railway, in so far as they were members of such organizations, would be withdrawn from the service of the company at 7 o'clock p. m. on that date; and, affiant declining to recognize these organizations, the threat to withdraw these men from the service of the company was carried out, to the extent of the power of the two vice presidents of the organizations named, at that hour."

The record shows that the defendants Montgomery and Farquharson, on behalf of their respective brotherhoods, notified Shoup at 1:30 p. m. of July 2, 1918, that, in the event the organization was not recognized, a strike would be called 5½ hours later, which was done. The record also shows that for several weeks preceding the strike the employés of the company were urged to join the unions, and were told, among other things, that they would be "eating dirt off the streets" in the event they failed to do so; that such of the employés as remained at work notwithstanding the strike order were subjected to threats, opprobrious epithets, and insults by members of the associations, and that the senior United States officer in command at San Pedro placed the trains of the complainant company under military guard, issuing the following order:

"To All Persons Concerned:

"1. Because the United States mails must have unimpaired movement;

"(2) In order that the transportation of troops, munitions, and military stores essential to the effective prosecution of the war may not be obstructed;

"(3) To prevent slowing down the building of vessels under construction for the United States Shipping Board at or near Los Angeles Harbor;

"(4) All persons are warned—and hereby cautioned—that any interference or attempt to obstruct the free passage of freight or passenger trains or trolley cars to or from San Pedro and the Outer Harbor, over any rail line, is at their own peril. Naval guards on each car will attend to the enforcement of these instructions; and it is earnestly requested that such guards shall not be hindered or hampered in the execution of duties with which charged.

"H. C. Poundstone,
"Commander U. S. Navy, Commanding Submarine Base and Senior Officer Present at San Pedro."

The record also shows that among the "duties of members and committeemen in conduct of strike on Pacific Electric Railway," issued by the defendants Montgomery and Farquharson on behalf of their respective brotherhoods is the following:

"(9) Members of these organizations, employed on neighboring or connecting lines, should be given to understand distinctly that they can continue to perform their usual duties on their own line, but they must not encroach in any way upon the lines of the Pacific Electric, to do work that has not been regarded as a part of their duty prior to the date the strike became effective."

The record further shows that factories engaged in packing sea foods for the United States and allied governments, docks and piers devoted to national use, and a harbor railroad owned by the city of Los Angeles and connecting with the shipyards, the submarine base, and the naval reserve camp at San Pedro, are exclusively served by the line of the complainant company.

The contention of the appellants' counsel that because the act of Congress of October 15, 1914, 38 Stat. 730, c. 323, commonly called the Clayton Act, was not expressly mentioned in either the majority or dissenting opinions of the Supreme Court in the case of Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461, we should hold that the court decided that case "upon the condition of the law existing at the time of its commencement, and not upon the condition existing at the time of the decision," is wholly unsound. The exact re-

verse is manifestly true. That the order here appealed from accords with the decision in the case cited is expressly conceded in the brief for the appellants, where it is declared that—

"the injunction approved by the Supreme Court in the Hitchman Case does the same violence to the provisions of the Clayton Act as does the order at bar."

And again:

"Certain it is that the provisions of the Clayton Act and the decision in the Hitchman Case cannot be reconciled."

Nor is it true that the Supreme Court made in the case cited no reference to the Clayton Act; for, notwithstanding the fact that that act was pressed upon its consideration, the court, in the course of its elaborate opinion, expressly declared it "needless to say there is no act of legislation to which defendants may resort for justification."

While it is perfectly true, as is expressly declared in section 6 of that act (Comp. St. § 8835f), "that the labor of a human being is not a commodity or article of commerce," it is equally true that laborers in this country, in whatever field of operation, and whether of head or hand, are governed and protected by the same Constitution and laws that govern and protect the owners of property here. One of the things thus permitted and secured is the right of contract. The latter, freely and fairly made upon sufficient consideration, is inviolable. In the present case the complainant company made nonmembership in a union a condition of employment, and to that condition the employés in question agreed. Such was the contract of the parties. Speaking to that point in the Hitchman Case, the Supreme Court said (245 U. S. 250, 251, 38 Sup. Ct. 72, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461):

"That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing nonmembership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to 'run union' were a sufficient explanation of its resolve to run 'nonunion,' if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of 'collective bargaining,' it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union, and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make nonmembership in a union a condition of employment as the workingman is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. Adair v. United States, 208 U. S. 161, 174 [28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764]; Coppage v. Kansas, 236 U. S. 1, 14 [35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960]. In the present case, needless to say, there is no act of legislation to which defendants may resort for justification.

"Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employés, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as

in any other legal right. That the employment was 'at will,' and terminable by either party at any time, is of no consequence."

With the contract between the complainant company and its employés the appellants Montgomery and Farquharson in their respective capacity, and others acting with them, undertook to interfere, not by "recommending, or advising, or persuading" such employés to break their contract and stop the work in which they were engaged by any peaceful or lawful means, but by threats, opprobrious epithets, and insults, to such an extent that it became necessary for the commanding officer of the United States Submarine Base at San Pedro to give public warning to all persons concerned against any interference, or attempt to interfere, or attempt to obstruct the free passage of freight or passenger trains or trolley cars to or from San Pedro and the Outer Harbor there, and to actually put naval guards on each car to enforce his command. Surely nothing more need be said to show the absurdity of the pretension that the appellants' interference with the existing contract between the complainant company and its employés was not that peaceful, lawful recommending, advising, or persuading the latter to cease work and terminate their employment, permitted by the provisions of the act of Congress of October 15, 1914 (38 Stat. 730). In speaking of similar acts in the Hitchman Mine Case, 245 U. S. 256, 38 Sup. Ct. 74, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461, et seq., the Supreme Court said:

"In any aspect of the matter, it cannot be said that defendants were pursuing their object by lawful means. The question of their intentions—of their bona fides—cannot be ignored. It enters into the question of malice. As Bowen, L. J., justly said, in the Mogul Steamship Case, 23 Q. B. Div. 613: 'Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.' And the intentional infliction of such damage upon another, without justification or excuse, is malicious in law. Bitterman v. Louisville & Nashville R. R. Co., 207 U. S. 205, 223 [28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693]; Brennan v. United Hatters, 73 N. J. Law, 729 et seq. [65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698], and cases cited. Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done. And we cannot deem the proffered excuse to be a 'just cause or excuse,' where it is based, as in this case, upon an assertion of conflicting rights that are sought to be attained by unfair methods, and for the very purpose of interfering with plaintiff's rights, of which defendants have full notice.

"Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are 'peaceable'—that is, if they stop short of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employés constitutes such a violation. * * *

"It was one thing for plaintiff to find, from time to time, comparatively small numbers of men to take vacant places in a going mine; another and a much more difficult thing to find a complete gang of new men to start up a mine shut down by a strike, when there might be a reasonable apprehension of violence at the hands of the strikers and their sympathizers. The disordered condition of a mining town in time of strike is matter of common knowledge.

It was this kind of intimidation, as well as that resulting from the large organized membership of the union, that defendant sought to exert upon plaintiff, and it renders pertinent what was said by this court in the Gompers Case, 221 U. S. 418, 439 [31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874], immediately following the recognition of the right to form labor unions: 'But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution, or by standing on such rights and appealing to the preventitive powers of a court of equity. When such appeal is made it is the duty of government to protect the one against the many as well as the many against the one.''

In the case of Stephens et al. v. Ohio State Telephone Co. (D. C.) 240 Fed. 759, 773, 774, Judge Killits, in discussing the same general subject, said, among other things:

"The right of free speech does not give any one the privilege to force his views upon others, to compel others to listen. The right of others to listen or to decline to listen is as sacred as that of free speech. It is clear that, if one does not desire speech of another, he may as surely have his privacy therefrom as the privacy of his home. It is undeniable that the so-called right of peaceful persuasion may be lawfully exercised only upon those who are willing to listen to the persuasive arguments.

"Again, every man has the right to the pursuit of his lawful business or employment undisturbed, and any act performed with intent to disturb the full and unrestrained exercise of his faculties and wishes in such employment is plainly unlawful.

"Again, he has the right of privacy and freedom from molestation of private persons, hostile or otherwise, at his home, at his lodging, at his place of work; he has the right to walk the streets without annoyance from the unwelcome attentions of others, so long as he is conducting himself in a lawful manner. * * *

"Again, the right of one man to work is as much entitled to respect as the right of another to cease work or to strike.

"Again, the right of an employer to engage whomsoever he chooses is as strong as the right of an employé to refuse to work. * * *

"It is a safe and proper generalization that any action having in it the element of intimidation, or coercion, or abuse, physical or verbal, or of invasion of rights of privacy, when not performed under sanctions of law by those lawfully empowered to enforce the law, is unlawful; every act, of speech, of gesture, or of conduct, which 'any fair-minded man' may reasonably judge to be intended to convey insult, threat, or annoyance to another, or to work assault or abuse upon him, is unlawful. Not a syllable of the Clayton Act, or of any other law, whether of legislation of Congress or of the common law, sanctions any of the incidents we have referred to. They are to be condemned as legally inexcusable; such must be the verdict of 'any fair-minded man'; nothing can be said in justification.

"These propositions are so elemental that, but for the confusion which exists in many minds that a labor controversy affects the commonest rules of life, it would seem a waste of time to state them. The existence of a strike does not make that lawful which would otherwise be unlawful. These personal rights to which we have alluded are, in each instance, precisely those which the striker himself would insist upon were conditions reversed. They are also so plain, and the answers to the questions involving them so certain, that one called upon to enforce the law, if he has but ordinary intelligence, will plainly fail to do his duty when in his presence a fellow citizen suffers an invasion of his rights of this character."

The order appealed from is affirmed.

KELLY et al. v. UNITED STATES.

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

No. 2978.

1. INDICTMENT AND INFORMATION ⚷171—FAILURE OF PROOF OF CONSPIRACY—EFFECT—CONVICTION OF CRIME.

Conspiracy alleged may fail in proof, as well as proved conspiracy may fail in execution; hence failure to prove the existence of a conspiracy alleged to have been formed to defraud the United States cannot affect the right, regardless of conspiracy, to prove that the fraud which was the alleged object of the conspiracy was actually committed.

2. CONSPIRACY ⚷37—CRIMINAL LAW ⚷876½—CONSPIRACY TO DEFRAUD GOVERNMENT—INCONSISTENT VERDICT.

An indictment for conspiracy to defraud the United States and one for the offense which was the object of the alleged conspiracy are for different offenses, and, where the cases are consolidated for trial, a verdict of acquittal under the conspiracy indictment is not inconsistent with a verdict of guilty under the other, although the overt acts charged in the former are some of acts relied on under the latter.

3. CRIMINAL LAW ⚷195(1)—FORMER ACQUITTAL—IDENTITY OF OFFENSES.

A plea of autrefois acquit is unavailing, unless the offense presently charged is precisely the same in law and fact as the former one relied on under the plea.

4. CORPORATIONS ⚷369—CORPORATE AGENTS—CRIMINAL RESPONSIBILITY.

It is a rule of the criminal law, as well as the civil, that corporate agencies cannot shield themselves behind the corporation, where they are the actual and efficient actors in committing a fraud or an offense, and an indictment is good which charges defendants with committing an offense "while engaged as officers, agents, and employés" of a corporation.

5. CRIMINAL LAW ⚷59(5)—INDICTMENT AND INFORMATION ⚷124(6)—CHARGING ACCESSORY AS PRINCIPAL—JOINDER OF PRINCIPAL.

Under Criminal Code, § 332 (Comp. St. § 10506), making aiders and abettors principals, one formerly known as an accessory may be charged as a principal, without joining the principal offender.

6. CRIMINAL LAW ⚷619—CONSOLIDATION OF INDICTMENTS FOR TRIAL.

Rev. St. § 1024 (Comp. St. § 1690), investing trial judges with discretionary power to require indictments charging one or more persons with different, though connected, acts or transactions of the same class of crimes or offenses to be consolidated for trial, applies to separate indictments of the same persons; one charging conspiracy to commit a substantive offense, and the other charging its actual commission.

7. CRIMINAL LAW ⚷1144(14)—REVIEW—INSTRUCTIONS ON ADMISSION AND PURPOSE OF EVIDENCE—PRESUMPTION.

It is not to be assumed in a criminal case, any more than in a civil case, that a jury cannot grasp the meaning of the court's instructions touching admissibility and purposes of evidence, even though a change in ruling in that behalf be involved.

8. CRIMINAL LAW ⚷1159(2)—SUFFICIENCY OF EVIDENCE—REVIEW BY APPELLATE COURT.

On review of the evidence in a criminal case, it is for the appellate court to determine only whether there was evidence introduced which was proper to go to the jury and legally sufficient to sustain the verdict.

9. CRIMINAL LAW ⚷1151—REVIEW BY APPELLATE COURT—DENIAL OF CONTINUANCE.

Refusal of the trial court to grant a continuance is reviewable only where it is clearly shown that there was an abuse of discretion.

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

In Error to the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Criminal prosecution by the United States against Dennis Kelly, Michael Leo Corbett, William H. Eberst, and William H. Kelley. Judgment of conviction, and defendants bring error. Affirmed.

Petition for writ of certiorari denied by United States Supreme Court, 249 U. S. 616, 39 Sup. Ct. 391, 63 L. Ed. —.

A. T. Seymour, of Columbus, Ohio, Ralph Crews, of New York City, and H. J. Booth, of Columbus, Ohio, for plaintiffs in error.

Robert W. Childs, Sp. Asst. Atty. Gen.

Before WARRINGTON and DENISON, Circuit Judges, and WESTENHAVER, District Judge.

WARRINGTON, Circuit Judge. Two indictments were returned in the court below, September 4, 1914, charging plaintiffs in error and certain other persons with violation of section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]) and of the Oleomargarine Act (Act Aug. 2, 1886, c. 840, 24 Stat. 209). The offense charged in the first indictment was conspiracy, and that in the second was fraud as respects the internal revenue tax of 10 cents a pound imposed upon oleomargarine manufactured and sold with artificial coloration, causing "it to look like butter of a shade of yellow." The plaintiffs in error, Dennis Kelly, Michael Leo Corbett, William H. Eberst, and William H. Kelley (hereinafter called defendants), were respondents in both indictments, with Cornelius A. Hayes and Otto S. Marckworth and, in the first indictment, were named with Mansfield B. Snevily, who, having testified before the grand jury, was not indicted; Hayes is dead, and Marckworth, having been called by the prosecution to testify, was not placed on trial. The cases were consolidated for purposes of trial. Under the conspiracy indictment or count, a verdict of not guilty was returned in favor of each defendant; but under the second indictment or count (comprising in itself a number of counts) a verdict of guilty was returned against each defendant. Sentences were pronounced, and the defendants prosecute error.

The oleomargarine in dispute was sold and distributed in the name of the Capital City Dairy Company. This company was organized under the laws of New Jersey in 1903, and its factory was located and maintained at Columbus, Ohio. The amount of oleomargarine manufactured at its plant grew rapidly, and the taxes alleged to have legitimately accrued to the government and which were not paid amounted to large sums. The validity of the indictments was tested upon motions to quash and upon demurrers. The trial occupied several weeks, and at the close of the testimony motion to direct was denied, whereupon a well-considered charge was delivered. Motions notwithstanding the verdict under the second indictment, for new trial, and in arrest of judgment, were overruled. Upon the motions to quash and the demurrers, and likewise on the motion for new trial, the court ren-

dered elaborate opinions. One hundred and thirty-five assignments of error are presented. It is not necessary to call distinct attention to all these assignments; indeed, this could not be done within space at all reasonable. But the nature and effect of the assignments will be sufficiently understood from those specifically commented on.

1. *Verdicts Claimed to be Inconsistent.*—It is urged in behalf of defendants that the conspiracy and overt acts alleged in the first indictment so far involved the frauds alleged in the second one as to require acquittal also under it, and hence that the findings and the verdict of the jury under the second indictment are "in fundamental and irreconcilable conflict with the findings and verdict of the jury" under the first one. In thus speaking of the indictments we, of course, have in mind the consolidation of the conspiracy case, numbered 798, with the fraud case, numbered 800, for purposes of trial; but it will be convenient occasionally to distinguish the cases by their original numbers, regardless of any effect the consolidation had in converting the two indictments into counts of a single indictment. We may say, further, that while the legal sufficiency of 798 is not now important, in view of the verdict thereunder, we cannot very well dispose of the question of claimed inconsistency without alluding to the schemes, respectively, of both indictments, and at the same time disclosing our view of the sufficiency in law of 800; and this view must also be determinative of the motion to quash 800, also of the demurrer thereto, and, in connection with the question of inconsistency, the motions non obstante and in arrest of judgment.

In considering the question of inconsistency between the verdicts, it is to be observed that indictment 798 charges that continuously from September 10, 1911, to the date of presentation of the indictment (September 4, 1914), the defendants, with Hayes and Marckworth, and also the "coconspirator" Snevily, had unlawfully and feloniously conspired, combined, confederated, and agreed to defraud the United States of a large sum of money ($1,000,000), being the aggregate of divers sums accruing from day to day as the internal revenue tax of 10 cents a pound upon oleomargarine "not free from artificial coloration that caused it to look like butter of a shade of yellow," which the defendants and their coconspirator "were to cause to be manufactured and produced" during such period of time, "while engaged as officers, agents and employés of the Capital City Dairy Company, a corporation, in causing that corporation to carry on the business of a manufacturer of oleomargarine * * * and from day to day unlawfully and knowingly to cause the same to be removed * * * and sold, vended and furnished to and for the use and consumption of others * * * and to dealers in oleomargarine," without affixing or causing to be affixed any coupon stamps representing such internal revenue tax, and without otherwise paying or accounting to the United States for such tax; and a large number of transactions are set out by dates, within the time above mentioned, as alleged overt acts committed in execution of such conspiracy.

Indictment 800 comprises nine counts. Count 1 charges that from March 10, 1913, to May 1, 1914, the defendants, with Hayes and

Marckworth (omitting Snevily), "unlawfully and feloniously did defraud the United States of a large sum of money" ($1,000,000), "being the aggregate of divers sums * * * which became due and payable to the United States from day to day during said period of time * * * as and for the internal revenue tax of 10 cents a pound upon oleomargarine * * * not free from artificial coloration that caused it to look like butter of a shade of yellow"; that the oleomargarine was manufactured by defendants "while engaged as officers, agents and employés of said the Capital City Dairy Company * * * in carrying on, for and in the name of said corporation, the business of a manufacturer of oleomargarine"; that on each week day they manufactured 20,000 pounds and removed the product and sold it for use and consumption "otherwise than upon their own several family tables," knowing it to be "oleomargarine not free from such artificial coloration," without affixing any coupon stamps representing payment of the internal revenue tax of 10 cents per pound, and without paying or otherwise accounting to the United States for such tax or any part of it. The difference between count 1 and count 2 is that the latter charges that on May 1, 1914, the defendants as individuals, not as officers or employés, though in the name of the Dairy Company, manufactured 20,000 pounds of oleomargarine with artificial coloration, as stated in the first count, and sold it for use and consumption by others without paying or making any provision for payment of the internal revenue tax of ten cents a pound. Count 3 is the same as count 2, except that the date is May 5, 1914, and that the defendants are charged with committing the acts individually, and not in the name of the Dairy Company; count 4 same as count 3, except that the date is June 6, 1914, and the amount 9,600 pounds; count 5 same as count 1, except that the date is May 11, 1914, and the amount 30,000 pounds; count 6 same as count 5 except that the date is May 15, 1914, and the amount 18,000 pounds; count 7 same as counts 3 and 4, except that the date is June 22, 1914, and the amount 18,000 pounds; count 8 same as counts 3, 4, and 7, except that the date is July 2, 1914, and the amount 24,000 pounds; count 9 differs (if it be a difference amounting to a distinction) from count 1 only in charging that defendants, as officers, agents and employés of the Dairy Company "caused" to be committed acts similar to those stated in count 1, instead of directly committing such acts themselves.

[1] There is an obvious and substantial distinction between the two indictments, in that the gist of the first is the alleged conspiracy (Williamson v. United States, 207 U. S. at page 447, 28 Sup. Ct. 163, 52 L. Ed. 278), and that of the second, in each of its counts alike, is the alleged fraud. The declared object of the conspiracy alleged, it is true, was to defraud the government of taxes identical in kind with those of which it is alleged in the second indictment the government was actually defrauded; but it is perfectly plain that two distinct offenses were alleged. Conspiracy alleged may fail in proof, as well as proved conspiracy may fail in execution. Failure, then, to prove the existence of a conspiracy alleged to have been formed to commit a particular character of fraud cannot affect the right,

regardless of conspiracy, to prove that fraud of the same character was actually committed. This is well within settled principles of the doctrine of conspiracy. As Judge Sater pointed out in overruling the motions to quash and the demurrers to the indictments, overt acts are something apart from the mere conspiracy, citing, among other decisions, Joplin Mercantile Co. v. United States, 236 U. S. 531, 535, 35 Sup. Ct. 291, 293 (59 L. Ed. 705), where Mr. Justice Pitney said:

"It is true, as held in Hyde v. Shine, 199 U. S. 62, 76 [25 Sup. Ct. 760, 50 L. Ed. 90], and Hyde v. United States, 225 U. S. 347, 359 [32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614], that a mere conspiracy, without overt act done to effect its object, is not punishable criminally under section 37 of the Criminal Code. But the averment of the making of the unlawful agreement relates to the acts of all the accused, while overt acts may be done by one or more less than the entire number, and although essential to the completion of the crime, are still, in a sense, something apart from the mere conspiracy, being 'an act to effect the object of the conspiracy.'"

Again, it was laid down in United States v. Rabinowich, 238 U. S. 78, 85, 35 Sup. Ct. 682, 683 (59 L. Ed. 1211):

"It is apparent from a reading of section 37, Criminal Code (section 5440, Rev. Stat.), and has been repeatedly declared in decisions of this court, that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. Callan v. Wilson, 127 U. S. 540, 555 [8 Sup. Ct. 1301, 32 L. Ed. 223]; Clune v. United States, 159 U. S. 590, 595 [16 Sup. Ct. 125, 40 L. Ed. 269]; Williamson v. United States, 207 U. S. 425, 447 [28 Sup. Ct. 163, 52 L. Ed. 278]; United States v. Stevenson (No. 2) 215 U. S. 200, 203 [30 Sup. Ct. 37, 54 L. Ed. 157]. And see Burton v. United States, 202 U. S. 344, 377 [26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362]; Morgan v. Devine, 237 U. S. 632 [35 Sup. Ct. 712, 59 L. Ed. 1153]. The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable. Williamson v. United States, supra. And it is punishable as conspiracy, though the intended crime be accomplished. Heike v. United States, 227 U. S. 131, 144 [33 Sup. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914C, 128]. * * * There must be an overt act; but this need not be of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy. United States v. Holte, 236 U. S. 140, 144 [35 Sup. Ct. 271, 59 L. Ed. 504, L. R. A. 1915D, 281]; Joplin Mercantile Co. v. United States, 236 U. S. 531, 535, 536 [35 Sup. Ct. 291, 59 L. Ed. 705]."

See, also, Goldman v. United States, 245 U. S. 474, 477, 38 Sup. Ct. 166, 62 L. Ed. 410; Louie v. United States, 218 Fed. 36, 39, 134 C. C. A. 58 (C. C. A. 9).

[2] Certainly there was no inconsistency in alleging the offenses severally charged in the two indictments. Can it be, then, that failure of proof as respects the controlling issue under either indictment can operate to defeat both indictments? The verdict of not guilty under the first and that of guilty under the second naturally signify that conspiracy was not proved under the former, but that fraud was proved under the latter. This derives special emphasis from the rule, just pointed out, that an effective overt act may be committed by one or more less than the entire number of those entering into a conspiracy, and need not constitute the very crime that is the object of the conspiracy, and indeed need not be of itself a criminal act. It results that the offense of which defendants were found guilty was

not the same offense as the one of which they were found not guilty. This, it is true, is but another way of stating, as we have already stated, that distinct offenses were charged in the two indictments.

[3] One of the grounds set up in the motion non obstante is that to support the charges of the second indictment, 800, the government "relied mainly upon evidence concerning acts and facts which are specifically set out and described as overt acts" in the first indictment, 798. This was in effect a plea of autrefois acquit. Such a plea, however, is unavailing unless the offense presently charged is precisely the same in law and fact as the former one relied on under the plea; thus, as Mr. Justice Harlan said (Burton v. United States, 202 U. S. 344, 380, 26 Sup. Ct. 688, 698 (50 L. Ed. 1057, 6 Ann. Cas. 362), in adopting language of Chief Justice Shaw, it must appear that the offense charged "was the same in law and in fact. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact." Some of the facts leading up to the application there made of this rule are helpful. The point was presented (202 U. S. 377, 26 Sup. Ct. 697, 50 L. Ed. 1057, 6 Ann. Cas. 362) whether defendant could "legally be indicted for two separate offenses, one for agreeing to receive compensation in violation of the statute, and the other for receiving such compensation." In sustaining the view that these were separate offenses Mr. Justice Harlan said (Id.):

"There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense; or compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated."

Defendant also invoked protection under the clause of the Constitution which declares that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." The first and second counts of an indictment in a former case charged that defendant had unlawfully accepted and received certain money from a company for services rendered in its behalf in a matter before the Post Office Department in which the United States was interested; while the third count of that indictment charged defendant with having unlawfully received this money from Mahaney, an officer of the company, as compensation for the services so rendered. Defendant was convicted on the first and second counts and acquitted on the third count. Defendant pleaded this acquittal in bar of the prosecution based on the third and seventh counts of the last indictment. In its answer to this plea the government alleged that, while the third and seventh counts of the present indictment were identical in legal effect with counts 1 and 2 of the first indictment, the offense charged in counts 3 and 7 of the last one was "not identical in legal effect with said count 3 of said original indictment." Demurrer to this answer was overruled in the court below, and in sustaining such ruling Mr. Justice Harlan, speaking for the court, said (202 U. S. 379, 26 Sup. Ct. 698, 50 L. Ed. 1057, 6 Ann. Cas. 362):

"It was not alleged in the former indictment that Mahaney paid the money to the defendant in behalf of or by direction of the company. This distinc-

tion was manifestly in the mind of the jury in the former case; for, while they found the defendant guilty of having received forbidden compensation from the company, they found him not guilty of having received such compensation from Mahaney."

And it was to this distinction that the rule before mentioned as laid down by Chief Justice Shaw was applied. The distinction thus pointed out and the application of the rule touching former jeopardy are plainly applicable to the instant case.

In Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153, the court had occasion to consider the rule against double jeopardy under petition of habeas corpus. Devine and another had pleaded guilty to an indictment containing two counts, one under section 192 of the Penal Code (Comp. St. § 10362), for unlawfully breaking into a post office with intent to commit larceny, and the other under section 190 (section 10360), for committing the larceny. Devine was sentenced for 4 years on the first count and 2 years on the second; the sentence being "cumulative and not concurrent." The other appellee was likewise sentenced for 3½ years' imprisonment and a fine of $100 on the first and 2 years on the second count. The object of seeking the writ was to be discharged from confinement at the expiration of the sentences under the first count, and the writ was granted below. Appellees claimed protection against double jeopardy forbidden by the Fifth Amendment, because the several things charged in the two counts were done at the same time and as part of the same transaction. In reversing the judgment of the District Court Mr. Justice Day said (237 U. S. 641, 35 Sup. Ct. 715, 59 L. Ed. 1153):

"As to the contention of double jeopardy upon which the petition of habeas corpus is rested in this case, this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. Without repeating the discussion, we need but refer to Carter v. McClaughry, 183 U. S. 365 [22 Sup. Ct. 181, 46 L. Ed. 236]; Burton v. United States, 202 U. S. 344, 377 [26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362], and the recent case of Gavieres v. United States, 220 U. S. 338 [31 Sup. Ct. 421, 55 L. Ed. 489]."

Upon the question whether Congress had created two distinct offenses in sections 190 and 192 of the Criminal Code, the court quoted section 1062 and the second paragraph of section 1052 of Bishop on Criminal Law; and counsel for the present defendants, relying on this as an approval of Mr. Bishop's view, make paragraph 2 of section 1052 (volume 1, 8th Ed., p. 630) the foundation for their claim of fatal inconsistency between the present verdicts. The test as there stated by Mr. Bishop is to the effect that, where two indictments have been returned, if there could have been a conviction under the first upon proof of what is set out in the second, the second indictment cannot be maintained; otherwise, it can be. We do not see that this differs materially from the rule laid down in Morgan v. Devine and just quoted; but it is to be observed, of the alternatives stated in Mr. Bishop's rule, the one adopted in Devine's Case concerning two closely related offenses is opposed to counsel's present contention.

Counsel strenuously insist that, unless the present defendants acted in concert so as to constitute the offense of conspiracy charged in the first indictment, it was "not possible" for them to commit any of the frauds alleged in the second indictment. The most obvious answer to this is to be found in the verdicts themselves, if upon the evidence they are sustainable; if they show anything, it is that what is claimed to have been "not possible" actually happened. The same insistence was made for defendants on their motion for new trial. This was met in several ways by the learned trial judge. One was that, if the point was well taken, it would follow "that a conviction on a fraud count laid against two or more persons under section 17 of the Oleomargarine Act (Comp. St. § 6229) cannot be sustained unless it be accompanied by averments of a conspiracy"—calling attention to decisions of this court (Hart v. United States, 183 Fed. 368, 105 C. C. A. 588, and Hardesty v. United States, 168 Fed. 25, 27, 93 C. C. A. 417, and also Enders v. United States, 187 Fed. 754, 109 C. C. A. 502 [C. C. A. 7]), where a plurality of persons had in each case been jointly indicted and convicted of frauds committed in violation of section 17 of the Oleomargarine Act, and the judgments were affirmed, although, as the District Judge said, in none of the cases "did the fraud counts hint at a conspiracy."

Counsel say in their brief that the use so made of these decisions shows that the principle upon which they rested their contention of inconsistency was misunderstood, and that they did not intend to assert that a fraud count could not be laid against two or more persons under section 17 of the Oleomargarine Act without "being accompanied by averment of conspiracy." Thus the contention of inconsistency is reducible to a question of fact, whether in this particular instance the absence of a conspiracy rendered it impossible for defendants to commit the frauds charged in the second indictment. In its last analysis this question at once challenges the wisdom of the statutes and the power to enact them, since they punish a conspiracy to do an act independently of penalizing the act itself. The power to enact such legislation cannot be questioned (Clune v. United States, 159 U. S. 590, 595, 16 Sup. Ct. 125, 40 L. Ed. 269), and if the assertion of an impossibility of two or more persons to do a particular thing without first agreeing to do it could prevail, the law might readily be frustrated.

The true test of this question is to be found in the instant case, not only in the verdicts, but also in the very rule counsel rely on; for it must be remembered that the gist of the offense charged in the first indictment was the formation of a conspiracy in violation of section 37 of the Criminal Code (35 Stat. 1095), while the substantive frauds charged in the second indictment were direct violations of the Oleomargarine Act. 24 Stat. 209, and as amended in 32 Stat. 194, c. 784, § 8. It therefore needs only to be stated, in view of the decisions before cited, as well as the rule of Mr. Bishop, that the evidence offered to prove the fraud counts of the second indictment was not of a character, certainly was not sufficient, to prove the conspiracy alleged in the first indictment. These distinct offenses can-

not be confused by the relation of evidence offered to show execution of the conspiracy alleged (not the conspiracy itself) to the evidence offered to show actual commission of the frauds charged in the other indictment. The contention of fatal inconsistency must therefore fail.[1]

We are the more content with this conclusion because of the consideration this court gave to a closely analogous question in Swepston v. United States, 251 Fed. 205, 209, 210, 163 C. C. A. 361, 365. Two cases had been brought and tried together before the District Judge upon petitions to attach for contempt. It was in substance charged in the petitions that respondents, sheriff and jailer, had conspired with one Dye, a prisoner, and had permitted and assisted him to escape from jail. In their answers the respondents denied both the alleged conspiracy and acts of permitting and assisting the prisoner to escape. It was found that the conspiracy alleged was not proved, but that the respondents in fact permitted and assisted the prisoner to escape, and judgment was rendered accordingly, and upon error the judgment was affirmed. In the course of the opinion it was said:

> "True, the conspiracy alleged was not proved; though, as already stated, Judge Sater found both respondents guilty of 'permitting and assisting Dye to escape.' This finding was clearly permissible, regardless of the charge of conspiracy; the fact of permitting and assisting might well have existed, and under the evidence apparently did exist, apart from the alleged conspiracy."

[4] We have thus far assumed the legal sufficiency of indictment 800. It is claimed that defendants are not charged with having been engaged in the business of manufacturing oleomargarine within the meaning of section 17 of the act. The variations in averment, already pointed out, as to the capacities in which defendants acted had the effect in some of the counts—third, fourth, seventh, and eighth—of charging them individually as principals and in the language of the statute as manufacturers of oleomargarine. This was sufficient, certainly on the face of the counts (Hardesty v. United States, 168 Fed. 25, 26, 29, 93 C. C. A. 417 [C. C. A. 6]); and so with the second count, since defendants were also charged there individually as principals though as operating under the name of the company (United States v. Orr [D. C.] 233 Fed. 718, 720). Counsel's claim must there-

[1] It may be added that both conspiracy and fraud counts were set up in the indictment in United States v. Morse (C. C.) 161 Fed. 429, 431, which survived demurrer, except as to some of the fraud counts. The defendants were acquitted under the former and convicted under the latter and the judgment was affirmed. Morse v. United States, 174 Fed. 539, 555, 98 C. C. A. 321, 20 Ann. Cas. 938 (C. C. A. 2). Petition for writ of certiorari was denied. 215 U. S. 605, 30 Sup. Ct. 406, 54 L. Ed. 346. It is claimed for the government, and denied for lack of knowledge by opposing counsel, that the question urged here was presented in the petition for writ of certiorari. We are not disposed, and in view of the decisions we have pointed out it is not necessary, to rest this feature of the case upon the fact that the same question seems to have arisen though does not appear to have been passed on in the Morse Case. It may be observed moreover that the practice of introducing a conspiracy count into indictments of kindred character was criticised in Hart v. United States, 240 Fed. 911, 915, 153 C. C. A. 597 (C. C. A. 2), but it was, of course, recognized as a lawful practice.

fore come to this: That the remaining counts do not charge that defendants committed any act at all, except as representatives of the corporation, and that they could not have been individually engaged as principals in the business of manufacturing oleomargarine, or have committed any fraud, within the meaning of the statute; indeed, counsel rely on the decision in United States v. Orr (D. C.) 223 Fed. 222, 224, which was rendered prior to the decision in the case of that name before cited and seemingly part of the same case.

The difference between the Orr Cases, as the decision in the second one indicates (233 Fed. at page 720), is that the defendants in the first were charged in their several capacities as officers of a named corporation, while in the second they were charged individually as principals, but as carrying on the business in the name of the corporation. The counts passed on in those cases are not sufficiently disclosed safely to compare them with the present counts as respects the reason for reaching opposite conclusions in the cases. We cannot think the difference there pointed out is material in the instant case. All the counts alike are here aimed against the very same persons; each count opening with a direct charge against them individually and employing practically the same language to characterize their acts, except only that in the first, fifth, sixth and ninth counts defendants are alleged to have committed the acts "while engaged as officers, agents and employés" of the corporation. Thus in the counts last mentioned defendants are severally charged in a double capacity, individual and representative, while in the others they are charged only as individuals. The effect of the averment touching the dual character of defendants was to set out a violation of the oleomargarine act through defendants' intentional perversion of the Dairy Company's corporate powers. And it is a rule of the criminal law as well as the civil that corporate agencies cannot shield themselves behind the corporation, where they are the actual and efficient actors in committing a fraud or an offense. United States v. Winslow (D. C.) 195 Fed. 578, 581, by the late Circuit Judge Putnam; Wood v. United States, 204 Fed. 55, 57, 122 C. C. A. 369 (C. C. A. 4); United States v. MacAndrews & Forbes Co. (C. C.) 149 Fed. 823, 832, by Judge Hough; Crall & Ostrander's Case, 103 Va. 855, 859, 49 S. E. 638; Bank v. Trebein, 59 Ohio St. 316, syl. 1, 52 N. E. 834; Exploration Mercantile Co. v. Pacific H. & S. Co. (D. C.) 177 Fed. 825, approved at page 839, 101 C. C. A. 39 (C. C. A. 9). The principle intended to be applied finds expression in the language of Chief Justice Campbell who, in Hempfling v. Burr, 59 Mich. 294, 26 N. W. 496, had occasion to say of a bank cashier who sought to escape a charge of fraud on the theory that it had been committed in his official capacity (59 Mich. 295, 296, 26 N. W. 496):

> "In such a case it is quite likely that Burr's conduct may have been official, but we are not aware of any principle which will exempt a person from personal responsibility for fraud committed in a double capacity."

[5] Further, considering the nature of the offenses here complained of, the acts charged against defendants in their dual capacities were such as would bind the corporation. New York Central R. R. v.

United States, 212 U. S. 481, 492, 495, 29 Sup. Ct. 304, 53 L. Ed. 613. If the corporation had been included with the present defendants in the indictment, as it clearly might have been under appropriate allegations (New York Central R. R. v. United States, supra), the legal sufficiency of the indictment would not in the present state of the law have been open to serious dispute, although defendants might in a technical sense have been regarded as aiders and abettors. Such is the necessary and adjudged effect of section 332 of the Penal Code:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." 35 Stat. pt. 1, p. 1152 (Comp. St. § 10506).

See Wood v. United States, 204 Fed. 55, 58, 122 C. C. A. 369 (C. C. A. 4); Dean v. United States, 246 Fed. 568, 574, 158 C. C. A. 538 (C. C. A. 5); Rooney v. United States, 203 Fed. 928, 931, 932, 122 C. C. A. 230 (C. C. A. 9); and see Ruthenberg v. United States, 245 U. S. 480, 483, 38 Sup. Ct. 168, 62 L. Ed. 414.

And where the statute, as here, has abrogated the distinction prevailing at the common law between principals and accessories in the commission of felonies, a charge against one formerly known as an accessory is good against him as principal. Rosencranz v. United States, 155 Fed. 38, 43, 83 C. C. A. 634 (C. C. A. 9). So, where persons were formerly chargeable as aiders and abettors, they may be indicted and prosecuted as principals, whether the principal offender has been indicted and acquitted (Rooney v. United States, supra), or has not been indicted at all (Wood v. United States, 204 Fed. supra, at page 58, 122 C. C. A. 369). This results, too, from the rule prevailing in some jurisdictions that under such modifying statutes the act of aiding and abetting is a substantive offense. Goins v. State, 46 Ohio St. 457, 462, 21 N. E. 476.[2]

It must follow from the foregoing considerations that the first, fifth, sixth, and ninth counts, as well as the others before passed upon, of indictment 800, are legally sufficient.

[6] 2. *Consolidation of the Two Indictments, One for Conspiracy and the Other for Substantive Fraud, Permissible.*—It is insisted that defendants were deprived of a fair trial by the order of consolidation. It is settled that section 1024, Rev. St. (Comp. St. § 1690), invests trial judges with discretionary power to require indictments charging one or more persons with different though connected acts or transactions of the same class of crimes or offenses to be consolidated for purposes of trial; this, of course, signifies a judicial discretion,

[2] Well-known rules and distinctions of the common law, which would otherwise be applicable here, have been modified by both federal and state legislation; and the state statutes, in connection with pertinent principles of the common law, have been frequently and exhaustively discussed by the courts of last resort in quite a number of the states. We may refer to the following: People v. Bliven, 112 N. Y. 79, 82, 19 N. E. 638, 8 Am. St. Rep. 701, et seq., by Judge (later Mr. Justice) Peckham; Vogel v. State, 138 Wis. 315, 330, 119 N. W. 190, et seq.; Spies v. People, 122 Ill. at page 242, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, et seq.; People v. Outeveras, 48 Cal. 19, 21 to 26. And see Rosencranz v. United States, supra.

soundly exercised, and not the uniting of offenses which for that reason would confound and prejudice the defendants. Dolan v. United States, 133 Fed. 444, 446, 69 C. C. A. 274 (C. C. A. 8). Similar power exists independently of the statute. Logan v. United States, 144 U. S. 263, 296, 12 Sup. Ct. 617, 36 L. Ed. 429; Brown v. United States, 143 Fed. 60, 66, 67, 74 C. C. A. 214 (C. C. A. 8). The nature of the power, however, implies that it may be improvidently exercised, though, in view of Mr. Justice Gray's observation in Mutual Life Insurance Co. v. Hillmon, 145 U. S. at page 293, 12 Sup. Ct. 909, 36 L. Ed. 706, such instances must be exceedingly rare. This is not to be qualified by the ruling in McElroy v. United States, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355, in view of differences in the indictments there pointed out (164 U. S. at page 79, 17 Sup. Ct. 31, 41 L. Ed. 355) and ruled upon (164 U. S. at page 81, 17 Sup. Ct. 31, 41 L. Ed. 355); and the features distinguishing that decision from the general rule received further attention in Williams v. United States, 168 U. S. 382, 390, 18 Sup. Ct. 92, 42 L. Ed. 509.

We have seen that the defendants in the instant case were included in both indictments, the one for alleged conspiracy and the other for fraud, and that the conspiracy alleged was to defraud the government of taxes like those of which it is alleged in the second indictment the government was actually defrauded. While distinct offenses were thus charged as before shown, it is evident that the indictments involved transactions of the same character, "transactions connected together," and "of the same class of crimes or offenses" within the meaning of section 1024 (Williams v. United States, supra, 168 U. S. at pages 390, 391, 18 Sup. Ct. 92, 42 L. Ed. 509); and in Emanuel v. United States, 196 Fed. 317, 320, 116 C. C. A. 137 (C. C. A. 2) it was held that where several defendants were included in each of several indictments, one charging conspiracy to commit substantive offenses and the others charging their actual commission, the indictments were rightly consolidated. True, upon the hearing of the instant motion to consolidate, counsel for the government expressed the belief in substance that no confusion would arise under the evidence offered in support of the respective indictments, certainly none that could not be cleared up by the court's instructions to the jury. The court expressed some misgiving, and in granting the order charged the government with the risk. On the motion for new trial, however, the trial judge believed that defendants had suffered no prejudice from the order, and in view of the record and of his presence at the trial it cannot be said that the order was not justified. Morse v. United States, 174 Fed. 539, 541, 98 C. C. A. 321 (C. C. A. 2), and petition for writ of certiorari denied, 215 U. S. 605, 30 Sup. Ct. 406, 54 L. Ed. 346; Gardes v. United States, 87 Fed. 172, 176, 30 C. C. A. 596 (C. C. A. 5); Lemon v. United States, 164 Fed. 953, 958, 90 C. C. A. 617 (C. C. A. 8).

3. *Rulings in Course of Trial.*—The assignments of error include rulings of the court (a) claimed to be inconsistent respecting admission of testimony and purposes for which the jury might consider it, whereby defendants "were kept in ignorance of what evidence had

been admitted" against them respectively "and for what purpose"; (b) refusing before the government closed its case to pass on exhibits and testimony offered as to certain of the defendants and compelling them to proceed with their defense before announcing whether and for what purpose such evidence was admitted; and (c) admitting claimed improper evidence offered by the government, refusing to strike out claimed inadmissible and prejudicial evidence, and withdrawing admissible evidence introduced by defendants. The details of these assignments are made the subjects of elaborate arguments. It is not feasible, nor is it necessary, to pass on the matters separately, or to group them so as to show the reasons for all the rulings complained of, though they have all been considered.

We understand counsel's claim in respect of inconsistent rulings to mean, for instance, that evidence would be received either generally or conditionally, or for special purposes, and subsequently either changed in scope or ruled out, and that many of such rulings were unduly delayed. It is true that rulings of this character were made in a number of instances. Some took place before and some after all the evidence was closed, and others after the opening arguments to the jury had been concluded; but we do not see how defendants, through their counsel, could have failed to observe and follow either the evidence that was finally retained or the purposes to which it was to be applied. It might as well be said that evidence received without objection or withdrawal could not be remembered or otherwise made available for purposes of defense. So far as any discoverable effect of the course pursued in the instant case is concerned, the ultimate rulings made on questions of evidence must be the test of error; and it is quite as vain to assign error to the intermediate rulings as it is to expect that changes in rulings will not occur in the course of a long trial, involving many and complicated items of evidence. It is said, however, that the effect of reserving rulings here until after the government closed its case, and requiring defendants meanwhile to proceed with their defense, was to violate article 5 of the Amendments to the Federal Constitution, which article in substance forbids compelling a person in a criminal case to be a witness against himself or depriving him of the guaranty of due process of law. We are not impressed by this contention. It did not deprive defendants of opportunity through care of their own and their counsel to observe and separate the subjects of such deferred rulings from the rest of their defense. Moreover, as to the rulings made after the testimony for the defense was closed and before the arguments were begun, defendants' introduction of testimony on the subjects of such rulings was voluntary, and cannot be said to have been prejudicial for that reason. It was open to defendants to withhold their testimony in that behalf until the reserved questions were passed upon; and as to the rulings made at the close of the opening arguments we do not discover that any objection was made to proceeding with the arguments, though error is assigned touching this feature of the delayed rulings. Nor is it perceived how defendants were prejudiced by any of such reserved rulings, for these rulings came at times when their entire

effect could be more readily apprehended and applied by both counsel and jury.

[7] We may add that our consideration of the rulings in question convinces us that the trial judge studiously analyzed the subjects involved and carefully instructed and warned the jury as to the purposes for which the evidence was received. The endeavor was, as the judge states in one of his rulings on a question of evidence, "to withhold final ruling until the case was so developed" that he "understood it." The necessity and wisdom of such a course in a case like this must be apparent to every experienced lawyer. In a word, we think the efforts made to render the evidence intelligible to the jury met the requirements intended to be exacted by this court in the Hendrey Case, 233 Fed. at pages 17, 18, 147 C. C. A. 75, here relied on by the defendants. And it is not to be assumed in a criminal case, any more than in a civil case, that a jury cannot grasp the meaning of a court's instructions touching admissibility and purposes of evidence, even though a change in ruling in that behalf be involved. As Mr. Justice Harlan said in Pennsylvania Co. v. Roy, 102 U. S. 451, 459 (26 L. Ed. 141), when speaking of an error committed by a trial judge which he subsequently corrected through instructions given to the jury:

"The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval."

There are exceptional instances, of course, where improper testimony may be received and subsequently excluded or withdrawn without removing the effect produced by its admission (Hopt v. Utah, 120 U. S. 430, 438, 7 Sup. Ct. 614, 30 L. Ed. 708; Looker v. United States, 240 Fed. 932, 153 C. C. A. 618 [C. C. A. 2]); but as respects the claimed inconsistent rulings as also certain withdrawals complained of here we are not convinced that any such instance is shown.

Upon the contention that the government was permitted to offer improper evidence, and that the court refused to strike out inadmissible and prejudicial evidence and directed withdrawal of admissible evidence introduced by defendants, we need not dwell. It would serve no useful purpose to point out the items of evidence discussed by counsel in this contention. Our examination of these features of the case and of the arguments of learned counsel concerning them persuades us that the objections may safely be answered in the language of the court when passing upon a kindred situation in the Morse Case, supra (174 Fed. at pages 554, 555, 98 C. C. A. 321, 336 [C. C. A. 2]):

"In an unusually protracted trial, depending upon a wilderness of figures, and during which a vast number of complicated transactions were investigated, it is not unnatural that mistakes should have been made. Neither is it sur-

prising that judges removed from the excitement of the forum, who have time to examine the events of the trial as they appear when portrayed in cold type, should have discovered some rulings which may be open to criticism. But we are convinced that no prejudicial error was committed."

4. *General Charge and Defendants' Special Requests.*—Considering the general charge (as to indictment 800) in its entirety, we think it was as favorable to the defendants as the law justified. It is in all respects fair and is comprehensive; it bears the impress of careful study in connection with numerous reported decisions pointed out; it in substance covers each of the special requests made in behalf of defendants so far as such requests were in accord with our conception of the weight of authority. The complaints made of the general charge and of the refusals to grant special charges consist of verbal criticism, and challenge of matters lacking in prejudicial effect, rather than anything amounting to reversible error. This may be illustrated by counsel's criticism upon the language used in the general charge to define reasonable doubt. The language and the citations accompanying it show that this portion of the charge, while not identical with, is to all intents and purposes the same as, language employed for a like object in well-known cases of this circuit, by Circuit Judge (later Mr. Justice) Jackson in the Harper Case (C. C.) 33 Fed. 482 to 484, Judge Hammond in the Means Case (C. C.) 42 Fed. 606, 607, and Judge Taft in the Youtsey Case (C. C.) 91 Fed. 868, 869; and in further support reference was made to Griggs v. United States, 158 Fed. 572, 578, 85 C. C. A. 596, and citations (C. C. A. 9).

Again it is urged that the court erred in refusing specifically to instruct the jury that under the evidence Snevily, for example, was an accomplice, instead of leaving the fact to be found by the jury; also in failing properly to define what corroboration meant respecting his testimony, and also in confusing the jury with two different rules by which to measure such testimony. But the trial judge referred to and evidently followed rules laid down by Mr. Justice Day in Holmgren v. United States, 217 U. S. 523, 524, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778, and by Judges Caldwell, Sanborn, and Thayer in Re Rowe, 77 Fed. 165, 166, 23 C. C. A. 103; and these decisions, as also the one in the Caminetti Case, since rendered (242 U. S. 495, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168), leave no room even for verbal criticism upon these features of the charge. We cannot think it necessary further to pursue the subject of the court's instructions.

[8] 5. *The Evidence.*—Motion to direct acquittal of each defendant was denied, as before pointed out. It is claimed that the evidence was not sufficient to show the commission of any of the frauds charged, nor to support the verdict against any of the defendants. It was for the jury to pass upon the facts; and it is for this court to determine whether there was evidence introduced which was proper to go to the jury and legally sufficient to sustain the verdicts.[8] It is not open

[8] Crumpton v. United States, 138 U. S. 361, 362, 11 Sup. Ct. 355, 34 L. Ed. 958; France v. United States, 164 U. S. 676, 681, 17 Sup. Ct. 219, 41 L. Ed. 595; Humes v. United States, 170 U. S. 210, 212, 213, 18 Sup. Ct. 602, 42 L. Ed.

to serious dispute that proper evidence was introduced to show that substantial portions of the oleomargarine product described in the fraud counts was artificially colored and removed at or about the times alleged and without payment of the prescribed tax; and, irrespective of the evidence restricted by the trial judge to the conspiracy count, we are satisfied from the record that proper evidence was ultimately received under the fraud counts in relation to the respective defendants which, if believed, was sufficient in law to support the several verdicts. This conclusion is strengthened by the fact that the trial judge, who had every opportunity to see and hear the witnesses and to become familiar with the circumstances disclosed at the trial, refused motions for new trial based in part upon the ground of insufficiency of evidence.

[9] 6. *Continuance Denied.*—Error is assigned to the refusal of the trial court to grant a motion supported by affidavits to continue the trial of the cause to the next succeeding term. This assignment has been earnestly supported both by brief and oral argument. The main ground of the motions was that immediately before the time fixed for trial of the cause many newspaper publications, purporting to relate in part to the facts involved in this cause and in part to the facts involved in other similar prosecutions, were circulated in the counties from which the jurors were to be drawn, and hence that defendants could not obtain a fair trial of the cause at the time fixed for the hearing. No sufficient showing is made that the opposing party, the government, instigated or brought about these publications. The question presented was after all one of judicial discretion and not subject to review, except where it is clearly shown that the discretion has been abused. Hardy v. United States, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. Ed. 1137; Isaacs v. United States, 159 U. S. 487, 489, 16 Sup. Ct. 51, 40 L. Ed. 229; Holt v. United States, 218 U. S. 245, 248, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138. The trial judge and the counsel alike exercised a marked degree of care and caution in securing fair and unbiased jurors and the court in its general charge specially admonished and instructed the jury not to consider these publications; it therefore cannot rightfully be said either that the court abused its discretion or that defendants suffered prejudice through denial of the motion.

Judgment affirmed.

1011; Burton v. United States, supra, 202 U. S. 373, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; Ling Su Fan v. United States, 218 U. S. 302, 308, 31 Sup. Ct. 21, 54 L. Ed. 1049, 30 L. R. A. (N. S.) 1176; Looker v. United States, supra, 240 Fed. 933, 153 C. C. A. 618 (C. C. A. 2); Tapack v. United States, 220 Fed. 445, 448, 137 C. C. A. 39 (C. C. A. 3); Hart v. United States, 84 Fed. 799, 803, 804, 28 C. C. A. 612 (C. C. A. 3); Dean v. United States, 246 Fed. 568, 572, 158 C. C. A. 538 (C. C. A. 5); Kellogg v. United States, 103 Fed. 200, 201, 43 C. C. A. 179 (C. C. A. 6); Hays v. United States, 231 Fed. 106, 108, 145 C. C. A. 294 (C. C. A. 8); Elder v. United States, 243 Fed. 84, 89, 155 C. C. A. 614 (C. C. A. 9); People v. Henssler, 48 Mich. 49, 51, 11 N. W. 804.

IRON MOLDERS' UNION, LOCAL NO. 68, et al. v. NILES-BEMENT-POND CO. et al.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1918.)

No. 3146.

1. COURTS ⚷317—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—ALIGNMENT OF PARTIES.
   In determining jurisdiction of a federal court, parties must be aligned as plaintiffs or defendants, respectively, according to their mutual interests.
2. COURTS ⚷317—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—ALIGNMENT OF PARTIES.
   In a suit by a corporation against a subsidiary corporation, of which complainant has complete control through stock ownership and common officers, and numerous ex-employés of defendant company and local labor unions, to enjoin acts of the latter named defendants growing out of a strike, and in which no relief is asked against the corporation defendant, such defendant must be aligned with complainant, and, if it is an indispensable party, the fact that it is a citizen of the same state as its codefendants will defeat the jurisdiction of a federal court.
3. INJUNCTION ⚷114(3)—INDISPENSABLE PARTIES.
   To a suit by a corporation against another corporation and its striking employés, to enjoin the latter from interfering with its business and present employés, the defendant corporation is an indispensable party; its rights as against those of its codefendants being necessarily involved.

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

Suit in equity by the Niles-Bement-Pond Company against the Niles Tool Works Company, the Iron Molders' Union, Local No. 68, and others. From an order granting a preliminary injunction, certain of the defendants appeal. Reversed.

For opinion below, see 246 Fed. 851.

W. B. Rubin, of Milwaukee, Wis., and R. J. Shank, of Hamilton, Ohio, for appellants.

Murray Seasongood, of Cincinnati, Ohio, and Allen Andrews, of Hamilton, Ohio, for appellees.

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

PER CURIAM. [1] This case presents a question of jurisdiction of the District Court, dependent entirely upon diversity of citizenship. The bill was filed by appellee Niles-Bement-Pond Company, a New Jersey corporation, as sole plaintiff, against the Niles Tool Works Company, an Ohio corporation, doing business at Hamilton, Ohio (hereinafter called the defendant company or the Tool Works), together with a large number of individual defendants (including two unincorporated Iron Molders' Union locals, located at Hamilton); the others being officers, representatives, or members of the respective unions or persons acting in sympathy therewith. The individual de-

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

fendants are all residents of Ohio. If the defendant company is properly aligned with the individual defendants, jurisdiction exists. If, however, it should be aligned as a coplaintiff, jurisdiction fails; for, in determining jurisdiction, the parties must be aligned, as plaintiffs or defendants, respectively, according to their mutual interests. Dawson v. Columbia Trust Co., 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713; Hamer v. N. Y. Railways Co., 244 U. S. 266, 274, 37 Sup. Ct. 511, 61 L. Ed. 1125.

[2] This suit is an outgrowth of a strike by former employés of the Tool Works (the defendant company) who are members of one of the Molders' Union locals. Its object is to restrain defendants other than the Tool Works from acts of intimidation, threats, abuse, and violence directed toward the Tool Works' employés and their families, as well as the congregating by individual defendants, and those acting in concert or sympathy with them, at or about the Tool Works factory and plant, as well as at the homes of that company's workmen. The District Court granted a preliminary injunction. 246 Fed. 851. This appeal is from that action.

Plaintiff's interest in and relations to the strike, and the grounds on which its claim to relief is based, are these: It has contracts for machinery and munitions to be furnished the government of the United States, amounting in value to about $3,000,000, the greater part thereof being for work necessary for the prosecution of the present war; its contracts therefor being either directly with the government or with concerns which have such contracts therewith, priority for such work being given by the National Defense Act (Act June 3, 1916, c. 134, 39 Stat. 166). Plaintiff has placed orders for a large amount of this work with the defendant company and cannot well have it performed elsewhere; the work so contracted for being nearly all partially manufactured and constructed, and being of such kinds and sizes that it cannot profitably be removed from the Tool Works' plant or completed elsewhere. Indeed, industrial plants generally which are equipped for manufacturing this class of machinery have prior orders in such amount as to forbid taking on the orders in question. Plaintiff is also prevented by the strike from taking further profitable contracts for similar work offered by the governments allied with the United States, as well as by other contractors. The strike will occasion plaintiff heavy loss of profits, besides subjecting it to danger of forfeiture of contracts and large damages. But for the threatened violence on the part of strikers and sympathizers, the defendant company could perform the contracts with plaintiff.

It is clear that plaintiff has a right to complain of unlawful injuries to its rights, but it seems equally clear that the defendant company, if it is to be a party, is interested on the same side of the suit with plaintiff, and that as between these two parties there is no adverse interest. The plaintiff absolutely controls the defendant company, through plaintiff's ownership of the entire common stock and a majority of the preferred stock of that company—the two corporations having a common president, one vice president in common, a majority of the board of directors of the defendant company be-

ing also directors of the plaintiff company. Each company, however, has a separate manager. The defendant company is essentially a subsidiary of the plaintiff. Ninety-five per cent. of the work done by the defendant company is allotted to it by the plaintiff. From the gross price under plaintiff's contracts with the government and others so allotted to defendant company, plaintiff receives a commission of 10 per cent. The defendant company receives the balance. The president of the two companies is authorized to fix the prices under its contracts with the government and others, and thus in effect the prices which the defendant company shall receive. Naturally and normally, the two corporations would stand together in every way, so far as their interests in this suit are concerned. That they do so stand together is affirmatively shown. The defendant company employed and paid the guards and watchman, and the representatives of the two companies consulted together regarding the strike, "how to manage it and how to get men into the foundry." The defendant company seems not to have appeared of record in the suit; its works manager testified that he "should say" that the counsel present at the trial [employed by plaintiff] represented both plaintiff and defendant company (presumably in reference to the conduct of the strike), that the witness had consulted with the attorneys named "in regard to matters connected with this strike," and that one of them represented the defendant company when one of the strikers was arrested, apparently during the strike now in question.

The bill states no case for relief against the defendant company and no such relief is asked, unless by the general prayer that the "court grant plaintiff any and all other equitable relief which in equity and good conscience it is entitled to receive." Indeed, plaintiff's control of the defendant company, and the complete harmony between them, renders relief at the hands of the court as against defendant company entirely unnecessary. It is equally clear that the interests of the defendant company and those of the individual defendants are wholly adverse to each other.

[3] The pivotal question thus is whether the defendant company has such a real interest in the subject-matter of the litigation as to render its presence necessary to make the final decree effectual. If so, it is an indispensable party. Hamer v. N. Y. Railways Co., 244 U. S. 266, 274, 37 Sup. Ct. 511, 61 L. Ed. 1125, and cases there cited; Steele v. Culver, 211 U. S. 26, 29, 29 Sup. Ct. 9, 53 L. Ed. 74; Lindauer v. Compania Palomas, etc. (C. C. A. 8) 247 Fed. 428, 432, 159 C. C. A. 482; South Penn Oil Co. v. Miller (C. C. A. 4) 175 Fed. at page 737, 99 C. C. A. 305; Waterman v. Canal-Louisiana Bank, 215 U. S. 33, 49, 30 Sup. Ct. 10, 54 L. Ed. 80; Gen. Investment Co. v. Railroad Co. (C. C. A. 6) 250 Fed. 160, 170, 162 C. C. A. 296.

We think this question must be answered in the affirmative. Treating the defendant company as an independent corporation as fully as plaintiff claims it to be, its interest in the settlement of the controversy between itself and its employés is direct and immediate, while that of the plaintiff is indirect and derivative. The court could

not decide in favor of the individual defendants without deciding against the asserted rights of the defendant company. Such adverse decision might well be disastrous to that company, and could not be made in its absence. On the other hand, a determination in favor of plaintiff would necessarily involve a determination in favor of the defendant company as against its employés, in respect of which the defendant company is vitally and immediately interested, and on which the court would require it to be heard. Moreover, the individual defendants have the right to have those issues settled as between themselves and defendant company. Jenney v. Hayden (C. C.) 171 Fed. 898, 899. Again, while the suit cannot be said to be collusive within the rule in Miller & Lux v. East Side Canal Co., 211 U. S. 293, 29 Sup. Ct. 111, 53 L. Ed. 189, and kindred cases, and not collusive in any vicious sense, yet, however much plaintiff may have been justified in preferring the federal court, it is apparent that the making of the Tool Works a defendant, instead of a coplaintiff, was "merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist." Dawson v. Columbia Trust Co., 197 U. S. 178, 181, 25 Sup. Ct. 420, 422, 49 L. Ed. 713; Hamer v. Railways Co., supra, 244 U. S. at page 274, 37 Sup. Ct. 511, 61 L. Ed. 1125. The very omission of any real prayer for relief against the defendant company "shows that properly it is to be treated as a plaintiff." Steele v. Culver, supra, 211 U. S. at page 29, 29 Sup. Ct. 9, 53 L. Ed. 74. And see Dawson v. Trust Co., supra, 197 U. S. at page 180, 25 Sup. Ct. 420, 49 L. Ed. 7.

We scarcely need say that we see no merit in the suggestion that the joinder of the defendant company as coplaintiff would make the bill multifarious. The case is not like Helm v. Zarecor, 222 U. S. 32, 36, 32 Sup. Ct. 10, 56 L. Ed. 77, where the party whose alignment was in question took sides with neither of the real parties to the controversy, but was merely the holder of the title, which might go to one or the other of the real parties. Nor is it governed by the rule announced in Metropolitan Railway Receivership Case, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403, where jurisdiction over a proper receivership, in a case of actual diversity of citizenship, was not allowed to be defeated merely because both parties preferred the federal court and united in having the proceeding in that court. Nor is it within the rule pertaining to a suit by a stockholder on behalf of a corporation (such as Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606), where the latter refuses to act.

Plaintiff, however, bases here its claim to jurisdiction, as it did below, on Carroll v. Chesapeake & Ohio Coal Agency Co. (C. C. A. 4) 124 Fed. 305, 61 C. C. A. 49. In that case, which was an appeal from a refusal to dissolve an injunction, the plaintiff corporation, engaged in the business of selling coal and coke, had contracts with defendant coal companies by which it was to take and pay for their product at the mines, to furnish transportation, and sell at prices fixed by the companies, receiving a stipulated sum per ton for its services. By the terms of the contracts the defendant companies were not liable for damages for failing to furnish coal or coke to plaintiff where such

failure was caused by strikes. In reliance on such contracts, plaintiff had contracted for the sale of large quantities of coal and coke, which could only be supplied by the mines of the defendant companies, and which the latter were prevented from furnishing by the acts of the individual defendants, who were conducting a strike among the miners, and who by intimidation and threats prevented others from working in the mines. It was held that the bill showed an interest in plaintiff so different from that of the coal companies as to entitle the plaintiff to maintain the suit in its own right, independently of those companies, and that the latter could not be aligned with plaintiff to defeat jurisdiction.

Assuming that the Carroll Case was properly decided, yet the differences between that case and this are radical. There the plaintiff could not control the coal companies; the latter were alleged to be irresponsible, and injunction was asked to restrain them from allowing the individual defendants or others to do acts tending to interfere with the working of the coal companies' employés. The court's opinion commented upon this prayer. Here, as already said, there is no such prayer, and no suggestion of insolvency; and plaintiff can absolutely control the action of the defendant company. There the plaintiff was, at the most, the sales agent of the coal companies; here the relations were quite different. Plaintiff's contracts with the government and others are made parts of its contracts with the defendant company, which, if the contracts are not fulfilled, must suffer in direct correspondence with plaintiff. There a distinction was drawn between the injuries suffered by the plaintiff and the companies, respectively, in that the former, by its failure to obtain coal and coke, would not only incur heavy and immediate pecuniary loss but suffer utter destruction of its business; while the latter would suffer merely an interruption in the profits, which, as they still had the mines, they could recoup when work was resumed. Indeed, if the prices of coal had increased, it was to the interest of the coal companies to escape from their contracts, without liability, through the medium of the strike. Here the differences between the injuries to plaintiff and the defendant company, respectively, are largely, if not entirely, of degree. Here there is no claim of fault on the part of the defendant company; there, in commenting on the alleged misjoinder of the coal companies as defendants, the court distinctly recognized the possibility of actual fault on their part, saying:

"It is the duty of the coal companies to have the mines worked; that of the individual defendants not to obstruct this operation. Discharging their duty, the coal companies should exhaust effort in obtaining workers for their mines, and in restraining and preventing the obstruction of the work. Non constat that the action of the individual defendants may not have been taken because of some acts of omission or commission on the part of the coal companies. At least complainant has the right to know about this, and the coal companies have the right to disavow and disprove it. Until this is done, the fault may lie with the coal companies and the individual defendants, with either or both."

We cannot accept the Carroll Case as an authority for jurisdiction here. The instant case is such as to make its failure for lack of juris-

diction unfortunate; but the conclusion that jurisdiction was lacking seems inevitable.

It results that the order complained of must be reversed, and the record remanded, with directions to dismiss the bill.

WEST v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1919.)

No. 3210.

1. PERJURY ⚿29(4)—VARIANCE.
An indictment for perjury under Comp. St. § 1687, which averred that the oath was taken by accused "before" a District Judge named, *held* supported by proof that the oath was taken in open court presided over by such judge, and was administered by the deputy clerk of the court.

2. CRIMINAL LAW ⚿1186(4)—REVERSAL—TECHNICAL ERROR—VARIANCE.
Assuming that an indictment for perjury must be construed as averring that the oath was administered by the judge, whereas the proof was that it was administered by the deputy clerk in open court, the variance, where not prejudicial to defendant, is not ground for reversal, under Judicial Code, § 269, as amended by Act Feb. 26, 1919, which requires the court on any writ of error to give judgment on the entire record, "without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

3. PERJURY ⚿9(1)—JURISDICTION OF COURT.
False swearing by a witness on hearing of a motion for preliminary injunction in a federal court *held* to constitute perjury, where the bill alleged facts showing diversity of citizenship which gave the court jurisdiction, although the testimony developed an identity of interest, between complainant and one of defendants which required the latter's alignment with complainant and defeated jurisdiction.

4. CRIMINAL LAW ⚿365(3)—EVIDENCE—RES GESTÆ.
Where, in a trial for perjury, it became an issue of fact whether defendant assaulted and struck another during a strike, testimony that immediately after striking such person defendant followed up and struck his companion, who was associated with him in work, *held* admissible as part of the res gestæ.

5. CRIMINAL LAW ⚿1159(2)—REVIEW ON ERROR—SUFFICIENCY OF EVIDENCE.
Where there is substantial testimony supporting the verdict in a criminal case, it cannot be disturbed by an appellate court on the ground of insufficiency of evidence.

In Error to the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Criminal prosecution by the United States against William West. Judgment of conviction, and defendant brings error. Affirmed.

Robert J. Shank, of Hamilton, Ohio, for plaintiff in error.
James R. Clark, Asst. U. S. Atty., of Cincinnati, Ohio.

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

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

KNAPPEN, Circuit Judge. On September 14, 1917, the Niles-Bement-Pond Company, which was interested in the Niles Tool Works Company, of Hamilton, Ohio, filed bill in equity in the District Court for the Southern District of Ohio, against an Iron Molders' Union local and a large number of other defendants, including plaintiff in error herein, asking injunction (amongst other things) against threatening, intimidating, interfering with, assaulting, and applying abusive language to the tool company's workmen and others wishing to work for it, and from congregating in the streets of Hamilton, Ohio; a strike, affecting the employés of the tool company, being then in progress. The tool company was made a defendant. On the hearing of the application for preliminary injunction, plaintiff in error testified in open court that on the 10th day of September, 1917, he talked with a workman named Wise in front of the house of one Bruning, in Hamilton, telling Wise to join the union, that "your brothers are in there; why don't you come over and be right, too," but denying that he said anything would happen to Wise if he did not do so, or that he struck Wise or any one else.

An order for injunction made by the District Court was reversed by this court, with direction to dismiss the bill for lack of diversity of citizenship, resulting from a necessary alignment of the tool company as coplaintiff with the Niles-Bement-Pond Company, due to their mutual interest in the injunction suit. Iron Molders' Union Local No. 68 et al. v. Niles-Bement-Pond Co. (No. 3146, decided by this court Nov. 6, 1918) 258 Fed. 408, —— C. C. A. ——. Meanwhile, plaintiff in error was indicted in the court below for perjury in so testifying on the application for injunction. This writ is brought to review a conviction thereunder.

[1] 1. The testimony on the trial of the perjury charge showed that the oath taken by plaintiff in error on the hearing of the injunction application (over which Judge Sater presided) was actually administered in open court by the deputy clerk of that court. The indictment averred that the oath was taken *before*—

"his honor, John E. Sater, a legally appointed, qualified and acting United States Judge for the Southern District of Ohio, said court being a competent tribunal and said John E. Sater being a competent officer and person before whom such oath is authorized by the laws of the United States to be administered."

The statute (U. S. Comp. St. 1916, § 1687) provides that in an indictment for perjury:

"It shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, *and* before whom the oath was taken, averring such court or person to have competent authority to administer the same, * * * and without setting forth the commission or authority of the court or person before whom the perjury was committed."

The indictment was sufficient in form, and the deputy clerk had full authority to administer the oath in the court's presence. Comp. St. 1916, § 1337. It was not necessary to allege the name of the clerk who administered the oath or that of the judge who took it. United States v. Walsh (C. C.) 22 Fed. 644, 646; United States v.

Howard (D. C.) 132 Fed. 325, 335, 341. The act of the clerk, in the presence of the court, was the act of the court. United States v. Howard, supra, 132 Fed. at page 341. Apparently the word "and," italicized above, means "or." United States v. Walsh, supra. If there is merit in the objection that the evidence of the administering of the oath was insufficient, it can only be because of a fatal variance between the indictment and the proof. There was no variance whatever, unless the indictment must be construed as alleging that Judge Sater personally administered the oath, as distinguished from being the judge, "before" whom the oath was taken or "before whom" it was "authorized * * * to be administered."

[2] It is not entirely clear that the indictment requires such construction. But, assuming that the intention was to charge that Judge Sater personally administered the oath, we think that, upon the record in this case, the variance was not fatal. Were there reason to believe that plaintiff in error was misled to his prejudice, in preparation for defense or otherwise, by an allegation, express or implied, however unnecessarily made, that Judge Sater personally administered the oath, the case would be different; but the record removes all reasonable possibility of misleading or surprise, for not only was there no suggestion of that nature on the trial, but the testimony that the clerk administered the oath was received without objection and was uncontroverted, and plaintiff in error expressly admitted, as a witness, that he gave on the hearing of the injunction application the precise testimony introduced by the government through the stenographer who took it. The frame of the indictment is such as to preclude all possibility of a second prosecution for the same offense.

Section 1691 of the Compiled Statutes provides that—

"No indictment * * * shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

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), declares that—

"On the hearing of any * * * writ of error * * * 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."

While neither of these sections attempts to sanction a violation of substantial rights, or to disregard prejudice (Markham v. United States, 160 U. S. 319, 16 Sup. Ct. 288, 40 L. Ed. 441), yet an immaterial and nonprejudicial variance between allegation and proof is not cause for reversal. See Matthews v. United States, 161 U. S. 500, 16 Sup. Ct. 640, 40 L. Ed. 786, where a variance of one day in the date on which the testimony was alleged to have been given in open court trial was held immaterial; Hogue v. United States, 192 Fed. 918, 114 C. C. A. 11, where an obviously clerical mistake in

using the name "clerk," instead of "court," was held not vital, the court failing "to find by such mistake that plaintiff in error was in any wise misled or prejudiced"; Daniels v. United States, 196 Fed. 459, 464, 465, 116 C. C. A. 233, where we held that evidence that bankrupt may have owed the payee $200 was not a material variance from the charge in the indictment that the debt owed did not exceed $50, the exact amount not being material; and see United States v. Howard, supra, where it was held (132 Fed. 334, 335) under what is now section 1691, supra, that leaving blank the day of the month on which the perjury was alleged to have been committed did not vitiate the indictment.

In our opinion, the objection of variance is without substance.

[3] 2. On the trial of the perjury charge below there were introduced the Niles-Bement-Pond Company's petition (or bill) for injunction; the motion to dismiss made by defendants other than the tool works, on the ground, among others, of lack of diversity of citizenship; the plea of abatement of the defendants other than the tool works, alleging lack of jurisdiction by reason of collusion between the Niles-Bement-Pond Company and the tool works to give such jurisdiction; and the order allowing the preliminary injunction from which the appeal was taken to this court. The motion to dismiss was denied before the hearing of the application for temporary injunction was taken up. The plea in abatement does not appear to have been formally passed upon.

Plaintiff in error contends that the record showed no jurisdiction in the court below over the hearing of the injunction application, that plaintiff in error thus could not have been guilty of perjury, and that his motion to dismiss should have been granted. The decision of this court, since the conviction below, directing the dismissal of the bill for lack of jurisdiction is invoked.

It is the well-established general rule that perjury cannot be predicated of a false oath in a proceeding before a court which had no jurisdiction to inquire into the matter which was the subject of that proceeding,[1] as, for example, where the proceeding in which the oath was taken was one wholly unauthorized by law (State v. Gates, 107 N. C. 832, 12 S. E. 319), or where it did not appear that there was pending any writ or entry forming the basis for the testimony (State v. Hanson, 39 Me. 337), or where the special tribunal before whom the testimony was taken was illegally appointed and without authority to act (Com. v. Hillenbrand, 96 Ky. 407, 29 S. W. 287), or where testimony was taken under a wrongly assumed authority to try a case on its merits rather than merely to take the examination of a party (Hamm v. Wickline, 26 Ohio St. 81).

To this general rule there are a number of limitations, as, for example, where a court has jurisdiction of the subject-matter and of the parties, and the testimony given is material to the inquiry then before the court, false swearing is perjury, although the proceed-

1 See note to Morford v. Oklahoma, 54 L. R. A. 513, on "Perjury as Affected by Invalidity of Proceeding in Which Testimony is Taken."

ings may be so irregular or erroneous as to require reversal on appeal (State v. Walton, 53 Or. at page 567, 99 Pac. 431, 101 Pac. 389, 102 Pac. 173 and cases there cited); and perjury may be committed on a trial under an indictment which is afterwards held insufficient (State v. Rowell, 72 Vt. 28, 47 Atl. 111, 82 Am. St. Rep. 918); and there may be jurisdiction in the absence of proof of facts dehors the record, which would be defeated by the presence of such proof (State v. Ridley, 114 N. C. 827, 19 S. E. 149).

It follows that, although a court may not have jurisdiction to proceed to judgment, it may have jurisdiction to take cognizance of a case in the first instance and until the facts showing lack of jurisdiction appear; and testimony given on a record showing jurisdiction is none the less perjury because facts later appear defeating jurisdiction, as, for instance, in suits for divorce in which the residence of a party within the state is necessary to relief or, in some cases, even to the jurisdiction of the court, false swearing to a bill showing such residence or jurisdiction, or false testimony in a suit under such bill, is perjury although it turns out that the right to relief, or even jurisdiction, is defeated by the absence of the asserted residence (People v. McCaffrey, 75 Mich. 115, 42 N. W. 681; Stewart v. State, 22 Ohio St. 477; Markey v. State, 47 Fla. 38, 37 South. 53).

Decisions in cases where the court has jurisdiction over the parties and over the subject-matter are not necessarily in point; and the same is true of cases holding that lack of jurisdiction over the person has been waived. We must reckon with the fact that the jurisdiction of the District Court was entirely dependent upon diversity of citizenship, and that lack of jurisdiction was not the subject of waiver. Interior Construction Co. v. Gibney, 160 U. S. at page 219, 16 Sup. Ct. 272, 40 L. Ed. 401. For the purposes of this opinion, we assume that the case is the same as if the District Court had itself, at the conclusion of the testimony, dismissed the suit for lack of jurisdiction, instead of making the order for injunction. We shall also assume that, if the petition for injunction had conclusively shown upon its face a lack of diversity of citizenship, the alleged false testimony would not amount to perjury.

The situation, however, is this: The petition for injunction in terms alleged diversity of citizenship between the Niles-Bement-Pond Company and the tool works. It set out the plaintiff's interest in and relations to the strike and the grounds on which its claim to relief are based in substance as given in the paragraph relating thereto on page 2 and the early part of page 3 of our opinion in No. 3146, supra (258 Fed. 409). But of the many facts otherwise enumerated on page 3 of that opinion (258 Fed. 409, 410) the only one appearing in the petition is this:

"The plaintiff has practically the exclusive sale of the output of said [tool] company, selling approximately 95 per cent. of the products manufactured by that company, and has a large ownership of the stock of the defendant company."

We think the petition, standing alone, was not subject to motion to dismiss for lack of diversity of citizenship. The Niles-Bement-

Pond Company's right to the exclusive sale of the tool company's output, and the former's interest in the latter's performance of subsisting contracts, tended to show an independent right to file a bill for relief; and the mere fact of its large ownership of stock in the tool company did not necessarily make the latter company merely a subsidiary of the former, nor did it amount to an assertion that the latter is actually dominated and controlled by the former. C., M. & St. P. R. R. v. Minneapolis Ass'n, 247 U. S. at page 500, 38 Sup. Ct. 553, 62 L. Ed. 1229; Bigelow v. Calumet & Hecla Min. Co. (C. C. A. 6) 167 Fed. 721, 94 C. C. A. 13. True, the failure of the bill to ask relief against the tool company (unless by the clause in the prayer "that the plaintiff recover of the defendants its damages suffered"—the bill elsewhere characterizing the tool company as the "defendant company"), and (as we held in No. 3146) its failure to state a case for such relief strongly suggested that the tool company was made a defendant merely for the purpose of giving a fictitious appearance of jurisdiction. But the bill was amendable in these respects (if the facts would justify, People v. McCaffrey, supra), even on the hearing of the plea in abatement, and, being so amendable, did not conclusively show lack of jurisdiction to hear the application for temporary injunction, even though, as it finally turned out, the facts would not justify amendment in these respects.

Upon the hearing of the injunction application plaintiff in error was sworn as a witness. It was in the course of that examination that the alleged false testimony was given. During the hearing of the injunction application the other facts recited on page 3 of our opinion in No. 3146 (258 Fed. 409, 410) were developed, which contributed largely to our conclusion of identity of interest in fact between the two corporations. Probably no one would doubt the court's jurisdiction to take testimony directly upon the question of that jurisdiction (Markey v. State, supra); but we think it clear that the court had jurisdiction to receive testimony in a single hearing upon the merits of the application for injunction in connection with the subject of its own jurisdiction, and that false testimony relating to the merits, in the connection stated, would constitute perjury equally as if aimed directly at jurisdiction. The alleged false testimony was material to the issue on the merits. We cannot think that the question of jurisdiction to take plaintiff's testimony, and thus the question of perjury or no perjury in giving it, could depend upon the subsequent affirmative conclusion, largely from testimony dehors the record, that the actual diversity of citizenship between plaintiff and the tool company, alleged in the bill and existing in fact, failed to give jurisdiction because of identity of interest between those parties.

[4] 3. The alleged assault on Wise occurred while he, Reichel, and a few other molders were being escorted by guards from the works to their respective homes, accompanied by a large and excited crowd said to contain several hundred people. There was testimony that Wise and Reichel were together until Wise was stopped and was engaged in conversation, and was subsequently struck by plaintiff in error, in front of Bruning's gate on Third street; Reichel having

meanwhile moved south in the crowd to an alley called Race street, which formed the southern boundary of the Bruning lot. Against objection of irrelevancy and incompetency, the government was permitted to show that plaintiff in error struck Reichel at the alley at a point, according to the varying statements of witnesses, from 15 to 50 feet from Bruning's gate. The trial judge, in a charge to which no exception was taken, instructed the jury that the issue was merely "what took place between [plaintiff in error] and Carl Wise in front of Bruning's house on the 10th of September, and what was there said and done," and that plaintiff in error should be acquitted "if he did not hit Wise at that time and place"; that he was not on trial for striking Reichel, and that the testimony concerning the alleged striking of the latter was admitted "for the purpose of letting the jury see the whole scene and what was taking place at that time, because whatever happened, happened within a very short time, there is evidence tending to show. So what was going on, and the circumstances under which the conversation took place between Wise and West, and as reflecting upon the conversation and the credibility of the witnesses."

The question is whether the alleged assault on Reichel falls within the rule which admits proof of acts committed as a part of the same transaction or a continuation of the main transaction, for while plaintiff in error was not on trial for assault or threats, but for perjury, the issue of fact was the same, viz. whether the alleged assault and threats were actually made, and on this issue the rule of evidence would be the same. A correct statement of the rule of res gestæ and its limitations is found in 16 Corpus Juris, 572–574, which we quote in the margin.[2] Whether or not the rule of res gestæ applies here

[2] "I. *Res Gestæ*. . 1. *In General.*—Matters constituting a part of the res gestæ are admissible in evidence, the rules as to admissibility, and as to what constitutes the res gestæ, being the same in criminal as in civil cases. The res gestæ is not confined to the act charged, but includes acts, statements, occurrences, and circumstances forming a part or a continuation of the main transaction. Conversely, matters so separated or disconnected in point of time or circumstance from the act charged as not to be a part of a continuous transaction are no part of the res gestæ of the act. While the question of res gestæ depends in a great measure on the circumstances of each case, especially as regards the matter of time, and a certain measure of discretion is vested in the trial court, certain general principles are regarded as well settled. For an act or declaration to be included in the accompanying circumstances which may be given in evidence with the principal fact or transaction, there must be a principal fact or transaction, the idea of res gestæ presupposing a main fact; and to be admissible as part of the res gestæ the act or declaration must be substantially contemporaneous with the main fact, must spontaneously spring out of it, must tend to illustrate, elucidate, or characterize it, must so harmonize and be connected with it as obviously to constitute one transaction, and must not in effect be a mere narrative of a past occurrence. However, the word 'contemporaneous', as employed in the rule, is not to be taken in its strict meaning, nor is time the only criterion for determining whether a thing said or done is part of a given transaction, although closeness in point of time is an element for consideration; the ultimate test is spontaneity and logical relation to the main event, and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstance and at a time so near it as to

depends on whether the record would reasonably support a conclusion that the alleged assaults on Wise and Reichel were, in effect, parts of one and the same transaction, and substantially contemporaneous.

There was testimony that while plaintiff in error was talking to Wise, after calling him a "scab" and threatening to "get him" if he returned to work the next day, some one in the crowd around Reichel called out "Hit him," whereupon plaintiff in error struck Wise and went hurriedly to the place where Reichel was apparently already under assault, and there struck Reichel. According to this testimony, the difference in time between the two alleged assaults was not necessarily more than a very few seconds. Considering all the evidence in the case, including the attempt (which it was open to the jury to infer) on the part of strikers and strike sympathizers to prevent operation of the works, the occasion for the gathering of the crowd, its hostility generally toward employés persisting in remaining at the works, and the permissible inference that plaintiff in error, who was a member of the Molders' Union local, was a strike sympathizer, we think it would support a finding that the two alleged assaults were practically contemporaneous, and were parts of one and the same transaction. This being so, it was not error to admit it or to refuse to instruct the jury not to consider it.

This view is specifically supported by Smith v. State, 88 Ala. 73, 76, 7 South. 52, 53, where in a prosecution for murder it was said that the act of the defendant, after inflicting a death wound on the deceased, in pursuing the latter's companion, and firing at him as he ran, "was not only part of the res gestæ, but tended strongly to show the hostile spirit under which he was acting"; May v. Commonwealth, 153 Ky. 141, 149, 154 S. W. 1074, where, in a prosecution for killing a woman, evidence that defendant killed the latter's husband, just before he killed her, was held admissible, not only as part of the res gestæ, but because showing the unlawful intent or motive for killing the wife, and this notwithstanding the fact that defendant had already been convicted under a separate indictment for killing the husband; State v. Schrum, 255 Mo. 273, 277, 280, 164 S. W. 202, where defendant was charged with shooting first one man and then another whom he came upon together, the shooting of the second was held admissible as part of the res gestæ upon the trial of the first; People v. Murphy, 276 Ill. 304, 306, 307, 321, 322, 114 N. E. 609, where in a prosecution growing out of a raid upon some Greeks living in a railroad car, in which one was shot within the car and the other after, in the course of the mêlée, he had gotten outside the car, the testimony as to the second homicide was held admissible on the trial of the indictment under the first, conviction being had under each indictment; State v. McCahill, 72 Iowa, 111, 116, 30 N. W. 553, 33 N. W. 599, where in a prosecution for assault, growing out of a strike, evidence of threats against another party, made immediately

preclude the idea of deliberation and fabrication, it is to be regarded as contemporaneous within the meaning of the rule. In determining what is admissible as part of the res gestæ, no distinction usually is, nor indeed can be, drawn between statements and acts."

after the killing of deceased, was held competent. For application of the rule to prosecutions for offenses other than assaults, see State v. McDowell, 61 Wash. 398, 403, 112 Pac. 521, 32 L. R. A. (N. S.) 414, Ann. Cas. 1912C, 782, and cases cited; People v. Mead, 50 Mich. 228, 231, 15 N. W. 95; Pirscher v. United States (C. C. A. 5) 133 Fed. 526, 67 C. C. A. 660; Sartin v. State, 7 Lea, 679.[3]

[5] 4. Finally, plaintiff in error contends that there was not enough substantial evidence of the untruth of his testimony in the injunction case to justify a finding of perjury beyond a reasonable doubt.

It is true that but two witnesses testified that plaintiff in error either struck or threatened Wise, and the testimony of these witnesses was directly disputed by that of seven or eight others. There were also other facts and considerations tending, in greater or less degree, to discredit the testimony of each of the two witnesses referred to. Each, however, testified positively that plaintiff in error had both struck and threatened Wise. The situation raised, at the most, a question of credibility, and the credibility of witnesses and the trustworthiness of their testimony are peculiarly questions for the jury. Rochford v. Pennsylvania Co. (C. C. A. 6) 174 Fed. 81, 83, 98 C. C. A. 105. If the jury believed these witnesses, there was substantial testimony sustaining the charge of perjury. The trial judge, who saw and heard the witnesses, denied a motion for a new trial on the ground, among others, that the verdict was not sustained by sufficient evidence and was manifestly against the weight of the evidence. We cannot disturb the verdict for insufficiency of evidence. Kelly v. United States (No. 2978, decided by this court January 7, 1919) 258 Fed. 392, —— C. C. A. ——, and cases cited in note under paragraph 5; Matthews v. United States, 192 Fed. 490, 113 C. C. A. 96.

It results from these views that the judgment of the District Court should be affirmed.

[3] The government contends that the record shows that the alleged assault on Reichel preceded that on Wise. If so, the evidence in question would be, if anything, even more directly in point. We think the view that the alleged assault on Wise preceded that on Reichel is the better one; but the question of priority is not, in our opinion, highly important.

In re C. JUTTE & CO.

Appeal of GRIBBLE et al.

(Circuit Court of Appeals, Third Circuit. June 19, 1919.)

No. 2424.

1. BANKRUPTCY ⚷88(2)—INTERVENTION—PETITION.
A petition to intervene in a bankruptcy case, after an order of adjudication or dismissal has been made, is addressed to the discretion of the court.

2. BANKRUPTCY ⚷99—DISMISSAL OF PETITION—WHAT CONSTITUTES.
Though a court of bankruptcy expressed an opinion indicating its purpose to dismiss an involuntary petition, yet where no order of dismissal was drawn, as directed by the opinion, the petition in bankruptcy is not dismissed, and remains pending.

3. BANKRUPTCY ⚷88(2)—INTERVENTION—RIGHT TO INTERVENE.
Where no order dismissing an involuntary petition in bankruptcy had been entered, though the trial court had expressed the opinion that it should be dismissed, *held* that, under Bankruptcy Act July 1, 1898, § 59f (Comp. St. § 9643), declaring that creditors other than the original petitioners may at any time enter their appearance and join in the petition, such creditors might intervene, regardless of their laches, so long as the petition has not been formally dismissed.

Appeal from the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

In the matter of the bankruptcy of C. Jutte & Co. From an order dismissing the petition of E. B. Gribble and another, creditors, for leave to intervene, they appeal. Reversed.

A. Devoe P. Miller, of Pittsburgh, Pa., for appellants.

Robert J. Dodds, of Pittsburgh, Pa. (George D. Wick and Reed, Smith, Shaw & Beal, all of Pittsburgh, Pa., of counsel), for appellee.

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

WOOLLEY, Circuit Judge. The single question in this case concerns the right of creditors of an alleged bankrupt, other than original petitioners, to appear at any time before the decision of the issue of bankruptcy and join in the petition, under authority of section 59f of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, 561 (Comp. St. § 9643).

The unexplained neglect of the appellants promptly to prosecute the right they now assert deprives them of every consideration of equity. If the right still exists, it does so only by force of the statute construed very strictly with reference to the facts.

In April, 1908, a petition in bankruptcy was filed against C. Jutte & Company, a Pennsylvania corporation. In due course, the company filed an answer denying that it had engaged in any trade or pursuit that brought it within the operation of the Bankruptcy Act. In September, 1908, the property of the company was sold under mort-

gage foreclosure, and the proceeds distributed to the holders of the accompanying bonds. Excepting the allowance in 1911 of a creditor to intervene and join in the petition, nothing more was done until April 22, 1912, when E. B. Gribble and Jane C. Jutte, owners of the Tug "Independent," the appellants in this case, petitioned for leave to intervene as creditors and join in the bankruptcy petition. On rule to show cause, the alleged bankrupt opposed this petition on the ground that it was not indebted to the petitioners, and that, in any event, the petition to intervene should be denied because of laches. On July 19, 1912, the court made an order of reference to a referee in bankruptcy, "to determine whether the said petitioners, E. B. Gribble and Jane C. Jutte, doing business as the Tug "Independent," are creditors of said C. Jutte & Company."

On September 13, 1912, with the reference of Gribble's and Jutte's petition still outstanding, Judge Orr, sitting in the District Court, handed down an opinion on the issue of bankruptcy raised by the company's answer to the original petition, in which he held that the alleged bankrupt, being engaged in the business of transportation, and not being "engaged principally in manufacturing, trading, printing, publishing, binding, or mercantile pursuits," was not such a corporation as can be adjudged a bankrupt. He therefore held against the motion for adjudication.

A year later, in October, 1913, the referee made a report on the order of reference. He found the alleged bankrupt indebted to Gribble and Jutte but in a lesser sum than they claimed, and found also, in view of the opinion of the court filed in September of the previous year holding that the alleged bankrupt corporation could not be adjudged a bankrupt, that Gribble and Jutte should not be allowed to intervene, but should be relegated to their right as creditors to file a new petition. On October 13, 1913, Gribble and Jutte filed exceptions to the report of the referee, first, as to the amount of the indebtedness found, and second, as to the disallowance of the petition to intervene. Later, the exceptions were renewed (March 8, 1915), but were not pressed until July 2, 1918, when they were disposed of by Judge Thomson, sitting in the District Court, on an order overruling the exceptions and dismissing the petition to intervene on the ground of laches. It was from this order (not from Judge Orr's order) that Gribble and Jutte took this appeal.

[**1-3**] The appellants base their appeal on Section 59f of the Bankruptcy Act, which provides, that "creditors other than original petitioners may at any time enter their appearance and join in the petition. * * *" Relying on the broad terms of this provision, the appellants claim, that, notwithstanding their seemingly inexcusable delay in entering an appearance, they have a right under the statute, being creditors, to appear "at any time" and join in the petition of bankruptcy. The appellee, arguing as though the petition in bankruptcy had been dismissed and as though the appellants claim a right to appear "at any time" *thereafter*, maintains that the allowance of a petition to intervene in such a case is not based on a statutory right but is purely discretionary with the court and should be denied, unless

the application be seasonably made. The cases cited in support of the latter contention hold quite uniformly, that a petition to intervene *after* an order of adjudication or dismissal has been made, that is, after the issue of bankruptcy has been determined, is addressed to the discretion of the court. In re First National Bank of Belle Fourche, 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355; In re Jemison Mercantile Co., 112 Fed. 966, 50 C. C. A. 641; In re Koenig & Van Hoogenhuyze (D. C.) 127 Fed. 891; 1 Loveland on Bankruptcy, 467. But the rule of these cases, which no one questions, is not applicable to this case, because, through inadvertence of counsel, or otherwise, Judge Orr's opinion was not followed by an order dismissing the original petition. We thus have a situation in which the court has expressed its conclusion on the issue of bankruptcy but has not reduced it to judgment. We are not unmindful of the distinction between the rendition of a judgment and the record of a judgment rendered. 15 R. C. L. 571, 572, 578. The trouble here is that while the views of the court were expressed in an opinion indicating its purpose to render a judgment in accordance with them, no judgment has, in fact, been rendered. The last act of the court was the direction: "Let an appropriate order be drawn." None was drawn. Until the order is drawn and signed, the original petition in bankruptcy is not dismissed. It remains pending, and so long as it is pending and the issue of bankruptcy is not disposed of by an order of adjudication or dismissal, creditors, other than original petitioners, stand where the statute places them, and they may, by authority of the statute as construed by the courts, intervene and join in the petition. In re Stein, 105 Fed. 749, 45 C. C. A. 29 (C. C. A. 2d); In re Charlestown Light & Power Co. (D. C.) 183 Fed. 160; In re Lutfy (D. C.) 156 Fed. 873; In re Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434 (C. C. A. 8th). Advantageous as would be the application of the doctrine of laches to this case, we find nothing in the statute or in the cases construing the statute, which indicates that tardiness or delay deprives creditors, other than the petitioners, of the right to avail themselves of the original petition at any time during its pendency.

In reaching the conclusion to which we are driven, we realize that in this case we are running very nearly counter to the maxim: Lex nil frusta facit. We wish, however, to make it clear, that, as this appeal is only from Judge Thomson's order, our decision affects in no way the views of Judge Orr as expressed in his opinion, and limits in no degree his freedom of action in dealing with the matter as it has been presented to him, or as it may again be presented to him.

The order dismissing the appellants' petition to intervene is reversed.

SNARE & TRIEST CO. v. ST. PAUL FIRE & MARINE INS. CO.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 179.

1. INSURANCE ⟹272—APPLICATION FOR MARINE INSURANCE—"DOCKED."
The word "docked," as used in application for marine insurance, *held* not to be ambiguous, but to mean dry-docked.

2. INSURANCE ⟹265—MARINE INSURANCE—ACTION ON POLICY.
A statement in an application for a marine policy on a vessel, "warranted docked and overhauled," not carried into the policy, is a representation only, and in an action at law on the policy may be shown to have been substantially performed.

3. INSURANCE ⟹255—REPRESENTATION IN APPLICATION—MATERIALITY.
Where the underwriter requests information in the application which, when given, amounts to a representation, such answer to a specific question is conclusively presumed to be material to the risk.

4. INSURANCE ⟹312—MARINE INSURANCE—PROMISSORY REPRESENTATION.
A representation in an application for insurance on a vessel during a voyage, that she will be dry-docked and overhauled before the voyage, is promissory, and a substantial compliance with it is sufficient to sustain the contract.

5. INSURANCE ⟹312—MARINE INSURANCE—SUBSTANTIAL COMPLIANCE WITH PROMISSORY REPRESENTATION.
A representation in the application for a marine policy that the vessel would be dry-docked and overhauled before the voyage may be shown to have been substantially complied with by proof which warrants a finding that, while not dry-docked, she was made entirely seaworthy, and was in as good condition as she would have been made if dry-docked.

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

Action by the Snare & Triest Company against the St. Paul Fire & Marine Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed.

In October, 1913, the Snare Company (plaintiff here and below) owned a certain scow lying at the time in the harbor of Havana, Cuba, where she had been for some time. Plaintiff employed Johnson & Higgins to procure marine insurance on this scow, which they intended to bring back to the United States. These brokers made written application on behalf of plaintiff to the general agent of defendant insurance company for $4,000 on hull, etc., of scow, to cover "at and from Havana to Charleston direct or otherwise (in) tow (of) the Barnett," a tug.

This application the insurer declined until it had been amended or changed by the insertion of the following words: "Warranted dkd and overhauled 1913." As changed or amended, insurance was granted, and one copy of the application was kept by the insurer and the other delivered to Messrs. Johnson & Higgins. The date of written application was October 9, 1913. On October 16th the insured issued its "certificate of insurance," under the "office policy" of defendant's general agent, which certificate, for the purpose of this case, may be taken as the policy of insurance. Neither in words nor substance was the phrase "Warranted dkd and overhauled 1913" inserted or expressed in said policy.

On October 30th the Barnett took this scow in tow and started from Havana to Charleston. Forty-eight hours after leaving a storm arose, said to have been of great severity, which "finally washed to pieces" the scow, which thus became a total loss. This action was brought to recover upon the policy.

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

There was evidence tending to show that the scow had been thoroughly caulked, overhauled, and painted, hatches secured with tarpaulins and put in "seaworthy and * * * first-class condition" before starting upon the voyage on which she was lost. But she had not been dry-docked in the year 1913, and before leaving Havana. Evidence was also introduced or offered to show that the overhauling and repairing of the scow put her in as good condition as she would have been had a dry dock been used.

The trial court took evidence tending to show that the word "dkd" was not only an abbreviation for "docked," but meant "dry-docked," and refused to submit any question to the jury, except the authority of Johnson & Higgins to apply for or accept insurance after making such representation or warranty as is embodied in the phrase "Warranted dkd and overhauled 1913." The jury found in favor of the authority of Johnson & Higgins by rendering a general verdict in favor of defendant on the single question submitted to them. Plaintiff took this writ.

Hector M. Hitchings and J. Elmer Melick, both of New York City, for plaintiff in error.

Oscar R. Houston and Harrington, Bigham & Englar, all of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] While under the jury's verdict we must hold that the word "docked" meant "dry-docked," we are of opinion that under the other circumstances shown no evidence was necessary to reach this conclusion. The acceptance of the application closed the contract for insurance; when and as approved by the insurer or his agent it was in substance a "binder" (Muller v. Globe, etc., Co., 246 F. 759, 159 C. C. A. 61), although no formal paper called a binder was in this case issued—a practice frequently followed. The word "docked," when used in such an instrument, is not ambiguous, but clear and precise, and needs no parol evidence to explain it. Hearn v. New England, etc., Co., 3 Cliff. 318, Fed. Cas. No. 6301. The word meant "dry-docked."

[2] But the insurance contract was not permitted to remain in the inchoate form of approved application or binder. A policy was issued and in force before the beginning of the voyage upon which the scow was lost, and into that policy the phrase out of which this controversy arose was not carried; it never became a part of the policy of marine insurance upon which this action is brought. As was held in Dow v. Whetten, 8 Wend. 160:

> "The * * * application for insurance is admissible in evidence to show the intention of the parties. In a court of law it is proper evidence only to show a misrepresentation; in equity it may be used to correct the policy."

This being an action at law, the words in question must be treated as a representation only. A warranty, being a part of the policy, must be strictly and literally performed. Hazard v. New England, etc., Co., 8 Pet. 580, 8 L. Ed. 1043. But "a representation to the underwriters need only be substantially performed." Pawson v. Watson, 2 Cowper, 785. See, also, Gow on Marine Insurance (3d Ed.) p. 266, and Hughes v. Union, etc., Co., 8 Wheat. 307, 5 L. Ed. 620.

[3] In considering the effect of a representation upon a policy of

insurance, the first inquiry is as to its materiality, and the point has been "much considered whether the materiality of a misrepresentation or a concealment is a question of law which the court determines or a question of fact to be submitted to the jury." Parson on Marine Insurance (Ed. of 1868) vol. 1, p. 463. But where the underwriter requests the information, which when given amounts to a representation, such answer to a specific question is conclusively presumed to be material to the risk. Kerr v. Union, etc., Co., 130 Fed. 415, 64 C. C. A. 617.

[4] The evidence in this case is at least sufficiently full to warrant a jury in finding that the meaning and intent of this representation was that the scow to be insured would be "dry-docked and overhauled" before she started upon her voyage from Havana to Charleston in tow of the Barnett. Such a representation is promissory, and we adopt the ruling of Wallace, J., in Lunt v. Boston, etc., Co. (C. C.) 6 Fed. 562, that a substantial compliance with a promissory representation is sufficient to sustain a contract for marine insurance.

[5] This brings us to the question whether an overhaul without dry-docking, which did as matter of fact make the scow entirely seaworthy, and which was as thorough an overhauling or reconditioning as could have been given to the vessel if put in dry dock, is or can be a substantial compliance with the admitted representation here in controversy.

The exact question has not apparently been considered in any reported case; but, having regard to what was indicated as a substantial compliance in the Lunt and Pawson decisions, supra, we feel justified in holding that there may be, and there is in this record, evidence tending to show that the scow was, at and before voyage commenced, substantially in the condition of seaworthiness indicated or defined by the phrase "to be dry-docked and overhauled."

We express no opinion on this matter of fact. Most modern suits on policies of marine insurance are in admiralty, and the court determines the facts as well as the law; but whether a compliance is substantial or not is a question of fact, and therefore at common law for the jury, subject always to such limitations as to materiality and relevancy of testimony as are by law imposed.

Because the trial court refused to submit this question to the jury, we think error was committed. It may be noted that the point actually sent to the jury, viz. the authority of the brokers, seems to us entirely immaterial in this case. If the brokers exceeded their authority or departed therefrom, they may be liable as unfaithful agents; but, in respect of procuring this insurance, whatever they did within the usual wide authority of such brokers was done by Snare Company.

Further, this defendant is only liable, in an action on a policy, on the particular kind of policy issued and in suit. That the broker got a document not wanted does not per se vary or increase the liability of the insurer.

Judgment reversed, with costs, and new trial ordered.

VIRGINIAN RY. CO. v. HALSTEAD.*

(Circuit Court of Appeals, Fourth Circuit. April 24, 1919.)

No. 1676.

1. MASTER AND SERVANT ⚿286(15)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY—SWITCH TARGET NEAR TRACK.
   Where a brakeman, required in course of duty to mount the ladder on the side of a moving car, was injured by his foot being struck by a switch target six or seven inches from the passing ladder, proof that the construction of the switch was in accordance with the custom of railroads is evidence of due care, but not conclusive, and the court cannot hold as matter of law that so narrow a space was reasonably safe.

2. MASTER AND SERVANT ⚿286(1), 288(1)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.
   In an action for injury to a brakeman, the questions of negligence and assumption of risk *held* properly submitted to the jury.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Action at law by Vernon Halstead, by Nora Halstead, his next friend, against the Virginian Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Walter H. Taylor, of Norfolk, Va. (Loyall, Taylor & White, of Norfolk, Va., on the brief), for plaintiff in error.

Thomas H. Willcox, of Norfolk, Va. (Earl W. White and Willcox, Cooke & Willcox, all of Norfolk, Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. [1] The plaintiff Vernon Halstead recovered a judgment against Virginian Railway Company for injuries alleged to be the result of defendant's negligence. The facts are not in dispute. At the time of the accident, plaintiff was a brakeman in defendant's barney yard between Jamestown Boulevard and Sewell's Point, in Norfolk county, Va. In this yard cars loaded with coal are collected and send by gravity to the scales and thence to the coal piers. For this movement it was necessary for the brakeman to throw the switch in order to shift the cars from one track to another, and then mount the moving car by a ladder and set the brakes. On August 26, 1917, this duty was required of Halstead. He threw the switch, went between the switch and the track a few feet beyond the switch in the direction from which the cars were coming, stepped on the ladder, and while pulling himself up to a standing position was struck on the foot by the switch target as the cars passed.

The defendant assigns error in the refusal to instruct the jury to find for defendant for lack of any evidence of negligence. The charge of negligence depends entirely on the uncontroverted fact that there was a clear space of only six to seven inches between the ladder and the switch target, alleged to be insufficient for the safety of the brake-

⚿For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 250 U. S. —, 40 Sup. Ct. 10, 64 L. Ed. —.

man mounting the car. Atkins, a former employé on the yard, testified that the distance between the car and the target was unsafe; that he had so reported it to his superiors; that some of the switches on the yard had been changed for that reason; that he had been grazed by this target while standing on the ladder. Garrett, another employé, testified that he had changed some of the switches because conductors and brakemen had complained of the danger, and he believed the clear space to be too small; that he did not change this particular switch because the embankment was too narrow. There was also testimony that plaintiff's course in throwing the switch and stepping on the ladder was usual and proper.

On behalf of defendant there was testimony to the effect that a man standing straight in the stirrup will pass the target safely, but if he leans out he is liable to be caught. Hanes, superintendent of this coal terminal, testified that the rod of the switch target was standard; that the distance of the target from the track was the standard distance used, not only by defendant, but by other railroads.

The defendant's first position is that the construction of the switch, including the length of the switch rod, and the distance between the passing car and the switch target, was an engineering question, and that, since the construction was proved to be standard, the court should have held it to be reasonably safe as a matter of law, and therefore should have directed a verdict for the defendant. To sustain this position defendant relies on Tuttle v. Milwaukee Ry. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114, wherein the court said:

"We have carefully read the evidence presented by the bill of exceptions, and although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question. (For analogous cases as to the right of a manufacturer to choose the kind of machinery he will use in his business, see Richards v. Rough, 53 Mich. 212 [18 N. W. 785]; Hayden v. Smithville Man. Co., 29 Conn. 548, 558.) The interest of railroad companies themselves is so strongly in favor of easy curves as a means of facilitating the movement of their cars that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to their employés. The brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto; and, if they decide to do so, they must be content to assume the risks."

In that case the brakeman was injured by the slipping of the drawbars while he was coupling cars from the inside of a curve. The court further held that the tendency of the drawbars to slip on the curve was an obvious danger which the brakeman assumed.

The language quoted must be accepted as an accurate statement of the law applicable to the facts of the case, but the doctrine must be strictly limited, unless we are to allow railroad experts to take away

from juries and themselves decide questions of their own negligence. As we had occasion to say in Norfolk & W. Ry. Co. v. Gillespie, 224 Fed. 316, 139 C. C. A. 552, the engineers may be the final judges of the proper construction of a curve; but when the elevations and safeguards were proved, "the issue which was properly submitted to the jury was whether, considering the method of construction which the defendant had chosen to adopt, it was not negligence to require its engineers to run over the curve at the speed required by the schedule." Union Pacific Ry. Co. v. O'Brien, 49 Fed. 538–547, 1 C. C. A. 354. So, in the present case, the proper distance between the switch target and the passing car may be altogether an engineering question, under ordinary conditions. But jurors know as well as engineers the space that a man's body occupies and the way men usually handle themselves. Hence when, in the operation of cars and switches, brakemen are required to place their bodies between a switch target and a passing car, proof that the construction of the switch was in accordance with the custom of railroads is evidence of due care, but not conclusive evidence. The issue of what is a reasonably safe clear space is to be decided by the jury under all the evidence, in the light of common observation and experience. Surely there is no principle which requires a court to say as a matter of law that a clear space of only six or seven inches was safe.

[2] The evidence required the defense of assumption of risk to be submitted to the jury. Plaintiff testified he had been working as a brakeman only about a month, and had never worked at this switch before the time of the accident, that he did not know the distance from a passing car to the switch target, and that he had never been warned of the danger. It is true that the distance between the railroad track and the target was obvious, but that did not make obvious the distance between the side of the car and the target. Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Norfolk & W. Ry. Co. v. Gillespie, 224 Fed. 316–324, 139 C. C. A. 552; Gila R. Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521. Nor was it plainly evident that the plaintiff without reason chose the dangerous place of mounting the car on the east side of the target, when there was a safe place on the west side after the car had passed the target, for he testified that the car would have reached the stopping place before he could have got up on the west side. The issues of negligence of defendant and assumption of risk and negligence of plaintiff were properly submitted to the jury.

Affirmed.

HUNTINGTON et al. v. DICKINSON et al.

(Circuit Court of Appeals, Fourth Circuit. April 18, 1919.)

No. 1670.

1. JUDGMENT ⚿747(1)—CONCLUSIVENESS—EJECTMENT—PERSONS NOT PARTIES—LANDLORD AND TENANT.
Under Code W. Va. 1913, c. 90, § 35 (sec. 4103), providing that a judgment in ejectment shall be conclusive as to the right of possession upon the party against whom rendered and all persons claiming from, through, or under him, by title accruing after commencement of suit, a judgment against the tenant, in an ejectment suit to which the landlord is not a party, does not affect the landlord's title.

2. JUDGMENT ⚿684—CONCLUSIVENESS—PERSONS CONCLUDED.
A judgment in a suit for the purchase money of land, allowing defendant therein credit for a parcel in dispute as for a deficiency, because of a recovery in ejectment by a third person against vendor's tenant, is not available as a finding that plaintiff had no such title as vendee was bound to accept, in a subsequent action to recover the disputed parcel, brought against those claiming under plaintiff in the ejectment suit.

3. EQUITY ⚿436—COMMISSIONERS' DEEDS—EFFECT.
A release given by a commissioner on order of the court covering a parcel of land, title to which was in dispute in a suit for the purchase price, has the effect of a quitclaim deed under Code W. Va. 1913, c. 72, § 3 (sec. 3780).

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action in ejectment by John Q. Dickinson and another against Arabella D. Huntington and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

George J. McComas, of Huntington, W. Va. (Enslow, Fitzpatrick & Baker, of Huntington, W. Va., on the brief), for plaintiffs in error.

C. W. Campbell, of Huntington, W. Va. (John F. Brown, of Charleston, W. Va., and G. W. McClintic, of Charleston, W. Va., on the brief), for defendants in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In the action of ejectment for several thousand acres of land, it turned out that the only controversy was over a triangular parcel containing 400 acres. Jury trial was waived, and the District Court found for the plaintiff.

On October 24, 1794, Joseph Skiles under a Virginia land warrant entered 40,000 acres of land in Kanawha county; but the warrant was not perfected into a grant until June 11, 1798. In the meantime, on November 11, 1794, John Steele under a like warrant entered 19,500 acres in the same county, and procured a grant therefor on December 1, 1794. By stipulation it was agreed that defendants Arabella D. Huntington and others had a regular chain of title under the senior Steele grant of 1794; the plaintiff denying, however, that the land in controversy was embraced in the grant. It was also stipulated that

the plaintiffs John Q. Dickinson and Mary D. Dickinson had a chain of title from the junior Skiles grant, embracing the land in dispute, regular in all respects, except in the three particulars mentioned below.

The reasoning of the District Judge leading to the conclusion of fact that the land in controversy was not covered by the Steele grant, and that it was covered by the Skiles grant, is so clear and convincing that nothing of value can be added to it. The defendants contend, however, that even if it be true the land is not covered by the senior grant under which they claim, yet plaintiffs cannot recover possession under the grant to Skiles, for three reasons thus stated by counsel:

"(1) They claim title through and under a deed from D. C. Gallaher, special commissioner, that is not legally sufficient as a muniment of title.

"(2) They claim under John D. Lewis and his heirs, who are estopped to deny the ownership by the plaintiffs in error of the interlock in controversy.

"(3) They are barred from a recovery in this case by a recovery had by C. P. Huntington against John Lewis Taylor, tenant of Norris & Clark, the grantees of John D. Lewis."

For the sake of clearness we take up first the third defense. In July, 1875, Collis P. Huntington, defendants' predecessor in title, recovered by default a judgment in ejectment for the land in dispute against John Lewis Taylor, who entered as a tenant of John D. Lewis, plaintiffs' predecessor in title. Before the judgment in ejectment was obtained by Huntington, Lewis sold about 40,000 acres, including the land in dispute, to Norris & Clark. Neither John D. Lewis nor Norris & Clark were parties to the action of ejectment. But, before the writ in ejectment was executed, first Norris & Clark, and then John Q. Dickinson and Mary D. Dickinson, after they acquired the title of Norris & Clark, intervened in the action of ejectment, and sought to prevent the execution of the writ and secure a review of the judgment, on the ground that as claimants of title and possession they were not bound by the judgment, and should be allowed to appear and defend the action against the tenant. Their applications were denied on the ground that the court had no jurisdiction to open the judgment after the expiration of the term in which it was entered. But in affirming the judgment and denying the applications this court said:

"The conclusion reached is without prejudice to the right of the plaintiffs in error to take such appropriate action as they may be advised to, looking to the recovery of the interests they have, if any, in the property in controversy, and we do not mean to express any opinion regarding such future litigation, or any question that may arise therein."

All the details of the long and complex litigation are set out in the opinion of the District Court and of this court. Dickinson v. Huntington, 185 Fed. 703, 109 C. C. A. 523; Huntington's Devisees v. Taylor (C. C.) 156 Fed. 700.

[1] Section 35 of chapter 90 (sec. 4103) of Code of West Virginia provides as to judgments in ejectment:

"Any such judgment in an action of ejectment shall be conclusive as to the right of possession established in such action, upon the party against whom it is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commencement of such action," etc.

Under this statute this court has held that a recovery in an action of ejectment against a tenant to which the landlord is not a party does not adjudicate the title of the landlord. King v. Davis (C. C.) 137 Fed. 198; Id., 157 Fed. 676, 85 C. C. A. 348. The judgment against the tenant, John Lewis Taylor, therefore, did not affect the title of Norris & Clark, or of John D. Lewis, or the plaintiffs, claiming under them.

[2] In a suit brought by John D. Lewis against Norris & Clark for the collection of the purchase money of the conveyance to them of the large tract of land, Norris & Clark were allowed credit at the acreage price agreed on for the 400 acres in dispute as a deficiency because of the recovery of Huntington against John Lewis Taylor, the tenant. Collis P. Huntington and the defendants claiming under him, not being parties to that suit, would not have been bound had the court held that the title of Lewis was good, and they cannot avail themselves of a finding that Lewis did not appear to have such title as Norris & Clark should be required to accept.

[3] As a result of the deduction of the price of the 400 acres in dispute in favor of Norris & Clark in their litigation with John D. Lewis, the court ordered Norris & Clark "to release" to the heirs of John D. Lewis the parcel of land described in the proceedings as the 400 acres recovered by Huntington. Upon their refusal to comply with the order, the court appointed D. C. Gallaher commissioner, and directed him on behalf of Norris & Clark "to make, acknowledge, and deliver to the heirs at law of John D. Lewis, purchaser at the sale aforesaid, a deed of release." Thereafter Gallaher, commissioner, executed an instrument, as a compliance with the order of the court, in which he undertook to grant and release the land to the heirs of Lewis. It is insisted that the commissioner had no authority to grant, and that a release did not carry the legal title to the heirs of Lewis. The point is disposed of by section 3 of chapter 72 (sec. 3780), Code of West Virginia, providing that a release shall have the effect of a quitclaim deed.

The contention that the land was not sufficiently identified in the order directing the release is equally untenable. There was only one 400-acre tract recovered by Huntington, and that was described in the action of ejectment of Huntington v. John Lewis Taylor.

Affirmed.

CAUGHMAN v. UNITED STATES.

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

No. 1664.

1. WITNESSES ⚷414(1)—PROSECUTIONS UNDER ESPIONAGE ACT—CREDIBILITY OF ACCUSED—CORROBORATION—ADMISSIBILITY.

In a prosecution for violating Espionage Act June 15, 1917, wherein defendant asserted that he had always been a loyal citizen, and that he had tendered his services to the government in the war before charges were brought against him, it was error to exclude evidence as to whether he had received an acknowledgment from the government for offering his services, and whether he had it with him; the case turning on defendant's credibility.

2. CRIMINAL LAW ⚷338(1)—PROSECUTIONS FOR VIOLATING ESPIONAGE ACT—EVIDENCE—ADMISSIBILITY.

In a prosecution for violating Espionage Act June 15, 1917, testimony by a witness that he had been asked by the commissioner at the preliminary examination, if what he knew was not practically the same as that testified to by another witness, and that he responded in the affirmative, and that such evidence was true, was inadmissible, being irrelevant and collateral.

3. CRIMINAL LAW ⚷778(5) — INSTRUCTIONS — ESPIONAGE ACT — BURDEN OF PROOF—PRESUMPTION OF INNOCENCE.

In a prosecution for violating Espionage Act June 15, 1917, an instruction, at the close of an extended charge, that a man "comes in clothed with the presumption of innocence, and that presumption continues until, in the opinion of the jury, the evidence is sufficient to show that he is guilty beyond a reasonable doubt, and from that time the burden is on him to establish his innocence," was misleading and prejudicial; the burden always being on the prosecution.

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

Joseph M. Caughman was convicted of violating Espionage Act June 15, 1917, and he brings error. Reversed.

George B. Timmerman and G. T. Graham, both of Lexington, S. C. (Timmerman, Graham & Callison, of Lexington, S. C., on the brief), for plaintiff in error.

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

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The indictment on which plaintiff in error, herein called defendant, was tried contains six counts, each charging a violation at Lexington, S. C., of the Act of Congress approved June 15, 1917 (40 Stat. 217, c. 30), commonly known as the Espionage Act. There was a general verdict of guilty, with recommendation to mercy, and the case comes here on writ of error.

As the testimony in support of the several counts was clearly sufficient for submission to the jury, we pass by the assignments of error

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

based on refusal to direct a verdict for defendant, and take up for brief discussion certain other rulings of the trial court which are made the subject of exception.

Testifying in his own behalf the defendant stoutly denied the treasonable utterances imputed to him by the government's witnesses, and asserted that he had always been a loyal citizen. In proof of this he stated that he had volunteered and served in the army during the Spanish-American war, that he had purchased a Libertv Bond and made contributions to the Red Cross, and that he had tendered his services to the government in the present war before these charges were brought against him. In connection with the latter statement the record shows:

"Q. Did you get any acknowledgment from the government for offering your services? A. Yes, sir. Q. Have you got it with you? A. Yes, sir—which questions were ruled out by the court, to which the defendant then and there excepted."

[1] We think this evidence was improperly excluded. The case turned on defendant's credibility. This was emphasized by the learned judge in his charge to the jury, when he said:

"But you have a right to consider the fact that he is on trial, and that his testimony tends to acquit; and just as you have a right to consider animosity is a human weakness, which may sway a witness, so, more strongly for you, you have a right to consider the credibility of the defendant, Caughman, that the desire to escape conviction and punishment may sway his testimony; it does not prevent you from believing him, but you have a right to consider it in estimating his credibility."

In short, the defendant was refused opportunity to prove conclusively, as he could have done, the truthfulness of an important statement made by him, bearing directly on the question of his loyalty, and the jury were in effect told that they might disbelieve everything he said. Taking into account the nature of the accusation against him, and the difficulty of meeting it except by his own denials, we are constrained to hold that the ruling here considered was erroneous and prejudicial.

[2] It appears that defendant had a preliminary examination before a commissioner, at which one Sawyer testified to certain disloyal declarations made by him at a time and place named. Taylor, another witness for the government, was present and heard Sawyer's evidence. At the trial in the court below, and after the close of defendant's testimony, Taylor was recalled and permitted, over objection, to answer questions as follows:

"Q. Did not the commissioner ask you what you knew about the case, or words to that effect, and what was your reply? A. You asked me, Mr. Weston, if what I knew in the case was practically the same as had been testified to by Mr. Sawyer and his brother. I said, 'Yes, sir,' and Mr. Sloan asked if that was true. Q. And you said 'Yes'? A. Yes, sir."

The record indicates that these questions were allowed because witnesses for defendant had testified that Taylor was not present at the preliminary; but this appears to have been a mistake, as no such testimony is found in the bill of exceptions. However that may be,

we are aware of no rule of evidence which justified the inquiry. It clearly should have been excluded. The error was doubtless inadvertent, and of itself can hardly be regarded as serious; but it served to introduce at the last moment a purely collateral and irrelevant matter, which in the circumstances was liable to improperly affect the jury.

At the close of a somewhat extended charge, which did not in terms include the rule of presumption of innocence, the learned judge was asked "to charge the jury the rule that when a man comes into court he comes in presumed to be innocent." To this request the following reply was made:

"I shall charge them that the Supreme Court says that a man comes in clothed with a presumption of innocence, and that presumption continues until in the opinion of the jury the evidence is sufficient to show that he is guilty beyond a reasonable doubt, and from that time the burden is on him to establish his innocence."

[3] We cannot doubt that the concluding clause of this instruction, the last word from the court to the jury, was seriously misleading and prejudicial. It is clearly at variance, in our opinion, with the rule laid down in the familiar cases of Coffin v. United States, 156 U. S. 432, 458, 15 Sup. Ct. 394, 39 L. Ed. 481, and Cochran v. United States, 157 U. S. 286, 299, 15 Sup. Ct. 628, 39 L. Ed. 704, and frequently since repeated. For example, in Davis v. United States, 160 U. S. 469, 487, 16 Sup. Ct. 353, 358 (40 L. Ed. 499), the Supreme Court says:

"Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime."

The point needs no discussion. In the light of the cited cases it seems plain that the instruction under review gave to the jury an erroneous impression as to the continuing presumption of innocence, which, as said in Coffin v. United States, supra, "is an instrument of proof created by the law in favor of one accused."

Of the remaining assignments of error it is sufficient to say, without taking them up in detail, that careful examination discloses no grounds for reversing the judgment. On the whole case, however, and specially for the reasons above stated, we are led to the conclusion that the defendant is entitled to a new trial.

Reversed.

CLARK v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. June 14, 1919.)

No. 2455.

1. CRIMINAL LAW ⟹1129(2)—APPEAL—ASSIGNMENTS OF ERROR.
A criminal case record, containing superfluous and overlapping assignments of error, disapproved.

2. RECEIVING STOLEN GOODS ⟹8(3)—SUFFICIENCY OF EVIDENCE—OWNERSHIP BY UNITED STATES.
In prosecution under Penal Code, § 48 (Comp. St. § 10215), for having possession with intent to convert property stolen from United States, evidence *held* to sustain jury finding that property belonged to United States, despite mistaken references in shipping orders to date of contract under which government secured title.

In Error to the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge.

James Clark was convicted of having property stolen from United States in his possession with intent to convert the same, and he brings error. Affirmed.

On January 20, 1918, pursuant to an agreement made on the fourth day of the same month, United Metals Selling Company entered into a contract with the United States to make and deliver to it a large quantity of electrolytically refined copper for use in the manufacture of munitions. In obedience to orders made by the Ordnance Department of the Federal Government, the Selling Company directed the Raritan Copper Works, one of its subsidiaries, to deliver to the Erie Railroad Company for shipment to United States Inspector of Ordnance at the New Jersey Tube Company at Harrison, New Jersey, a quantity of the contract copper to be manufactured by the latter concern into munition parts under a contract between it and the United States. The bill of lading for the shipment recited the United States and carrier as parties and was in the form used especially for transporting government property. The copper was dealt with by the Copper Works, the Railroad Company, the government agents and the Tube Company as property of the United States. It was delivered by the Copper Works to the United States under contract, carried toward Harrison by the Railroad Company for the United States, and like consignments, not stolen, were received by the United States Inspector of Ordnance at Harrison as property of the United States and there worked into munition parts by the Tube Company under contract with the United States.

Men who were informed of a proposed shipment of copper from the Copper Works to the Tube Company boarded the train at a point at which it had stopped on the Jersey City "dumps," tossed out copper bars to the value of $4,500.00, hauled them to the premises of Clark and there hid them under circumstances involving his complicity in the transaction.

Wm. A. Kavanaugh, of Hoboken, N. J., for plaintiff in error.
A. J. Steelman, of Jersey City, N. J., for the United States.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and DICKINSON, District Judge.

WOOLLEY, Circuit Judge (after stating the facts as above). James Clark, Mendel Rankin, Louis Hanin, Julius Schlecter and Caesar Frazer were charged by one indictment with having in their possession

goods and merchandise stolen from an interstate shipment (Act Cong. Feb. 13, 1913, c. 50, § 1, 37 Stat. 670 [Comp. St. § 8603]), and by another indictment with having in their possession with intent to convert to their use property of the United States which had theretofore been stolen by another person, knowing the same to have been stolen (Penal Code [Act March 4, 1909, c. 321] § 48, 35 Stat. 1098 [Comp. St. § 10215]). The trial proceeded by consent on both indictments against the first four named defendants. Frazer had not been apprehended. The court directed the jury to acquit Schlecter on both indictments and to acquit the remaining defendants on the first indictment. Under the second indictment, Clark, Rankin and Hanin were convicted. Rankin and Hanin submitted to sentence, and Clark alone sued out this writ of error.

We have presented to us thirty-eight assignments of error, which may be readily compressed into four groups, viz.: Errors (1) in the admission of evidence; (2) in the refusal of the court to charge as prayed; (3) in the instructions charged; and (4) in the court's refusal to direct a verdict of acquittal.

[1] This record with its superfluous and overlapping assignments of error constrains us to repeat the admonition of the Supreme Court in Chesapeake & Delaware Canal Co. v. United States, 250 U. S. 123, 39 Sup. Ct. 407, 63 L. Ed. —:

"This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel on the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on." Phillips Construction Co. v. Seymour, 91 U. S. 646, 648 [23 L. Ed. 341]; Grayson v. Lynch, 163 U. S. 468 [16 Sup. Ct. 1064, 41 L. Ed. 230]; and Central Vermont Ry. Co. v. White, 238 U. S. 507 [35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252].

The assignments of error as we have grouped them resolve themselves into three questions: First, whether there were errors in the admission of evidence and in instructions which the court charged and refused to charge the jury; second, whether the evidence sustains the finding of the jury that property in the stolen copper was in the United States as laid by the indictment, and third, whether the evidence sustains the finding of Clark's complicity in the crime.

"Of course, in jury trials, erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless." Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 39 Sup. Ct. 435, 63 L. Ed. —.

Applying this rule to the first question, we dispose of it without doing more than to say, that the trial court's rulings on evidence and its charge to the jury, covering instructions made and denied, were in nearly every instance free from error; and in the few instances open to doubt, it affirmatively appears, that if error was present, it was entirely harmless.

[2] We find no substance in the question of proof of property in the United States. This question as raised by the plaintiff-in-error is based on several mistaken references to a date of the contract between the United Metals Selling Company and the United States, con-

tained in shipping orders from the Ordnance Department to the Selling Company, by which the Government proposed to prove property in itself. The references were to a contract between the Selling Company and the Government of January 4, 1918, when the contract obviously referred to bore the date of January 20, 1918. But the misreferences in these orders were instantly cured by correct references in the same orders to the contract by its contract number—G1875-360S. There can be no question that the contract bearing this number was the contract under which the orders were issued and the shipment was made and that it showed the Government's property in the copper. Aside from this contract as evidence of property, there was other evidence to the effect that the copper, when delivered by the Copper Company to the Railroad Company for transportation, and later when it was stolen in transit, was the property of the United States and had previously been accepted as such by its duly authorized agents. The defendants did not attempt to controvert the Government's testimony on this issue by testimony of their own; they merely challenged its accuracy and sufficiency.

The remaining question—the sufficiency of the evidence of Clark's complicity in the crime—is not open to dispute in view of the positive character of the Government's testimony and the negative character of the testimony produced by Clark. As the testimony for and against Clark was admitted with scrupulous regard to the rules of evidence in the trial of criminal causes, and as the jury have resolved that evidence against Clark, there is nothing for this court to do but direct that the judgment below be

Affirmed.

THE AURORA.

THE LEONARD J. BUSBY.

(Circuit Court of Appeals. Second Circuit. May 14, 1919.)

Nos. 228, 229.

COLLISION ⚷66—VESSELS IN TOW—EVIDENCE.

Evidence *held* to show, contrary to finding below, that a tug failed to control her long tow, which swung with the tide into collision with libelant's tow, which was in its proper place near Staten Island shore.

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

Libels by the Wright & Cobb Lighterage Company against the steam tug Aurora, her engines, etc., the Lehigh Valley Transportation Company, claimant, and by Owen J. McWilliams and others against the steam tug Leonard J. Busby, her engines, etc., the Wright & Cobb Lighterage Company, claimant, in which the steam tug Aurora and the Lehigh Valley Transportation Company, claimant, were impleaded. From an adverse decree, the Wright & Cobb Lighterage Company appeals. Reversed.

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

Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.
Harrington, Bigham & Englar, of New York City (T. Catesby Jones, and Anthony V. Lynch, Jr., both of New York City, of counsel), for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Wright & Cobb Lighterage Company appeals from decrees entered in these proceedings.

On April 1, 1917, at 2 a. m., in the Kill von Kull, a collision occurred between the barge Blue Coat, the port boat in the fifth or last tier of the Aurora's tow, bound west with the flood tide, and the lighter Prince. The lighter was the outside boat of two, towed stern first, on the port side of the tug Leonard J. Busby. The Busby had the derrick lighter Luna on her starboard side and was navigating east against the tide. Both the Prince and the C. G. Mueller of the Aurora's tow were damaged. The owners (the libelants) libeled the Aurora, and a decree has been entered dismissing the libel. Owen J. McWilliams et al., owners of the Blue Coat, libeled the Busby, and the Wright & Cobb Lighterage Company, claimant, interpleaded the Aurora. Its petition has been dismissed, and the Busby has been held solely at fault.

The Aurora had 19 boats, all light, arranged in four tiers of 4 boats each, and a fifth tier of 3, towed on hawsers about 30 fathoms long. These hawsers ran from the stern boats to the outside corners of the outside boats of the tiers. The boats in the tow were about 100 feet long, and the entire tow was about 600 feet in length, all on hawsers 180 feet long. The tug was about 120 feet long, therefore making a total length of about 800 to 900 feet. The Aurora navigated without a helper tug, expecting to meet one at the Baltimore & Ohio Railroad bridge. The Busby was making her way from Pier 7, N. R., to Port Ivory. She left the red and black buoy on her port hand, and when 400 feet west of Livingston Point she saw the Aurora's red and green lights and showed both her own. The captain of the Aurora testified before the local inspectors that he saw a red light and towing lights, although he testified on the trial that he first saw both the Busby's side lights. Apparently he did not see her until he was fairly close, and until she was well on his port and toward Staten Island. The Aurora's lookout, who was on the bow deck, first saw the red light of the Busby.

The captain of the Busby testified that he kept going closer to Staten Island, and thus shut out the green light of the Aurora. She kept her course without change until abreast, when she hard-a-ported. When the Busby first sighted the Aurora, she was about 2,000 feet east of Livingston Point, and some 2,000 feet away from the Aurora. The Busby blew one whistle, ported her wheel, and received no answer. She then blew another whistle three seconds later and slowed her engine. These whistles were blown about three full seconds apart. At that time the tugs were showing red to red. Not hearing a response to the second signal, the Busby then hard-a-ported and worked under a

slow bell. Under these circumstances, the Busby could not stop altogether, for to do so she would have lost control of her tow, as the outside boat was in the current and the inshore boat in slack water. This would have resulted in her shearing. The Busby did all that could be done under the circumstances in going against the tide, as she was obliged to; she went about 200 feet between the time she blew the first whistle and the time of the collision. She was well over toward the Staten Island shore. The Aurora was going with the tide and more swiftly than the Busby.

The cause of the collision, undoubtedly, was the effect of the tide in swinging the tail of the Aurora's tow toward Staten Island, but this swing could not be increased by her porting the wheel as she passed the Busby. The tow swung so far on the port side that one of the witnesses says he could see the Aurora's stern, and she was shearing a little toward Staten Island—this probably due to her porting the wheel. If the tow was following the shearing tug, the tail of the tow must have swung toward Staten Island, considering the location as given by the Aurora's witnesses of its tow; and considering the space occupied by having four barges abreast, and the fact that the Aurora's tow were light barges, it is quite apparent that the Busby then was several hundred feet off the Staten Island shore and the Aurora crowded her over into this position. The record is clear that the Busby continued to head over to the Staten Island shore, for at the time of the collision the Luna, the lighter on the starboard side of the Busby, was less than 100 feet from the Staten Island shore.

We are satisfied that the collision was due to failure to properly manage the tow of the Aurora. It was improbable that the Busby would have kept in the middle of the flood tide, when she could get slack water by keeping close to the Staten Island shore. The fault may well be predicated upon the Aurora alone, with such a long tow in tide waters in an uncontrollable state. She was obliged to keep her tow in line, and if she had not sufficient power to do this alone, it was incumbent upon her to employ helpers. The Busby went as close to the Staten Island shore as safety would permit, and we are of the opinion that she should be exonerated from fault.

The decree will therefore be reversed.

ARBITMAN v. WOODSIDE et al.

(Circuit Court of Appeals, Fourth Circuit. April 17, 1919.)

No. 1673.

1. ARMY AND NAVY ⚷20—EXEMPTION BOARDS—REVIEW BY COURT.
   Action of an exemption board within the scope of its authority is final, and not subject to judicial review, when the investigation has been fair and its finding is supported by substantial evidence.
2. HABEAS CORPUS ⚷16—DISCHARGE FROM MILITARY SERVICE.
   On proof that investigation by an exemption board has not been fair, or that it has abused its discretion by a finding contrary to all the substantial evidence, relief should be given under writ of habeas corpus.

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

3. ARMY AND NAVY ⚷20—EXEMPTION BOARDS—UNFAIR REJECTION OF CLAIMS.
Rejection by exemption board of petitioner's claim to exemption as an alien who had not declared his intention to become a citizen, his showing being prima facie sufficient, and in no way met, but being disbelieved merely because other claims for exemption had been supported by false affidavits, was arbitrary and unfair, amounting to refusal to investigate.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Habeas corpus proceeding by Samuel Arbitman against Capt. H. N. Woodside, commanding First Separate Detachment Company, 154 Depot Brigade, and the military authorities of Camp Meade, Md. Application for writ dismissed, and petitioner appeals. Reversed.

Joseph Hettleman, of Baltimore, Md., for appellant.
Samuel K. Dennis, U. S. Atty., of Baltimore, Md., for appellees.

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

WOODS, Circuit Judge. Appellant, Samuel Arbitman, by writ of habeas corpus applied to Judge Rose of the district of Maryland for discharge from military service at Camp Meade, alleging himself to be a citizen of Russia who had not declared his intention to become a citizen of the United States, and that the action of local exemption board No. 1 of Philadelphia in placing him in class A1, and of the district board in sustaining the classification, was arbitrary, unfair, fraudulent, and in abuse of discretion. After hearing testimony, the District Judge dismissed the application, holding that the boards had given petitioner a fair hearing, and that therefore he had no jurisdiction to review their action by habeas corpus.

[1, 2] The rule is established that the action of such executive boards within the scope of their authority is final, and not subject to judicial review, when the investigation has been fair and the finding supported by substantial evidence; but upon proof that the investigation has not been fair, or that the board has abused its discretion by a finding contrary to all the substantial evidence, relief should be given by the courts under the writ of habeas corpus. United States v. Ju Toy, 198 U. S. 253–280, 25 Sup. Ct. 644, 49 L. Ed. 1040; Lewis v. Frick, 233 U. S. 291–304, 34 Sup. Ct. 488, 58 L. Ed. 967; Tang Tun v. Edsell, 223 U. S. 673–675, 32 Sup. Ct. 359, 56 L. Ed. 606; Low Wah Suey v. Backus, 225 U. S. 466–468, 32 Sup. Ct. 734, 56 L. Ed. 1165; Angelus v. Sullivan, 246 Fed. 54, 150 C. C. A. 280; Koopowitz v. Finley (D. C.) 245 Fed. 871; In re Hutflis (D. C.) 245 Fed. 798; United States ex rel. Troiani v. Heyburn (D. C.) 245 Fed. 360; Summertime v. Local Board Div. No. 10 (D. C.) 248 Fed. 832; Ex parte Beck (D. C.) 245 Fed. 967; Wong Yee Toon v. Stump, 233 Fed. 194, 147 C. C. A. 200.

In proof of his claim to be placed in class 5 as a resident alien who had not filed his first naturalization papers, Arbitman presented to the local board his own affidavit in precise accordance with the reg-

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ulations and in the form prescribed by the Provost Marshal General, giving the date and place of his birth in Russia, the date of his immigration to this country, and stating that he had not taken out the first papers looking to naturalization; the affidavit of Samuel Portner and Isadore Portner to the same effect; a Russian passport, dated April 18, 1914, purporting to authorize him to move from place to place in Russia. On rejection of his claim to be placed in class 5 by the local board, and by the district board on review, Arbitman was taken to Camp Meade on January 3, 1918. On February 21, 1918, his attorney addressed a letter to Maj. Gen. J. E. Kuhn, in command of Camp Meade, asking for a discharge. Gen. Kuhn replied, stating that he could not review the matter, because the local board had given a full and fair hearing, and because relief had not been asked as required by the regulations within seven days after arrival at camp. The military authorities, however, apparently waived the time limit and considered the matter on the merits, for Gen. Kuhn did refer it to the adjutant general of Pennsylvania, who in turn referred it back to the local board, which refused to reconsider the case.

Petitioner's showing before the boards, made out in precise accordance with the requirements, established prima facie that he was a Russian citizen, and had taken no steps looking to naturalization. Nothing was offered tending to show that the affidavits to this effect were false, or that the passport was not genuine. The sole reason upon which the exemption was rejected was that the boards did not believe the affidavits; and the sole basis of this disbelief was the ease with which members of the board had found that such affidavits could be obtained. Nothing appeared tending to impeach the reputation or character of petitioner, or either of the other affiants, and nothing to show that any member of either board knew them to be unworthy of belief. Although the records of the immigration commissioner were open to the exemption officers, they made no effort to disprove the statement that Arbitman had not applied for naturalization papers.

[**3**] Under these circumstances, it seems to us that the rejection of petitioner's claim was arbitrary and unfair. It meant the refusal to investigate his claim and proofs on their own merits, merely because other claims for exemption had been supported by false affidavits. For this reason the judgment must be reversed.

This conclusion is no reflection on the character, competency, or good faith of the exemption boards of Philadelphia. The duties of the exemption boards were most onerous. The country's safety required quick decision and action on many difficult questions. These duties were discharged at great personal sacrifice, with so much ability, fidelity, and fairness, that the number of applications for judicial interference has been very small. It was inevitable that there should be an occasional slip, like that made by the boards in this case. The matter of surprise is that there were not more mistakes.

Reversed.

UNITED STATES v. FIDELITY & CASUALTY CO. OF NEW YORK (two cases).

(Circuit Court of Appeals, Third Circuit. June 18, 1919.)

Nos. 2468, 2469.

1. BAIL ⚷75—FORFEITURE OF BOND.
Where defendants failed to appear for trial, and surety failed to produce them, their recognizances may be forfeited.

2. BAIL ⚷79(1)—SETTING ASIDE FORFEITURE.
Under Rev. St. § 1020 (Comp. St. § 1684), authorizing court to remit recognizance forfeitures where public justice does not otherwise require, etc., the court's refusal to set aside forfeitures as to inmates of a bawdy-house near a military camp, who did not appear until a week after date set for their trial, causing inconvenience regarding witnesses, the disposition of other cases, etc., was not error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Actions by the United States against the Fidelity & Casualty Company of New York as surety for Rose Jacobson and against the same company as surety for Eva Melsker. From orders refusing to remit forfeitures of recognizances (257 Fed. 760), the surety brings error. Affirmed and remanded.

William G. Wright, of Philadelphia, Pa., for plaintiff in error.
Robert J. Sterrett, of Philadelphia, Pa., for the United States.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

BUFFINGTON, Circuit Judge. These cases concern the forfeiture of recognizances given, respectively, by Rose Jacobson and Eva Melsker in the court below for their several appearances when called for trial on criminal indictments. Their cases were duly set for trial on March 10, 1918, but they both failed to appear. Thereupon the surety was duly called in open court to produce them, and having failed to do so, or show any cause for their default, the recognizances were forfeited. A number of witnesses were in attendance for the trials, in expectation of which all other cases had been postponed for hearing at later date. The result of the default was one of those delays and obstructions which cause criticisms of courts, but which in fact no court can prevent, where persons who should be in attendance fail to keep their engagements. But, while courts cannot prevent these delays, they can sometimes take a salutary course that may prevent repetition. A week later than required the defendants appeared and were tried and convicted. Thereupon the surety company petitioned the court to take off the forfeiture of the recognizances. This the court refused to do. Whereupon the surety company sought to appeal from such refusal, but the judge, asserting the taking off of the forfeiture was wholly a matter of discretion, refused to grant such attempted appeal. Thereupon the surety company sued out this writ of error, and assigned for error the refusal of the court to take off the

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forfeiture. A motion is now made to dismiss this writ of error, on the ground that the matter was one of discretion, and not the subject of review.

[1, 2] Without entering upon this question, we will, inasmuch as we have the full cases before us, assume, for present purposes, appeals would lie, and the causes are properly before us for disposition on the merits. Such being the case, has the surety company shown the court below was in error? We think not. There can be no question but that the court had the right to enter decrees of forfeiture when the defendants failed to appear and the surety failed to produce them. Such decrees having been properly entered, R. S. § 1020 (Compiled Statutes, § 1684),[1] printed in the margin, specifies the circumstances which enable a court to take off such forfeiture. Turning to that statute, we note it provides that the court "may, in its discretion, remit the whole or a part of the penalty," where "it appears to the court that there has been no willful default of the party," and "that public justice does not otherwise require the same penalty to be enforced."

Passing by the question whether the failure of the surety to produce the defendants when called for trial, and with no valid excuse for so doing, save neglect to fulfill the stipulated duty, was not in itself a willful default, we are very clear that the default was in fact one where public justice might well require the penalty should be enforced. These defendants were ones of a lot of women who were brought from New York City and installed in a bawdyhouse within the prohibited limits of a military camp. The court found "the conviction cannot be resisted that in doing what she did she was financed by, if not in fact acting for, others." The efforts of these women, many of whom were diseased, to entice the men in the camps, was open, shameless, and blazoned with effrontery. The case and the time were such as to necessitate prompt trials, so as to safeguard the young men in the camp. Not only was such prompt trial thwarted, but, as the court found, "the nonappearance of the defendants 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 be definitely estimated." No one but the trial judge, whose court was subjected to the consequences resulting from the failure of these defendants to appear, can better determine whether public justice required that the penalty of forfeiture be enforced in these cases, and we are of opinion that, in view of all the attendant circumstances, some, but not all, of which we have referred to above, he committed no error in refusing to take off the forfeitures.

The orders refusing to take them off are therefore affirmed, and the causes remanded to the court below for further procedure.

[1] "When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

THE WESTMEATH.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 25.

CONSTITUTIONAL LAW ⟹275(2)—SEAMEN ⟹1—SEAMEN'S ACT—CONSTITUTIONALITY.

Seamen's Act March 4, 1915, § 4 (Comp. St. § 8322), requiring payment to seamen on demand of half wages earned at every port where the vessel shall load or deliver cargo, as applied to foreign seamen on foreign vessels entering American ports, although subversive of their contracts, is constitutional.

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

Suit by Peter Lucas and Gustav Blixt against the steamship Westmeath; J. M. Thompson, claimant. Decree for libelants, and claimant appeals. Affirmed.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter, John M. Woolsey, and Peyton Randolph Harris, all of New York City, of counsel), for appellant.

Silas B. Axtell, of New York City, for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. The legal ground-work of this action is identical with that of The Italier, 257 Fed. 712, — C. C. A. — (opinion filed herewith).

At a port in Australia and in December, 1915, libelants shipped as members of the crew of the British steamer Westmeath for a voyage "not to exceed one year." Before that year expired the Westmeath arrived in the harbor of New York, where she loaded and discharged, and there the libelants aver they made demand for half wages under R. S. § 4530, as amended (Comp. St. § 8322). This demand was refused, whereupon this action was brought for full wages, etc.

The libelants had decree below, and as to the facts it is sufficient to say that the single defense (of desertion) set up in the answer is not proved. On the contrary, we agree with the District Judge that libelants' case was proved within the statute.

To grant this decree in favor of foreign seamen against a foreign vessel solely because such vessel, by coming into the harbor of New York and there loading and discharging, gave to her crew rights entirely contravening those secured or granted to that crew by British law, is now asserted to be such an interpretation of the Seamen's Act of March 4, 1915, c. 153, 38 Stat. 1165 (Comp. St. § 8322), as to render Rev. St. § 4530, as amended, unconstitutional.

That the statute impairs, or rather abrogates, the foreign seaman's shipping contract, is admitted; but we know of no reason why Congress, if so minded, may not pass such a statute. "It is no answer (to a plain congressional declaration) to say that it interferes with the validity of contracts, for no provision of the constitution prohibits Con-

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gress from doing this, as it does the states." Mitchell v. Clark, 110 U. S. 643, 4 Sup. Ct. 170, 28 L. Ed. 279.

It is, however, urged that any interpretation of the act which enables a seaman on a foreign ship to accomplish that which is embodied in the decree appealed from, is violative of the Fifth Amendment, in that it interferes "with the liberty to contract on such terms as may be advisable to the parties to the contract," and is therefore "a deprivation, of liberty without due process of law," and for this reliance is placed upon Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. In our opinion this very contention was in substance made in Patterson v. The Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, and there disposed of; and this decision was recently approved in The Talus, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. —— (December 23, 1918).

The employment and discharge, treatment, status, and punishment of merchant seamen has long been a part of the regulation of water-borne commerce. With the advisability or expediency of declaring all seamen, irrespective of nationality, to have a status, or be entitled to treatment when within a harbor of the United States totally differing from the treatment or status accorded them in every other part of the world, we have no concern, but entertain no doubt of the power of Congress to enact this statute as a commercial regulation.

Decree affirmed, with costs.

ILLINOIS CENT. R. CO. v. BEAVERS.

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

No. 3365.

NEGLIGENCE ⚿142—FINDINGS—CONSTRUCTION.

A finding by a jury of wanton negligence necessarily involves a finding of simple negligence.

Pardee, Circuit Judge, dissenting.

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

Action by Pauline Beavers against Illinois Central Railroad Co. Judgment for plaintiff and defendant brings error. Affirmed.

Augustus Benners, Borden Burr, and James Rice, all of Birmingham, Ala., for plaintiff in error.

Luke P. Hunt and C. C. Nesmith, both of Birmingham, Ala., for defendant in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. The court submitted to the jury the issues of simple negligence and of wanton negligence upon the part of the defendant. A general verdict for plaintiff was returned. The evi-

dence is such that a verdict for plaintiff, based upon wanton negligence, would properly be set aside. A finding, however, by the jury of wanton negligence, necessarily involves a finding of simple negligence —the one including the other.

The jury having found simple negligence, either upon the issue of simple negligence or in their finding upon wanton negligence, and there being evidence to sustain a finding of simple negligence, and there being no evidence which would justify a finding that plaintiff was guilty of contributory negligence, the judgment is affirmed.

PARDEE, Circuit Judge (dissenting). On a careful examination of all the evidence submitted by the plaintiff on the trial below, I find none sufficient to warrant the submission to the jury of the issue of simple negligence on the part of the railroad company or any of its employés. However, over the objections of the defendant below, the trial judge did submit to the jury in an involved charge the question of wanton negligence, and that error was sufficient to mislead and prejudice the jury in determining the questions of simple, wanton, and contributory negligence involved in the case; and I doubt whether we are authorized to assume that the jury based their verdict wholly upon the evidence submitted under the first count of the complaint.

SILVER & CO., Inc., v. S. STERNAU & CO., Inc. (two cases).

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

Nos. 203, 204.

1. PATENTS ⟹328—INFRINGEMENT—COLLAPSIBLE STOVE.
   The Ferdon patent, No. 1,199,257, for a collapsible stove, is limited to the particular means shown for keeping the legs in open position when in use, and, as so construed, *held* not infringed.
2. PATENTS ⟹226—INFRINGEMENT—PRACTICAL IDENTITY.
   Infringement should not be determined by the mere decision that the terms of a claim of a valid patent are applicable to defendant's device, but the question involves considerations of practical utility and substantial identity, and that must be quantitative as well as qualitative.
3. PATENTS ⟹328—VALIDITY AND INFRINGEMENT—COLLAPSIBLE STOVE.
   The Ferdon patent, No. 1,229,432, for a collapsible or knock-down stove, *held* void for lack of invention, and also not infringed.

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

Two suits in equity by Silver & Co., Incorporated, against S. Sternau & Co., Incorporated. Decrees for defendant, and complainant appeals. Affirmed.

Stephen J. Cox, of New York City, for appellant.

John Robert Taylor, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

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MANTON, Circuit Judge. Both suits between the litigants were tried together in the lower court and are presented here in a single record upon this appeal. Both will be treated in one opinion.

The first action is based upon patent No. 1,199,257, issued September 26, 1916, to the appellant's assignor. The second action involves the alleged infringement of patent No. 1,229,432, issued June 12, 1917. Both patents were issued to Guy W. Ferdon. The appellant refers to the first as a kitchenette patent and the second as a collapsible stove. Each patent, however, refers to the invention as a collapsible stove.

Claim 1 alone is involved in action No. 1, while claims 7, 8, and 9 are involved in action No. 2. After the trial, the District Judge dismissed the suit on the first patent on the ground that infringement was not established. In the action for infringement upon the second patent, the patent was held void for lack of invention.

[1] Claim 1, of patent No. 1,199,257 reads as follows:

"In a support for heaters, in combination, a hot plate, legs hinged to the underside of said plate, and adapted to be folded against said plate, means adapted to fold against said legs for keeping said legs in open position, and means when the device is in use, for supporting heating devices in proper relation to said hot plate."

The inventor says that his invention relates to collapsible stoves or heaters, and particularly to a device to be used for cooking with alcohol lamps, whether the lamps be those which use solid or liquid alcohol. He does not restrict his device to the use of this particular fuel, and says that lamps supplied with other solid liquid or gaseous fluid may be employed in connection with the device. He refers to his invention in his specification as a folding stove of the kind that can be folded into a small package and carried about in an automobile kit by hand or as an article of luggage, which may be instantly set up for picnic or other cooking. It is quite apparent, from this record, that the recent increase in the use of solid alcohol for cooking purposes, a field which has been entered extensively by the parties to this litigation, gave rise to the need for small folding stoves. The idea of collapsibility at the date of the issuance of this patent was very generally resorted to in the cases of articles for transient use, such as card tables, ironing boards, folding beds, and folding chairs, and articles and structures in which it was sought to secure compactness of bulk. Other collapsible articles were dining room tables, pianos, bureaus, and bedsteads. This record demonstrates that in the stove art the structures have been made to collapse for use in camping or for motoring, the idea being to provide for collapsing or knocking down to reduce the bulk in transportation. Examples of such collapsibility are found in the prior art in the patents issued to Cook, Morawetz, Swinney, and Pjerron.

This patent discloses a structure comprised of two separate and distinct parts, the stove proper, which may be folded, and the shelf, which is separate therefrom, and which cannot, in any sense, be said to be foldable. It comprises a hot plate, made of thin sheet metal and provided with openings and grates of the usual type. The hot plate is bent or turned around its edges for the purpose of connecting a wire

to form a stiffening flange. To the underside of the hot plate is attached, at each of the four corners, a wire eyelet. Connected to each of these wire eyelets is a piece of wire so bent as to produce a number of wire legs at opposite ends of the hot plate and formed with a wire link or reach connecting each pair of legs. The wire link is bent upwardly, so as to form a ledge or rest for the separate sheet metal lamp-supporting shelf, which may be placed and used for holding the heating devices it is desired to utilize. To each of the four legs is pivotally attached a wire bracket formed of a single piece of wire. The two wire brackets at each end of the structure may be folded against the wire legs to which they are pivotally connected. The brackets and legs can be folded inwardly upon the underside of the hot plate. When setting the stove up, the legs are opened outwardly, the brackets are extended, and then the brackets are forced into engagement with clips or locks formed on the underside of the hot plate, midway of its length, for the purpose of bracing the structure to give stiffness and rigidity to the legs and to support the hot plate. The shelf is then rested in a position upon the connecting wire links extending between the pair of legs located at each end of the hot plate, and is firmly held there. The specifications provided that, when folded, the shelf is removed and laid alongside the parts folded together. The wind shield, a separate part, is often sold commercially with the appellant's device.

In the original claim in the Patent Office, as the structural element, it was not provided for "means adapted to fold against said legs for keeping said legs in an open position," but it was provided as "means for keeping said legs in open position." The Patent Office, granting the patent, however, allowed the claim as "means adapted to fold against said legs for keeping said legs in open position."

In the defendant's device, the means for keeping the legs in open position are not adapted to fold against the legs, but to fold against the top plates, to which they are hinged. When folded, they do not rest against the legs, but are placed in close position side by side to the legs, making a compact heater, and thus saving space in transportation. Appellant's specifications do not describe or illustrate any means for keeping the legs in open position which are adapted to fold against said legs. The brackets, which are adapted to fold against the legs, and which are intended to constitute the "means" provided in claim 1, do not, of themselves, perform the function of keeping the legs in open position. It is only when these brackets are swung into position beneath the clips or lock, and there held pinched against the underside of the hot plate, that sufficient rigidity is afforded to keep the legs stiff and in open position. The clips or lock device is the essential feature of the structure, in co-operation with the brackets, to keep the legs in open position. They are not adapted to fold against said legs. The shelf cannot be considered the means for giving rigidity to the legs. According to the specifications, it serves another purpose.

In the claim as originally filed in the Patent Office there was cited against the appellant the British patent, No. 13,312, A. D. 1912, to

Irving and Anderson. This disclosed a hot plate, legs hinged to the underside of the plate and adapted to fold against the plate, and means when the device is in use for supporting heating devices in proper relation to said hot plate. The only difference between the claim of the patent in suit and the British patent resides in the means adapted to fold against said legs and keeping said legs in open position. The heating device in the Irving patent acts as a support for the heating apparatus and keeps the legs in open position. We think that the Ferdon invention is limited to a particular form or kind of means adapted to fold against said legs for keeping said legs in open position.

In view of the state of the art, particularly the Irving and Anderson patent, the appellant's claim must be read with no range of equivalents, at least such as would be permitted if defendant's structure was held to be an infringement. The defendant manufactures a folding kitchenette, having a wind shield and shelf integrally constructed therewith, and having no separate parts of any kind. It is made of sheet metal, and no wires are employed in its construction. It has the hot plate, with the necessary openings. The top plate is supported by three sheet metal sides, comprising two end supports and a side support. The end supports, beside constituting a wind shield, act as legs. The wind shield is provided with a horizontally disposed sheet metal shelf, provided with two openings which, when the device is assembled, are positioned beneath and in line with the openings on the top plate. In order to prevent the legs of the stove from collapsing, it is necessary to lock them against longitudinal movement. It has no means which are adapted to fold against the legs for keeping said legs in open position. It does have a wind shield hinged to the top plate and adapted to fold against the under side of the top plate. The wind shield does not keep the legs or supports in open position. The legs or supports are kept in open position by co-operation of a key upon the outside of each with the end supports, which engage with a tenon passing through a keyhole located in each of the end supports; tenons being formed on the ends of a centering shelf, which is hinged upon the wind shield to keep the legs open and the device in operative position.

[2] Appellee's structure requires the co-operative action, therefore, of these different elements. Infringement should not be determined by a mere decision that the terms of a claim of a valid patent are applicable to the defendant's device. The question of infringement involves considerations of practical utility and substantial identity and that must be quantitative as well as qualitative. Edison Co. v. American Mutoscope & Biograph Co., 151 Fed. 769, 81 C. C. A. 391; Goodyear Co. v. Spalding (C. C.) 101 Fed. 990.

We think the District Judge very properly held that there was no infringement. The decree in this action is affirmed.

[3] In the second action, involving suit for infringement of patent No. 1,229,492, the appellant contends that this is in the nature of an improvement on the device of the first patent. It appears, however to be an entirely different type of structure from the defendant's kitchenette.

The device made pursuant to this patent would appear to be a permanent liquid stove or range, such as might be used as a permanent fixture in a kitchen. Ease of collapsibility is not important in a stove of such character or for such use. It is collapsible in the sense that it might be said to be of the knock-down type, so as to be readily shipped or transported by the manufacturer or in moving from house to house. The specification says:

"The object of the invention is to provide an oil stove of the usual blue flame kind which can be shipped knock-down."

It consists of four parts, a stand or table, a drip pan, reservoir for the oil, and the stove proper. The stand or table consists of two bars extending lengthwise, to which are connected at the end a pair of braced legs; the legs being adapted to fold down upon the connecting bars. The top of these legs are provided with feet upon which the legs, forming part of the stove proper, which constitutes the separate part of the structure, are adapted to rest. The stove legs are provided with corresponding feet, and these two parts of the apparatus, the stove and the table, are fastened together with bolts and nut connection through the holes in the feet and the other respective parts. The drip pan is located below the top plate and secured to the legs by bolts and nuts. In disassembling the parts, it is necessary to remove the bolts and nuts which serve the means of connecting the stand or table of the stove.

While this structure may be termed a knock-down one, it is not in any sense a folding structure; the only folding or collapsible parts being the legs of the stove and the legs of the stand. Constructing a knock-down stove under claims 7, 8, and 9 of this patent presents no novelty or invention. Such construction was well known to the prior art. The appellant shows in its patent, heretofore considered, the hinging of the top plate. It is also shown in the Irving and Anderson patent, No. 13,312, A. D. 1910. There is nothing to indicate any commercial success because of this method of assembling parts of a stove.

We think that as to this patent in suit there is neither infringement nor even invention.

Decree affirmed.

ALBERTSON & CO. et al. v. BECKLEY-RALSTON CO. et al.

(District Court, N. D. Illinois, E. D. June 12, 1919.)

No. 1144.

PATENTS ⊂⊃138(2)—INTERVENING CLAIMS—VALIDITY.

Where one defendant simply copied from original patent, and never in good faith produced a tool of its own, but took the one invented, knowing that the inventor had the right of reissue, defendants are in no position to claim intervening rights, claimed to have been acquired between dates of original patent and reissue.

In Equity. Infringement suit by Albertson & Co. and another against the Beckley-Ralston Company and another. Decree for plaintiffs.

Williams, Bradbury & See, of Chicago, Ill., for plaintiffs.
Taylor E. Brown, of Chicago, Ill., for defendants.

SANBORN, District Judge. This is an infringement suit, on claims 8, 9, and 10 of the Robert H. Hazeltine reissue patent, No. 13,421, May 21, 1912 (original 918,049, April 13, 1909). The patent was sustained in Specialty Machine Co. v. Ashcroft Mfg. Co., 213 Fed. 35, 129 C. C. A. 629, in the Second Circuit, reversing (D. C.) 205 Fed. 760. The opinions in these cases describe the device quite fully, especially the one in the District Court. Substantially the same questions were there presented as here, and the evidence does not seem to require any special consideration, except as to defendants' claim of intervening rights claimed to have been acquired by it between the dates of the original patent and the reissue. The defendant's tool, alleged to infringe, is much closer to the patent device than the one in the New York litigation. No evidence by way of anticipation was offered which seems to be as pertinent or forceful as that before the New York court.

As to intervening rights, I do not think the defendants are in any position to claim them, because the Ideal Company simply copied from the original Hazeltine patent in making its own device. It never in good faith produced an independent tool of its own, but took the one invented by Hazeltine, knowing that he had the right of reissue. I do not put the decision entirely on the ground of comity, but think the reissue a valid one, and the claims in suit infringed, entirely independent of the New York case.

There should be a decree for plaintiff, sustaining the reissue, and that the three claims in suit are infringed, with a reference as to damages and profits, with costs.

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

SMITH v. SEIBEL et al.

In re SEIBEL.

(District Court, N. D. Iowa, C. D. June 18, 1919.)

No. 14.

1. EQUITY ⚷409—FINDINGS BY MASTER—CONCLUSIVENESS.
   When a master has considered evidence, even when conflicting, and made his findings of fact thereon, they must be taken to be presumptively correct, and, unless some serious mistake has been made in the consideration of the evidence, will be permitted to stand.
2. EQUITY ⚷410(1)—FAILURE TO FILE EXCEPTIONS—QUESTIONS OF FACT.
   Where no exceptions are filed to a report of a master within 20 days, as required by equity rule 66 (198 Fed. xxxvii, 115 C. C. A. xxxvii), the report as to the facts should be confirmed; but the legal conclusion of the master upon the facts, when it appears upon the face of the report, may be noticed by the court.
3. BANKRUPTCY ⚷185—RIGHTS OF TRUSTEE TO PROPERTY TRANSFERRED.
   In an action by a trustee in bankruptcy to obtain a judgment against a third person, to whom the bankrupt had conveyed property to defraud creditors, only claims which arose within four months immediately preceding the bankruptcy passed to the trustee, under Bankruptcy Act July 1, 1898, § 67e (Comp. St. § 9651), and he could recover a judgment only for the amount of such claims, notwithstanding sections 70a (4) and 70e (section 9654), vesting in the trustee by operation of law, as of the date of adjudication in bankruptcy, the title to property transferred by the bankrupt in fraud of his creditors.

In Equity. Suit by Leonard M. Smith, substituted for C. A. Bryant, as trustee in bankruptcy of the estate of B. Alvin Seibel, bankrupt, against Cecil Seibel and B. Alvin Seibel. Decree for plaintiff.

This suit is by the plaintiff, as trustee in bankruptcy of the estate of B. Alvin Seibel, bankrupt, to recover from Cecil Seibel, his wife, and the bankrupt, some $5,195, with interest, as the value of two certain promissory notes secured by mortgages upon real estate, alleged to have been transferred to her by the bankrupt shortly before his bankruptcy, in fraud of his creditors. The defendants answered separately, admitting the transfer by the bankrupt to the defendant Cecil Seibel of the notes and mortgages as alleged in the petition, but each denied that the property was so transferred in fraud of the bankrupt's creditors, and further alleged that the property was transferred by the bankrupt to his wife under a valid agreement and for a valuable consideration. The matter was referred by the court to a special master with the consent of the parties, June 25, 1918, to take the testimony, find the facts, and report the same to the court, with his legal conclusions, before October 1, 1918.

Pursuant to such reference, the testimony of the respective parties was taken by the special master upon the issues so formed, the facts found and reported by him, together with his legal conclusions to the court on September 28, 1918, recommending a decree for the plaintiff against the defendant Cecil Seibel, and they are now on file with the clerk. On November 11, 1918, while the cause was being argued, the defendants filed exceptions to the report of the master upon the ground (1) that the legal conclusions of the master are not supported by the testimony, and are contrary thereto; (2) that the said bankrupt was not indebted to creditors at the time of the transfer of the notes and mortgages to his wife, in excess of $400, and, as shown by the testimony, was solvent at the time of such transfer; (3) that the undisputed testimony

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

shows that the transfer of the notes and mortgages to the defendant Cecil Seibel was upon a valid consideration without fraud, and that the master erred in recommending that a judgment and decree be entered in favor of the plaintiff against the defendant Cecil Seibel. The matter was argued orally to the court by counsel for the parties, and each has submitted a typewritten brief in support of their respective contentions.

C. M. Hanson and Robt. Healy, both of Ft. Dodge, Iowa, for plaintiff.

Max Hemingway, of Webster City, Iowa, and Mitchell & Files, of Ft. Dodge, Iowa, for defendants.

REED, District Judge (after stating the facts as above). The master found that the two notes and mortgages involved in this controversy were transferred by the bankrupt to his wife, the defendant Cecil Seibel, about June 28, 1915, with intent to defraud his creditors; that the petition in bankruptcy was filed May 19, 1916; that he was then insolvent; and as a legal conclusion recommends that a decree in favor of the trustee in bankruptcy for the full value of such securities, viz. $5,195, with interest at 5 per cent. from March 1, 1916, and costs, be rendered against her.

[1] The testimony as taken by the master is practically without dispute, and the rule "that when the master or chancellor has considered evidence, even when conflicting, and made his findings of fact thereon, they must be taken to be presumptively correct, and, unless some serious mistake has been made in the consideration of the evidence, will be permitted to stand," should be applied. Tilgham v. Proctor, 125 U. S. 136, 149, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 524, 9 Sup. Ct. 355, 32 L. Ed. 764; De Laval Separator Co. v. Iowa Dairy Separator Co., 194 Fed. 423, 425, 114 C. C. A. 385 (this circuit). The report of the master that the notes and mortgages were transferred to the defendant Cecil Seibel in fraud of the bankrupt's creditors will be accepted as correct, as there is nothing in the record to show that any error was made by the master in the consideration of the evidence. We shall not, therefore, consider or review the evidence upon which the master has found the facts against the defendant Cecil Seibel, in the absence of any exceptions to the report challenging the findings of fact.

[2] It is the contention of the defendant Cecil Seibel that the recovery by the trustee should in any event be limited to the indebtedness the bankrupt was owing at the time of the transfer, and not to any subsequent indebtedness that he may have incurred thereafter; that creditors subsequent to the transfer of the notes and mortgages to her should not be permitted to attack such transfer upon the ground that it was fraudulent. This question was not put in issue in the case, and no evidence was taken before the master in regard thereto, and he has made no finding or conclusion thereon. This question was first raised in the argument before the court. The present equity rule 66 (198 Fed. xxxvii, 115 C. C. A. xxxvii) provides:

"The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in

the equity docket. The parties shall have 20 days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise."

The master's report, as we have seen, was filed with the clerk September 28, 1918, prior to the November term of court that year, and, as no exceptions were filed thereto within the 20 days, the report as to the facts, under equity rule 66, stands confirmed, and the defendant is precluded from urging the question thus raised as against the finding of the facts by the master. But the legal conclusion of the master upon the facts so found appears upon the face of the report, and may be noticed by the court.

From the master's report it appears that one E. L. Cavanaugh sustained a personal injury through the alleged negligence of the bankrupt in June, 1915, for which he sued the bankrupt shortly thereafter in the state court for $5,000, and recovered judgment for $700, which, with the costs, has been filed as a claim against the bankrupt estate and allowed as such. The date of this judgment does not appear from anything before the court, but the injury which was the basis of the judgment occurred shortly prior to the transfer of the notes and mortgages to the defendant Cecil Seibel, and there is much ground under the testimony for believing that the securities so transferred by the bankrupt were so transferred in an effort to evade the payment for such injury, to the knowledge of Mrs. Seibel. There is no evidence as to the amount of the indebtedness owing by the bankrupt at the time of the transfer of these securities, nor at the time of the filing of the petition in bankruptcy, other than the injury which is the basis of the Cavanaugh judgment. The petition in bankruptcy was involuntary, and the total amount of the claims of the three petitioning creditors alleged in such petition is some $800 only; and this, with the judgment in favor of Cavanaugh, would amount to some $1,500, besides the interest and costs. There is nothing before the court or in the report of the master to show that there are any other claims filed against the bankrupt estate, but it is admitted by counsel upon this hearing that all claims owing by the bankrupt at the time of the adjudication, other than the Cavanaugh judgment and costs, have been paid or otherwise settled.

The master concludes his report as follows:

"That the defendant B. Alvin Seibel was indebted at the time of the transfer of the mortgages to his wife cannot be questioned, although suggestions casting doubt upon this subject were raised in argument by counsel at the hearing. It is without dispute that the Cavanaugh claim for damages was in existence as early as the 20th day of June, 1915, eight days prior to the transfer in question. * * * The burden is upon the transferee in this case to show that the grantor had other property sufficient to pay his debts, and no evidence was introduced by the defendants bearing upon this question. * * * I further find that, since the transfer of the said mortgages to the defendant Cecil Seibel, she instituted an action to foreclose said mortgages, which was settled, and that she was paid the amount of said mortgages in cash, and that she has since invested a part or all of said cash in real estate in Ft. Dodge, Iowa. My conclusion is that a decree should be entered for the

plaintiff against the defendant Mrs. Cecil Seibel, for the full value of the mortgages in question, in the sum of $5,195, with interest thereon at 5 per cent. per annum, since the 1st day of March, 1916, as provided in said mortgages."

[3] But the property was so transferred by the bankrupt to his wife some 11 months before the petition in bankruptcy was filed. Only the Cavanaugh claims arose within the 4 months immediately preceding the bankruptcy, and under section 67e of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [Comp. St. § 9651]) passed to the trustee in bankruptcy, and can be recovered by him for the benefit of such creditor.

It is urged in behalf of the trustee that under sections 70a (4) and 70e (section 9654) the trustee may recover the value of the property fraudulently transferred under these sections, regardless of the four months limitation of section 67e, and some cases are cited in support of such contention; but the purpose of section 70a (4), as expressed therein, is to vest in the trustee by operation of law, as of the date of the adjudication in bankruptcy, the title to the bankrupt's property (other than exempt property) "to all (1) documents relating to his property; (2) * * * patent rights," etc.; "(3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors"—thus vesting him with the right to recover, under section 67e of the act, all property transferred in fraud of creditors within 4 months prior to the bankruptcy, which any creditor of such bankrupt might have avoided under the law of the state, territory, or district where it is situated, and may so recover such property or its value from the person to whom transferred for the benefit of such creditors; otherwise, there might be inconsistency between sections 70a (4), 70e, and 67e. But as the only debt unpaid against the bankrupt estate, which the trustee in this action may recover, is the Cavanaugh judgment and costs, which accrued within the four months immediately preceding the filing of the petition in bankruptcy, such inconsistency, if any there be, is not, therefore, important in this case, unless the master's report might permit a recovery against the defendant Mrs. Seibel for an amount greater than the unpaid indebtedness of the bankrupt, which excess would have to be returned by the trustee, if recovered, to the bankrupt estate.

The report of the master will therefore be modified, so as to limit the amount of the recovery by the trustee against Mrs. Seibel to the amount of the Cavanaugh judgment only, with interest and costs, including any unpaid costs in the bankruptcy proceedings, and the compensation of the master in this proceeding, and the suit will be dismissed as against the bankrupt B. Alvin Seibel.

Decree will be entered accordingly.

UNITED STATES ex rel. PIERCE v. CARGILL, Assessor, et al.

(District Court, E. D. Arkansas, W. D. June 5, 1919.)

No. 6022.

1. TAXATION ⚷40(1), 49—UNIFORMITY OF ASSESSMENT—CONSTITUTIONAL REQUIREMENTS.
Under Const. Ark. art. 16, § 5, providing that "all property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the state" and the decisions of the state Supreme Court, the same basis of assessment must be followed by each county, and where a uniform system of assessment at one-half actual money value has been adopted and followed by direction of the state tax commission, one county cannot be compelled to assess at full valuation, although a state statute requires such assessment.

2. TAXATION ⚷49—ASSESSMENT—CONSTITUTIONAL PROVISIONS.
The provision of Const. Ark. art. 16, § 5, that "all property subject to taxation shall be taxed according to its value," as construed by the Supreme Court of the state, does not require assessment at full value, but only makes such valuation the basis of assessment.

3. COURTS ⚷366(1)—FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES—FOLLOWING STATE DECISIONS.
If by reason of an oversight a federal court has reached a different conclusion as to the construction of a state Constitution or statute from what had theretofore been decided by the highest court of the state, it is the duty of the national courts to follow the construction of the state court when the fact is called to their attention.

4. COURTS ⚷366(6)—FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES—FOLLOWING STATE DECISIONS.
The rule of law that the latest decision of the highest court of a state controls as to the construction of a state statute is especially applicable to taxing statutes.

5. COURTS ⚷365—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.
The decision of the highest court of a state, construing its prior decisions, should be accepted by a federal court.

Petition for mandamus by the United States, on the relation of Frank Pierce, against H. W. Cargill, Assessor, and others. Denied.

Buzbee, Pugh & Harrison, of Little Rock, Ark., for relator.

J. F. Koone, of Clinton, Ark., and Bratton & Bratton, of Little Rock, Ark., for respondents.

TRIEBER, District Judge. The relator, at the October term, 1917, recovered in this court a judgment against the county of Van Buren, Ark., for several thousand dollars. The judgment was based on county warrants, issued in conformity with the laws of the state, payable out of the general fund. The debts for which these warrants were issued were all contracted not earlier than 1914, and the warrants sued on were issued at different times since then, and purchased by the relator after the decision in United States ex rel. v. Jimmerson, 222 Fed. 489, 138 C. C. A. 85, L. R. A. 1918B, 1102, and prior to the decision in State ex rel. v. Meek, 127 Ark. 349, 192 S.

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

W. 202, L. R. A. 1918F, 642. The county having no means with which to pay the judgment, and its property not being subject to execution, the relator filed a petition for mandamus against the assessing officers of the county, the respondents herein, to compel them to assess all the property in the county subject to taxation at its true money valuation. The petition alleges that the county has no money in the treasury wherewith to pay this judgment, or any part thereof, and that under the laws of the state its property is not subject to levy, seizure, or sale under execution; the laws of the state expressly prohibiting it. Section 3233, Kirby's Digest. It is further alleged that there is a large amount of floating warrants or scrip of the county, similar to that upon which the judgment is based, outstanding; that it is of depreciated market value, by reason of the fact that the outstanding warrants largely exceed the possible revenues of the county under the present system of assessment and taxation, the Constitution of the state, in force at the time the warrants were issued, and now in force, limiting the rate of taxation by counties, for general purposes, to 5 mills on the dollar; that the statutes of Arkansas make all warrants, regardless of the time of their issuance, receivable in payment of all county taxes and dues; that the assessor and board of equalization of the county have heretofore valued the property in the county for taxation at not exceeding 50 per cent. of its true valuation in money, and propose to continue to do so under future assessments, although required by the laws of the state to assess it at its full valuation, and unless the assessing officers of the county be required by the mandate of this court to discharge their legal duty, as required by the laws of the state, assessing the property at its true value in money, there will be no means whereby the relator can secure payment of its said judgment against the county.

The respondents filed a response, setting up:

"That the assessment of the property of said county by its assessor and his assistants at 50 per cent. of its true value, under the direction of the Arkansas tax commission, is and will be in accordance with assessments of other property in all other counties of the state; that the Arkansas tax commission has made an order fixing 50 per cent. of its true value as the proportionable valuation to be assessed on the taxable property throughout the state for purposes of taxation for the year 1919."

The cause was submitted on the pleadings and an agreed statement of facts, which is as follows:

"It is agreed between the parties hereto as follows: That the warrants on which the judgment, referred to in the petition, was rendered, were issued by the county of Van Buren, and purchased by the plaintiff, Frank Pierce, subsequent to the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of United States ex rel. Fall City Construction Company v. Jimmerson, which was rendered April 14, 1915, and is reported in 222 Fed. 489, 138 C. C. A. 85, L. R. A. 1918B, 1102, and prior to the decision of the Supreme Court of Arkansas in the case of State ex rel. Nelson v. Meek, which was rendered February 5, 1917, reported in 127 Ark. 349, 192 S. W. 202, L. R. A. 1918F, 642. That at the time said warrants were issued by the county and purchased by the plaintiff, Frank Pierce, the decision of the United States Circuit Court of Appeals for the Eighth Circuit, in the case of United States ex rel. v. Jimmerson, was in full force and effect. That the property of Van

Buren county, and of other counties in the state, is now assessed, under direction of the state tax commission, at 50 per cent. of its value, and that the revenue derived by said assessment in Van Buren county is not sufficient to enable the county to pay the judgment in favor of plaintiff."

The question involved is not only of great importance, but is of a most delicate nature, involving as it does a conflict of views in the construction of the Constitution and statutes of the state of Arkansas, between the Supreme Court of the state and the United States Circuit Court of Appeals for this circuit, the court whose decisions, ordinarily, are conclusive on this court.

In United States ex rel. v. Jimmerson, 222 Fed. 489, 138 C. C. A. 85, L. R. A. 1918B, 1102, the United States Circuit Court of Appeals for this circuit held that, under the Constitution and laws of the state of Arkansas, the relator was, upon a state of facts identical with those in this case, entitled to a mandamus requiring the assessing officers of the county of Monroe, state of Arkansas, to assess all the property of that county, subject to taxation, at its full cash value, although the property of the other 74 counties of the state is assessed at 50 per cent. of its real value in money, by agreement and consent of all the assessing officers of the state, and by direction of the state tax commission, which, under the laws of the state, is authorized to advise and direct the assessing boards of the county in all matters relating to assessments for taxation, "to the end that all assessments of property shall be made in relative proportion to the just and true value thereof." This board also acts as a state board of equalization. Act May 12, 1909, p. 764. The opinion in that case was delivered on April 14, 1915. On February 5, 1917, the Supreme Court of Arkansas, in State ex rel. v. Meek, 127 Ark. 349, 192 S. W. 202, L. R. A. 1918F, 642, upon facts identical with those in the Jimmerson Case, unanimously held that the relator in that case was not entitled to a mandamus requiring the assessing officers of a county to make an assessment at a higher valuation than that made of the property of the other counties in the state, in pursuance of a well-defined policy of the state tax commission and the assessing officers of all the counties of the state. The court, after full consideration of the Jimmerson Case, expressly declined to follow the construction of the provisions of the Constitution and statutes of Arkansas by that court. This case was reaffirmed in Eureka Fire Hose Mfg. Co. v. Deffenbaugh, 129 Ark. 41, 195 S. W. 1076.

As the question of law involved depends solely upon the construction of the Constitution and statutes of the state of Arkansas, the decisions of the highest court of the state ordinarily control the national courts. But there are some well-defined exceptions to this rule. Counsel have cited a number of decisions of the Supreme Court and the inferior courts of the United States to sustain their respective contentions. Whether these authorities can be distinguished upon the facts, or in any wise reconciled, it is unnecessary to determine at this day, as in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 360, 30 Sup. Ct. 140, 54 L. Ed. 228, that question is settled conclusively, so far as this court is concerned, although there are some exceptions to the

principles enunciated there, which, so far as applicable, will be referred to hereafter. In that case the court carefully reviewed its former decisions and summarized the law. We refer to the opinion in that case without quoting what is said.

Applying these rules of law applicable to the facts in the instant case, the first question to be determined is: Had the Supreme Court of the state construed that section of the Constitution of the state, prior to the time he purchased the warrants, upon which he has obtained the judgment in this cause, and was that construction against the contention of the relator? If it had, it is the duty of this as well as every other national court to follow that construction, rather than that of the Circuit Court of Appeals, if the latter court had either overlooked that fact or had erroneously construed the decision of the state Supreme Court.

On the part of the respondents it is claimed that long before that time the Supreme Court of the state had, in Ex parte Ft. Smith & Van Buren Bridge Co., 62 Ark. 461, 36 S. W. 1060 (opinion filed June 6, 1896), and Bank of Jonesboro v. Hampton, 92 Ark. 492, 123 S. W. 753 (opinion filed December 6, 1909), construed that section of the Constitution and the statutes of the state bearing on that question, and had held that, where all the property of a county is, in pursuance of a well-settled custom and practice, assessed at one-half of its full value, the property of every other corporation or citizen must be assessed at the same valuation, and, if erroneously assessed at its full value, must be equalized by reducing it to one-half thereof, in order to comply with the uniform taxation provision of the Constitution.

[1] This provision of the Constitution of the state is as follows:

"Art. 16, § 5. All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the state."

It is further claimed by respondents, and it was so held in the Meek and Eureka Fire Hose Mfg. Co. Cases, that this construction applied as well to the entire state as to one county, for it was held that:

"To assess the property of one county at its full cash valuation, while the property in the other 74 counties of the state is assessed at half value, destroys the equality and uniformity of taxation throughout the state, as prescribed by this Constitutional provision."

Under the Constitution and laws of the state there is only one assessment made in each county, and that is the basis for taxation, not only for the county taxes, but also for all state, district, municipal, school, and road taxes. The statutes applicable are fully set out in the opinions in the Jimmerson and Meek Cases, and it is therefore unnecessary to insert them here. In the Jimmerson Case the court held that the opinion in Ex parte Ft. Smith & Van Buren Bridge Co., supra, was not applicable, and therefore not controlling. Bank of Jonesboro v. Hampton, supra, was not referred to by the court; its attention probably not having been called thereto by counsel, it was overlooked.

On the other hand, the Supreme Court of Arkansas in the Meek and Eureka Fire Hose Mfg. Co. Cases, before referred to, has expressly held that these two cases were in point and ruled the cases before it. Presumptively the Supreme Court of Arkansas knows the meaning of its own decisions, and unless it clearly appears that it misconstrued them, this court considers it its duty to accept its views. Excerpts from the opinion in the Jimmerson and Meek Cases show the reasons upon which each of these courts based its conclusions. The United States Circuit Court of Appeals in its opinion, treating the question as one never determined by the Supreme Court of the State, said:

"It is contended that this case is ruled by Ex parte Ft. Smith & Van Buren Bridge Co., 62 Ark. 461, 36 S. W. 1060. It is claimed that the precise question was decided by the Supreme Court of Arkansas in that case contrary to the contentions of the relator in this case. Let us see if this is so. The bridge company owned a bridge over and across the Arkansas river, one-half of which was in Sebastian and the other in Crawford county, Ark. The assessor assessed the half of the bridge in Crawford county for the year 1895 at $150,000. The bridge company asked that the assessment be reduced to $75,000. There was an appeal, and the case finally reached the Supreme Court. It was practically conceded that the sum of $150,000 would not have been in excess of a fair valuation of the half of the bridge assessed in Crawford county. The Supreme Court decided: 'As the assessment of the real property of Crawford county was purposely equalized at one-half of its market value, so the valuation of one-half of the bridge of appellant should have been reduced by the county court to $75,000, as the owner requested; that being fully as much as or more than one-half of its market value.' What the court decided was that, if the assessor in any particular county uniformly assessed property at 50 cents on the dollar of its true valuation, he could not single out a bridge company, or some particular taxpayer, and assess its or his property at its full value. Whether the assessor of Crawford county had a right to assess property at 50 per cent. of its value was not in question."

[2] The Supreme Court of the state, in refusing to follow this construction, held that the Constitution only required uniform taxation, but does not require the assessment of property at full valuation. It said:

"The only command embraced in this provision [article 16, § 5, of the Constitution] is that the property shall be taxed 'according to value'; that is to say, on the valuation basis, and not on some other basis. * * * There is no doubt of the power of the Legislature to provide for an assessment based on the full money valuation of property, not that the Legislature had so provided in the statutes which have been enacted since the adoption of the present Constitution; but it is equally clear that the Constitution itself does not compel an assessment according to full value, and it does, in fact, leave that matter entirely to the lawmakers. That is the effect of our previous decisions on that subject. In Bank of Jonesboro v. Hampton, 92 Ark. 492 [123 S. W. 753], we said: 'It is true the Constitution provides that all property subject to taxation shall be taxed according to its value, but this is done when the valuation is equalized with other property of the same kind in the county.' "

After a full review of the Constitution and statutes of the state, and its former opinions on the subject of assessments at full value, it was held:

"The only two specific mandates contained in the Constitution are, one that a valuation basis must be adopted, and the other that in fixing the value the same shall be 'equal and uniform throughout the state.'"

In discussing the acts of the Legislature defining the duties of the assessors and the state tax commission, it held:

"It does not require complete attainment of the full valuation, nor absolute uniformity, but it recognizes the fact that valuations are merely relative, and that uniformity is only an approximation, and that perfection in neither direction can be attained. It is readily seen, however, that uniformity is the dominant idea in the performance of the duties of the tax commission."

It then concludes its opinion by holding:

"We are of the opinion that the answer of the defendants is a sufficient one, and that they are compelled by the plain mandate of the Constitution to assess property in the county in conformity with the valuations placed on such property in other counties, regardless of the fact that it calls for an assessment at less than full value. Any other view of the matter would work an injustice to the taxpayers of that particular county, and that, too, in manifest violation of the constitutional guaranty."

To the same effect is Greene v. Louisville & Interurban R. R., 244 U. S. 499, 516, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

That the Legislature recognized that uniformity is more essential than full valuation is shown by the provisions of Act 257, Acts 1909, pp. 764, 769, 772 (sections 11 and 12), creating the state tax commission, cited in the opinion in the Meek Case and also by section 7004, Kirby's Digest. The latter, in prescribing the duties and powers of the county boards of equalization, provides:

"In the equalization of real property not previously entered for taxation on the tax books as then listed, it shall raise the valuation of such tracts and lots of real property as in the opinion of the county board has been returned below their value in money, to such price or sum as it may find to be the true value thereof, agreeably to the rules prescribed by this chapter for the valuation of real property, or may reduce the valuation of such tracts or lots as in the opinion of the board have been returned above their true value, as compared with the average valuation of the real property of such county," etc.

The effect of the decision of the Supreme Court of Arkansas in those cases is that, if the statute requiring the assessment for taxation of all property at its full value in money, destroys the uniformity of taxation throughout the state, it is unconstitutional and must give way to the plain commands of the Constitution.

An exception to the principles announced in Kuhn v. Fairmont Coal Co. is: If a state statute, previously sustained by the national courts, is by the highest court of that state held to be unconstitutional, the national courts must follow the latest decision, provided, of course, rights have not been acquired under former decisions. Therefore, if the Arkansas statute, requiring the assessment of property at full value has, by reason of the established practice and agreement of all the assessing officers of the state, including the state tax commission, been disregarded and all the property assessed at only half its value, and by reason thereof the statute has by the highest court of the state been declared unconstitutional, in so far as it requires the assessments to be at full valuation, when not applied to all the prop-

erty in all the counties of the state, that determination is conclusive on the national courts, regardless of the fact whether it was so declared before or after the trial court had passed on it, provided the rights of the complainants had not become vested before the last decision, as is claimed by relator to be the fact in the instant case. In Metzger Motor Car Co. v. Parrott, 233 U. S. 36, 42, 34 Sup. Ct. 575, 576 (58 L. Ed. 837), a state statute, which had not been construed by the highest court of the state at the time the District Court of the United States decided the case, was held to be constitutional by that court. While pending in the Supreme Court on error to the District Court, the highest court of the state held the statute to be unconstitutional under the Constitution of the state. The Supreme Court, in reversing the judgment of the lower court, said:

"We cannot now treat as existing a statute which the court of last resort of the state declares cannot be enforced compatibly with the state Constitution."

In Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. Ed. 746, the Supreme Court of the state of Montana declared a statute of that state unconstitutional under the state Constitution, while the case was pending in the Supreme Court of the United States, on error to a United States Circuit Court of Appeals, which had held the statute involved constitutional. In reversing the Circuit Court of Appeals the Supreme Court said:

"As this ruling of the court of last resort of the state of Montana, interpreting the Constitution and laws of that state, is binding here, the sole ground upon which the Circuit Court of Appeals rested its judgment is destroyed."

In Wade v. Travis County, 174 U. S. 499, 507, 509, 19 Sup. Ct. 715, 43 L. Ed. 1060, the Circuit Court had declared certain bonds of defendant county void in conformity with a decision of the Supreme Court of the state, rendered before that time. On error the United States Circuit Court of Appeals affirmed the judgment of the Circuit Court. 81 Fed. 742, 26 C. C. A. 589. The Supreme Court granted a writ of certiorari. While the cause was pending in the Supreme Court of the United States the Supreme Court of Texas in Mitchell County v. Bank of Paducah, 91 Tex. 361, 43 S. W. 880, held that such bonds were valid. The Supreme Court of the United States followed the last decision, reversing the judgment of the lower courts. The court in its opinion said:

"While, if this case had been brought before this court before the decision in the Mitchell County Case, we might have taken the view that was taken by the courts below, treating the question as one hitherto unsettled in that state. we find ourselves relieved of any embarrassment by the decision in the Mitchell County Case, which manifestly applies to this case and requires a reversal of their judgment."

The court then proceeded:

"But assuming that the later case was intended to overrule the prior ones, and to lay down a different rule upon the subject, our conclusion would not be different"

—citing numerous authorities, and distinguishing those cases in which parties, in reliance of a decision of the highest court of the state, entered into new contracts or bought bonds issued under the same statute. The same rule has been applied in the construction of statutes now involving their constitutionality.

To the same effect are the rulings of the Circuit Court of Appeals of this circuit. In St. Louis Cordage Co. v. Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551, the United States Circuit Court of Appeals, for this circuit, construing a Missouri statute, requiring gearing and belting in factories to be guarded, held that that statute did not abolish the rule of assumption of risk. At that time the statute had not been construed by the Supreme Court of the state. The same question came again before that court in Columbia Box Co. v. Saucier, 213 Fed. 31, 129 C. C. A. 656, and Atlas Portland Cement Co. v. Hagen, 233 Fed. 24, 147 C. C. A. 94. In the meantime the Supreme Court of Missouri had construed the statute, holding that it did abolish the rule of assumption of risk. Thereupon the Circuit Court of Appeals refused to adhere to its former decision in the Miller Case, and other cases following it, holding that it was its duty to follow the construction of the statute by the state Supreme Court. The same principle was followed in Sidey v. City of Marceline, 237 Fed. 168, 170, 150 C. C. A. 314, and St. Louis & S. F. R. R. Co. v. Quinette, 251 Fed. 773, 164 C. C. A. 7.

In Western Union Telegraph Co. v. Poe (C. C.) 61 Fed. 449, and Adams Express Co. v. Poe (C. C.) 61 Fed. 470, Judge Taft, on demurrer to the bills of complaint in those cases, held a taxing act of the state of Ohio unconstitutional, as being in violation of the Constitution of that state, and granted a temporary injunction. Later, upon failure of the defendant to answer, decrees pro confesso were taken. Before final decrees were entered the Supreme Court of Ohio, in State v. Jones, 51 Ohio St. 492, 37 N. E. 945, held that the act was constitutional. Thereupon the defendant moved the court to set aside the decrees pro confesso, dissolve the temporary injunctions, and grant a rehearing on the demurrers. Judge Taft sustained these motions, holding that it was the duty of the Circuit Court to reverse its former ruling in deference to the decision of the Supreme Court of the state. Western Union Telegraph Co. v. Poe (C. C.) 64 Fed. 9. Upon appeal this ruling was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit, Sanford v. Poe, 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641, the late Justice Lurton, then Circuit Judge, delivering the unanimous opinion of that court. On certiorari the Supreme Court affirmed the rulings of the lower courts, sub nomine Adams Express Co. v. Ohio, 165 U. S. 194, 219, 17 Sup. Ct. 305, 41 L. Ed. 683. While four of the Justices dissented in that case, they placed their dissent solely upon the ground that the statute was in violation of the national Constitution, but that part of the majority opinion, which held the construction of the Ohio Constitution by its court of last resort, although rendered after the cause in the national court had been instituted, should control, was not questioned by any of the dissenting Justices. See, also, Northern Pacific

Ry. Co. v. Meese, 239 U. S. 614, 619, 36 Sup. Ct. 223, 60 L. Ed. 467, and American Sugar Ref. Co. v. New Orleans, 119 Fed. 691, 55 C. C. A. 328.

[3] If by reason of an oversight the court reached a different conclusion from what had theretofore been decided by the highest court of the state, it is the duty of the national courts to follow the construction of the state court of last resort, when that fact is called to their attention.

A case directly in point is Fairfield v. County of Gallatin, 100 U. S. 47, 52, 55, 25 L. Ed. 544. In Town of Concord v. Portsmouth Savings Bank, 92 U. S. 625, 23 L. Ed. 628, the court had held bonds issued by a municipality of Illinois void, as not having been issued in conformity with the provisions of the Constitution and statutes of that state. Prior thereto the Supreme Court of Illinois had held bonds issued in the same manner as were those in suit in the Town of Concord Case to be valid obligations under the same provision of the Constitution and statutes of the state under which the bonds in the Fairfield Case were issued. But that decision of the Supreme Court was not called to the attention of the Supreme Court of the United States, and was overlooked by that court. The Circuit Court in the Fairfield Case, following the decision of the Supreme Court in the Town of Concord Case, held the bonds of Gallatin county void. The Supreme Court reversed the case, and after referring to the decision of the Supreme Court of Illinois, which it had overlooked in the Town of Concord Case, held:

"In view of all this, ought this court to adhere to the construction we gave to the state Constitution in ignorance of the fact that the Supreme Court * * * had previously construed it in a different manner?"

After referring to numerous prior decisions, it answers this query by holding:

"We are not constrained to refuse following the decision of the state court in order to save rights acquired on the faith of our ruling in Town of Concord v. Portsmouth Savings Bank. * * * In such a case, we think it our duty to follow the state courts, and adopt as the true construction that which those courts have declared."

[4] The rule of law, that the latest decision of the highest court of the state controls, is especially applicable to taxing statutes. Games v. Dunn, 39 U. S. (14 Pet.) 322, 328, 10 L. Ed. 476; State Railroad Tax Cases, 92 U. S. 575, 618, 23 L. Ed. 663; Stutsman v. Wallace, 142 U. S. 293, 306, 12 Sup. Ct. 227, 35 L. Ed. 1018; Pittsburg, etc., Ry. Co. v. Backus, 154 U. S. 421, 425, 14 Sup. Ct. 1114, 38 L. Ed. 1031. For this court to refuse to follow the decisions of the Supreme Court of Arkansas would result in granting to noncitizens of the state, who can maintain actions in the national courts, benefits not possessed by citizens of the state, and relief denied to the latter. This should be avoided, if at all possible. Smith Purifier Co. v. McGroarty, 136 U. S. 237, 241, 10 Sup. Ct. 1017, 1019 (34 L. Ed. 346), where it was said:

"It would be an extraordinary result, if the courts of the United States, in exercising the jurisdiction conferred upon them with a view to secure the

rights of citizens, residing in different states, should hold such a conveyance to be valid against citizens of other states as the Supreme Court of Ohio holds to be void as against its own citizens." Paterlini v. Memorial Hospital, 247 Fed. 639, 160 C. C. A. 49.

Mandamus is a writ of discretion. Duncan Townsite v. Lane, 245 U. S. 308, 38 Sup. Ct. 99, 62 L. Ed. 309; United States ex rel. v. Lane, 249 U. S. 367, 39 Sup. Ct. 293, 63 L. Ed. 650.

Tax titles for nonpayment of taxes on such assessments would depend on the validity of these assessments, and they would, in almost all instances, be determined by the state courts, and when so decided would become a rule of property binding on the national courts.

[5] Here we are confronted with a decision of the highest court of the state, expressly holding that, years before this cause of action arose, it had in two well-considered cases construed its Constitution and statutes, holding that the uniformity clause of its Constitution controls the full valuation assessment statute, and, if conflicting, the latter must give way. The same conclusion has been reached by Judge Youmans in a cause in the Western District of Arkansas.

For the reasons stated, the court feels bound to follow the construction of the Constitution and statutes of the state by its highest court, and deny the petition for a mandamus.

ZEIGLER et al. v. HOPKINS et al.

(District Court, E. D. Kentucky. December 3, 1918.)

1. MINES AND MINERALS ⚿79(6)—OIL LEASE—FORFEITURE FOR NONPAYMENT OF RENT.
   An oil and gas lease on land in Kentucky *held* not forfeited for failure to promptly pay the stipulated rental on failure to drill a well within one year, where the letter containing it was undelivered and immediately on its return the money was deposited in bank, as the lease provided might be done.
2. MINES AND MINERALS ⚿81—OIL LEASES—CONFLICTING LEASES.
   An oil and gas lease *held* valid as against a subsequent lease which, while executed when the first lessor was technically in default for nonpayment of rent, was obtained by misrepresentation by the second lessees, who had actual notice of the prior lease and of complainants' ownership thereof, and express notice of complainants' right and claim before entering upon the land.

In Equity. Suit by H. J. Zeigler and Lee Howell against James S. Hopkins, A. J. Hopkins, A. R. Putnam, and Emma Hamilton. Decree for complainants.

Decree reversed, — C. C. A. —, 259 Fed. 43.

Kelly Kash and Hunter M. Shumate, both of Irvine, Ky., Martin T. Kelly, of Lexington, Ky., and Worthington, Cochran & Browning, of Maysville, Ky., for plaintiffs.

Pendleton & Bush, of Winchester, Ky., and A. J. Hopkins, of Chicago, Ill., for defendants.

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

COCHRAN, District Judge. [1, 2] This cause is before me on final hearing. It involves a contest between owners of two successive oil and gas leases, covering a tract of 50 acres of land, in Lee county, in this district, made by the defendant Emma Hamilton, the owner thereof. The first one was made March 2, 1916, to W. J. Gibson. He assigned it July 11, 1916, to W. V. Abney, and Abney assigned it July 14, 1916, to plaintiffs, who have ever since claimed it. The lease first grants to Gibson "all the oil and gas in and under" the land, and the land itself, "for the purpose of entering upon, operating thereon, and removing therefrom said oil and gas for the term of 10 years from date, and as much longer thereafter as oil and gas is found thereon." It then provides that the "grant or lease was made" on five terms. The first one is in these words:

"Lessee agrees to drill a well upon said premises within one year from this date, or thereafter pay to lessors rentals as hereinafter provided until a well is completed or the property granted hereby is conveyed to lessor."

The other four have no pertinency to the controversy here. The lease thereafter provides as follows:

"Second party agrees to complete a well on the premises within one year from the date thereof (unavoidable accidents and delaying excepted), unless the lessee thereafter pays a rental of 10 cents per acre payable in advance until a well is completed, which payments for delay in completing a well may be made direct to any one of the lessors or deposited to Emma Hamilton in the Lee County Deposit Bank, Beattyville, Ky., which payments shall fully and completely extend this lease from time to time until a well is completed, and lessors agree to accept said payment of rentals when made and to mail receipts for same to the lessee. And it is further agreed that the lessee may at any time remove all his property and reconvey the premises hereby granted, which conveyance said lessor agrees to accept, and thereupon this instrument shall become null and void, and the payments which shall have been made be held by the lessor as full stipulated damages for nonfulfillment of the foregoing contract."

The lease was not recorded before its assignment to plaintiffs, but on July 17, 1916, three days thereafter, it, with the assignment to Abney indorsed therein, and the assignment to plaintiffs, which was on a separate paper, were delivered to the clerk of the Lee county court and the state tax on each instrument was paid. Thereupon both documents were legally lodged for record. The assignment to plaintiffs was at once recorded. For some reason the lease itself with the assignment to Abney indorsed thereon, was not recorded until July 23, 1917, after this controversy arose. It is claimed that the lease was not recorded when lodged, because the fee for recording was not paid. But there is no indication that the fee for recording the assignment was paid then, and yet it was recorded. It is likely that it was not recorded at the same time the assignment was recorded from oversight. Payment of the recording fee was thereafter demanded, and it was not recorded until such fee was paid. Though not recorded until the date stated, when lodged for record it was placed in the box for unrecorded instruments on which the tax had been paid and properly indexed.

No well has ever been commenced on the land under this lease. On February 25, 1917, just shortly before the lapse of a year from its

making, and in anticipation of the expiration thereof, when the first quarterly rental was to become due, the plaintiffs, through their manager, Eli Howell, sent by mail to the lessor, the defendant Emma Hamilton, $1.35, a $1 bill and 25 cents in stamps, $1.25 to pay the rental about to come due, and 10 cents for postage. It was sent from Irvine, in the county of Estill, which adjoins Lee, where plaintiffs had their headquarters. The envelope was addressed to the lessor at Evelyn, her post office, which was about 10 or 15 miles distant from Irvine, and from which she lived a distance of 4 miles. Inclosed in it, in addition to the money and stamps, was a letter and receipt for the quarter's rent, to be signed and returned by her. The envelope, with its inclosures, was returned to plaintiffs in 10 or 15 days undelivered, and on March 12, 1917, they deposited to the lessor's credit in the Lee County Deposit Bank the sum of $1.25 to pay the quarter's rent, which they sent to the bank by mail. Since then the quarterly installments of rent have been deposited to her credit in that bank as they matured.

The other was made by the defendant Emma Hamilton to her codefendants, three in number and partners, on March 7, 1917; i. e., between the expiration of a year from the making of the lease under which plaintiffs claim, to wit, March 2, 1917, and the making of the first deposit of the quarterly installment of rent to the lessor's credit in the Lee County Deposit Bank, to wit, March 12, 1918. When these lessees took the second lease, they had actual notice that their lessor had given a previous lease, though not of the fact that the plaintiffs had acquired it. The defendant Putnam, on their behalf, visited the lessor on the 3d or 4th of March, 1917, a day or so after the year ran out, and she informed him that she had theretofore given a lease. She could speak only from recollection about it, as she had misplaced the copy thereof which she had retained. She informed him that she thought that it was only for a year and that the year had run out. She was an illiterate woman, and when it was given it was read over to her by the officer who took her acknowledgment, and Abney, who obtained it for Gibson, said that, if a well was not driven within a year or the rental paid, the lease would be null and void. There is some uncertainty as to whether she informed him as to whom the lease had been given, but the evidence tends to show that she told him, or he otherwise ascertained, that it was given to Gibson. A disinterested witness, who was present, testified that she said that she had given it to Gibson. Besides Martin's wife, an adjoining landowner, had made a lease to Gibson at the same time, and defendant Putnam was aware, not only of the existence of this lease, but that it was made to Gibson. The lease was not executed at this first interview. Possibly the lessor would not have made a second lease in her then state of mind, and it is likely that the defendant Putnam would not have taken it with such information as he then had.

The defendant Putnam who had had experience in examining titles, and the defendant James S. Hopkins, who is a lawyer, went at once to the office of the clerk of the Lee county court, to see what they could find as to this prior lease given by the defendant Hamilton. They found nothing. They testify that they looked into the box containing

instruments lodged for record, but not recorded, and it was not there, and that they inquired of the clerk whether there was an index of such instruments, and he told them that there was not. The clerk denies both of these statements. Whilst I have no reason to doubt the veracity of these two defendants, I cannot accept these statements as true. The clerk had no interest to mislead them or testify falsely. The first lease is before me, indorsed lodged for record by the clerk at the same time, day and hour, that the assignment, which was at once recorded, is indorsed as so lodged, and it is unquestioned that there is in the clerk's office an index of instruments lodged for record but not recorded, and that this lease is properly indexed therein. The testimony of these two defendants is to be accounted for in this way: It is likely that there is in the Lee county court clerk's office, as in every other county court clerk's office in the state, a box or other receptacle containing instruments delivered to the clerk, on which the tax has not been paid, which are therefore not legally lodged for record, and of which no index is kept. If so, the clerk understood their inquiry to relate to such instruments, and it was into this box that they looked. To find an instrument on which the tax has been paid, and which is therefore legally lodged for record, it is not likely that the box containing such instruments will be looked into, unless the index of such instruments is first examined, and it is found to be indexed. These two defendants were strangers to Kentucky, and liable not to have made themselves understood. Either such was the case, or a more adverse view of their testimony will have to be taken.

It was after this examination of the records that the defendant Putnam again visited the lessor on March 7, 1917, and obtained the second lease. He stated to her that he had searched the clerk's office and the lease was not of record. It was on the basis of this statement that the second lease was made. At the same time Putnam obtained a lease for himself and partners from Martin and wife on the adjoining land, covered by the prior lease to Gibson from Martin's wife, and which plaintiff also held on the idea that such lease was invalid, in that Martin had not united in it. The defendant lessees placed their lease from the defendant Hamilton on record March 13, 1917. On April 18, 1917, before they had made an entry under this lease. they were actually notified by plaintiffs that they were the assignees of the Gibson lease, and claimed under it. Thereafter, and before this suit was brought, they entered and drilled three good wells. As soon as plaintiffs were informed that the defendant lessees were developing the property, they demanded that it should cease, and shortly thereafter brought this suit. Plaintiffs' general manager testified that he notified defendant Putnam of their lease, and warned him not to interfere, on or about February 25, 1917. This Putnam denies. As the two are of equal credibility, I prescind from this testimony.

It must be held that the equity of this case is with the plaintiffs. When the defendant lessees obtained their lease, they had actual notice that a prior lease had been given, and constructive notice that it had been assigned to plaintiffs, and, if it was still valid, that they were the holders thereof. The fact that the lease and the assignment thereof to

Abney had not been recorded did not prevent such being the case. It is sufficient that the tax had been paid and the lease lodged for record. Cain v. Gray, 146 Ky. 402, 142 S. W. 715.

Furthermore, it cannot be said that the defendants were not without fault in not finding that the lease had been assigned to plaintiffs, the finding of which should have led to an inquiry of them as to what they had done towards paying the rental that had just accrued, and which inquiry would have then developed whether the present claim as to what was done is true. The lease was lodged for record, was in the box containing such instruments which had not been recorded, and was properly indexed.

Still further, defendants obtained their lease upon a misrepresentation, if not made by so many words, made by action. The misrepresentation was not a willful one; i. e., it was not made with a knowledge that it was such. Yet it was none the less a misrepresentation. It consisted in the representation that the prior lease, under which plaintiffs claim, was invalid because not of record. This representation was not true, even if the lease had not been lodged for record. Recordation is not essential to the validity of a recordable instrument. If it amounted to no more than that it was not valid as to defendants, still it was not true. They had actual knowledge of its existence and constructive knowledge as to its being held by the plaintiffs. It was on the basis of this misrepresentation that the defendant Hamilton executed the lease to the lessee defendants. It is not unlikely that she would have made it on the ground that it had run out, had she been put to it to do so. But she did not in fact make it on that ground.

Yet again the lessee defendants were indifferent towards plaintiffs' right in the matter of the Martin lease. When they ascertained that there was a possible defect in that lease, in that Martin had not united with his wife in making it, without considering whether possibly plaintiffs had some equities in the matter which might lead Martin untempted to testify the defect, if there was one, and without saying a word to plaintiffs about it, they induced Martin and his wife to make a second lease to them. This treatment of plaintiffs is, so far as my experience goes, characteristic of the treatment by oil men of one another. If they think that they have found some defect in an existing lease sufficient to overthrow it, they do not reflect whether fair dealing requires that they should either hands off, or first take the matter up with the lessee therein, to find out exactly how it stands from his point of view, but tempt the lessor to make a second lease by offering a better bargain, and then, when the first lease is asserted against it, enlarge on the great wrong done the lessor, either by the terms of the first lease or what the lessee has failed to do thereunder.

And finally, before the defendant lessees had incurred any expense in developing the property under their lease, they had actual notice that plaintiffs were claiming the right to develop it under the first lease as assignees thereof. On the other hand, the plaintiffs and those under whom they claim are not open to serious criticism. It is urged that Gibson had no intention to develop the property, and that his sole purpose was to dispose of the lease for a consideration. This is usual

in such cases, and the lease contemplated that this might be done; for it expressly provided that the terms and conditions thereof should extend and apply to the assigns of the lease.

It is urged, further, that there was no development during the first year. But, as is usual in such cases, the lease expressly provided for the extension of the time of development by the payment of the stipulated rental. Outside of Kentucky the lease might be open to the criticism that the time of development could be extended for 10 years by payment of such rentals. But it is not open to such criticism in Kentucky, since the decision in the case of Monarch Oil, Gas & Coal Co. v. Richardson, 124 Ky. 602, 99 S. W. 668. There was a lease for 20 years, with an agreement to drill a well in a year or pay a certain annual rental until it was drilled. It was held that the lessee could not postpone the drilling of the well for 20 years by payment of the annual rental, but that the lessor could at any time require the well to be drilled within a year by giving notice to that effect. Whilst this may be said to remake the contract for the parties, it lays down a very equitable rule. In view of this, the lessor here could, by giving notice, require a well to be drilled, possibly in three months after the expiration of the first year.

Nor should plaintiffs' failure to pay the rent at the end of the first year, when it became due, bring them into disfavor. There can be no question that what they did did not amount to such payment. But their failure to make payment was a pure misadventure. The defendants question whether plaintiffs made the effort to make such payment which they set forth. They rely on several considerations as weakening the claim that they did:

One is that the returned letter is not produced. Plaintiffs account for its absence by saying that it has been lost. This is said, however, after the litigation has arisen and the importance of having it is appreciated. From the standpoint of its importance, it is hard to realize why it would not have been preserved. It must therefore in some way have got lost. But when it was received back the circumstances were not conducive to the thought that it was important to preserve it. No litigation was then on hand or anticipated, and promptly upon its return the deposit was made. It is possible that on its receipt the letter was opened and money and stamps removed, and then no pains taken to preserve the envelope or letter, a copy of the latter of which had been made and retained when it was mailed. Its absence, therefore, may be accounted for by the fact that no pains were taken to preserve it, and not on the ground that in some mysterious way it got lost.

Another is that plaintiffs in their original bill alleged that what was inclosed in the letter was a check for the rent, and plaintiffs' manager, who claims to have sent the rent, swore thereto. The manager placed the blame on the attorneys, and the attorneys accept it. But it is not improbable that the manager himself was to blame. He may have told the attorneys that he sent it by check, by a slip of the tongue, and by inattention not have observed the allegation in the bill. I notice that when he testified as a witness herein, and was asked what he did towards paying the rent before the year expired, his answer was:

"We mailed a check to Mrs. Hamilton." This he did, notwithstanding he then had in his hands the copy of the letter which he claimed to have mailed to the lessor, in which it was stated, and he thereafter testified, that he inclosed a $1 bill and 35 cents in stamps, as had theretofore been alleged in the amended bill.

A third consideration is the testimony of the postmaster at Evelyn that no such letter was received at his post office and returned. Several things weaken the value of this testimony. It may have been received and returned, and the postmaster have forgotten about it after a lapse of a year and a half. There may have been an assistant postmaster responsible for its nondelivery and return. There is usually an assistant postmaster at such post offices. No inquiry was made as to whether there was one here. Then it may have been sent to another post office by mistake of some official. I had this experience last spring. I mailed a letter, addressed to Lebanon, Ky., plainly, I thought. It was sent to Corbin, Ky., and after having remained there for a month or two it was returned to me. I thought possibly that plaintiffs may have misdirected the letter. Their lease did not give the lessor's address. The sole information which plaintiffs had was a map of that territory, and her land was closer to Arvel, another post office, than Evelyn. But this is negatived by the fact that the address given in the copy of the letter which was retained and in the deposit slip is Evelyn.

On the other hand, there are several considerations which require an acceptance without question of the correctness of plaintiffs' claim that an effort was made to make payment, and it was unsuccessful in the way for the reason claimed. One is the positive testimony of plaintiffs' manager to that effect. There is not the slightest reason to question his veracity. Another is the copy of the letter which is claimed to have been sent, which it was natural and businesslike to retain, bears the marks of genuineness. Another is the deposit in bank of the rent on March 12, 1917. This removes all possibility of claiming that plaintiffs had abandoned the lease until, by reason of the development of the property by the defendants, it was shown to be good oil territory. When this deposit was made, not only no such development had been made, but plaintiffs had no information that the defendant lessees had become interested in the property, or were likely to become so. And, finally, the change in position of plaintiffs as to what they inclosed in the letter to their lessor. This circumstance is not only not against the truthfulness of their claim that they made such effort to make payment, but decidedly strengthens it. It evidences that they are not setting up a false claim and trying to mislead. If such were the case, no such change would have been made. As good a case could have been made out to the effect that the effort was to make payment by check as by currency and stamps, and an opportunity would not have been afforded defendants to make a point of the change. I can say that I have had the slightest doubt as to the truthfulness of this claim.

Another criticism of plaintiffs' conduct, which has been advanced. is their failure to pay the recording fee of the clerk. I am not ad-

vised that the clerk had the right to demand payment of this fee before recording the lease. It is not likely that the failure to record it at once was due to this circumstance. The assignment was recorded at once, and there is no indication in the evidence that the fee for recording it was paid in advance. Nor is it certain that plaintiffs were derelict in not paying the fee for recording the lease after demand of payment was made. And at most this is not a matter of which defendants can complain. It is very likely that the second lease would have been made, had defendants been fully advised of all the circumstances. The defendant lessees would have taken the position that the plaintiffs' lease was forfeited by the failure to make payment of the rental before the expiration of the year, and offered the defendant lessor sufficient inducement to make the second lease.

And, finally, criticism is made of plaintiffs' use of the mail to make payment of the rental, instead of making payment to her in person. The mail was reasonably sure. If it had not been used, some other agency would have reasonably been resorted to. Had the deposit been made in the bank, she would have had to have been at the trouble and expense of going to Beattyville to get it, or it would still have had to have been sent to her by mail. The uncontradicted evidence is that it is customary to make such payments by mail, and the lease itself seems to contemplate that payments to the lessor direct might be made by mail, in that it provides that the lessor is to accept payment of the rentals and "to mail receipts for same to lessee."

It is in view of the facts of this case as thus presented that I conclude that the equity thereof is with plaintiffs. The only thing that can be said in favor of the defendant lessees is that they have developed the property and incurred considerable expense in so doing. But this they did after they had full notice of plaintiffs' claim, and in so doing they voluntarily took the risk of losing out. This equity in favor of plaintiffs is such as to require that, even if the failure to make payment in time of the installment of rent due on or before March 2, 1917, worked a forfeiture of plaintiffs' rights under their lease, they should be relieved against it. But I do not think it worked a forfeiture. I still adhere to the views advanced in the former opinion herein, with a possible qualification. The rule laid down in Monarch Oil & Gas Co. v. Richardson is an equitable one. It finds no warrant in the contract of the parties. Indeed, it may be said to work a change therein. The parties agreed in the lease involved therein that the lease should have the right to explore for 20 years. The lessee agreed to drill a well within a year or to pay a certain annual rental until the well was drilled. According to the contract of the parties, therefore, the lessee, by paying the rental, could postpone development as long as he desired. What, then, are the implications of this decision? Are the rights of the lessee subject to what is equitable in other particulars? If, so, there is room to hold that if the lessee should refuse on demand, or even if he should intentionally fail to pay rent when it becomes due, that he forfeits his rights. I am not prepared to commit myself as to this, and it is not necessary that I determine it in this case. The defendant Hamilton did not demand payment of the rent which be-

came due March 2, 1917, and the plaintiffs did not intentionally fail to pay it. Their failure to pay was wholly unintentional, and, as I have held, the result of a pure misadventure. The case of Monarch Oil, Gas & Coal Co. v. Richardson requires, further, that there should be no forfeiture where the failure to pay was unintentional and the result of such a misadventure. The plaintiffs are entitled to the decree.

HERMAN v. MARKHAM AIR RIFLE CO.

(District Court, E. D. Michigan, S. D. November 4, 1918.)

No. 5706.

1. WEAPONS ⚷18(1)—NEGLIGENT SALE OF AIR RIFLE BY MANUFACTURER.
   A manufacturer, who, without examination, sold to a wholesaler a loaded air rifle, discharged at a retailer's employé by a prospective customer, believing that it was not loaded, both vendees being ignorant of its condition, *held* guilty of negligence.
2. WEAPONS ⚷18(1)—NEGLIGENT SALE OF AIR RIFLE—PROXIMATE CAUSE OF INJURY.
   Where defendant manufacturer of air rifles negligently permitted a loaded rifle to be sold to a wholesaler, who resold it to a retailer, in whose store it was discharged at a clerk by a prospective customer ignorant of its condition, defendant's negligence was the proximate cause of the injury, and the customer's act was not an independent intervening cause.
3. NEGLIGENCE ⚷61(1)—PROXIMATE CAUSE—CONCURRENT CAUSES.
   One who negligently puts into operation a train of events which is likely to lead, in a continuous sequence, to an injury which is the natural and probable result of the original act, is liable, although the injury was immediately caused by last link in chain of events.
4. WEAPONS ⚷18(1)—MANUFACTURER'S LIABILITY FOR NEGLIGENT SALE OF AIR RIFLE—PRIVITY.
   A manufacturer, failing to make proper inspection before selling a loaded air rifle discharged at a retailer's employé by a prospective customer of the retailer buying it from a wholesaler without knowledge of its condition, is liable for the injury, although there is no privity of contract between the person injured and the manufacturer.

Action by Rose Herman, a minor, by Maurice Herman, her next friend, against the Markham Air Rifle Company. On demurrer to the declaration. Demurrer overruled.

Millis, Griffin, Seely & Streeter, of Detroit, Mich., for plaintiff.
Paul W. Voorheis, of Detroit, Mich., for defendant.

TUTTLE, District Judge. This matter comes before the court on a demurrer to the declaration in an action of trespass on the case. The declaration, which contains three counts, alleges in substance that the defendant, a resident of Michigan, is a manufacturer, dealer, and vendor of a certain air rifle known as the "King air rifle," and advertised by the defendant as a harmless instrument for the amusement of young persons and others; that the defendant so advertised, manufactured, and sold such air rifle in large quantities to the public,

and thereby induced a belief in the minds of the public generally, and in the mind of the plaintiff, a resident of Illinois, that the same was harmless to handle and without danger to life or limb; that defendant sold a quantity of such rifles to a wholesale dealer in St. Louis, Mo., for the purpose, as was well known to the defendant, of resale to other dealers, and for the purpose of ultimately being handled in retail stocks and sold to individual customers; that it then and there became and was the duty of the defendant to use reasonable care to ship such air rifles not loaded and without any shot therein, but the defendant disregarded such duty, and negligently shipped to such wholesale dealer for such resale a certain air rifle loaded with shot; that such dealer, being unaware of the presence of such shot, resold the rifle to a certain retail dealer, who, being likewise ignorant of the fact that the rifle contained shot, placed the same in his stock and in charge of the plaintiff, who was employed as a stockkeeper and saleswoman in his store; that while this air rifle was so in charge of the plaintiff in such store it was handled by a certain prospective customer or visitor, who, believing that it was not loaded and was harmless, and being ignorant of the fact that it contained shot, proceeded to handle it and pulled the trigger, discharging said shot, which violently struck plaintiff, while she was exercising due care, and destroyed the sight of her right eye and endangered the sight of the other eye, so that it will probably be also lost, whereby plaintiff has suffered certain damages specifically claimed.

The three counts are identical, except that in the first count the negligence alleged consists in the careless shipment of the air rifle with the shot therein; in the second count the negligence charged is the failure to use reasonable care not to permit any shot to be placed and left in such air rifle, and the consequent negligent causing and permitting such shot to be so placed and left in the air rifle while it was being shipped; and in the third count the negligence counted on is the alleged failure to make proper examination and inspection of the air rifle, to ascertain that no shot had been placed or left therein before its shipment.

The demurrer sets forth several objections to the sufficiency, in law, of the declaration, which may be conveniently grouped under three general grounds, as follows: First, that such declaration does not allege any actionable negligence on the part of the defendant; second, that the facts therein stated fail to show that any negligence of the defendant was the proximate cause of the injury complained of; and, third, that such facts fail to show that the defendant owed to the plaintiff any duty to exercise reasonable care in the premises. These grounds will be considered in the order named.

[1] 1. It seems to me plain that the averments in the declaration just referred to sufficiently allege actionable negligence on the part of the defendant. No case has been cited, and I have discovered none, holding that one who sells an air rifle, capable of causing the injury inflicted upon this plaintiff, loaded with shot, and without a proper examination to discover whether it be so loaded, and without warning as to its condition, is, as a matter of law, not guilty of negligence.

The authorities cited by defendant to the effect that the sale of firearms, like this rifle, does not constitute negligence, are obviously not in point, as there is a wide difference between the furnishing to the public of such weapons in their usual condition, to be loaded by the user, and the furnishing of such a weapon already loaded and ready to inflict serious injury. It seems to me too plain for argument that if the allegations in this declaration are true, and the defendant, after advertising this air rifle as a harmless instrument, loaded it with shot, or failed to use ordinary care to find and remove such shot, and then sold the rifle in this dangerous condition to a purchaser, who was without knowledge of the danger and believed, as the defendant must have known he would believe, that it was unloaded, and would naturally pass it on to some other person in that condition, the defendant did not exercise the care which an ordinarily prudent person would have exercised under such circumstances. Certainly, if the evidence on the trial of an action should disclose such a state of facts, the court would not be justified in directing a verdict for the defendant on the ground that reasonable men could not from such evidence properly infer negligence. I have no doubt that the declaration alleges actionable negligence on the part of the defendant, and the contention to the contrary must be overruled.

[**2, 3**] 2. It is urged by the defendant that, conceding that it was guilty of negligence as alleged, such negligence was not the proximate cause of the injury sustained by plaintiff. It is insisted that the act of the person who handled the air rifle, in causing it to be discharged at the plaintiff, was such an independent and intervening cause as to be the proximate cause of the injury, so that the original negligence, if any, of the defendant, became the remote cause of such injury.

I cannot agree with this contention. I think it clear that the circumstances surrounding the discharge of this weapon, and the consequent injury to the plaintiff, were what an ordinarily prudent person would and should expect to follow as a consequence of the act of placing upon the market this loaded gun. I am satisfied that the inflicting of this injury upon the plaintiff by the person mentioned, under the circumstances shown, was the natural and probable result of the negligence of the defendant, assuming that its acts in the premises constituted negligence. The mere fact that the act of the defendant did not directly and immediately cause this injury does not, of course, render such act any the less the proximate cause of such injury. It has been well settled, from the time of the famous "Lighted Squib" Case down to the present day, that one who by his negligent act puts into operation a train of events which is likely to lead, in a continuous sequence, to an injury which is the natural and probable result of his original act, so that there is a natural causal connection between the two, is responsible for such injury, notwithstanding the fact that the latter may have been directly and immediately caused by the last link in this natural chain of events. Milwaukee & St. Paul Railroad Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; Ætna Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395; The Joseph B. Thomas, 86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58; Teis v. Smuggler Mining

Co., 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893; City of Winona v. Botzet, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204. If, therefore, the defendant was guilty of negligence in shipping this loaded air rifle under the circumstances alleged, the act of this person in discharging the rifle at the plaintiff was only incidental to, and the natural and probable result of, such negligence, which was the proximate cause of the injury resulting.

Nor is the situation affected by the fact, if, as strenuously insisted by defendant, it be a fact, that the person actually discharging the rifle in question was also guilty of negligence in pulling the trigger without ascertaining whether the rifle was loaded, or in pointing it toward the plaintiff.

At most, such negligence would be merely a concurring cause of the injury, co-operating with the negligence of the defendant to produce it, and would not relieve defendant from liability therefor. Grand Trunk Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; Memphis Consolidated Gas & Electric Co. v. Creighton, 183 Fed. 552, 106 C. C. A. 98; Wells Fargo & Co. v. Zimmer, 186 Fed. 130, 108 C. C. A. 242; Pacific Telephone & Telegraph Co. v. Hoffman, 208 Fed. 221, 125 C. C. A. 421.

[4] 3. Finally, it is contended by defendant that, as there was no privity of contract between it and the plaintiff, it owed the latter no duty of care in connection with the sale of this air rifle, and that consequently it cannot be held responsible to the plaintiff for the injury suffered by her. If the article sold by the defendant were an ordinary commodity of merchandise not essentially dangerous to the safety of the user thereof, there would be much force in this contention. This loaded air rifle, however, sold by the defendant under the circumstances disclosed, was an article inherently and imminently dangerous to human safety, as the result of its sale in this case conclusively shows; and it is well settled that the manufacturer or vendor of an article of this dangerous character is not relieved from liability for injury resulting from its negligence in connection with the preparation or sale of such article by the fact that there was no privity of contract between it and the person so injured, but in such a case defendant is liable for any injury caused by such negligence, subject, of course, to the rules of law applicable to negligence, contributory negligence, and proximate cause. National Savings Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621; Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303; Marquardt v. Ball Engine Co., 122 Fed. 374, 58 C. C. A. 462; Riggs v. Standard Oil Co. (C. C.) 130 Fed. 199; Standard Oil Co. v. Parrish, 145 Fed. 829, 76 C. C. A. 405; Keep v. National Tube Co. (C. C.) 154 Fed. 121; Cadillac Motor Car Co. v. Johnson, 221 Fed. 801, 137 C. C. A. 279, L. R. A. 1915E, 287, Ann. Cas. 1917E, 581; Ketterer v. Armour & Co., 247 Fed. 921, 160 C. C. A. 111, L. R. A. 1918D, 798.

For the reasons stated, an order will be entered overruling the demurrer and requiring the defendant to plead to the declaration within the usual time.

UNITED STATES v. SAMPLES. SAME v. DE LAPP. STATE OF MISSOURI v. HOLLAND, United States Game Warden.

(District Court, W. D. Missouri. July 2, 1919.)

1. STATES ⚷4—TREATIES AND LAWS—WILD ANIMALS.
Primarily the state, both as trustee for the rights of its people and in the exercise of its police power, has control over the right to reduce animals feræ naturæ to possession, and the federal government, in absence of treaty, has no paramount authority therein.

2. TREATIES ⚷11—OPERATION IN STATES.
The treaty making power is one of the highest degree, delegated by the states to the federal government by the terms of the Constitution, and is superior to state Constitutions, state laws, and all other state powers, including police powers, but the subject-matter must not be arbitrary, disconnected, and remote from international intercourse.

3. TREATIES ⚷1—DEFINITION.
A treaty is a compact between two or more independent nations, with a view to the public welfare, or entered into for the common advancement of their interests and the interests of civilization.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Treaty.]

4. CONSTITUTIONAL LAW ⚷45—CONSTITUTIONALITY OF TREATY—POWER OF COURT TO DECLARE INVALID.
If a treaty is invalid because in violation of, or inconsistent with the Constitution, the court, in a proper case where the rights of citizens are involved, may so declare.

5. GAME ⚷4—TREATIES ⚷2—VALIDITY—PROTECTING MIGRATORY BIRDS—VALIDITY OF STATUTES.
The protection of migratory birds is properly the subject of negotiation between the United States and Great Britain and the treaty of December 8, 1916, is valid, and Act July 3, 1918 (Comp. St. 1918, Append. §§ 8837a–8837m), enacted to give effect to the treaty, is constitutional and valid.

6. UNITED STATES ⚷125—CONSENT TO BE SUED.
The United States cannot be sued without its consent.

George L. Samples and W. C. De Lapp were separately indicted on charge of having violated Act Cong. July 3, 1918, relating to hunting and killing migratory birds, and they demur to the indictments on the ground that the act is unconstitutional and void, and after the return of the indictments the State of Missouri, through its Attorney General filed its bill in equity, seeking to restrain Ray P. Holland, Game Warden of the United States, from enforcing such act within the state, and the respondent through the United States District Attorney moved to dismiss this bill, and the demurrers and motion were heard together. Demurrers overruled, and bill dismissed.

Frank W. McAllister, Atty. Gen., John T. Gose, Asst. Atty. Gen., J. G. L. Harvey, of Kansas City, Mo., E. L. Westbrooke, of Jonesboro, Ark., and Samuel W. Moore, of Kansas City, Mo., for defendants and complainant.

Francis M. Wilson, U. S. Dist. Atty., of Kansas City, Mo., for plaintiffs and respondent.

VAN VALKENBURGH, District Judge. December 8, 1916, a treaty between Great Britain and the United States for the protection

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

of migratory birds was proclaimed by the President (39 Stat. 1702). Thereafter, to give effect to this convention, Congress enacted a law, approved July 3, 1918 (United States Statutes at Large, vol. 40, pt. 1, c. 128, pp. 755–757 [Comp. St. 1918, Append. §§ 8837a–8837m]). This act, among other things, provided that it should be unlawful to hunt, take, capture, or kill, attempt to take, capture, or kill, etc., at any time or in any manner, any migratory bird included in the terms of said convention between the United States and Great Britain, unless and except as permitted by regulations made as therein provided by the Secretary of Agriculture. Thereafter such regulations were made, and duly proclaimed by the President, wherein the open seasons for hunting such birds in all parts of the United States were defined. Canada by an act of Parliament, approved August 29, 1917, gave full effect to said convention and promulgated regulations thereunder May 11, 1918.

The defendants Samples and De Lapp were indicted upon the charge of having violated said act of Congress, passed to give effect to the treaty aforesaid, and the regulations made thereunder, it being provided in said act that such violation shall be deemed a misdemeanor, carrying a penalty of fine or imprisonment or both. The defendants have interposed to these indictments demurrers containing several specifications, the gist of which is that the act in question is unconstitutional and void, because the subject-matter thereof is exclusively within the property rights and police powers of the state; because no provision can be found in the federal Constitution for the protection of migratory birds; and because the convention between the United States and Great Britain exceeds the limitations of the treaty making powers under the Constitution, and is therefore in violation of the Constitution itself.

After the return of these indictments the state of Missouri, through its Attorney General, filed its bill in equity, seeking to restrain the Game Warden of the United States, in this jurisdiction, from arresting or prosecuting, or attempting to arrest and prosecute, any person for taking, killing, or using wild game within the borders of the state of Missouri, and from in any wise enforcing or attempting to enforce the aforesaid act of Congress known as the Migratory Bird Treaty Act, or any regulations or orders of the Secretary of Agriculture of the United States made or pretended to be made thereunder; and from in any wise interfering with the exercise of the rights and privileges granted by complainant to its citizens in the assumed exercise of its sovereign and reserved power. The respondent, through the United States District Attorney, filed his motion to dismiss this bill. Both demurrers and motion were heard together; the former will be first considered.

The issues tendered by the pleadings present two questions: One, the validity of the law standing by itself as affecting the relative powers of the federal government and of the states; the other, the status of the treaty, to give effect to which the so-called Migratory Bird Treaty Act was passed.

[1] Primarily the state, both as trustee for the rights of all its people and in the exercise of its police power, has control over the right to reduce animals feræ naturæ to possession. Manchester v. Mass., 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159; The Abby Dodge, 223 U. S. 166–174, 32 Sup. Ct. 310, 56 L. Ed. 390; Geer v. Conn., 161 U. S. 519, 522, 528, 16 Sup. Ct. 600, 40 L. Ed. 793; Ward v. Race Horse, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244; Patsone v. Penn., 232 U. S. 138, 34 Sup. Ct. 281, 58 L. Ed. 539; United States v. McCullagh (D. C.) 221 Fed. 288; United States v. Shauver (D. C.) 214 Fed. 154; Silz v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75; Kennedy v. Becker, 241 U. S. 556, 36 Sup. Ct. 705, 60 L. Ed. 1166; State v. Rodman, 58 Minn. 393, 59 N. W. 1098; Smith v. Maryland, 18 How. 71–75, 15 L. Ed. 269; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; Carey v. South Dakota, Supreme Court, No. 346, May Term, 1919, 250 U. S. 118, 39 Sup. Ct. 403, 63 L. Ed. ——. And in the absence of treaty there appears to have been no delegation of paramount authority to the federal government. Under the foregoing authorities, therefore, as well as on principle, this act, in the absence of treaty, would be unconstitutional, as exceeding the legitimate powers of Congress; and so it has been held in cases substantially identical. United States v. Shauver (D. C.) 214 Fed. 154; United States v. McCullagh (D. C.) 221 Fed. 288. That this power in the state is subject to any valid exercise of authority under the provisions of the federal Constitution is clear; and that a valid exercise of the treaty making power may be recognized as such a valid exercise of authority has been foreshadowed by necessary implication or by express reservation in the decisions of the Supreme Court of the United States. Ware v. Hylton, 3 Dall. 199, 1 L. Ed. 568; Manchester v. Mass., 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159; The Abby Dodge v. United States, 223 U. S. 166–174, 32 Sup. Ct. 310, 56 L. Ed. 390; Geer v. Conn., 161 U. S. 519, 522, 528, 16 Sup. Ct. 600, 40 L. Ed. 793; Ward v. Race Horse, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244; Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Kennedy v. Becker, 241 U. S. 556, 36 Sup. Ct. 705, 60 L. Ed. 1166; Smith v. Maryland, 18 How. 71–75, 15 L. Ed. 269; United States v. Forty-Three Gallons of Whisky, 93 U. S. 188–197, 23 L. Ed. 846; Carey v. South Dakota, Supreme Court, No. 346, May Term, 1919, 250 U. S. 118, 39 Sup. Ct. 403, 63 L. Ed. ——. See, also, opinion of Attorney General Griggs, Treaties—Fisheries, 22 Op. Attys. Gen. 214.

[2] That the power to make treaties is a substantial power of highest degree, delegated by the states to the federal government by the terms of the Constitution, is beyond controversy. The treaty making power has been surrendered by the states and given to the United States. Baldwin v. Franks, 120 U. S. 678–782, 7 Sup. Ct. 656, 32 L. Ed. 766; Fong Yue Ting v. United States, 149 U. S. 711, 13 Sup. Ct. 1016, 37 L. Ed. 905; Chinese Exclusion Cases, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068. And this extends to state Constitutions and laws as well as to the reserved powers. Ware v. Hylton, 3 Dall. 199, 1 L. Ed. 568; Hoke v. United States, 227 U. S. 321–322, 33 Sup.

Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905.

Mr. John C. Calhoun, foremost among those insisting upon the fullest sovereign powers of the states, while Secretary of State, made this statement in an official document:

"The treaty making power has indeed been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possibly arise between us and other nations and which can only be adjusted by their mutual consent, whether the subject-matter be comprised among the delegated or the reserved powers." Crandall on Treaties (2d Ed.) par. 105, p. 247.

Where, then, any power has been granted to the federal government by the Constitution, to be exercised through legislation by Congress, or as an incident of the legitimate treaty making power, it is superior to state Constitutions and state laws, and to all other powers, including police powers, ordinarily belonging to the states. All such must be modified, curtailed, or, in a proper case, suspended, to insure the full and complete exercise of that superior power which has been delegated by the Constitution to the central government.

"While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." Chinese Exclusion Case, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068.

It must be remembered that we are here considering the power of the federal government in its relation to the several states. In such case, it is necessary only that the grant of power to the former and its legitimate exercise shall be established. Thereupon all elements of state sovereignty, however reserved, become at once subordinate. No other construction is possible if the Constitution is to be vindicated as the supreme law of the land. Undoubtedly, we may conceive of many rights of the states over which the federal government through its power to make treaties can have no control. A number of such are stated in Pierce v. State, 13 N. H. 576. The subject-matter of negotiation must be one which falls naturally and logically into recognized classification. It must not be arbitrary, disconnected, and remote from international intercourse.

[3, 4] The validity of this act then depends upon whether this treaty was a valid exercise of federal authority as delegated by the Constitution. A treaty is a compact between two or more independent nations with a view to the public welfare. It is a compact made between two or more nations, entered into for the common advancement of their interests and the interests of civilization. Michie's Ency. of U. S. Sup. Ct. Rep., vol. 11, p. 636; Altman & Co. v. United States, 224 U. S. 583, 32 Sup. Ct. 593, 56 L. Ed. 894; 14 Diamond Rings v. United States, 183 U. S. 176–182, 22 Sup. Ct. 59, 46 L. Ed. 138.

A treaty is invalid if in violation of or inconsistent with the Constitution. Butler on Treaties, vol. 2, par. 455, p. 350; Crandall on

Treaties (2d Ed.) p. 268; Federal Statutes Annotated, vol. 9, p. 28; Cherokee Tobacco Case, 11 Wall. 620, 20 L. Ed. 227; United States v. Old Settlers, 148 U. S. 427, 13 Sup. Ct. 650, 37 L. Ed. 509; Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; Ex parte Dos Santos, Fed. Cas. No. 4,016, 7 Fed. Cas. 949; Geofroy v. Riggs, 133 U. S. 266, 10 Sup. Ct. 295, 33 L. Ed. 642.

And this being true, the court, in a proper case where the rights of citizens are involved, may so declare. Michie's Encyc. of U. S. Sup. Ct. Rep., vol. 11, p. 640; Head Money Cases, 112 U. S. 580–598, 5 Sup. Ct. 247, 28 L. Ed. 798; In re Cooper, 143 U. S. 473, 501, 503, 12 Sup. Ct. 453, 36 L. Ed. 232; Jones v. Meehan, 175 U. S. 32, 29 Sup. Ct. 1, 44 L. Ed. 49.

The general rule as to limitations upon the treaty making power is most comprehensively stated in Geofroy v. Riggs, 133 U. S. 266, 10 Sup. Ct. 295, 33 L. Ed. 642. If this pronouncement, in any view, could properly be regarded as obiter, nevertheless it has been so frequently and approvingly restated that it must now be regarded as the settled rule in the courts of this country.

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. * * * But with these exceptions, * * * there is no limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country." Geofroy v. Riggs, 133 U. S. 266, 10 Sup. Ct. 297, 33 L. Ed. 642.

As has been frequently stated, "An attempt to enumerate these limitations in more specific terms than here used by Mr. Justice Field would be idle." It is sufficiently comprehensive to include all acts by the treaty making power which might seek or tend to impair or destroy the constitutional functions exclusively conferred upon this government and its several departments.

[5] Is the protection of migratory birds then "properly the subject of negotiation with a foreign country"? In the opinion of a former Attorney General the United States is given power to enter into treaty stipulations with Great Britain for the regulation of the fisheries in the waters of the United States and Canada along the international boundary; and such is now the accepted view. This is because "the nature and habits of fishes, the means necessary to their preservation from extinction, and their protection in spawning time are such as to render it of importance that laws regulating their capture shall be uniform and uniformly enforced over the whole extent of the body of water which they inhabit. Where a lake or river is divided into two jurisdictions by a boundary line between two nations, it is manifest that it would be not only convenient, but almost necessary, for the adequate regulation of the subject that an agreement by treaty or other stipulation should exist between the governments of the two countries, in order to make any system of regulation and protection

effective." Otherwise "it is impossible of regulation by uniform and reciprocal rules." Mutuality and the attainment of reciprocal benefits are distinctive features of international conventions. Of course, such must be tangible and proximate. The subject-matter must be of the nature of those that have usually been made the subject of negotiation and treaty in the ordinary intercourse of nations, provided, always, that they are consistent with the nature of our institutions. It is, of course, unnecessary that the precise subject shall have been previously under consideration. This would mean that nations have exhausted the subject-matter of their intercourse, and can no longer extend their avenues of mutual advantage. But, as above stated, the matter of negotiation must be one which falls naturally and logically into recognized classification. It must not be arbitrary, disconnected, and remote from international intercourse.

The case of free-swimming fishes in international waters is one which appeals more readily to the common understanding, because there international contact is apparent. But does the case of migratory birds differ in principle from that of migratory fishes or other similar forms of wild life? The term "migrate" as used in this connection is thus defined:

> "To pass periodically from one region or climate to another for feeding or breeding. * * * The majority of birds of the north temperate and arctic regions perform regular migrations, which are dependent on food supply more than on temperature, moving north in the spring and south in the fall."

Seals go regularly to their breeding and feeding grounds. Fishes migrate during the spawning season. Migratory birds nest in the north and feed in the south with the regularity of the seasons. The movements of all these forms of life may be computed almost with mathematical precision. Their courses through the water and through the air are almost as well defined as though marked by Old Trails' monuments. Their movements are dictated by neither whim nor caprice, but are impelled by an instinct which inheres in the law of their being. If this be true, what distinction can we draw between the fish which swims through one of the great natural elements and the bird which flies through another? The controlling consideration is the effect upon the mutual interests of the two nations concerned. By this treaty the United States profits by the protection which is accorded such wild fowl in Canada during the nesting and feeding seasons before the migration sets in to the south. Canada gains by the same protection which is thrown about the same birds during their stay within the United States. The people of both countries, of our entire Union and of all the states, benefit by the mutual and reciprocal advantages which accrue from this arrangement. If this be so, then the subject-matter comes properly within the treaty making power. If it curtails any right which would otherwise be lodged in an individual state, it does so only through the full and untrammeled exercise of a federal power to negotiate with a foreign government. The conflict of jurisdiction, if one can be said to exist, differs in no respect from that which is experienced in the exercise of any power concededly lodged in the federal government which comes in con-

tact with the ordinary powers of the state over the same subject-matter.

From the foregoing, it follows necessarily that the demurrers to the indictments must be overruled.

[6] With respect to the bill filed on behalf of the state of Missouri but little remains to be said. It is based upon the same misconception as to the constitutionality of this statute that lies at the foundation of the demurrers. The District Attorney insists that the bill should be dismissed for want of jurisdiction. It is true that the United States cannot be sued without its consent, and that, in general, courts of equity are without jurisdiction to restrain criminal proceedings. It would seem, however, that a United States officer, as well as a state officer, under certain circumstances may be restrained from instituting criminal proceedings under an unconstitutional law in accordance with exceptions to the general rule as pointed out in decisions of the Supreme Court. However, it is unnecessary to enter upon any extended discussion of this question. In my view, the law is constitutional, and the United States Game Warden has acted, and is about to act, under lawful authority in the discharge of his official duties. From such acts he cannot, and should not, be restrained by this court. Inasmuch as the bill of complainant is founded solely upon the unconstitutionality of the law and the alleged invasion of a sovereign prerogative of the state, it follows that the relief prayed must be denied, and that the bill must be dismissed. It is so ordered.

HILLSDALE GASLIGHT CO. v. CITY OF HILLSDALE.

(District Court, E. D. Michigan, S. D. June 13, 1919.)

No. 280.

1. GAS ⚷7(2) — FRANCHISE — ACCEPTANCE BY PUBLIC UTILITY COMPANY — BINDING AS A CONTRACT.

   Where a municipality, under proper authority of the state, granted a gas franchise to a public utility company, conferring upon the latter for a definite period, on definite terms and conditions, the right to use public streets for supplying inhabitants, and the franchise was accepted and used, it became mutually binding upon the two parties, and cannot be amended or abrogated by either without the consent of the other.

2. MUNICIPAL CORPORATIONS ⚷285—PUBLIC GAS FRANCHISES—CONTRACT—POWER TO GRANT.

   A defendant city of the fourth class had the power, in view of Pub. Acts Mich. 1895, No. 215, c. 27, § 8, and Pub. Acts Mich. 1905, No. 259 (Comp. Laws Mich. 1915, §§ 3183, 3298), to make a franchise contract for 10 years with a public service corporation to furnish its inhabitants with gas at rates fixed by the franchise.

3. COURTS ⚷282(1)—UNITED STATES DISTRICT COURT—JURISDICTION—FEDERAL QUESTION.

   Where plaintiff public utility corporation brought an action to restrain a city from enforcing gas rates, prescribed in a franchise alleging that such enforcements would violate Const. U. S. art. 1, § 10, also Amendments 5 and 14, the case is one arising under the laws of the United States.

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

In Equity. Bill of complaint by the Hillsdale Gaslight Company against the City of Hillsdale. Decree for defendant, dismissing the bill for want of equity.

Beaumont, Smith & Harris, of Detroit, Mich., for plaintiff.

G. F. Lewis, of Hillsdale, Mich., and Corliss, Leete & Moody, of Detroit, Mich., for defendant.

TUTTLE, District Judge. This is a motion to dismiss the bill of complaint of the Hillsdale Gaslight Company, a Michigan public service corporation, which is furnishing, under a franchise granted by the city of Hillsdale, in said state, gas to the inhabitants of said city. The suit is brought for the purpose of restraining the city from enforcing the rates for gas prescribed in said franchise on the ground that they are unreasonable and confiscatory, and operate to deprive plaintiff of certain rights under the federal Constitution hereinafter referred to. The motion to dismiss the bill is based on the grounds that such bill does not show the necessary jurisdiction on the part of this court and that it lacks equity.

The bill alleges that plaintiff was duly incorporated under the Michigan statute governing the organization of manufacturing and mercantile corporations; that upon its incorporation it acquired the franchise previously granted by the city of Hillsdale, a Michigan city of the fourth class, to the Hillsdale City Gas Company, which was also a public service corporation, and which had owned and operated a plant for the furnishing of gas to said city and the inhabitants thereof; that thereafter, and up to the date of the filing of said bill, the plaintiff had been, and then was, operating said property under said franchise, which prescribed certain rates, it having, with the consent of said city, succeeded to all of the rights conferred by said franchise; that the plaintiff, as a public service corporation, became entitled, upon its incorporation, under the Constitution and laws of the state of Michigan, to earn and receive a reasonable return on the fair present value of the property employed by it for public use, and that it had been at all times, and then was, entitled to charge for its gas a price sufficient to earn such fair return; that such right accrued to it through its charter as a gas company and its status as a public service corporation, irrespective of any franchise or contract between it and said city; that by reason of great increases in the cost of material and labor necessary to the operation of its business, much of which increase had been imposed by governmental authority, the plaintiff had been, and then was, operating at an actual loss to itself, and that it could not operate, except at a loss; that it should be relieved from the operation of the terms of said "ordinance and contract with the public in the city of Hillsdale (if such contract should be held to limit the price of the gas), since the performance thereof can be had only by the confiscation of the plaintiff's property"; that said city had refused to permit it to increase its said rates; that the said franchise impaired the obligation of the contract between the plaintiff and the state of Michigan and the city of Hillsdale, as evidenced by the charter of

said plaintiff, the act under which it was incorporated, and the Constitution of Michigan, whereby it had been guaranteed a fair return on its property devoted to public use, and that therefore said franchise was in violation of article 1, section 10, of the United States Constitution; that the enforcement of said franchise as to rates was a taking of the property of plaintiff for public use without just compensation therefor, in violation of the Fifth Amendment to the United States Constitution; and that the enforcement of said franchise in respect to the rates fixed therein deprived the plaintiff of its property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution. Plaintiff prayed that said franchise, so far as it fixed the rates to be charged for gas; be decreed to be unreasonable and impossible of performance, and that it be canceled and set aside, and the defendant city be restrained from attempting to enforce it.

The theory on which the bill was thus based has the merits of novelty and ingenuity, but I am unable to follow counsel for the plaintiff in his reasoning, or to agree with him in his contention, at least so far as the present case is concerned. If this argument were advanced in a case wherein a question concerning the powers of a state public utility commission, and their effect upon franchises between municipalities and public utility companies, were involved, or if the plaintiff were not a party to a legally authorized contract with a municipality, empowered by the state to make such contract, there might be force in the contention that rights as between it and a municipality might be affected by relations or contractual rights between it and the state. In the present case, however, no acts or powers of any state board, no applicable provisions of the state Constitution, nor any contractual relations between plaintiff and the state are involved.

[1] It is elementary that where a municipality, under proper authority from the state, as in the present case, grants a franchise, such as that involved here, to a public utility company, conferring upon the latter, for a definite period and on definite terms and conditions, the right to use public streets and other places for the purpose of supplying the inhabitants of said municipality with a public necessity, and the municipality accepts such franchise, so that both agree to the terms thereof, the latter becomes a mutually binding contract between the two parties thereto, and cannot be amended or abrogated by either of such parties without the consent of the other. Lansing v. Michigan Power Co., 183 Mich. 400, 150 N. W. 250; New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Detroit v. Detroit Citizens' Railway Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155; Home Telephone & Telegraph Co. v. Los Angeles, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176; Detroit United Railway v. Michigan, 242 U. S. 238, 37 Sup. Ct. 87, 61 L. Ed. 268; Columbus Railway, Power & Light Co. v. Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669 (decided April 14, 1919, after the arguments in this case).

[2] The statute under which the defendant city granted the fran-

chise in question is Act No. 215, Michigan Public Acts of 1895, providing for the incorporation of cities of the fourth class (chapter 27, § 8, being section 3183, Michigan Compiled Laws of 1915), which provides as follows:

"The council may contract from year to year, or for a period of time not exceeding ten years with any person or persons, or with any duly organized corporation, for the supplying of such city or the inhabitants thereof, or both, with gas, electric or other lights upon such terms and conditions as may be agreed, and may grant to such person, persons or corporation the right to the use of the streets, alleys, wharves and public grounds of such city as shall be necessary to enable such person, persons or corporation to construct and operate proper works for the supplying of such light upon such terms and conditions as shall be specified in such contract."

The power of Hillsdale to grant this franchise was strengthened by Act No. 259 of the Public Acts of 1905, being section 3298 of the Michigan Compiled Laws of 1915, which provides as follows:

"The respective actions of the councils of all cities of the fourth class, granting franchises to, and making contracts with, persons or corporations, to use streets and public places, for the supplying of such cities or the inhabitants thereof, or both, with gas, electric or other lights, for periods of time exceeding ten years, but not exceeding thirty years, are hereby legalized and made valid."

There can be no doubt, both from the language of the Legislature pursuant to which this franchise was granted and also from the rule of law applicable, that such franchise constituted a binding contract upon both the plaintiff and upon the defendant city. Lansing v. Michigan Power Co., 183 Mich. 400, 150 N. W. 250; City of Traverse City v. Citizens' Telephone Co., 195 Mich. 373, 161 N. W. 983; Village of Otsego v. Allegan County Gas Co., 203 Mich. 283, 168 N. W. 968.

The only case cited by plaintiff in support of its contention is that of Atlantic Coast Electric Railway Co. v. Board of Public Utility Commissioners (N. J.) 104 Atl. 218 (June 17, 1918). That case, however, aside from any other consideration, is clearly inapplicable to the situation in the present case, for the reason that there the state had not authorized the municipality to make contracts of the kind in question with public utility companies, but that power was reserved to the state. During the course of the opinion, the court distinctly says:

"It is well settled that a power to fix rates may be delegated to the municipality, and that rates so fixed may amount to an irreparable contract, binding future Legislatures."

Furthermore, in order to make it very clear that it was not upholding the contention which is urged by plaintiff in the present case, the court in its opinion in the case just cited used the following explicit language:

"To avoid possible misunderstanding, we add, what is probably plain enough, that our view does not affect contracts made by the Legislature itself, or by any individual or corporation which has power to make them."

In the instant case it is plain that the city of Hillsdale was granted by the state of Michigan the power to make the contract in question, and that such contract was entered into between it and the plaintiff. It is therefore mutually binding upon them both, according to its terms

and conditions, and does not impair any contractual obligations of plaintiff or of the state, at least so far as any showing in this case indicates.

Reliance is placed by plaintiff upon the contention that the circumstances and conditions affecting the cost of operation of its plant had, at the time of the filing of the bill, so increased as to prevent plaintiff from continuing such operation at the rates fixed in its franchise, and that therefore such rates had become unreasonable and confiscatory, and the franchise impossible of performance. As the same contention was urged and overruled in the case of Columbus Railway, Power & Light Co. v. City of Columbus, supra, it is unnecessary for me to discuss the subject further than to refer to the opinion of the United States Supreme Court in that case.

[3] Plaintiff has based its bill and claims to relief upon the sections of the federal Constitution hereinbefore referred to, and the case is therefore clearly one arising under the laws of the United States and properly cognizable by this court. The claim, therefore, of defendants, that the court lacks jurisdiction, must be overruled. Columbus Railway, Light & Power Co. v. City of Columbus, supra.

For the reasons hereinbefore stated, the motion to dismiss the bill on the ground of want of equity must be granted, and a decree will be entered to that effect.

In re SCHILLING et al.

(District Court, N. D. Ohio, E. D. June 26, 1919.)

No. 6510.

BANKRUPTCY ⚷140(½)—PROPERTY—TITLE.

Under contract with county commissioners, providing that contractor, now bankrupt, should furnish all materials and labor and complete highway, and that estimates should be made once a month of the amount and value of "material in place on the ground," title to brick which had been bought by bankrupt, delivered and stacked in piles, partly on and partly off the highway, in position to be used, was in the bankrupt, though included in estimate made, even if regarded as a sale, in view of Uniform Sales Act (Gen. Code Ohio, §§ 8381–8456).

In Bankruptcy. In the matter of Chandler Schilling and W. H. Loller, doing business as the Schilling Construction Company. On trustee's exceptions to special master's report. Second exception sustained.

See, also, 251 Fed. 966, 972.

McKain & Ohl and Hine, Kennedy, Manchester & Conroy, all of Youngstown, Ohio, for trustee.

Frank N. Sweitzer, of Canton, Ohio, for commissioners.

WESTENHAVER, District Judge. This matter is before me on trustee's exception to special master's report finding that title to 186,000 brick is in the county commissioners of Stark county, and was not in the bankrupt, at the time the petition herein was filed. A

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

brief statement of facts and of former proceedings herein is necessary to a clear understanding of questions of law and of fact to be passed on.

The Schilling Construction Company, a partnership composed of Chandler Schilling and W. H. Loller, entered into a contract with the county commissioners of Stark county for construction of a public highway, known as the Cairo-Hartville road. An involuntary petition in bankruptcy was filed against them December 29, 1917, and an adjudication in bankruptcy was had February 28, 1918. Thereafter the trustee, in administering the assets, found certain property, including these 186,000 brick, upon and along this highway, where construction work was then in progress. The brick had been bought by the bankrupt, delivered to it, and stacked in piles, partly on and partly off the highway, in position to be used in the construction work. The trustee took possession of all this property, including the brick, and caused it to be appraised. Later he filed his petition for authority to sell, making defendants thereto, among others, the New Amsterdam Casualty Company, the surety on the performance bond of the bankrupt, and the county commissioners of Stark county. Notice by mail of the filing of this petition and of the time and place of hearing was given, and the Casualty Company appeared and made claim to this property, but the county commissioners failed to appear. An order was made, finding title to this property, including this brick, in the bankrupt, and authorizing the sale.

This sale was advertised to take place July 27, 1918, and some two days prior thereto the county commissioners brought a suit in the court of common pleas of Stark county, alleging ownership in them of this brick, and sought and obtained a restraining order, preventing the trustee from interfering with the brick or making sale of the same. Later application was made by the trustee to this court for an order enjoining the county commissioners, its officers, and agents from interfering with the bankruptcy court's custody and jurisdiction, and with the trustee's possession and sale of these assets, and from further prosecuting its suit with respect thereto in the state court. The county commissioners appeared herein, a temporary restraining order was granted as prayed, and leave given to appear and file a petition, asserting all their rights and title to the brick.

A petition was accordingly filed, and the issues arising thereon were referred to a special master, to hear the evidence and to report his findings of fact and conclusions of law. He finds that the referee's order of sale had been made without actual service or notice to the county commissioners, and that the title to this brick at and before the filing of the petition in bankruptcy had passed to and was in the county commissioners. Both of these findings are excepted to.

In the view I take of this case the first exception is immaterial and may be disregarded. If it be true that notice by mail is sufficient in law, and was in fact received by the county commissioners, they did not appear and were not heard in opposition to the original order of sale, and therefore, if necessary to enable them to assert and have protected a substantial property right, their petition might be treated

as an application to set aside an order made by default and grant a rehearing.

The other question is the important one. The facts upon which the special master's finding of title was made are not in dispute. These brick had been acquired, delivered, and stacked in the manner already stated, prior to October 10, 1917. On that day the county surveyor, being the person properly authorized in that behalf by the construction contract, made an estimate as required thereby of the amount due to the bankrupt, and included therein 340,000 "brick on site" at $20 per 1,000. The balance thus shown, less 10 per cent. required by the contract to be reserved until the highway was finally completed, was paid by check to the bankrupt on October 20th following. The 186,000 brick, of which possession was taken by the trustee and which is now claimed by him, are a part of the 340,000 thus included in the estimate.

The special master's conclusion of law from these facts that title to the brick had passed, upon making such payment, to the county commissioners, must be based on the view that the construction contract so provided, or that a sale of the brick was thereby effected. No reasons are given to support the finding of fact or conclusion of law. The special master contents himself with saying that they are "the property of Stark county and not subject to sale by the trustee." The question, therefore, is when materials owned or bought by the contractor become the property of the county commissioners. The contract contains, among other clauses, the following:

"Estimates will be made once a month by the engineer as the work satisfactorily progresses of the amount and value of material in place on the ground and work done. Ninety per cent. of the value so determined, less any previous payments made, will be paid to the contractor five days after being approved by the county commissioners. No partial payment can be construed as an acceptance by the county highway superintendent or county commissioners of any material furnished or work done. Any or all estimates may be withheld indefinitely until any or all of the orders given by the engineer or county commissioners, in compliance with and by virtue of the terms of this contract, have been complied with by the contractor."

Authority to include brick in the engineer's estimate is deduced from the words "material in place on the ground." The trustee contends that this means such brick only as had been placed in the highway in their final position, and not brick merely delivered and stacked up by the roadside, ready and available for such use by the contractor. On the other hand, the contention is that any material delivered on the premises and in a position to be used by the contractor as required is within the meaning of the paragraph above quoted. Supporting this contention is invoked the fact that this practice had been followed under this contract.

I deem a decision of this question of construction immaterial, for the reason that, if the inclusion in the estimate of the brick was authorized, it does not follow therefrom as a matter of law that title or property in the bricks passed, as a result thereof, to the county commissioners. This contract is not a contract for the sale of goods. It is one requiring the bankrupt to furnish all the materials and perform all the labor necessary to construct and complete a highway

according to certain definite plans and specifications. This contract is not fully performed until the highway is entirely completed and all unused material and rubbish is removed therefrom. Payments are to be made from time to time on estimates as the work progresses. These payments are in effect payments on account, and the paragraph above quoted furnishes only a basis whereby the amounts may be computed with safety as the work progresses. Obviously the bankrupt, as materials were furnished and labor was performed, needed payments. It was not contemplated that the bankrupt should fully perform the contract and get no payment until the final completion of the work. The provisions in the paragraph above quoted, so far as they permit material in place on the ground to be included in an estimate, are intended to accomplish this purpose, and not to relieve the bankrupt from responsibility for material not yet in its final resting place, or from the burden of performing such further labor as was needed..

Manifestly, notwithstanding this estimate and payment, the bankrupt was required to perform much additional labor in placing these bricks in their final position, and to do this at their own expense. The title to the brick, it seems to me, therefore, remained in the bankrupt, notwithstanding such payment. No change in the relations of the parties to materials not yet used, nor with respect to their obligations and liabilities, was contemplated or is effected merely by the issue and payment of an estimate.

Assuming, however, the theory of a sale, reference to familiar principles of the law of sales will conclusively show that the master's conclusion of law cannot be sustained on that theory. These principles are now embodied in the Uniform Sales Code of Ohio. See General Code, §§ 8381 to 8456. Section 8381 defines a sale of goods as an agreement whereby the seller transfers the property in the goods to the buyer for a consideration called a price. Obviously neither party understood that such an agreement was being made. Property in goods sold is transferred to the buyer at such time as the parties to the contract intended it to be transferred, and, where the contract is silent, certain rules are adopted for the purpose of enabling one to ascertain that intention. Thus section 8399, rule 2, provides in substance that when the contract is one to sell specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until that something is done. Rule 5 provides in substance that if the seller is required to deliver the goods to the buyer at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, property does not pass until the goods have been delivered to the buyer or reached the place agreed upon. Section 8402 provides in substance that the goods shall remain at the buyer's risk, unless otherwise agreed, until the property therein is transferred to the buyer. These rules merely declare the settled law. See The Elgee Cotton Cases, 22 Wall. 180, 22 L. Ed. 863; United States v. Andrews, 207 U. S. 229, 28 Sup. Ct. 100, 52 L. Ed. 185; Williston on Sales, §§ 265, 280.

Applying these rules, manifestly title did not pass, even if a sale were intended and one was made, because the ultimate place of delivery of these bricks was their final resting place in the completed roadway, and much labor yet remained to be done by the bankrupts before that delivery was made. The question of title to these bricks was considered by me on the petition for review of the New Amsterdam Casualty Company, the bankrupt's surety, which sought to reverse the original order of the referee finding title thereto in the bankrupt. My opinion is reported in 251 Fed. 966. One contention then made was that the surety was entitled by subrogation to all the county commissioners' title to or liens upon this property. I then said (page 970):

"The construction contract does not, however, confer on the county commissioners any title to or lien upon the property now in dispute, or purport to give any right to use the same in completing performance. If such a title or a lien had been in terms expressly conferred, it would not be valid as against the trustee in bankruptcy, for the same reason that a like provision in the surety's contract with the bankrupt is invalid; that is to say, such a provision would be only a chattel mortgage, and would be void if not filed for record, or if possession of the property were not taken prior to the filing of the petition in bankruptcy."

This language was used advisedly and after mature consideration. A re-examination of the questions involved confirms my opinion then reached that no basis exists to support the contention that these bricks are anything else than a part of the equipment and materials acquired and owned by the bankrupt for the purpose of enabling it to perform the contract, and that no change of title or of right resulted from an inclusion of them in an estimate which was afterwards made.

The second exception to the special master's report will be sustained. An order may be entered, finding that this property is a part of the bankrupt's estate, and denying the county commissioners' claim thereto, and directing the trustee to execute the order of sale heretofore entered. An exception may be noted.

POSTAL TELEGRAPH-CABLE CO. v. FLORIDA EAST COAST RY. CO.

(District Court, S. D. Florida. June 13, 1919.)

1. EMINENT DOMAIN ⚷171—RAILROAD RIGHT OF WAY—CONDEMNATION FOR TELEGRAPH PURPOSES.
   A telegraph company is not precluded from condemning right to construct poles on a railroad right of way, because certain points on the right of way are not sufficiently wide to accommodate petitioner's poles, since compensation will be allowed only for portions of right of way actually taken.
2. EMINENT DOMAIN ⚷177—RAILROAD RIGHT OF WAY—TELEGRAPH POLES—PARTIES.
   Under Gen. St. Fla. 1906, §§ 2821-2823, authorizing telegraph companies to condemn easements necessary for their poles in railroad rights of way, and providing that judgment shall not interfere with existing telegraph lines, railroad company is only defendant interested in con-

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

demnation proceedings, since rights of existing telegraph company will be protected by judgment entered.

3. EMINENT DOMAIN ⚷171—ACTIONS—ISSUES.

Under Gen. St. Fla. 1906, §§ 2821–2823, authorizing telegraph companies to condemn easements in railroad rights of way, and providing that judgment shall not interfere with existing telegraph lines, question whether existing telegraph line will be interfered with by construction of petitioner's line will not be determined in the statutory condemnation proceedings against the railroad.

In Equity. Condemnation proceeding by the Postal Telegraph-Cable Company against the Florida East Coast Railway Company, in which the American Telephone & Telegraph Company intervenes. Hearing on questions of necessity, propriety, etc. Finding for petitioner.

Marks, Marks & Holt, of Jacksonville, Fla., for petitioner.

John E. Hartridge and Scott M. Loftin, both of Jacksonville, Fla., for respondent.

Fred T. Myers, of Tallahassee, Fla., and J. L. Parrish, of Des Moines, Iowa, for intervener.

CALL, District Judge. On September 18, 1917, petition was filed by the Postal Telegraph-Cable Company, seeking to condemn locations for its poles over the right of way of the Florida East Coast Railway Company from East Palatka to Miami, a distance of 304.2 miles, alleging necessary facts showing its right to exercise eminent domain under chapter 5211, Laws of Florida.

The Florida East Coast Railway Company, on February 15, 1918, filed its answer to the petition, in which was incorporated a demurrer, attacking the constitutionality of said chapter 5211, and then sets up causes why the petition should not be granted, among other things, that no necessity for such condemnation exists; that its line of railway crosses many streams over which bridges have been constructed, and the condemnation would authorize petitioner to attach its wires to such structures; that the construction of such line would interfere with the ordinary use of its railroad lines; that it had entered into contract with the American Telephone & Telegraph Company, a New York corporation, by which the right to construct telephone poles over its right of way had been granted; that pursuant to said contract the New York corporation built its lines and is now maintaining same; that about 86.7 per cent. of its right of way is 100 feet wide, but many parts are only 50 feet or less; that the poles of the American Telephone & Telegraph Company, where the right of way is 100 feet wide, are located approximately 27 feet from the center of track on the side other than that on which the Western Union Telegraph Company and the railroad have poles erected, but this distance is not uniform, but varies at many points on account of variations in width of right of way, switches, structures, etc.; that more than 100 parts of its right of way between the points are less than 100 feet wide; that at the time of filing the petition three separate and distinct lines of wires on its right of way are strung on two lines of poles, one line on each side of

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

its roadbed; that the erection of petitioner's line would interfere by induction with the operation of the other lines already built and in operation.

On November 3, 1917, the American Telephone & Telegraph Company was given leave to intervene, and pursuant to such leave on December 3, 1917, filed its answer, setting up the contract between itself and the railroad company for the construction of its lines from Jacksonville to Key West and the building of same on poles of the standard length of 25 feet, with one or more cross-arms of 10 feet in length, and provided for attaching two additional cross-arms, as business may make necessary; that the construction of petitioner's lines would interfere physically with its telephone lines, and the operation of petitioner's lines would interfere by induction with the transmission of speech over its lines. It then sets up the provision of the Florida statute requiring noninterference with existing telegraph and telephone lines, and prays the court will determine the extent of the interference and whether the right to condemn should be refused or granted. Whereupon, on April 21, 1919, the case was called and the court took testimony on the issues made by the petition and the answers.

The issue, it seems to me, that the court must decide before the submission of the question of the amount to be assessed by the jury is entered into, is the right of the petitioner to maintain condemnation proceedings against the railroad company. There is no question, under the testimony before me, but "that the petitioner is such a corporation as is contemplated by the Florida statute, and is vested under that statute with the right of eminent domain." The issue is made in the answer of the railroad company that it is not necessary for petitioner to construct its line on the right of way. On this issue, I find from the testimony in favor of the petitioner.

[1] The next inquiry is: Will the construction of the lines of petitioner obstruct the railroad company in the use of its right of way for railroad purposes? I think it will not be seriously contended that it will. Nor do I think the fact that there are points on the railroad right of way where the width is not sufficient to allow petitioner's poles to be placed on the right of way a sufficient cause to deny petitioner's condemnation proceedings. The jury, in awarding compensation, will allow it only for such portions of the right of way as are taken. Nor does the petitioner, as I understand it, seek to condemn a right to attach its wires to any bridges or other structures of the railroad company.

What I have said above eliminates the causes set up in the answers, except that of the contract existing between the railroad company and the American Telephone & Telegraph Company, by which its poles were placed upon the right of way, and the interference with its lines physically or by induction.

As to the contract, it may be said that it is material to show that the American Telephone & Telegraph Company, is not a trespasser, but occupies a portion of the right of way lawfully, but such contract cannot afford a reason why the petitioner may not condemn the right to build its line, if it can do so conforming to the statute of Florida.

[2, 3] Section 1 of chapter 5211 is reproduced in sections 2821 and 2822 of the General Statutes of Florida. Section 2821 vests in telegraph or telephone companies the right of eminent domain to subject rights of way of railroad companies to the easement necessary for the construction and maintenance of lines of telegraph and telephone. The proviso is:

"The ordinary travel or use of said railroad is not interfered with by reason thereof."

This section contains a further proviso as to distance of poles from outer edge of the track. Section 2822 provides for the petition, its contents, and method of service, etc.

Section 2823 of the General Statutes (section 2 of the act) provides for the trial, and section 2824 of said General Statutes (section 3 of the act) specifies the judgment, etc., to be entered upon the finding of the jury. The pertinent portion of said last section reads as follows:

"Said judgment and decree shall provide that such telegraph or telephone line shall be constructed as set out in the petition, and so as not to interfere with the operation of the trains of said defendant, or any telegraph or telephone line already upon such right of way," etc.

Considerable testimony, expert in its nature, was introduced before me for and against the contention that the construction and operation of petitioner's line would interfere with the lines now operated by the American Telephone & Telegraph Company. The position, as I understand it, of the petitioner, is that under the provisions of sections 2822 and 2823 the railroad company is the only one interested in the condemnation proceedings; it is its compensation which the jury is to assess; that the rights of the American Telephone & Telegraph Company are fully protected by the judgment to be entered as prescribed in section 2824.

A careful reading and consideration of the sections referred to convinces me that this contention is correct. The statute does not contemplate that any property right of any one except the railroad company shall be condemned for the use of the petitioner, and safeguards any right possessed by another telegraph or telephone company, arising through contract, by providing that petitioner's line shall be so constructed as not to interfere with the operation of any telegraph or telephone line already on the railroad right of way; and, if so constructed, certainly there can be no cause of complaint by such telephone or telegraph company, and no right of such company, property or otherwise, invaded, by the proceeding.

It may become necessary for the court on another proceeding to decide whether a line, if constructed, interferes with the operation of a telegraph or telephone line already on the right of way; but in this proceeding, being purely statutory, such question cannot be decided in limine.

I therefore find in favor of the petitioner, because no sufficient cause has been shown why petitioner should not have condemnation as prayed in its petition.

UNITED STATES v. F. ROMEO & CO., Inc., et al.

SAME v. SCARAMELLI & CO., Inc., et al.

(District Court, S. D. New York. June 7, 1918.)

CUSTOMS DUTIES ⚷86—INVOICES—BONDS FOR PRODUCTION OF INVOICE.

Under Tariff Act, par. E, § 3 (Comp. St. § 5522), providing that, when entry of merchandise exceeding $100 in value is made by a statement in the form of an invoice, the collector shall require a "bond for the production of a duly certified invoice," the collector has no authority to exact from an importer a bond for any further or other purpose; and where an importer, upon entry of merchandise, prior to payment of duty on an appraised value, gave a bond providing that the obligor should pay the collector "the amount of duty to which it shall appear by such invoice the said goods imported were subject over and above the amount duly estimated on appraisement," the bond was void and of no effect.

At Law. Separate actions by the United States against F. Romeo & Co., Incorporated, and another, and against Scaramelli & Co., Incorporated, and another, upon a bond given in each case. Judgment for defendants, dismissing the complaint, in each case.

Francis G. Caffey, U. S. Atty., and John E. Walker, Asst. U. S. Atty., both of New York City, for the United States.

Thomas M. Lane, of New York City, for defendants Romeo & Co., Inc., and another.

Allan R. Brown, of New York City, for defendants Scaramelli & Co., Inc., and another.

MAYER, District Judge. These two actions are at law, a jury was waived in each, they were both tried together, and both involve the same question. A statement of the undisputed facts in the Romeo Case will suffice for both cases.

On March 20, 1916, F. Romeo & Co., Incorporated, imported at New York 200 cases of cheese, which were duly entered at the custom house. The cheese was dutiable at 20 per cent. ad valorem under Schedule G, paragraph 196, of the Tariff Act of October 3, 1913, c. 16, 38 Stat. 114 (Comp. St. § 5291). At the time of making the entry the certified consular invoice for the merchandise had not appeared, and the importers made entry on a pro forma invoice, or statement in the form of an invoice, as permitted by section 3, paragraph E of the Tariff Act (Comp. St. § 5522), giving bond for the production of a duly certified invoice. The provision in question is as follows:

"And when entry of merchandise exceeding $100 in value is made by a statement in the form of an invoice, the collector shall require a bond for the production of a duly certified invoice."

The value stated for the cheese in the pro forma invoice was 270 lire per 100 kilos, packing included. Upon filing their entry, the importers made an addition therein sufficient to raise the unit value of the merchandise to 300 lire per 100 kilos, packing included. This addi-

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tion was made under certificate, in order to meet advances made by the appraiser in similar cases then pending on appeal for reappraisement, as permitted by section 3, paragraph I of the Tariff Act of October 3, 1913 (Comp. St. § 5527). The appraiser approved the entered value of 300 lire per 100 kilos, packed, and indorsed on the pro forma invoice, "Estimated packing charges 7 lire per case." The importers then took an appeal to a United States General Appraiser, who found the actual market value or wholesale price of the merchandise, at the time of exportation, in the principal markets of the country whence exported, to be 265 lire per 100 kilos, packing extra. The importers thereupon made application to the Secretary of the Treasury, under said paragraph I, for a reduction of the entered value, which was granted by the Department, and the collector instructed to liquidate the entry upon the basis of the reappraised value. The collector thereupon liquidated the entry at a value of 265 lire per 100 kilos, plus packing at 7 lire per case, and the duties assessed upon said value were paid.

Thereafter the importers produced a certified consular invoice as required by the bond. This invoice stated a unit price for the merchandise of 340 lire per 100 kilos, packing, consular certificate, insurance, and export tax included, or at the rate of 331.21 lire per 100 kilos, packed, after deducting the nondutiable charges for consular certificate, insurance, and export tax.

The price of 265 lire per 100 kilos found by said General Appraiser, and upon which duties were computed by said collector, with an addition of 7 lire per case for packing charges, was the actual market value or wholesale price at which said merchandise was sold for home consumption in the principal markets of Italy, and the net price of 331.21 lire per 100 kilos, packed, stated in said certified consular invoice, was the price at which said goods were sold in Italy for exportation to the United States, and was higher than the price at which the merchandise was or could be sold at the time of exportation for home consumption in the Italian markets. The reason for the discrepancy between the price for home consumption in Italy and the price for export was that the Italian government, on account of the war, permitted the exportation of cheese only under a government license, from which it resulted that cheese for which export license had been issued commanded a higher price, due to the inclusion of a charge for said export license, than could be obtained for the same cheese bought for home consumption in Italy.

At the time of and preceding the entry of the goods, the collector of customs at the port of New York would permit entry and delivery of merchandise upon a pro forma invoice only upon the filing of a written instrument in the following form:

"Whereas, the above-bounden principal has applied to the collector of customs at the port of New York to make entry of certain goods, wares, and merchandise imported in the Caserta from Naples, and described in consumption entry No. 144122, dated March 20, 1916.

"And whereas, it is temporarily impracticable for the said principal to produce a proper invoice thereof, duly authenticated according to law, by reason

whereof entry of the said goods, wares, and merchandise is allowed upon the execution of this bond:

"Now, therefore, the condition of this obligation is such that, if the above bounden obligors shall and do within six months from the date hereof produce to the said collector of customs a duly authenticated invoice of the said goods, wares, or merchandise, and shall pay to the said collector the amount of duty to which it shall appear by such invoice the said goods, wares, or merchandise are subject, over and above the amount of duties estimated on the appraisement of said goods, wares, or merchandise, then the above obligation shall be void; otherwise, it shall remain in full force and effect."

No other form of bond for the production of consular invoices was accepted by the collector, and defendants could not obtain entry upon a pro forma invoice, nor obtain delivery of their said merchandise in any other way than by filing a bond in this form. It is also agreed between the parties that the form of bond used in this case is an old form, which was in use prior to August 5, 1909, and that the form was not changed by the government, notwithstanding changes in the law made at that time.

The government brings this suit upon the bond to recover duty at 20 per cent. upon the difference between the reappraised and liquidated value of 265 lire per 100 kilos, plus packing at 7 lire per case, or 272 lire per 100 kilos, packed, and the consular invoice price of 331.21 lire, packed. The question in the case is whether there is any authority in law for the provision in the bond that the obligor shall pay to the collector "the amount of duty to which it shall appear by such invoice the said goods * * * are subject over and above the amount of duties estimated on the appraisement of said goods." The provision of the statute is simple and plain. It merely provides that the collector shall require a bond for the production "of a duly certified invoice." When such invoice shall have been duly produced, the obligation of the bond is satisfied.

There is no authority whatever conferred upon the collector to exact a bond for any further or other purpose, and in so far as this bond goes beyond the limitations of the statute it is void and of no effect. The construction of the statute seems so plain and simple that a citation of authority is unnecessary. My attention, however, has been called to the opinion of the Board of General Appraisers in the case reported as T. D. 34999, G. A. 7651, and found in the pamphlet of Treasury Decisions dated December 24, 1914, this case appearing as United States v. Marquardt, 6 Ct. Cust. App. 168. I find that I am in agreement with the Board of General Appraisers on the point here under consideration. A contrary view is expressed in United States v. Hobbs, 3 Ct. Cust. App. 256. With this latter case, however, I am unable to agree.

In view of the foregoing, the defendants in each case may have judgment dismissing the respective complaints.

Submit findings on notice.

THE MOMI T. TEBO YACHT BASIN CO. v. TWEEDIE. TWEEDIE v. TEBO YACHT BASIN CO.

(District Court, E. D. New York. June 9, 1919.)

SHIPPING ⚿75—REPAIRS TO VESSEL.

Contract for repairs to a vessel construed, and *held* not to require libelant for the lump sum named to make all the repairs which were made, but only such as had been specified by the surveyor, which entitled him to extra pay for additional work done with respondent's approval.

In Admiralty. Suit by the Tebo Yacht Basin Company against M. Stanley Tweedie, owner and claimant of schooner Momi T, and cross-libel. Decree for libelant, and cross-libel dismissed.

Crowell & Rouse, of New York City, for Tebo Yacht Basin Co.
Kirlin, Woolsey & Hickox, of New York City, for Tweedie.

CHATFIELD, District Judge. The libelant, Tebo Yacht Basin Company, agreed with the respondent to make, for $13,000, the repairs specified in a survey by one Andrew P. Jensen, under date of September 20, 1918. This agreement was put in writing upon December 23, 1918, and the repairs were to be completed within 21 days after delivery of the boat at the yard. On December 31st, the agreement was changed by mutual consent. The owner of the vessel agreed to re-establish a lien upon the vessel, in addition to a guaranty by the firm to which the freight moneys had been assigned, and obtained, in return, an extension to 30 days from completion, foi payment of the amount due. In the same letter an agreement was reached that the total amount of the contract should be increased from $13,000 to $16,000, in order to cover the cost of an entirely new keelson and sister keelson, "or additional work" required on the vessel. In consideration for this last increase of amount the libelant agreed to complete the work and to have her ready for sea not later than January 20, 1919.

It is apparent from the testimony of the witnesses and from this correspondence that up to this time the parties had been contracting with reference to the repairs that each knew of, or which, in the case of the additional contract, were required by the surveyor in order to make the boat first class, and obtain a certificate for her. But an examination of the respondent's letter of December 23, 1918 (Exhibit 3 in evidence), shows that the possibility had entered his mind of obtaining by a general contract repairs which he suspected might exceed in amount those which were contemplated. He says:

"There are a few things of minor importance not mentioned in Capt. Jensen's survey and recommendation of September 20th, the survey which Capt. Hopcroft handed to you as per copy attached hereto. These few additional things consist of the following: Three new topmasts and one new boom to be furnished and installed and rigged, ship's rigging and sails to be overhauled and repaired or renewed where necessary, some work is to be done in the stern, whatever may be ordered by Capt. Jensen, where the ratholes are, and we want the ship's bottom definitely and thoroughly caulked whether necessary or not, and the ship's bottom topsides and bulwarks and houses properly painted. We understand from Capt. Hopcroft you agree to include this work

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in your tender, and that you agree to do all the work to the satisfaction of Capt. Hopcroft and to the satisfaction and approval of Capt. Jensen and the American Bureau of Shipping, and to comply with all the requirements of Capt. Jensen for the retention of her A-1 class in the American Bureau of Shipping, and that you agree to have the vessel put in thorough and efficient condition in every respect, and ready for sea, including overhauling and repairing or replacing her sails, and that you will do all this work for us at the lowest price you can, but that you guarantee the total cost to us shall not exceed $13,000."

It is evident from the language just quoted that the respondent was seeking to so word the agreement by his counter proposals as to make the libelant liable for any excess, if the cost of the work should exceed $13,000; and yet both parties were agreeing to make specific repairs so as to comply with the surveyor's requirements in order to obtain the rating and first class seaworthy condition desired Mr. Tweedie says there is among the "things of minor importance" some work "to be done in the stern, whatever may be ordered by Capt. Jensen, where the ratholes are." At that time Capt. Jensen had not opened the deck up nor examined the amount of work which would be required in the stern, and apparently none of the parties contemplated that the entire stern would be found to have rotted when the deck was removed. The surveyor, Capt. Jensen, certainly did not intend to limit the repairs which might be needed to those set forth in his survey. He specifies that "the main keelson and sister keelson are rotten in the hatchways"; but in the agreement of December 31st the cost was raised from $13,000 to $16,000, because an entire new keelson and sister keelson and a large amount of additional work had been ordered by the surveyor. It is evident that both parties, when they agreed to do such work as might be required in the stern, where the ratholes were, had in mind repairs of "minor importance." The phrase "some work" would be misleading if used in any other way, when the contract is taken into consideration.

There was therefore no meeting of minds and no contract with respect to the items as to which neither party had knowledge. There was a mistake of fact on the part of each signer of the contract as to the conditions shown when the deck was removed at the stern, in order to get at the matters of "minor importance," where the ratholes were.

To hold otherwise would be to accuse the respondent of bad faith and a deliberate attempt to obtain for nothing work which he readily agreed to pay for when the necessity for this work was discovered and demand made that the contract be changed.

On January 16th the respondent writes:

"I have your favor of even date. I do not agree with your views of the work on the stern. However, neither you nor I are infallible, and each of us is entitled to his own view. But in view of the fact that the knocking off of the work on the vessel would involve huge damages, a necessity I desire to avoid taking, if possible, I have chatted with you over the telephone, and as I understand it the following is mutually agreeable."

Then he agrees to change the contract price to $20,000 and a delivery of the boat was arranged for January 30, 1919. This agreement was substantially complied with. Certain work could not be

completed owing to the presence of dunnage, for which the respondent was responsible, and which necessitated the presence of carpenters on the vessel for a few days after she began loading, but after her delivery on the 30th of January. The making good of such small items after the date of delivery would not be a breach of the covenant to deliver the boat in first-class condition, and there is nothing to indicate that these repairs were not completed by the mutual consent and to the mutual advantage of both parties.

Just before the vessel was delivered to the respondent certain items, such as the furnishing of new fresh water tanks, the repair of certain boiler tubes, the supplying of jaws to a boom and gaff, and other minor details, were called for by the representative of the respondent. The original repairs were to be made to his satisfaction, but these repairs were not a part of the requirements of the American Bureau of Shipping, and were pure extras not included in any of the original contracts. The testimony shows that the prices with reference to all the work and supplies were reasonable, and there is nothing to indicate that the respondent has objected because of any dissatisfaction either in the work which he received or the price set upon it. His sole ground of contest is based upon his contention that the libelant agreed for a lump sum, and on their own examination of the boat, to do everything which might be required.

But such was not the case. The contract was plainly based upon the representations of the surveyor or of the respondent, and related to repairs for which the need was apparent. The contract did not cover repair of hidden defects, beyond those based upon the respondent's own representations, where no examination was made, and where reliance upon his representations is apparent.

The respondent has brought a cross-libel, alleging damages for delays in delivery of the boat; but no delay has been shown from which damage resulted, other than that necessary delay incurred by the making of the repairs covered by the contract.

If the libelant's claims are upheld, then the cause of action for delay must fall.

The libelant may have a decree for the amounts claimed by him, and the cross-libel for delay will be dismissed.

THE KID.

BENN RIGEL CONTRACTING & SUPPLY CO. v. IRA S. BUSHEY & SONS, Inc.

(District Court, E. D. New York. April 21, 1919.)

WHARVES ⚷20(7)—REPAIRS—CONTRACT FOR DRY DOCK—SUFFICIENCY OF EVIDENCE.

Owner of vessel, seeking recovery of damages entailed by sinking thereof after being taken to another for repairs, *held* not to have sustained its burden of proof that the other agreed to place it, immediately on arrival, in dry dock.

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

In Admiralty. Two libels, one by Ira S. Bushey & Sons, Incorporated, against the hoister Kid, and the other by the Benn Rigel Contracting & Supply Company against Ira S. Bushey & Sons, Incorporated. Decree for libelant in first case; libel in second case dismissed.

Foley & Martin, of New York City (James A. Martin, of New York City, of counsel), for Bushey & Sons.

William S. Pettit, of Far Rockaway, N. Y., and Mr. Bunker, for the Kid.

GARVIN, District Judge. Two cases have been tried together. Ira S. Bushey & Sons, Incorporated, libeled the hoister Kid for work, labor, and services in connection with repairs to that vessel. It is not disputed that repairs were made, but Benn Rigel Contracting & Supply Company, owner of the Kid, claim that Bushey & Sons, Incorporated, undertook to place the Kid upon the dry dock on the afternoon of November 3, 1917, that this was not done, and that as a result the Kid sunk twice, was raised and pumped out each time, and was then towed ashore by Bushey & Sons, instead of being placed in the dry dock, and when beached filled with water.

The libel filed by Benn Rigel Contracting & Supply Company sets forth that on November 3, 1917, Ira S. Bushey & Sons, Incorporated, promised to place the hoister Kid upon dry dock on the afternoon of that day, that libelant delivered the boat to the respondent, which received her for the purpose of repairing her, and that, instead of placing her in dry dock at once, it neglected her and allowed her to sink twice. The libel is for various items of damage in connection with raising the Kid, pumping her out, damages to her deckhouse, and for loss of her use while she was being repaired.

It appears that about 11 a. m. on November 3, 1917, Benjamin Rigel, an officer of Benn Rigel Contracting & Supply Company, talked by telephone with Frank Bushey, of Ira S. Bushey Sons, Incorporated, and told him that he wished said Bushey Sons to repair the Kid. He further testified in substance that Bushey told him to bring the boat there during the day and that she would be put in dry dock at once. Bushey denied this vigorously, and testified that November 3 was a Saturday, that his men stopped work at 4:30 p. m., and that he told Rigel that the Kid must be at the dry dock at 4 o'clock at the latest. This is corroborated to some extent by the witness Ferrick, and I am of the opinion the Benn Rigel Contracting & Supply Company has not sustained the burden of proof. The boat did not reach the dry dock until 4:30 p. m. or later.

There will therefore be a decree for the libelant in the libel brought by Bushey & Sons, Incorporated, and the libel brought by the Benn Rigel Contracting & Supply Company will be dismissed.

THE LADY RASENDYLL.

(District Court, N. D. New York. June 14, 1919.)

MARITIME LIENS ⚷25—STATUTORY LIEN—REPAIRS AND SUPPLIES AT HOME PORT.

Act June 23, 1910, § 1 (Comp. St. § 7783), giving one furnishing repairs or supplies to a vessel, whether domestic or foreign, a maritime lien on the vessel, enforceable in rem, applies, though the repairs and supplies are furnished at the home port.

In Admiralty. Suit by Henry B. Nevins against the yacht Lady Rasendyll. Heard on motion to dismiss libel, on the ground that the supplies and repairs were furnished the vessel in her home port, and hence are not a maritime lien, and cannot be enforced in admiralty. Motion denied.

Foley & Martin, of New York City, for libelant.
John O'Leary, of Clayton, N. Y., for respondent.

RAY, District Judge. Act June 23, 1910, c. 373, 36 Stat. 604, § 1 (Comp. St. § 7783), provides that:

"Any person furnishing repairs, supplies or other necessaries * * * to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

Section 5 of the act (section 7787) provides:

"This act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies, and other necessaries."

In The Yankee, 233 Fed. 919, 924, 925, 147 C. C. A. 593, it was held that by the provisions of the above act "the distinction between foreign and domestic ports is abolished." In The Oceana, 244 Fed. 80, 82, 156 C. C. A. 508, 510 (certiorari denied Morse Dry Docks & Repair Co. v. Conron Bros. Co. et al., 245 U. S. 656, 38 Sup. Ct. 13, 62 L. Ed. 533), the Circuit Court of Appeals, Second Circuit, said:

"Obviously the act was passed in restriction of the rights of vessel owners and in the aid of those who furnish repairs, supplies, and other necessaries. It wiped out all difference between foreign and domestic vessels, and between repairs, supplies, and other necessaries furnished in the home port, as distinguished from those furnished in foreign ports, and between such as were ordered by the master and such as were ordered by the owners," etc.

It is plain and beyond all controversy that since the enactment of the statute of June 23, 1910, and in view of its plain provision, it is no longer a defense that the repairs and supplies were furnished at the home port.

The motion to dismiss the libel is denied.

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

LINCOLN v. VIRGINIA PORTLAND CEMENT CO.

(Court of Appeals of District of Columbia. Submitted April 2, 1919. Decided May 5, 1919.)

No. 3226.

1. REFERENCE ⚷41—FITNESS OF SPECIAL AUDITOR—CONFLICTING AFFIDAVITS.
Conflicting affidavits regarding an auditor's prejudice against defendant *held* not to show that the court abused its discretion in appointing him special auditor to complete a case which he had heard previously to his resignation as regular auditor.

2. APPEAL AND ERROR ⚷967(1)—DISCRETION OF COURT—APPOINTMENT OF SPECIAL AUDITOR.
A court's ruling that a person appointed special auditor was not disqualified by prejudice against the defendant will not be disturbed, except for an abuse of discretion.

3. REFERENCE ⚷44—AUTHORITY TO APPOINT SPECIAL AUDITOR.
Under Code of Law 1901, § 254, authorizing reference of a law case grounded on an account to a regular or special auditor, a regular auditor. who had resigned, may be appointed special auditor to complete a case he had heard before his resignation.

4. APPEAL AND ERROR ⚷967(1)—HARMLESS ERROR—AMENDING EXCEPTIONS.
No prejudicial error is shown in refusing permission to make a second amendment of exceptions to a special auditor's report; where the record does not indicate in what respect it was desired to change the exceptions.

5. REFERENCE ⚷100(5)—AUDITOR'S REPORT—AMENDING EXCEPTIONS.
The court did not abuse its discretion in refusing defendant permission to amend for the second time exceptions to a special auditor's report.

6. REFERENCE ⚷100(5)—AUDITOR'S REPORT—AMENDING EXCEPTIONS.
Ordinarily, allowing the amendment of exceptions to a special auditor's report rests within the sound discretion of the trial court.

7. REFERENCE ⚷105—QUESTION FOR JURY.
The defendant, in a case based upon an account and referred to an auditor, is not entitled to have a jury pass upon the question whether interest should be allowed, where there are no disputed facts regarding the interest items.

8. REFERENCE ⚷100(4)—EXCEPTIONS TO AUDITOR'S ACCOUNT.
Where an auditor found that plaintiff's count and inspection of sacks returned by defendant was to govern under the contract between the parties, and that credit was so given, defendant's exception, which failed to specify either that the contract did not so provide or that the credit given by plaintiff was incorrect, *held* insufficient.

9. REFERENCE ⚷48—AUDITOR—AUTHORITY.
Where a case was referred under Code of Law 1901, §§ 254–258, to audit and state the dealings between the parties, etc., the auditor was authorized to ascertain whether an account stated existed between the parties, and, if so, its scope.

10. REFERENCE ⚷105—AUDITOR'S REPORT—EXCEPTIONS.
Under Code of Law 1901, §§ 254 and 255, requiring exceptions to specify basis and requiring issues of fact raised by exceptions to be tried by jury, an exception that the evidence before an auditor failed to establish an account stated between the parties is too indefinite to raise a question of fact for determination by jury.

11. ACCOUNT STATED ⚷19(3)—EVIDENCE—SUFFICIENCY.
Evidence that the parties adjusted their books so as to make their statements of account correspond, that such account was recognized by de-

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fendant, who failed to produce his books of account, etc., *held* to sustain the trial court's finding that an account stated existed as a matter of law.

12. JURY ⟹31(8)—RIGHT TO JURY TRIAL—REFERENCE.
Code of Law 1901, §§ 254-258, providing that law cases based on an account may be referred to an auditor and that exceptions to his report may raise issues of fact to be tried by jury, does not unconstitutionally restrict the right to jury trials.

13. REFERENCE ⟹2—ACTION ON ACCOUNT—CONSTRUCTION OF STATUTE.
Code of Law 1901, §§ 254-258, authorizing reference to an auditor of law cases based on accounts, must be read according to the natural import of the language, without resorting to subtle or forced construction.

Appeal from the Supreme Court of the District of Columbia.

Action by the Virginia Portland Cement Company, a corporation, against S. Dana Lincoln, trading and doing business under the name of the National Mortar Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lucas P. Loving, Wharton E. Lester, and L. L. Hamner, all of Washington, D. C., for appellant.

H. Ralph Burton, Walter C. Clephane, and J. Wilmer Latimer, all of Washington, D. C., for appellee.

SMYTH, Chief Justice. The Virginia Portland Cement Company, referred to hereafter as the Cement Company, sued S. Dana Lincoln, trading as the National Mortar Company, to recover from him over $8,000, a balance alleged to be due for about 1,400 shipments of cement, which were made on different dates running through a period of about five years. The Cement Company recovered, and we are asked by Lincoln to reverse the judgment against him.

By consent of the parties the case was referred to Louis A. Dent, as auditor of the court, under chapter 4 of the Code, "to audit and state the account and the dealings between the plaintiff and the defendant and to report the same with his conclusions" to the court. While the case was in his hands he tendered his resignation as auditor, to take effect June 30, 1915. Before this date he had completed the taking of testimony but had not made his report. The testimony covered about 1,100 pages, and in addition thereto voluminous documents had been submitted to him. In these circumstances the Cement Company moved that the case upon the expiration of the auditor's term be referred to Mr. Dent as special auditor, to the end that he might complete his work under the original reference. This was opposed by Lincoln for various reasons set forth in affidavits. Among other things it was charged that the auditor was violently prejudiced against Lincoln. There were counter affidavits. In one the auditor denied any prejudice, and asserted that after the controversy had arisen one of counsel for Lincoln stated to him that he "was satisfied that the auditor was not imbued with any prejudice toward his client and would give him an unbiased and impartial finding." This statement in effect was admitted by the counsel referred to, in an affidavit filed two days later. Another affidavit alleges that Lincoln's resent-

ment was due to the fact that the auditor's rulings during the hearing were adverse to his conception of what he was entitled to. The court overruled the opposition and sustained the motion of the Cement Company.

Shortly afterwards Mr. Dent filed his report, which was in favor of the Cement Company. In due time Lincoln presented exceptions to the report, which were overruled. He thereupon asked leave to file amended exceptions, which was granted. The amended exceptions were overruled. A second application for leave to amend was denied, and judgment was then entered on the report.

[1, 2] Whether or not the special auditor was unfit to complete the report because of prejudice presented a question of fact, which was resolved by the court against Lincoln. We perceive no error in this. The matter addressed itself to the sound discretion of the court. As in the case of proposed jurors whose competency is challenged, the court's ruling should not be disturbed unless there was an abuse of discretion (Miller v. United States, 41 App. D. C. 52, 54; Paolucci v. United States, 30 App. D. C. 217, 12 Ann. Cas. 920; Reynolds v. United States, 98 U. S. 145, 156, 25 L. Ed. 244), and we are clear that there was none here.

[3] It was not only within the power of the court to authorize Mr. Dent to complete the work which had been assigned to him as auditor, but it would have been a mistake not to have done so under the circumstances. He had heard all the testimony, had listened to the contentions of counsel with respect to it, and was therefore peculiarly equipped to perform the duty involved. The Code (section 254, c. 4) authorizes the court "at any stage of the cause" to refer a law case grounded on an account to the regular auditor or to a special one, in its discretion. By the order assigning the case to Mr. Dent as special auditor the previous one committing it to him as auditor was in effect, though not formally, modified.

[4-6] Nor do we believe there was error in refusing to permit a second amendment of the exceptions. Lincoln requested leave to amend nine of them. This was granted, with the direction that the amendments must "point out specifically and precisely the grounds of such exceptions." They did not comply with this direction, and were rejected by the court. Lincoln then requested permission to further amend, but this was denied him. In the record there is nothing to indicate in what respect he desired to change his exceptions, and in the absence of a showing we cannot say whether the proposed change, if made, would be an improvement. If it would not, he was not prejudiced by the refusal. Besides, the matter of granting amendments is ordinarily in the sound discretion of the court, and where, as here, there is no abuse of that discretion, its rulings will be upheld. Meyers v. Davis, 13 App. D. C. 361, 364; German Evangelical Society v. Prospect Hill Cemetery, 2 App. D. C. 310, 315.

We now come to a more serious question. The Code (section 254, c. 4) provides that the exceptions "shall point out particularly the item or items" in the report excepted to and state the ground of the exceptions, and that the report shall be supported by an affidavit of the

party excepting that the allegations of fact set forth in the exceptions are true to the best of his knowledge and belief. And section 255 thereof provides that when the exceptions thus supported raise an issue of fact it must be submitted to a jury for its determination. Do the exceptions finally passed upon here raise a question of fact? If so, the court erred in not submitting it to a jury.

[7] Five of the exceptions relate to the allowance of interest. The auditor found that the contract between the parties provided for the payment of interest on each shipment after 60 days from the date of its delivery, but he did not follow the contract as to the greater part of the amount involved, because, as stated by him, of "the relaxation by plaintiff in his demand for strict compliance with the contract in this respect." He figured interest on the amount which he found due on August 28, 1912, the date that a demand for payment was made, which was several years after some of the shipments had taken place. Thus the Cement Company was allowed considerably less interest than it was entitled to under the contract. Certainly of this Lincoln had no cause for complaint. As to the items subsequent to August, 1912, he followed the rule of the Supreme Court of the United States, which provides that in case of partial payments "the creditor shall calculate interest, whenever a payment is made. To this interest the payment is first to be applied, and, if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment fall short of the interest, the balance of interest is not to be added to the principal, so as to produce interest." Story v. Livingston, 13 Pet. 359, 370, 10 L. Ed. 200.

It is said that the auditor allowed compound interest in fixing the ultimate balance, but this is without any basis in the record. The process employed by him in determining the amount of the interest is clearly set out in the report. If he made any error in his calculation, or misstated any fact, Lincoln has failed to identify it, either "particularly," as required by the statute, or otherwise. True, the auditor gave interest on the final balance found by him from the date, April 15, 1913, on which "it was due and payable" (Code, § 1184); but this sum included no interest, for each credit exceeded at the time it was given the amount of interest, then due.

The contention that the question as to whether or not interest should be allowed at all was for a jury has no merit, since there was no disputed fact concerning it.

Exceptions 11, 12, 13, 16, and 17 are perhaps sufficiently definite to raise a question of fact for the determination of a jury, but the matters covered by them, except two small items, are all embraced, the auditor found, in an account stated between the parties. Whether or not he was authorized to make this finding is a point we shall examine in a moment; but if he was, and the account stated is binding, the matters referred to are not open to further investigation.

[8] The two items mentioned relate to sacks which Lincoln says he returned to the Cement Company and for which he was entitled to credit, but did not receive it. Concerning this the auditor found that under the contract between the parties "the count and inspection of

sacks by plaintiff [the Cement Company] at the mill was to govern the credit," and that he gave credit according to that count. Lincoln, in his exception, does not point out wherein this finding is incorrect. If the contract did not provide as the auditor found, or if the amount the Cement Company gave credit for was not correct, it would have been any easy matter for Lincoln to have said so in his exception; but he did not, and for this reason it was properly rejected by the court.

[9] With respect to the account stated Lincoln excepted to it on two grounds: (a) That the auditor had no authority to find whether or not an account stated existed between the plaintiff and the defendant; and (b) because the evidence taken before him wholly failed "to establish the existence of an account stated." Relative to the first, the declaration of the Cement Company was based in part "on account stated between them" (the parties). The cause was referred to the auditor, as we have seen, "to audit and state the account and dealings between the plaintiff and the defendant and to report the same with his conclusion." An account stated was a part of "the dealings between" the parties, and therefore the auditor was empowered to find whether or not one existed, and, if so, its scope.

[10, 11] In his report the auditor states specifically the ultimate facts upon which he based his conclusion that there was an account stated between the parties. He found that the statement of account of the Cement Company with Lincoln was taken from the former's books, and was compared with the latter's books; that after certain omitted entries were made, amounting to about $40, a balance was struck upon the books of both parties as of March 1, 1913; that the same is set out in a letter of March 26, 1913, written by the Cement Company to Lincoln; that Lincoln admitted the account referred to in the letter was his own account, made up from the Cement Company's invoices; that another paper produced by the Cement Company, and which it later appeared was brought by Lincoln to it, was a statement made by Lincoln's bookkeeper, which was apparently a reconciliation of the accounts of both parties by certain small adjustments; that Lincoln failed to produce his books of accounts in denial of the Cement Company's evidence; and that the Cement Company's testimony to the effect that there was an account stated was corroborated by letters produced by Lincoln. The latter in his exceptions makes no specific objection to any of these findings, does not point out "particularly the item or items therein to which he objects," but contents himself with saying that "the evidence taken before the auditor wholly fails to establish the existence of any account stated between the plaintiff and the defendant." This is entirely too indefinite to raise any question of fact for submission to a jury. The facts found clearly disclose an account stated, and the court did not err in so deciding as matter of law.

[12, 13] Chapter 4 of the Code is a valid exercise of legislative power. Simmons v. Morrison, 13 App. D. C. 161, 169. It does not deprive a party, in a proper case, of a trial by the common-law triers of fact, but provides a simple and workable method by which he may secure it. If the facts upon which the auditor finds against him are

specifically denied by him, he may have them tried by a jury; but, if he refuses to deny them specifically, and thus fails to raise an issue of fact, he has no just cause for complaint if the court holds as matter of law that he has not made out a defense. To sustain exceptions so vague and general as those before us, when preciseness was easy, if the facts warranted it, would be to fritter away by construction the chapter of the Code we are examining. The act must be read "according to the natural and obvious import of the language, without resorting to subtle and forced construction." United States v. Temple, 105 U. S. 97, 99 (26 L. Ed. 967); Moore v. United States, 249 U. S. 487, 39 Sup. Ct. 322, 63 L. Ed. 721, decided April 14, 1919.

The other objections argued, all of a minor character, have been examined by us and found to be untenable.

Finding no merit in any of the contentions of the appellant, the judgment of the lower court is affirmed, with costs.

Affirmed.

STALLINGS v. SPLAIN, United States Marshal.

(Court of Appeals of District of Columbia. Submitted April 1, 1919. Decided May 5, 1919.)

No. 3225.

1. EXTRADITION ⚷26—FEDERAL OFFENSES—DISTRICT OF COLUMBIA.
In view of Code of Laws D. C. 1901, § 930, a person may be arrested in the District of Columbia on a warrant from a federal District Court and held for a reasonable time for extradition papers.

2. CRIMINAL LAW ⚷105—JURISDICTION—WAIVER OF OBJECTIONS.
A person who, while at large on bail given in habeas corpus proceedings instituted by him after his arrest on a warrant from another federal jurisdiction, was rearrested on a commissioner's warrant, by appearing and after a hearing giving bail for his appearance in the other jurisdiction, waived any objection to the jurisdiction of the commissioner over his person pending the habeas corpus proceeding.

Appeal from the Supreme Court of the District of Columbia.

Habeas corpus by Leslie C. Stallings against Maurice Splain, United States Marshal for the District of Columbia. From a decree discharging the writ, petitioner appeals. Affirmed.

W. B. Jaynes, of Washington, D. C., for appellant.

John E. Laskey, U. S. Atty., and J. B. Archer, Jr., Asst. U. S. Atty., both of Washington, D. C., for appellee.

ROBB, Associate Justice. This appeal is from a decree in the Supreme Court of the District, discharging the writ of habeas corpus that had issued on appellant's petition.

Appellant, hereinafter called the petitioner, was arrested in this District on June 10, 1918, on a bench warrant from the United States District Court for the District of Wyoming charging him with embezzlement. On June 11th he filed his petition for a writ of habeas corpus in the court below and was released on bail, pending a hearing. On

the 27th of June, 1918, a complaint was duly made before a United States commissioner in this District, charging petitioner with embezzlement in Wyoming. On the 5th of July following, petitioner was arrested on the commissioner's warrant and appeared before the commissioner, whereupon, petitioner "having admitted his identity and former official character as described in said complaint and having entered thereto a plea of not guilty, the United States, on its part, produced a duly certified copy of the indictment pending against petitioner in the District Court of the United States for the District of Wyoming, mentioned in the bench warrant, * * * certain correspondence from the United States marshal for the district of Wyoming to the United States marshal for this District, all of which were admitted in evidence without objection by petitioner." Thereupon petitioner moved for his discharge, the motion was denied, and petitioner, at his request, was admitted to bail for his appearance in the District Court of the United States for the District of Wyoming.

On July 18, 1918, petitioner applied in the habeas corpus proceeding for a writ of certiorari to the commissioner, averring that the acts of the commissioner "are wholly void and of no effect, because petitioner's application in habeas corpus was then pending in full force." The writ was directed to issue. Petitioner then demurred to the return of the marshal herein, which return set forth the foregoing facts. The case came on for hearing "upon the petition for the writ of habeas corpus, the writ issued thereon, the return thereto, and the demurrer to said return filed herein, and the petition for the writ of certiorari, the writ issued thereon, and the return thereto." Petitioner's demurrer to the marshal's return was overruled, with leave to plead to or traverse the return. Petitioner electing to stand upon his demurrer, the court dismissed the petition and discharged the writ.

[1] The preliminary arrest of petitioner which gave rise to this proceeding was regular and proper. Code, § 930; 2 Moore on Extradition, §§ 591–595; Union Pacific R. Co. v. Belek (D. C.) 211 Fed. 699. It is settled law that an accused person may be held a reasonable time to await the preparation and transmission of extradition papers from the demanding state.

[2] As to the contention that the commissioner was wholly without jurisdiction during the pendency of the habeas corpus proceedings, and therefore that his acts were null and void, it may not be questioned that he had jurisdiction of the subject-matter before him. Petitioner had given bail for his appearance in the habeas corpus proceeding, in which he sought to have tested the legality of his detention under the preliminary warrant. He was arrested under the warrant issued by the commissioner upon the final complaint. Hearing was accorded him by the commissioner, which resulted in his being held for extradition. Instead of seeking protection from the court out of which the writ of habeas corpus had issued, petitioner elected to give bail before the commissioner for his appearance in Wyoming, there to answer the indictment against him. Inasmuch as the commissioner had jurisdiction of the subject-matter, petitioner, by pleading to the complaint and giving bail, waived any right to question the jurisdic-

tion of the commissioner over the person. And this conclusion is not inconsistent with the decision of the court in the Farez Case, 7 Blatchf. 34, 8 Fed. Cas. 1006, relied upon by petitioner. Farez was arrested and sued out a writ of habeas corpus. Thereupon another warrant, designed to cure defects in the first, was placed in the hands of the marshal and that officer served the second warrant upon Farez, who already was in his custody. The opinion states that "no proceeding took place under the second warrant, except the arrest of Farez under it." The court found that, "when the question of the lawfulness of the detention under the first warrant should have been disposed of, then the marshal could properly proceed to execute the second warrant, but not before." That the arrest under the second warrant was not wholly void is apparent from the fact that there follows a careful consideration of the second warrant, and a finding that it, too, was defective. The most that may be said in the present case is that the marshal should have held the warrant issued by the commissioner until the decision of the court; but, as we have seen, it by no means follows that the proceeding before the commissioner was void. Inasmuch as the commissioner had jurisdiction of the subject-matter, and petitioner submitted to jurisdiction over his person by pleading and giving bail before the commissioner to appear in Wyoming, the court in the habeas corpus hearing was not called upon further to inquire into the proceeding before the commissioner.

There is another view that may be taken of this case, with the same result. If, as petitioner contends, the warrant of the commissioner was "illegal, null, and void," and "his entire proceedings were void and of no effect," then the preliminary warrant remained. As we have found that the arrest under that preliminary warrant was regular and legal, it results that in any event the writ was properly discharged.

The decree is affirmed, with costs.

Affirmed.

LISNER v. HUGHES.

(Court of Appeals of District of Columbia. Submitted March 4, 1919. Decided May 5, 1919.)

No. 3184.

1. MASTER AND SERVANT ⟹313, 325—TORTS OF SERVANT—NATURE OF MASTER'S LIABILITY—FORM OF ACTION.

   A master and servant are both liable in trespass for tortious acts of the servant done by express direction of the master, but the master's liability for a tort of the servant, committed while engaged in the business of the master and within the general scope of his authority, but without the master's direction, is not in trespass, but in an action on the case, based on the servant's negligence.

2. MASTER AND SERVANT ⟹329—TORTS OF SERVANT—JOINT LIABILITY—PLEADING AND PROOF.

   The declaration in an action of trespass against a master and servant for an assault by the servant, alleged to have been made by the master's direction, states a good cause of action; but, where the evidence showed

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that it was without the master's knowledge, there was a failure of proof as to him, which entitled him to a directed verdict.

3. APPEAL AND ERROR ⟹1048(6)—CROSS-EXAMINATION OF PARTY CALLED BY ADVERSE PARTY.

Exclusion of a question asked a defendant by his counsel on cross-examination, in explanation of a fact stated by him when called as a witness by plaintiff, *held* prejudicial error.

Appeal from the Supreme Court of the District of Columbia.

Action by Reu Hughes against Abram Lisner and Michael Cohen. Judgment for plaintiff, and defendant Lisner appeals. Reversed.

Leon Tobriner and Byron U. Graham, both of Washington, D. C., for appellant.

Fred B. Rhodes, Paul B. Cromelin, W. A. Coombe, and Chapman W. Maupin, all of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a judgment for the plaintiff, appellee here, in the Supreme Court of the District in an action of trespass vi et armis against appellant and Michael Cohen.

The declaration alleges that Cohen, "acting under the order and direction" of Lisner, did with force and arms assault the plaintiff while she was in the department store of the defendant Lisner, by jerking or grabbing a muff from her hands. Plaintiff's evidence failed to show that Lisner had anything to do with the alleged assault; that, on the contrary, he did not even hear of it until after its alleged commission. Lisner thereupon moved for a directed verdict. This motion was denied, and the case submitted to the jury, as against Cohen because the evidence tended to show that he had committed the alleged assault, and as against Lisner solely as the result of the relation of master and servant; in other words, on the theory that the liability of Cohen, the employé or servant, was primary, and that of Lisner, the employer or master, was secondary.

Appellant contends that, when the evidence disclosed that there had been a misjoinder of causes of action, his motion for a directed verdict should have been granted. Appellee concedes that "it is undoubtedly true as a general rule that if a joint tort be alleged a joint tort must be proved," but contends that the misjoinder, to be availed of, must be pleaded in abatement.

Except as "repealed by express statutory provision, or modified by inconsistent legislation, or where it has become obsolete or unsuited to our republican form of government, the common law of England in all its branches, both civil and criminal, remains to-day the law of the District of Columbia, and it has been repeatedly so held." De Forrest v. United States, 11 App. D. C. 466. Common-law forms of action have not been abolished here. Miller and Ambrose, 35 App. D. C. 75, 81. What, therefore, is the proper form of action for the recovery of damages from a master for an assault by his servant?

[1] The rule is well stated in Steamboat Co. v. Housatonic R. Co., 24 Conn. 40, 63 Am. Dec. 154, which was an action for trespass vi et armis against a master and servant. The court, after pointing out

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that the master is liable for the tortious acts of his servant done in the performance of the master's business and within the scope of the general authority conferred (see Axman v. W. G. Light Co., 38 App. D. C. 150), as well as for similar acts done by his express direction, said:

"But the remedies applicable to these several injuries are entirely different. In the former case he is liable only in an action upon the case, founded upon the negligence of the servant in the performance of the master's lawful business; whereas in the latter case he is liable in an action of trespass caused by the act of the servant. But his liability to be sued in trespass does not rest at all upon the relationship of master and servant, which exists, but upon the fact that the act complained of was done by his express direction and command, and so in reality, as well as in law, is his own act, though done through the instrumentality of another. A man shall not be made a trespasser against his will, though he may be made liable in an action on the case for the negligence of the servant, while engaged in the business of the master, however contrary to the master's wishes such negligence may be."

To the same effect are Martin v. Moore, 99 Md. 41, 57 Atl. 671; Wiest v. Traction Co., 200 Pa. 148, 49 Atl. 891, 58 L. R. A. 666; Campbell v. Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Mulchey v. Methodist Relief Society, 125 Mass. 487; Warax v. Cin., N. O. & T. P. Co. (C. C.) 72 Fed. 637; Helms v. N. P. R. Co. (C. C.) 120 Fed. 389; Gustafson v. Chicago, R. I. & P. R. Co. (C. C.) 128 Fed. 85.

[2] The declaration stated a good cause of action. The difficulty is that the evidence did not sustain its averments. Obviously, therefore, the declaration was not subject to a plea in abatement. It is not for a defendant to say what the form of the action shall be, for that is the exclusive province of the plaintiff. Railroad Co. v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121. It is the right of a defendant, however, who has gone to trial upon the case stated by the plaintiff, to insist that there shall be some evidence in support of that case. So here the defendant Lisner, having been charged with directing an assault by his employé, had a right to a directed verdict when there was an entire failure of evidence in support of that charge. The record shows that a motion for a directed verdict was seasonably made, but it does not show that the grounds of the motion were stated. It is contended, therefore, that appellant on this appeal may not challenge the trial court's ruling. Since another assignment of error would compel the reversal of the judgment in any event, we do not determine this question of practice.

[3] Mr. Lisner was called as a witness for the plaintiff, and it was shown by his testimony that, after he obtained knowledge of the incident underlying this action, he still retained Cohen in his employ. On cross-examination the witness testified that it was Cohen who gave him the information shortly after the occurrence. Thereupon witness was asked the following question: "What did he say to you, and what did he report to you that he had seen or done?" Plaintiff objected, and the objection was sustained, over the exception of the defendant. Counsel for defendant then stated to the court that the obvious purpose of the plaintiff in showing that witness had re-

tained Cohen was to show ratification of Cohen's act, and hence that Mr. Lisner should be permitted to state that Cohen had made a report to him inconsistent with the opening statement for the plaintiff. In other words, that under the report made to Lisner by Cohen Cohen's retention was proper. The action of the court in excluding this evidence was error, prejudicial to defendant. Plaintiff, having brought out the fact of Cohen's retention after Lisner had learned of the incident, could not deny Lisner's right to state what he had learned: that is, the facts upon which he had acted.

The judgment is reversed, with costs, and cause remanded.

Reversed and remanded.

ROBISON v. WASHINGTON RY. & ELECTRIC CO.

(Court of Appeals of District of Columbia. Submitted February 10, 1919. Decided May 5, 1919.)

No. 524.

APPEAL AND ERROR ⟹323(4)—NECESSARY PARTIES—JUDGMENT FAVORABLE TO COPARTY.

Under Code of Law 1901, § 30, providing that "either party who may think himself aggrieved by the judgment" may appeal, where, in an action of tort against two defendants, the tort charged is several, and the result is a judgment in favor of one defendant and against the other, the latter may appeal from that part of the judgment against him, without joining or severing his codefendant.

At Law. Action by William Robison against the Washington Railway & Electric Company and others. On application by plaintiff for leave to docket special appeal. Denied.

Webster Ballinger, of Washington, D. C., for petitioner.

SMYTH, Chief Justice. William Robison brought action in the municipal court against the Washington Railway & Electric Company and F. L. Middleton, Arthur Middleton, and H. W. Marshall, copartners, as joint tort-feasors. The tort charged was several. There was a judgment against the Railway & Electric Company and in favor of the other defendants. The Railway & Electric Company appealed to the Supreme Court of the District, without making its codefendants parties to the appeal. Robison appeared specially and moved to dismiss the appeal. This motion was overruled, and he now makes application to this court for leave to docket a special appeal, that the action of the lower court in overruling his motion may be reviewed. He contends that the appeal of the Railway & Electric Company is void because no notice of it was given by the company to its associate defendants, no citation was issued for those defendants when the case was docketed, and no deposit of fees was made with the marshal to cover the costs of the citation as required by rule 18 of the Supreme Court. In other words, that the appellant was compelled to take up the entire judgment, including the part in favor of its codefendants, and in sup-

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port of this contention cites sections 30, 31, 75, and 80 of the Code and rule 20 of the municipal court.

We think the action of the court below was right. Section 30 of the Code provides that "either party who may think himself *aggrieved* by the judgment or other final order" of the municipal court may appeal. Appeal from what? Clearly, from that part of the judgment which aggrieves him. The Railway & Electric Company was not aggrieved by the part of the judgment in favor of its codefendants. There was no inconsistency between liability on the part of the Railway & Electric Company and nonliability on the part of its codefendants; the tort being several, not joint. By what right could it be heard to complain of the action of the court in releasing the other defendants? We know of no principle upon which it could ask that the judgment in their favor should be set aside. Nor was it required to make any of its associate defendants a party to the appeal, for the simple reason that it sought no relief against any one of them.

Although there was but one judgment in form, there were two in effect—a judgment against the Railway & Electric Company and a judgment for its codefendants. The case comes within the doctrine of Gilfillan v. McKee, 159 U. S. 303, 16 Sup. Ct. 6, 40 L. Ed. 161, where it was said:

> "The decree was several, both in form and substance, and the interest represented by each defendant was separate and distinct from that of the other. In such cases any party may appeal separately to protect his own interest. [See also] Cox v. United States, 6 Pet. 172 [8 L. Ed. 359]; Todd v. Daniel, 16 Pet. 521 [10 L. Ed. 1054]; Hanrick v. Patrick, 119 U. S. 156 [7 Sup. Ct. 147, 30 L. Ed. 396]; State Bank v. Hunter, 129 U. S. 557, 578 [9 Sup. Ct. 346, 32 L. Ed. 752]."

It may be admitted that, generally speaking, all parties should be joined in an appeal, but this, as we have just seen, does not preclude any one or more of them from prosecuting an appeal where the interests of the parties are not united.

In Raub v. Relief Association, 3 Mackey (D. C.) 68, 77, the executor of the estate of Hopkins brought action against a fraternal association upon an insurance certificate which had been issued upon the life of his testator, claiming that the money due on the certificate should be paid to him, notwithstanding that by the terms of the certificate it was payable to Mary E. Hopkins, whom he made a defendant. By the judgment of the trial court the association was directed to pay the money to the executor. Mary E. Hopkins appealed, and her right to do so without joining her associate defendant was denied by the executor. The court, recognizing the principle that ordinarily, where there is a decree against two joint defendants, one of them cannot separately appeal, said:

> "This is not a case of that character. The decree was virtually a decree in favor of this executor, and against this appellant. They were the contesting parties, and when the decree said that the association should pay the plaintiff, it was really a decree against her. So that we think the case is properly here for review."

To the same effect, see Peer v. Cookerow, 14 N. J. Eq. 361, 364; Coffee v. Planters' Bank, 11 Smedes & M. 458, 465, 49 Am. Dec. 68.

The decisions cited by petitioner, to the effect that a judgment appealed from is thereby completely annulled and that under Code section 80 a trial in the Supreme Court on an appeal from the municipal court is de novo do not conflict in any wise with what we have just said. The severed part of the judgment appealed from is annulled by the appeal, and the trial of that part is to be de novo. These authorities do not mean that a party who has been unsuccessful in the low court may appeal, not only from the judgment against him, but must also appeal from a judgment in favor of another party, which in no way affects his interests.

The application is denied.

TOWSON v. TOWSON.

(Court of Appeals of District of Columbia. Submitted April 3, 1919. Decided May 5, 1919.)

No. 3227.

1. DIVORCE ⚷243, 302—SUIT FOR LIMITED DIVORCE—DENIAL OF DIVORCE—ALIMONY AND CUSTODY OF CHILDREN.
   In a suit by the wife for limited divorce, where the court finds that her allegations are not sustained, it is without power to award her the exclusive custody of children and permanent alimony for her and their support.
2. HUSBAND AND WIFE ⚷283(1) — SEPARATE MAINTENANCE — STATUTORY RIGHT.
   Code of Laws D. C. 1901, § 980, providing that wherever a husband shall fail or refuse to maintain his wife and minor children, although able to do so, the court, on application of the wife, may commit the children to her care and award her a sum for maintenance, authorizes such relief only on a finding of the husband's dereliction.
3. DIVORCE ⚷221—SUIT BY WIFE—COSTS AND ATTORNEY'S FEES.
   Under Code of Laws D. C. 1901, § 975, a wife is entitled to costs and reasonable attorney's fees in a suit for divorce brought by her, although unsuccessful.

Appeal from the Supreme Court of the District of Columbia.

Action by Nannie Campbell Towson against Richard M. Towson. Decree for plaintiff, and defendant appeals. Reversed.

Crandal Mackey, of Washington, D. C., for appellant.

D. S. Mackall and J. Barrett Carter, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. Nannie Campbell Towson sued her husband, Richard M. Towson, for a divorce a mensa et thoro, alimony, and the custody of their son, aged 15. She charged him with cruelty, and alleged that he had not contributed anything towards her support from the 16th of September, 1916, which was six days before she instituted her suit. It was further stated by her that she and her husband had separated in the previous June; she going with her son to board in the country during the rest of the summer. In his answer he denied all her charges, and asserted that he at her request accompanied her to

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the train on the occasion of her visit to the country referred to in her petition, and supplied her with funds during her stay, which lasted till September 16th. He further said that he had provided a suitable home for his family at Alexandria, Va., and had invited her to join him there upon her return from the country, but that she failed to do so. The court in its opinion reviewed at considerable length the testimony given by both parties, and, finding that the wife had failed to sustain any of her allegations of wrongdoing, concluded its opinion with these words:

"I shall refuse the prayer for a limited divorce, but, if it is asked in behalf of the wife, I shall make a decree, if it is within the scope of the bill, and the prayers of the bill are sufficiently wide, requiring him to continue his support of her."

Mrs. Towson accepted the suggestion of the court, and accordingly a decree was entered, denying her a legal separation, but granting her permanent alimony for the support of herself and her son, and giving her the custody of the child, subject to the right of the father to visit him at stated times.

[1] We have, then, a decree for the separate maintenance of the wife, where the court found that the husband had not been guilty of cruelty and had not failed to support her, and where the record discloses, without contradiction or question, that he had provided a proper home for her which she might use if she pleased. The question thus raised is not new. It has been before the courts many times. In Davis v. Davis, 75 N. Y. 221, it was said:

"The question presented for our determination is whether the court, in an action for a limited divorce brought by the wife against the husband, after having denied the principal relief sought, on the ground that the evidence does not establish any of the causes for which a separation can be adjudged, may nevertheless, by its judgment in the action, award to the plaintiff the custody of the children of the marriage, and make provision for their maintenance out of the property of the husband."

After a careful consideration of the question the court concluded thus:

"It would be an anomaly in legal proceedings to allow a complainant, who had failed to establish a claim to the principal relief sought, to have a decree against the defendant for the mere incidents to that relief. In this case the plaintiff, by her suit, invoked the jurisdiction of the court to grant her a separation under the statute. She has failed to make a case for a divorce, and the defendant was, we think, entitled to a judgment of dismissal. The court was not authorized, in this action, after having denied judgment of separation, to award to the plaintiff the custody of the children, or make a decree for their support."

Other pertinent decisions are Keppel v. Keppel, 92 Ga. 506, 17 S. E. 976; Newman v. Newman, 69 Ill. 169; Wagner v. Wagner, 34 Minn. 442, 26 N. W. 450; Wilde v. Wilde, 2 Nev. 306; Bishop on Marriage and Divorce, vol. 2, p. 1002; Chestnut v. Chestnut, 77 Ill. 349.

[2] Is this rule changed by section 980 of the Code, which provides:

"Whenever any husband shall fail or refuse to maintain his wife and minor children, if any, although able so to do, the court, on application of the wife, may decree that he shall pay her, periodically, such sums as would be

allowed to her as permanent alimony in case of divorce for the maintenance of herself and the minor children committed to her care by the court, and the payment thereof may be enforced in the same manner as directed in regard to such permanent alimony."

This section has been held by us in Tolman v. Tolman, 1 App. D. C. 299, to mean precisely what it says. Under it the power of the court to grant separate maintenance can be exercised only where the "husband shall fail or refuse to maintain his wife and minor children, if any, although able so to do." The husband here has not been guilty of any delictum in this respect. He is willing to provide his wife with suitable maintenance according to his means, and the court in effect has so found.

The statute does not say that, if the wife without cause sees fit to leave the home established by her husband, he is obliged to support her apart from him. "The general rule is," says Tiffany on Domestic Relations, 188, "that on marriage" the husband "has the power to establish the family domicile and it is the duty of the wife to follow him." The Supreme Court of the United States in Atherton v. Atherton, 181 U. S. 155, 164, 21 Sup. Ct. 544, 547 (45 L. Ed. 794), used this language:

"If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile;" and it is "hard to see how, if she unjustifiably refused to live with her husband, * * * she could lawfully acquire in his lifetime a separate domicile in another state," etc.

See, also, Cheely v. Clayton, 110 U. S. 701, 705, 709, 4 Sup. Ct. 328, 28 L. Ed. 295; Town of Watertown v. Greaves, 112 Fed. 183, 50 C. C. A. 172, 56 L. R. A. 865.

The husband discharges his full duty when he provides as good a home as his resources will permit and otherwise conducts himself in a befitting manner. Either this must be the rule, or else, whenever a wife fails in her application for divorce, she would have a right to a separate maintenance. But the statute gives no countenance to such a proposition, and the power of courts in this regard is measured by the statute. We are conscious that this may place the defeated wife in an undesirable plight; but she took that chance when she went into court and made charges against her husband, which she was unable to sustain. To return to her husband may involve some humiliation, but she has the assurance that, if she does her part, he must do his, or the law will grant her relief.

[3] Without regard to whether or not the wife succeeds in her litigation, we think that under section 975 of the Code she is entitled to reasonable attorney's fees for services rendered in prosecuting her case, and to costs of the suit.

It follows that the decree, in so far as it provides for separate maintenance for the wife and affects the custody of the child, should be reversed, but in all other respects affirmed, at the cost of the appellant; and a decree in conformity with this holding will be entered in this court.

Reversed.

UNITED STATES ex rel. SYKES v. LANE, Secretary of the Interior.

(Court of Appeals of District of Columbia. Submitted April 3, 1919. Decided May 5, 1919.)

No. 3245.

1. DEEDS ⚷54, 56(1)—EXECUTION—"DELIVERY" NECESSARY.
A deed is not executed until delivered, and the mere act of signature does not constitute a "delivery."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Delivery.]

2. INDIANS ⚷15(2)—ALLOTTED LANDS—"EXECUTION" BY ALLOTTEE.
Where the Secretary of the Interior removed restrictions upon alienating Indian allotted lands, effective upon the "execution" of a deed by the allottee, a deed signed by the allottee and given to an Indian superintendent for transmission to the purchaser does not pass title, and is subject to cancellation by the Secretary, since the deed's "execution" had not been completed by delivery.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Execution.]

3. INDIANS ⚷15(1)—DEEDS—"DELIVERY" BY INDIAN TO INDIAN SUPERINTENDENT.
Where an Indian allottee signed a deed and transmitted it to an Indian superintendent for delivery to the purchaser, the superintendent was not the purchaser's agent, and his reception of the deed did not constitute a delivery.

4. INDIANS ⚷15(2)—DISCRETION OF SECRETARY OF INTERIOR AS TO ALIENATION OF LANDS.
The judgment of the Secretary of the Interior as to removing restrictions upon the alienation of Indian allotted lands will not be disturbed by the courts, unless clearly arbitrary.

Appeal from the Supreme Court of the District of Columbia.

Mandamus proceeding by the United States of America, on the relation of C. E. Sykes, against Franklin K. Lane, Secretary of the Interior. From a judgment denying the writ, relator appeals. Affirmed.

Alexander Britton and F. W. Clements, both of Washington, D. C., and H. A. Ledbetter, of Ardmore, Okl., for appellant.

Charles D. Mahaffie and C. Edward Wright, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. This case involves the right of the relator, Sykes, to a mandamus against the Secretary of the Interior, requiring him to deliver to Sykes a deed for land allotted to Dwight Butter, a full-blood Choctaw Indian, in distribution of the tribal property. Congress placed certain restrictions upon the alienation of such land, but by Act May 27, 1908, c. 199, 35 Stat. 311, the Secretary of the Interior was authorized to remove them "under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." Pursuant to this authority the Secretary provided for the removal of the restrictions on Butter's property by the following order:

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"Now, therefore, I, under the authority vested in me by the act of Congress of May 27, 1908, Public No. 140, and the regulations prescribed thereunder, hereby remove the restrictions from said described land, such removal of restrictions to be effective only and simultaneously with the execution of deed by said allottee to the purchaser after said land has been sold in compliance with the directions of the Secretary of the Interior."

By direction of the Secretary the land in question was offered for sale at public auction for the benefit of Butter, having been first appraised at $1,300. Sykes bid $1,500 and paid down one-tenth of the purchase price, as required by the terms on which the property was offered for sale. The clerk in charge notified the superintendent of the Five Civilized Tribes of Syke's bid, and recommended that it be accepted. In turn the superintendent informed Butter of the offer and requested him to execute a deed for the land, if the offer was acceptable to him. Butter appeared before one Foltz, a representative of the superintendent, and signed, and delivered to him, a deed for the land in favor of Sykes. This deed Foltz sent to the superintendent. Soon thereafter the latter, having learned that a very large gas well had been "brought in" within 1½ miles of the land, informed Butter of it by letter and asked him if he was still willing to accept Syke's offer, and, if not, the deed would be returned to him for cancellation. Butter wrote at first that he wanted $2,000 instead of $1,500 from Sykes, and later asked $5,000 or $6,000. Some time afterwards he changed his mind and requested the superintendent to deliver the deed to Sykes and collect from him the $1,500. This the superintendent refused to do, saying:

"It is not believed that it would be to your best interests at this time to sell this land."

The action of the superintendent was reported to the Secretary of the Interior through the proper channels, and approved by him.

[1-3] The order of the Secretary of the Interior by its plain terms, as we have seen, was to be "effective only and simultaneously with the execution of deed by said allottee to the purchaser." Until then the restriction on alienation remained, and while it did no one could acquire title to the property. With this order Sykes was familiar, or at least he is presumed to have been, when he bid. We do not understand that he takes any issue on this point. The only question, then, before us is as to whether or not the deed from Butter was executed, within the meaning of the order. If it was, Sykes is entitled to have it delivered to him; if it was not, he has no right to it. He urges that the signing of the deed by Butter was an execution of it in a colloquial sense, but the order of the Secretary of the Interior is not to be interpreted according to colloquial standards. It must be read in harmony with its legal meaning. The mere signing of a deed does not constitute a delivery of it, and unless it is delivered it cannot be said to be executed. "The averment in the petition," says the Supreme Court of Nebraska, "that the grantors 'made and executed' the deed, under the definitions already given, includes the delivery of the instrument as a conveyance of the property." Brown v. Westerfield, 47 Neb. 399, 403, 66 N. W. 439 (53 Am. St. Rep. 532). The word "exe-

cution," when used with reference to a deed, "legally means not only the signing of the instrument, but also includes its delivery, which completes the execution and gives validity to the deed." Tucker v. Helgren, 102 Minn. 382, 384, 113 N. W. 912. To the same effect are Collins v. Cornwell et al., 131 Ind. 20, 21, 30 N. E. 796; Farrior v. New England Mortgage Security Co., 88 Ala. 275, 277, 7 South. 200. The act of delivery symbolizes the passage of title from the seller to the purchaser.

Was the superintendent Sykes' agent or the agent of Butter? We do not think he was either, for he was a public officer discharging his duties as such when he received the deed from Butter. Smith v. United States, 170 U. S. 372, 18 Sup. Ct. 626, 42 L. Ed. 1074. But, whether or not he was the agent of Butter, he certainly was not the representative of Sykes, and in consequence the delivery to him was not a delivery to Sykes. Butter, it is true, authorized him to deliver it to Sykes, but he did not execute the power, and until it was executed no title passed.

[4] If there were any doubt about this, which there is not, we would resolve it in favor of the Secretary. He is charged by law with the important duty of protecting and safeguarding the interests of the Indians in such transactions as the one before us, and his judgment in such matters, unless clearly arbitrary, will not be disturbed by the courts. Duncan Townsite v. Lane, 245 U. S. 308, 38 Sup. Ct. 99, 62 L. Ed. 309. This we have said more than once. United States v. Lane, 48 App. D. C. 279; United States ex rel. Ashley v. Roper, 48 App. D. C. 69, 75; Handel v. Lane, 45 App. D. C. 389.

We think the judgment of the lower court is right, and it is therefore affirmed, with costs.

Affirmed.

CONKLIN v. LANE, Secretary of the Interior.

(Court of Appeals of District of Columbia. Submitted April 4, 1919. Decided May 5, 1919.)

No. 3228.

1. PUBLIC LANDS ⚷106(1)—PROCEEDINGS OF DEPARTMENT—GROUND OF DECISION—APPEAL.

Where plaintiff claimed a deceased soldier's additional homestead right under Rev. St. §§ 2306, 2307 (Comp. St. §§ 4594, 4602), had been conveyed to him by the guardian of the soldier's alleged grandchildren, the Department of the Interior is not precluded from denying that its records established the descent of the alleged grandchildren from the soldier by fact that it had rejected the claim on other grounds.

2. DESCENT AND DISTRIBUTION ⚷71(6)—SOLDIER'S ADDITIONAL HOMESTEAD—EVIDENCE OF RELATIONSHIP.

Where plaintiff claimed a deceased soldier's additional homestead right under a conveyance from a guardian of the soldier's alleged grandchildren, an abandoned pension application by the soldier's alleged son has no probative value in establishing the applicant's relationship to the soldier.

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

3. PUBLIC LANDS ⚷41—SOLDIER'S ADDITIONAL HOMESTEAD RIGHT—EVIDENCE.

Assuming that a soldier's additional homestead right under Rev. St. §§ 2306, 2307 (Comp. St. §§ 4594, 4602), is so clearly descendible that a ruling by the Department of the Interior to the contrary amounts to arbitrary action, controllable by injunction or mandamus, plaintiff must first establish in the Interior Department that the persons he claims under are the soldier's descendants.

Appeal from the Supreme Court of the District of Columbia.

Bill by Percy L. Conklin against Franklin K. Lane, Secretary of the Interior. From a decree dismissing the bill, plaintiff appeals. Affirmed and remanded.

E. Hilton Jackson and S. S. Ashbaugh, both of Washington, D. C., for appellant.

Charles D. Mahaffie and C. Edward Wright, both of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District, after hearing on bill and answer, dismissing appellant's bill.

John W. Miller qualified under section 2306, R. S. (Comp. St. § 4594), to enter 78.60 acres of land as an additional homestead right. He died a widower, without having exercised the right, whereupon it was sold as an asset of his estate and a patent issued thereon.

The bill alleges:

"That as shown of record at the date of the death of the said John W. Miller, as aforesaid, he left surviving him one and only minor orphan child, Fred Douglas Miller."

It is further alleged:

"That petitioner derived his title from the heirs at law of Fred Douglas Miller, who, as shown by records of the Interior Department, died in the city of St. Louis, Mo., while domiciled in St. Louis county, Mo., in 1908, leaving a widow and minor children, which minor children are still minors, and whose rights were transferred to petitioners by mesne conveyances from the guardian duly appointed by probate court of Cook county, state of Illinois;" that Fred Douglas Miller at one time filed a claim for pension as a minor child of John W. Miller, which claim is still on file in the Interior Department.

In his answer the Secretary—

"says that there is no evidence in the records of the Interior Department sufficient to show that Fred Douglas Miller was the son of John W. Miller, the soldier, that he was ever married to the said Stella Svelich, that he ever had any children, that if he had, that the same are alive, and that if he had, that the said Stella Svelich is their duly appointed guardian or was ever authorized by any court to execute an assignment to any one of the right made which plaintiff claims. He admits that, as hereafter more fully stated, one Fred Douglas Miller filed a claim for pension as the minor child of John W. Miller, and says that the said claim is still on file in the Pension Bureau as an abandoned claim."

[1, 2] The basis of the foregoing averments in the bill as to the records in the Interior Department is a decision of an Assistant Secretary, on appeal from the decision of the General Land Office in

this case, in which it was ruled that, John W. Miller having died a widower and no application for a patent having been made for more than 30 years thereafter, "obviously he could have had no minor children at that time," and hence that no rights accrued under section 2307, R. S. (Comp. St. § 4602). In other words, the facts were assumed to be as contended by appellant, but deemed immaterial under the then view of the Department. The Secretary now says that the records of the Department, relied upon by appellant, are not sufficient to establish the essential facts. It does not follow that, because the Department did not deem it necessary in deciding the case to challenge the averments of fact, the question may not be raised now. In view of the averments in the answer, it must be assumed that a real doubt is entertained in the Department as to the facts. By relying solely upon what was before the Department, appellant now is left with unsupported allegations, traversed by the Secretary's answer. Of course, the abandoned pension application has no probative evidential value.

[3] We therefore do not deem further consideration of the case necessary, for first of all it was incumbent upon appellant to establish in the Interior Department the material facts upon which he relied. Should we rule that the right of a deceased soldier's "minor orphan children," under section 2307 R. S., is so clearly descendible that the Department's ruling to the contrary amounted to arbitrary action, and hence is controllable by injunction or mandamus (Ness v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610), there would yet remain unsolved the fundamental question as to the identity of Fred Douglas Miller and his heirs.

The decree is affirmed, with costs, and the cause remanded.

Affirmed and remanded.

WASHBURN v. LANE, Secretary of the Interior, et al.

(Court of Appeals of District of Columbia. Submitted April 4, 1919. Decided May 5, 1919.)

No. 3253.

PUBLIC LANDS ⚷108—LIEU LANDS—CANCELLATION.

Where land within a forest reserve was relinquished and application filed for other land in 1911, pursuant to Act June 4, 1897, as amended by act June 6, 1900, providing that land within a forest reserve may be exchanged for other nonmineral public lands, etc., and the new selection was included in a petroleum reserve in 1914, the applicant being notified that he might show selected land was in fact nonmineral, or apply for surface patent, under Act July 17, 1914 (Comp. St. §§ 4640a–4640c), *held* that no vested rights were secured which prevented Department of Interior from canceling the lieu land selection before taking final action upon it.

Appeal from the Supreme Court of the District of Columbia.

Suit by Jed L. Washburn against Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office. From a decree sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

W. P. Fennell and Aubrey B. Fennell, both of Washington, D. C., for appellant.

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Charles D. Mahaffie and C. Edward Wright, both of Washington, D. C., for appellees.

ROBB, Associate Justice. Appellant filed a petition below seeking to restrain appellee "from rejecting and refusing to approve and from canceling" a certain selection of land made by appellant, and also seeking a mandatory order that the selection be approved and a patent issued therefor. All facts necessary to a decision of the case on the merits appearing in the petition, appellee demurred, the demurrer was sustained and this appeal resulted.

Act June 4, 1897 (30 Stat. 36, c. 2), as amended June 6, 1900 (31 Stat. 614, c. 791), provides for the exchange of land situated within the outboundaries of a national forest for an equal area of "vacant, surveyed and nonmineral public lands which are subject to homestead entry." On April 3, 1911, appellant relinquished to the government land within the limits of the Santa Barbara Forest Reserve in California and filed an application in due form for "Lot 3, Sec. 19, T. 46 N., R. 98 W. 6th P. M., Wyoming." The final survey of the township embracing this land was not completed until January 16, 1918, so that final action on appellant's application was not taken until after that date. On May 6, 1914, the land covered by this selection was, by Executive Order, included in Petroleum Reserve No. 37, and the Geological Survey reported that the land within the reserve "is mineral land prospectively valuable for deposits of oil and gas." When, therefore, the Department came to act upon appellant's selection, the fact appeared that it was within a petroleum reserve and that, prima facie at least, the land was mineral. Appellant was notified that under the provisions of the act of July 17, 1914 (38 Stat. 509, c. 142 [Comp. St. §§ 4640a–4640c]), he might, within a stated time after receipt of the notice, make a showing that the selected land was "in fact nonmineral in character," or might apply for a surface patent as provided in the act. Contending that his rights already had become fixed prior to the passage of said act of 1914 and the Executive Order of the same year, appellant failed to avail himself of either alternative presented by the Department and filed this suit.

The act under which appellant's entry was made required that the land selected should be nonmineral in character. Before final action was taken on appellant's selection, this land was withdrawn because of a showing to the satisfaction of the Department that it was mineral in character, and hence not subject to entry. If the land was mineral land when the Department was asked to approve the selection, it was of the same character when the application was filed originally, and appellant could acquire no vested rights in violation of the statute. We think the case ruled by our decision in Central Pac. R. Co. v. Lane, 46 App. D. C. 372, Ann. Cas. 1918C, 1002. There, as here, an attempt was made to review a finding of the Department based upon evidence that selected land was mineral in character.

It appearing that the Department has not exceeded its authority under the law, the decree is affirmed, with costs.

Affirmed.

GETZ BROS. & CO. v. ALASKA PACKERS' ASS'N.

(Court of Appeals of District of Columbia. Submitted March 12, 1919. Decided May 5, 1919.)

No. 1208. Patent Appeals.

1. TRADE-MARKS AND TRADE-NAMES ⚷21—REGISTRATION.
"Premium," as a trade-mark for canned salmon, is not entitled to registration, where the opposing party had previously used the word "Premier" as a mark for the same kind of goods.

2. TRADE-MARKS AND TRADE-NAMES ⚷44—PRIORITY—SUFFICIENCY OF EVIDENCE.
Evidence *held* to sustain a finding by the commissioner of patents that opposer's predecessor, had used the word "Premier" as a trade-mark for canned salmon before the applicant used the word "Premium" for the same kind of goods.

Appeal from Commissioner of Patents.

Application by Getz Bros. & Co., to register a trade-mark, opposed by Alaska Packers' Association. From a decision of the Commissioner of Patents, denying registration, the applicant appeals. Affirmed.

The opinion of the Commissioner of Patents, mentioned by the court, is as follows:

This is an appeal from the decision of the Examiner of Interferences, sustaining the opposition of the Alaska Packers' Association to the registration by Getz & Co. of the word "Premium" for canned salmon. The opposition is based on what opposer claims to be the prior use of the word "Premier," registered December 4, 1894, No. 25,610, for the same goods.

Although these marks have been used side by side for many years, and there is no proof of any actual confusion, still I hold with the Examiner of Interferences that the words are too close together, having much the same sound and appearance, and a similar meaning. See the very recent decision of the Court of Appeals of the District of Columbia in Goodrich Drug Co. v. Cassada Mfg. Co., 237 O. G., 918, holding "Velvelite" too close to "Velvetina."

The goods being the same and the marks too nearly alike, it only remains to be decided who first adopted the mark. Opposer claims to have acquired its mark "Premier" from the Kodiak Packing Company, which it bought out in 1893, having at the same time consolidated four or five other salmon packing companies into opposer company, and with this business acquired its trade-mark (Exhibit No. 2), which included 244 Premier labels and 714 Premier boxes. Indeed, applicant does not contest these facts, or that opposer has used "Premier" on canned salmon since May, 1893.

Getz, president of the applicant company, was formerly one of the principal owners of the Kodiak Packing Company; but he says that the Kodiak Packing Company had no such mark as "Premier" (Getz record, page 273). In this he is probably mistaken, since the Kodiak Packing Company registered "Premier" in Great Britain, January 6, 1892. This, together with the "Premier" labels taken over from the Kodiak Packing Company by the opposer company, fortified by the testimony of Fortman, president of the opposer company, makes it very probable that opposer company bought "Premier" from the Kodiak Packing Company in 1893.

There is no record evidence of the use of "Premium" by applicant prior to 1908. Applicant's records, however, were burned in the San Francisco fire of 1906; but there is no showing why some records between 1906 and 1908 have not been produced. Applicant's witnesses, Stimson, Phillips, and Getz, testify from memory that "Premium" was used by the applicant company as far

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back as 1886 or 1887; but such testimony, without any record of sales, after the lapse of 30 years, is liable to be wrong. There even may have been ephemeral use, but not enough to establish trade-mark rights. Furthermore, the Kodiak Company, with which Getz was connected, had used "Premier," and they may have confused the two. An illustration of how they may have confused matters after so long an interval is shown in Getz's testimony. He seemed quite positive (applicant's record, page 273) that the Kodiak Packing Company had never used "Premier" back in 1893, when the record shows that in all probability it had.

Furthermore, as brought out in the Examiner's decision, unlabeled salmon was not generally sold to jobbers until 1898. The applicant company was a jobber, and probably got salmon already labeled from the packer. And, lastly, applicant in its application only alleges use back to 1896.

A careful review of all these circumstances leads to the conclusion that there is no error in the Examiner's decision giving opposer prior use, and, since the marks are too near together, the opposition is sustained, and the decision of the Examiner of Interferences is affirmed.

E. T. Fenwick and L. L. Morrill, both of Washington, D. C., for appellant.

Alex S. Stewart, of Washington, D. C., Chas. E. Townsend, of San Francisco, Cal., and Church & Church, of Washington, D. C., for appellee.

PER CURIAM. The appellant sought the registration of the word "Premium" as a trade-mark for canned salmon. This was opposed by the appellee, who asserted that it was the prior user of the word "Premier" as a mark on the same kind of goods; that its mark was registered in the Patent Office in 1894; that the two words had much the same sound and appearance, and a similar meaning; and that the use of them by both parties upon the goods in question would be likely to produce confusion in trade. The opposition was sustained by the Examiner of Interferences, and his action affirmed on appeal by the Commissioner.

[1, 2] We think the Patent Office was right, and we affirm the Commissioner's decision, for the reasons given in his opinion, as well as upon the authority of Thomas Manufacturing Co. v. Æolian Co., 47 App. D. C. 376, 378, and cases there cited.

Affirmed.

ALASKA PACKERS' ASS'N v. GETZ BROS. & CO.

(Court of Appeals of District of Columbia. Submitted March 12, 1919. Decided May 5, 1919.)

No. 1216, Patent Appeals.

TRADE-MARKS AND TRADE-NAMES ⟹20—REGISTRATION—"OUR FLAG"—PREVIOUS USE OF FLAGS BY OTHERS ON SIMILAR GOODS.

Registration of the mark "Our Flag" for canned salmon and oysters is not precluded because the opposer had previously used several different flags in connection with the sale of the same kind of goods.

Appeal from Commissioner of Patents.

Application by Getz Bros. & Co. to register a trade-mark, opposed by the Alaska Packers' Association. From a decision of the Commis-

sioner of Patents granting the application, the opposing party appeals. Affirmed.

Alex S. Stewart, of Washington, D. C., Chas. E. Townsend, of San Francisco, Cal., and Church & Church, of Washington, D. C., for appellant.

E. T. Fenwick and L. L. Morrill, both of Washington, D. C., for appellee.

PER CURIAM. Alaska Packers' Association opposed the registration by Getz Bros. & Co. of the mark "Our Flag" for canned salmon and canned oysters. It appears that the opposer was organized in 1893 by combining several minor companies. Each of the merged companies had been accustomed to use a flag, bearing a distinguishing letter, as a mark and the opposer after the merger continued to use the flags of its constituent companies to designate different brands of salmon. In Alaska Packers' Association v. Admiralty Trading Co., 43 App. D. C. 198, the Trading Company applied for registration of a flag "having a blue background," etc., with the red monogram "A. T. Co.," to be used as a mark on canned salmon, and was opposed by the Packing Association, appellant herein, on the ground that the use of the flag by the Trading Company would be likely to produce confusion in trade. We ruled that since the Packing Association used several different flags in the sale of different brands of its goods it was hardly in a position "to contend that the mark of the applicant will be likely to cause confusion in trade, since that mark differs from each of its marks as much as they differ from one another." Applying this decision to the case at bar when it was before him, the Commissioner said:

"I do not see why this holding does not apply in the present case. It certainly decided that the Admiralty Trading Company could not be stopped by the Alaska Packers' Association, the present opposer, in its use of a flag as a trade-mark. If, then, the Admiralty Trading Company can use its flags as a trade-mark, it is drawing pretty fine distinctions to say that the present applicant is not entitled to use the words "Our Flag" as its mark. The distinction is entirely too fine to be noticed by the purchasing public."

We believe that the Commissioner was right, and for that reason his decision is affirmed.

Affirmed.

UNITED STATES v. MOYNIHAN.

(Circuit Court of Appeals, Third Circuit. July 7, 1919.)

No. 2460.

1. LARCENY ⟹1—INTERSTATE COMMERCE.
In a prosecution for violating Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604), making it a crime to steal, or unlawfully take, carry away, or conceal, etc., any goods or chattels moving as part of an interstate or foreign shipment, etc., the statute will be construed to apply to the case of a shipment from one point in the state to another point, where the route is in part without the state.

2. LARCENY ⟹55—INTERSTATE COMMERCE—EVIDENCE.
In a prosecution under Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604), denouncing the offense of stealing, or unlawfully taking, carrying away, or concealing, or by fraud or deception obtaining from any railroad car, station house, or platform, depot, steamboat, vessel, or wharf, any goods or chattels moving as an interstate or foreign shipment, etc., where it appeared that a bale of silk was pushed from an express wagon, and it was claimed defendant attempted to place the silk in an automobile, etc., evidence *held* insufficient to show that the silk was stolen from any platform, etc.

In Error to the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

Edward Moynihan was convicted of violating Act Feb. 13, 1913, making it a crime to steal or unlawfully carry away or conceal, or by fraud or deceit obtain from any railroad car, etc., any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment, and he brings error. Reversed and new trial granted.

George E. Cutley and Thomas F. A. Griffin, both of Jersey City, N. J., for plaintiff in error.

Charles F. Lynch, U. S. Atty., and Samuel I. Kessler, Asst. U. S. Atty., both of Newark, N. J.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

BUFFINGTON, Circuit Judge. On September 6, 1918, the firm of John Dunlop's Sons, at their place of business in New York city, delivered to the American Express Company a bale of silk for express carriage to their factory at Spring Valley, New York state. Spring Valley was a station of the Erie Railroad and no other railroad reached it. Having no other possible routing except by the Erie Railroad, and as that road could only be reached at its terminus in Jersey City, the express company routed the package over that road, and took it to its dumping station in New York City, preparatory to sending it by ferry to New Jersey. The proof showed the package was duly accepted and receipted for by the express company, and was delivered at the dumping station on that day. The next testimony as to the package is that on the same evening the attention of a policeman was attracted to an express wagon passing along a Jer-

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

sey City street, and a package, which proved to be this bale of silk, was being pushed by a pair of hands from the tailboard of the wagon. The officer was unable to see any part of the person who pushed it except his hands. This pushing out of the bale was evidently part of a concerted plan, for as it was done an automobile in which were two men approached the express wagon. One of the men jumped out, grasped the bale of silk which was being pushed out, took it in his arms, and tried to put it into the auto. He failed in the effort, dropped the bale, and both he and the man in the auto started to escape, the man who dropped the bale running up the street, and the man in the auto driving away in the car. The latter escaped. The policeman called on a soldier who was standing by to guard the bale, and himself ran after the fleeing thief, firing two shots as he pursued him. Others joined in the chase, and two men finally captured the fugitive and delivered him to the officer. He identified him as the man who had alighted from the automobile and had taken the bale of silk from the tailboard of the express wagon. The man proved to be Edward Moynihan, the defendant. In pursuance of the act of Congress of Feburary 13, 1913, c. 50, 37 Stat. 670 (Comp. St. §§ 8603, 8604), which makes it a crime to "steal or unlawfully take, carry away or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, steamboat, vessel, or wharf, with intent to convert to his own use, any goods or chattels moving as, or which are a part of, or which constitute, an interstate or foreign shipment of freight or express, or shall buy, or receive, or have in his possession any such goods or chattels, knowing the same to have been stolen," Moynihan was indicted for having in possession goods stolen from an interstate shipment, and pleaded not guilty.

Under the charge of the court, four distinct questions of fact, inter alia, were submitted to the jury as essential to be found before the defendant could be convicted: First, "that the bale was an interstate, or part of an interstate, shipment," and in determining that fact the truth of the evidence "that the only route by which shipments may be made by express from New York City, N. Y., to Spring Valley, N. Y., was by the Erie Railroad, which runs from New York City, in the state of New York, over to Jersey City, in the state of New Jersey, and then back from the state of New Jersey into the state of New York," was submitted to the jury's consideration. The second question submitted was whether the bale of silk was stolen from a platform or depot of the American Express Company in New York City. The third question was whether Moynihan had the bale of silk in his possession. The fourth was whether, if Moynihan had the bale in his possession, he knew it was stolen. In view of these exact instructions, we must accept the verdict of guilty as establishing as facts these several essential elements of the crime, if there was evidence before the jury from which they might so find. After sentence of imprisonment, Moynihan sued out this writ, and the first substantial question here involved is whether, under the facts proven and the inferences and findings the jury drew therefrom, Moynihan was guilty of violating the statute in question.

[1] The determination of that question depends on whether the

bale of silk which Moynihan, and those confederating with him, were endeavoring to steal, was included under the broad term, "any goods or chattels moving as, or which are a part of, or which constitute an interstate * * * shipment of * * * express." That the bale of silk constituted "goods and chattels" is a fact; that they were moving as and constituted a shipment of express is equally undeniable; and that the express company could only carry them to destination by taking the bale from its own dock in New York state and delivering it to a railroad's own cars at its terminus in New Jersey is also certain. Such being the unquestioned facts, it follows that the bale of silk was actually moving as an interstate shipment, and was the class of commerce Congress had power to protect from depredation in transit. It follows, therefore, that Moynihan's crime was punishable under the statute, unless we are to hold that, notwithstanding the facts found, this court shall hold that because the bale of silk started from, and was to be delivered to, points in New York state, the bale was thereby so theoretically fixed as an intrastate shipment that its compulsory interstate routings between those intrastate points did not confer an interstate character as it moved over this compulsory interstate route.

To give this act, in its application to the particular case before us, the narrow construction here contended for, would result in such disastrous consequences to the safety of goods moving on many interstate routes over the country between shipping and delivery points situate in the same state as may well cause us to hesitate. Take, for example, a single instance in this circuit; the great traffic, by freight and express, carried over the Baltimore & Ohio System between Philadelphia and Pittsburgh. Both termini are in the state of Pennsylvania, but the routing is through Delaware, Maryland, and West Virginia. In such interstate transit, shipments between these two Pennsylvania terminals, during their movement through these other states, remain in terminal yards, may be transhipped, are handled by many employés, and are, by reason of moving through such other states, in need of that protection which the federal government can alone afford to shipments passing outside the borders of a state. Although the shipment and delivery points of this particular traffic are both in Pennsylvania, yet, by reason of its necessarily interstate movement between those intrastate points, Pennsylvania is unable to protect such commerce, and for such interstate protection the interstate powers of the federal government are absolutely necessary.

Now, over Moynihan's crime, committed, as it was, wholly in New Jersey, New York could have no jurisdiction. And in the country at large there must be a great many like instances of necessarily like interstate routings between intrastate points, in the minds of Congress when this statute was passed. That Congress meant, in the broad terms it used, "goods or chattels moving as, or which are a part of, or which constitute an interstate * * * shipment of freight or express," to exclude from federal jurisdiction and federal interstate protection the vast volume of freight and express thus moving between terminal points in a single state, but by routings through other states, is simply unbelievable.

In reaching the conclusion we have, we deem it proper to say that we have not overlooked the several cases cited to us. Some of them bear on taxation and other subjects than the one single one we have here before us, viz. the protection of goods moving on interstate routes. We have therefore not discussed them, and limit ourselves to saying that, within the meaning of the statute, the views expressed by us find support in the simple, common-sense statement of Judge Holt in United States v. Delaware Co. (C. C.) 152 Fed. 271: "There is a possibility of some discrimination under any theory, but I think that the simplest theory is that as soon as merchandise is carried from one state to another it becomes interstate commerce." We accordingly hold that the statute applied to the facts in this case, so far as the interstate character of the shipment is concerned.

[2] On another phase of the case, however, we think that the proof has failed to establish, with the degree of certainty required in criminal cases, one of the jurisdictional prerequisites of the statute and necessary allegations of the indictment. It will be observed from the before-quoted provision of the statute that, so far as goods constituting an interstate or foreign shipment of freight or express are concerned, it is limited in its application to thefts from certain designated places. In obedience to this requirement, the indictment alleged that the bale of silk in question had been stolen from a platform or depot of the Twenty-Sixth street terminal of the American Express Company in New York City. That the proofs were insufficient to warrant the jury in finding that this allegation of the indictment had been substantiated was appropriately raised at the close of the testimony by motion for a direction of verdict of acquittal, and error assigned on the refusal of the trial court to grant the motion.

Whether the bale of silk had been stolen from the platform in New York, as alleged in the indictment, whether it had been stolen from a platform or depot in Jersey City, or from an express wagon, or whether it was still lawfully in the possession of some employé of the express company when it was pushed from the back of an express company wagon and taken possession of by Moynihan, the evidence does not disclose. The facts and circumstances are quite as susceptible, if, indeed, not more so, of the inference that the bale of silk was being stolen by Moynihan and a confederate on the express wagon as they were of the inference that it had been previously stolen from the platform in New York or some intermediate place. The jury were permitted, therefore, merely to guess as to whether one of the essential elements necessary to justify a conviction had been established, without substantial evidence upon which to base an affirmative answer. We are therefore of opinion that it was error to have declined to direct a verdict of acquittal upon the ground just discussed.

Upon another trial it should not be, we apprehend, difficult for the government to prove, by reference to the express company records, whether or not the bale of silk had lawfully left the platform of the express company in New York City, as alleged in the indictment. If it was not lawfully taken from that platform, that fact would be an

important item of evidence to establish the ultimate fact that it had been stolen from the platform in New York, as alleged in the indictment.

The judgment below is therefore reversed and a new trial granted.

CARBON STEEL CO. v. LEWELLYN, Collector of Internal Revenue. WORTH BROS. CO. v. LEDERER, Collector of Internal Revenue. LEWELLYN, Collector of Internal Revenue, v. FORGED STEEL WHEEL CO. *

(Circuit Court of Appeals, Third Circuit. June 9, 1919.)

Nos. 2438, 2465, 2462.

1. INTERNAL REVENUE ⚷4—STATUTE—CONSTRUCTION—PURPOSE.
In construing Act Sept. 8, 1916, tit. 3, § 301 (Comp. St. § 6336¼b), the court must put himself in the position of Congress when it enacted the law, and from the circumstances and surroundings then existing, and the general purpose then in view, ascertain what was meant to be done.

2. INTERNAL REVENUE ⚷11—TAXATION OF AMMUNITION MANUFACTURERS.
The broad general purpose of Act Sept. 8, 1916, was to include in the field of taxation all such specified articles or parts thereof as were either made for war purposes, or were withdrawn from the general field of commerce and used for the making of war articles.

3. INTERNAL REVENUE ⚷9—"MANUFACTURING SHELLS"—PERSONS SUBJECT TO TAX—"MAKING."
A steel company, contracting to deliver shells to a foreign government, which manufactured in its own plant bars for which shells were made, and turned them over to subcontractors for completion, retaining ownership and control of the work, and afterwards delivering shells under its contract, realizing a net profit, was "manufacturing shells," and therefore subject to the tax imposed by Act Sept. 8, 1916, "making" being manufacturing.

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

4. INTERNAL REVENUE ⚷9—"A PERSON MANUFACTURING SHELLS * * * OR ANY PART OF ANY OF THE ARTICLES MENTIONED."
A company which contracted with another company, having a contract with a foreign government, to sell and deliver high explosive shells, to furnish the steel, and complete six of the initial steps, representing about 40 per cent. of cost of shells, *held* "a person manufacturing * * * shells * * * or any part of any of the articles mentioned," and to be subject to the tax imposed by Act Sept. 8, 1916.

5. INTERNAL REVENUE ⚷9—MANUFACTURING MUNITIONS—"A PERSON MANUFACTURING SHELLS * * * OR ANY PART."
A subcontractor which agreed with contractor, having contract with a foreign government to supply high explosive shells, to furnish to contractor rough steel shell forgings, and which to fulfill its contract made, had made, or bought in the market steel required, *held* "a person manufacturing * * * shells * * * or any part," thereof and to be subject to the tax imposed by Act Sept. 8, 1916.

No. 2438:
In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.
No. 2465:

⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari granted 250 U. S. —, 40 Sup. Ct. 15, 64 L. Ed. —.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.
No. 2462:

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Actions by the Carbon Steel Company against C. G. Lewellyn, Collector of Internal Revenue for the Twenty-Seventh District of Pennsylvania, by the Worth Bros. Company against E. Lederer, Collector of Internal Revenue for the First District of Pennsylvania, and by the Forged Steel Wheel Company against C. G. Lewellyn, Collector of Internal Revenue for the Twenty-Third District of Pennsylvania. Judgment for defendants in the first two cases, and against defendant in the third case (255 Fed. 364), and the Carbon Steel Company, the Worth Bros. Company, and C. G. Lewellyn bring error. Judgment in the first two cases affirmed, and judgment in the third case reversed.

In No. 2438:

H. V. Blaxter, of Pittsburgh, Pa., and F. DeC. Faust, of Washington, D. C., for plaintiff in error.

R. L. Crawford, U. S. Atty., and B. B. McGinnis, Sp. Asst. U. S. Atty., both of Pittsburgh, Pa., and William L. Frierson, of Washington, D. C., for defendant in error.

In No. 2465:

A. H. Wintersteen, of Philadelphia, Pa., for plaintiff in error.

William L. Frierson, of Washington, D. C., for defendant in error.

In No. 2462:

William L. Frierson, of Washington, D. C., for plaintiff in error.

George B. Gordon, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges

BUFFINGTON, Circuit Judge. These cases concern the construction and application of section 301 of title 3 of the act of Congress of September 8, 1916, 39 St. 756, 780 (Comp. St. § 6336¼b), which provides:

"That every person manufacturing * * * projectiles, shells, * * * or (if) any part of any of the articles mentioned in (b), (c), (d), or (e) shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

An examination of the whole act shows it imposes an excise tax on persons manufacturing either certain mentioned war munitions or appliances, or on persons manufacturing any part of any of the said mentioned articles. Therefore two questions naturally arise: First, who shall be deemed manufacturers of the mentioned articles; and, second, who shall be deemed manufacturers of any part of the articles mentioned.

[1] In ascertaining the true construction of the law, and thus carrying out its purpose, this court must necessarily put itself in the position of Congress when it enacted the law, and from the circumstances

and surroundings then existing, and the general purpose then in view, seek to ascertain, from what was meant to be done, how best to construe and apply what was done. When Congress took up this matter the situation was that during the two preceding years of the World War great quantities of war munitions and war accessories had been manufactured in this country, and sold to the Allied governments at high and abnormal prices, owing to the fact they were abnormal products, and the call for them was imperative and instant. It was therefore felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation. That the tax was abnormal and its imposition temporary was evidenced by the provision:

"(2) This section shall cease to be of effect at the end of one year after the termination of the present European war, which shall be evidenced by the proclamation of the President of the United States declaring such war to have ended."

In addition to the feeling that these war supplies manufactured here and sent abroad were proper subjects of temporary taxation, there were other motives which led to the passage of this statute, namely, the pacifist spirit which urged embargo legislation to prevent the exportation of war supplies to belligerents, and the pro-German spirit which asserted the furnishing of war munitions to the Allies was an unneutral act. It will thus be seen that, whatever may have been the impelling motive of individual legislators, the fact is that all united in a common purpose to include the whole subject of war munitions and war accessories in a common class. And since all that were thus sent abroad were manufactured here, indeed the act is expressly directed to "such articles manufactured within the United States," and the profits made from such manufacture were the gauge of the taxation imposed, it is clear that the means Congress used to bring the whole subject-matter of war munitions and war accessories within the sphere of taxation was to take these goods as they were manufactured, and to impose an excise tax on the person who manufactured such articles, or "any part of any of the articles mentioned," and to fix such tax by "the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States." Such being the case, it follows that the pertinent subjects of inquiry where the act is to be applied is, first, to ascertain whether the war munitions or war accessories were articles "manufactured within the United States"; second, if they were so manufactured within the United States, who manufactured such article, and, if so, what were the "net profits actually received or accrued * * * from the sale or disposition of such articles"; third, if they were so manufactured within the United States, who manufactured any part of such article, and, if so, what were the "net profits actually received or accrued * * * from the sale or disposition of such articles."

In thus applying the broad, inclusive terms of the statute, "every person manufacturing * * * shells * * * or any part of any of the articles mentioned," along the lines of inquiry above indicated, it is clear that it must have been in the mind of Congress that complex questions would arise in specific cases, and that these difficulties of spe-

cific application must be solved on some general principles of the act. Turning to the act, we think the broad purpose of Congress is clear to select, as the subject of taxation, war munitions and war appliances, for each of the enumerated articles is such as can be used for war. At the same time it must have been foreseen that many of these articles could also be used for the normal needs of commerce, and those who made them for such normal use were not making abnormal profits. So, also, the articles that in their completed, unitary form were adapted solely for war purposes might have parts which, in and by themselves, could be also used, and would naturally be used, for the normal purposes of commerce. In view of such recognized facts, was it the purpose of Congress to tax the manufacture of such articles, or parts thereof, which, while susceptible of warlike use, were, in point of fact, not so used, but remained in the channels of normal commerce and use? Clearly not; first, because such articles, or parts of articles, when sold in ordinary commerce, did not earn war profits; and, second, because the general purpose of the act not to subject the ordinary normal commerce of the country to this abnormal temporary war tax is manifested even in such warlike agencies as gunpowder, explosives, caps, and the like, by the act providing that such of said articles as are "used for industrial purposes" are excepted.

[2] It would therefore seem that the broad general purpose was to include in the field of taxation all such specified articles or parts thereof as were either made for war purposes or as were withdrawn from the general field of commerce and used for the making of war articles.

Applying these general principles and lines of construction to the act, and in its application to the individual cases arising under it, let us turn to the facts of the three cases here involved, viz.: Carbon Steel Co. v. Lewellyn, Collector; Worth Bros. Co. v. Lederer, Collector; and Lewellyn, Collector, v. Forged Steel Wheel Co.

In the first case it appears the Carbon Steel Company made three substantially similar contracts with the British government, whereby in one contract it agreed "to manufacture 75,000 4.5" shells lyddite, * * * suitably packed for export, and delivered free alongside steamer New York. * * * Inspection will be carried out at contractor's works by an inspector or inspectors appointed by the Secretary of State."

In a second contract the steel company contracted to sell, and the British government to buy, 425,000 shells. The contract provided that in case of—

"the seller being able to manufacture from its present plants more than 425,000 of the said shells before June 30, 1916, the buyer will accept and pay for any such additional shells up to 175,000."

Payment was to be made on-

"invoices and certificates of inspection, executed by an inspector of the buyer, certifying that such shells have been manufactured and have passed all factory inspection and shop tests with respect thereof. * * * It is understood and agreed that the buyer shall have the right of having one or more inspectors at each of the factories where the shells hereby contracted for, and their component parts, are being manufactured, for the purpose of observing

the manufacture thereof, and of testing the same at any time before delivery, and that the seller or its subcontractors shall furnish all facilities required by such inspector for this purpose. The seller at its expense shall furnish all gauges, including master gauges, to be used in connection with the manufacture of the shells hereby contracted for, and their component parts, including all gauges required by the inspectors of the buyer."

The third contract was substantially of like import.

[3] From the contracts it will be seen that the general purpose of the Carbon Steel Company was to make, or have made—and making is manufacturing—and to deliver in the United States shells contemplated by the act.

In carrying out the contracts the shells were made in the United States; they were accepted by the British government, and the contract price was paid therefor by the government to the Steel Company; and, as a result, there accrued to the Steel Company "net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States." Such being the fact, it would seem the case falls within the general scope of the act, unless the Steel Company can show that in the manufacture of the shells it contracted to have manufactured it did not manufacture the shell as a whole or any part thereof. Is such the fact?

Now, what was done in this case was this: The making of a shell consisted of nine operations, as follows:

"(1) Obtaining suitable steel in bar form;
"(2) Cutting or breaking said steel bars to proper length;
"(3) Converting said cut bars or slugs into a hollow shell forging by means of a hydraulic press;
"(4) The turning of said shell upon a lathe to exact dimensions;
"(5) Closing in one end of said forging to form the nose of the shell;
"(6) Drilling out the case of said shell and the inserting of a base plate;
"(7) Threading of the nose of the shell, and the insertion of the nose bushing, and the insertion in said nose bushing of a wooden plug to protect the thread thereof;
"(8) Cutting a groove around the circumference of said shell, and the insertion therein of a copper driving band, and the turning of said band to required dimensions;
"(9) Varnishing, greasing, and crating of the completed shell."

But when all is said and done, it is clear that the basic operation of shell manufacture was making steel of certain characteristics, for all later steps depended on the composition and characteristics of the steel made in this initial step. This foundation step the Steel Company effected in its own plant, and the relative importance of this first step, compared with the remaining eight, is shown by the fact that the bare material and running expenses involved in this step amounted to somewhat over $2,000,000 as compared with some $4,300,000 paid to subcontractors as their expenditures for work, material, and profits in the other eight steps. The steel thus made in the first step was the property of the Steel Company, it remained its property while the subcontractors completed the other eight steps, then was finally transferred by the Steel Company to the British government. Moreover, during such eight steps every operation of these subcontractors on the original steel was followed up by employés of the Steel Company, who checked

the work as it progressed, and by virtue of the contracts to which we have referred it was subjected to the inspection of the British government provided for in the contract. It will thus appear that every step involved in the manufacture of the shell, from the raw product to the finished shell, was either done by the Steel Company itself or by those whom it hired to do some part thereof, and that the original steel base never passed out of the control and direction and ownership of the Carbon Steel Company.

To us it is clear that if the law here involved were a draft or conscription law, and that from its operation there was exempted from draft "every person manufacturing * * * shells * * * or any part of the articles mentioned," that all the workmen of the Steel Company engaged in making shells here involved would fall within said exception, because they—and therefore the company—were manufacturing shells. We therefore conclude that by virtue of the Steel Company's own work in the first step, and by virtue of its effecting and controlling the other eight steps through its subagents, the Steel Company was manufacturing shells, and therefore subject to the tax imposed by this statute. It follows that the judgment of the court below, which was that the Steel Company could not recover from the government the tax it had paid, must be affirmed.

[4] In the case of Worth Bros. Co. v. Lederer, Collector, coming from the Eastern District of Pennsylvania, the pertinent facts are: The Midvale Steel Company and Worth Bros. Company are corelated to each other, in that both companies are owned by the Midvale Steel & Ordnance Company. The Midvale Steel Company contracted with the French government to sell and deliver about 400,000 high explosive shells, to be made under accompanying specifications, and under inspection of the government as the work progressed. The said company was equipped to completely manufacture shells, and in fact did, at its own plants, so completely manufacture large quantities of the shells thus contracted for. Later it contracted with Worth Bros. Company to furnish the steel and complete six of the initial processes of the shell-making, which six steps constituted about 40 per cent. of the cost of the shells. Thereafter the remaining 29 steps of the shell-making process, and which constituted 60 per cent. of the cost, was done by the Midvale Steel Company itself. Did the work thus done by the Worth Bros. Company on these six initial steps bring it within the provisions of the act as being a "person manufacturing * * * shells * * * or any part of any of the articles mentioned."

Turning to the facts, we note that the six stages of shell manufacture done by Worth Bros. Company were, as found by the court below:

"(1) Smelting the ore in the blast furnace into pig iron without, however, running it into the moulds which would form what are commercially known as pigs.

"(2) In its molten state transferring it with a laddle into an open hearth furnace, where it was converted into steel and tapped out of the furnace and conveyed into moulds in the form of ingots.

"(3) Heating the steel ingot to the proper temperature for rolling when it was rolled in the blooming mill into rounds or blooms.

"(4) The rounds or blooms were then cut with a hot saw into billets of sufficient length, diameter, and weight to produce the required shell forging. At

this point the French inspectors inspected each individual billet to determine whether there were defects in the steel, such as piping or blow holes. After acceptance of the billets so tested, they were chipped to determine whether surface defects existed. At this stage the steel billet, which was the material which was to become the shell forging, is cylindrical in shape, of approximately two-thirds of the outside diameter of the shell forging to be produced and approximately one-third of its length.

"(5) The billet was then taken to the forge shop, heated from two to three hours in a continuous furnace, and placed in the container or die of a hydraulic piercing press. It was pierced while hot by a piercing bar entering one end and pushing its way to within sufficient distance of the other end to leave a closed end or base. During this process the metal, being heated to about 2,100 degrees, is viscous, so that the metal is pushed up to the sides of the die or container. The product of this process was a cylindrical forging, hollow, with one closed and one open end.

"(6) The forging was then taken to a horizontal hydraulic bench and drawn while the metal was hot, so as to increase its length, and conform its inside and outside diameter to the required size of the forging ordered by the Midvale Steel Company."

It will, of course, be noted that all six steps were progressive advances toward the chemical constituents, the shape, and the dimension required by, and essential to, the manufacture of shells in compliance with the contract. And while, in the first three steps, the work was of such a character that the product made thereby could, up to the fourth stage, have been diverted to general commercial needs, yet, as noted, the work done in said three steps was actually done with a view to contract needs and shell requirements. With the fourth step the contract shell inspection of the French government began, and in the fifth step the fluid metal was taken, from the possibility of use for general commercial purposes, by a hollow cylindrical forging process which restricted the steel to the field of use for shells. By the sixth step this hollow cylindrical forging was drawn to a length, and to an inside and outside diameter, which enabled the Midvale Steel Company to thereafter carry forward its twenty-nine progressive steps, which, with the six of the Worth Bros. Company, were required by the contract to complete the manufactured shell of the contract. From this it will be seen the Worth Bros. Company selected the material required in the shell; it made the steel which constituted the shell; by work done upon said steel, it segregated it from the general field of commercial use and limited it to use for shell-making. That some of that material, when imperfect, was scrapped and used for other mechanical purposes only tends the more strongly to show that the work done by the Worth Bros. Company, in accordance with the contract, was shell work distinctively; for, even where it failed by not being up to contract requirements, it was so far removed from the general field of commerce that it was sold, not as an ordinary commercial product, but as scrap, and its subsequent use was only such restricted use for minor objects as scrap heaps permit. It would therefore seem clear that the volume of work done by the Worth Bros. Company—40 per cent. of the cost—and the character of that work—segregating the steel from the general field of commercial use and narrowing it to shell use—made its work such as was aptly described by the act as being "manufacturing * * * shells * * * of any kind, loaded or

unloaded, * * * or any part" of a shell. Indeed, to say that when Worth Bros. Company made the steel which constituted the shell, and when by pressing a cavity in the steel they made an outer rim or shell which gave it such shape as committed and restricted it to shell use, to say that Worth Bros. Company, when they were doing this abnormal work and earning abnormal profits thereby, were making those profits neither from manufacturing shells nor manufacturing any part of shells is to lose sight of substance and of the purpose of Congress in using the plain, broad, inclusive words of this statute. The statute shows on its face that Congress contemplated that cases would arise where parts of the articles named would, if not indeed must, be made by joint co-operation. Indeed, the found facts in this case show that not more than two or three plants in the whole country were equipped to make a complete shell. Shell-making in this country had been going on for the two preceding years. It was well known that the shells made for the Allies in the United States were manufactured by the joint work of different plants. In the light of these facts, it would seem that a construction of the act which narrowed its application to the case of a plant that did the entire work would defeat the whole purpose of Congress, which presumably was to subject the profits of all engaged in the manufacture of shells or any part thereof to this excise tax. Such being the case, we hold the tax imposed on Worth Bros. Company was justly laid, and the judgment of the court below, which held the company could not recover the tax from the government, was right, and should be affirmed.

[5] We next turn to the case of the Forged Steel Wheel Company against Lewellyn, collector. From the proofs it appears the British government made contracts with certain persons whereby the latter agreed to supply it with high explosive shells in compliance with the specifications, requirement, and inspection of the said government. To fulfill such shell contract the contractor made subcontracts with the Forged Steel Wheel Company, by which the latter agreed to manufacture and furnish to said contractor rough steel shell forgings of the character provided in the contract, as to chemical constituents, tensile strength, size, shape, etc. To fulfill its contract, the Forged Steel Wheel Company either made, had made, or bought in the market the grade of steel required. This steel was of a common commercial type known as rounds. These rounds it nicked and broke into 18-inch lengths, which it then heated and put through two forging processes, by the first of which a hole was pierced from one end of the round to within two inches of the other; by the second, the round was lengthened by drawing it through three successive rings of a hydraulic press. The output of the Forged Steel Wheel Company's work was a hollow steel body or shell form, of suitable composition, shape, and length, from which to make, to the British government standards, the high explosive projectiles contracted for. The weight of such shell forms was about 170 pounds. To make this shell form suitable for use as a shell, the contractor to whom the Forged Steel Wheel Company then delivered it was required to dress, bore, and machine it down to 77 pounds. This required some 27 distinct and separate processes.

Such being the facts, did the work of the Forged Steel Wheel Company noted above make it "a person manufacturing * * * shells * * * or any part of" a shell? The court below held it did not, and such holding constitutes the question involved in this case.

In reaching that conclusion the lower court construed the act as though it read "a person manufacturing * * * shells * * * or any *component, completed,* part of" a shell, in that regard saying:

"I am therefore of opinion that Congress meant to levy the tax only upon those persons who were manufacturing and selling at a profit the *completed* things specifically designated in (b), (c), (d), and (e), and on those persons who were manufacturing and selling at a profit any *completed* part of any of those designated things. That one is not a manufacturer of a part unless the manufacture of that part is carried forward by him to the same point of completion to which it would have been necessary to carry it if he had been the manufacturer of the completed thing."

The court was also influenced, first, by the fact that, as stated in its opinion,

"The completed shell is a composite structure, consisting of six different parts: First, the shell body in one piece, cylindrical in shape, with a pointed head to increase its speed in flight and its power of penetration. Second, a copper driving band near the base of the shell body, projecting slightly so as to engage the rifling of the gun. This gives the shell its rotary motion, necessary for precision in flight. Third, a base plate inserted into the bed of the shell to prevent premature discharge. Fourth, a nose bushing of two parts, one of which screws into the shell body and the other into the fuse. Fifth, the fuse, either time or percussion, a highly complicated piece of mechanism screwed into the nose bushing. Sixth, the high explosive charge. These several parts or pieces of mechanism, each delicately constructed, and designed not only individually, but with reference to each other, when assembled together, constitute a high explosive shell."

Starting with the unquestioned premise that a completed shell was made up of assembling six separate and complete parts, the court assumed that the purpose of Congress was not to tax any one but (a) the manufacturer of a completed shell, or (b) the maker of a completed part of a shell; and that because the shell form the Forged Steel Wheel Company made was not a completed part of a shell, that it was therefore not subject to the excise tax imposed by the statute.

Now, it is manifest that, standing alone, the statute neither expresses nor implies any warrant or implication for limiting the broad, inclusive, generic words "any part" to the restricted, specific, qualified term "any completed part." It follows, therefore, that ground for inferring such intent in the mind of Congress must arise from something apart from the language of the act itself. Such intent the court below found in certain decisions of the federal courts involving tariff laws which exempted from duty "manufactured" articles. And these decisions, holding what were "manufactured" articles in tariff legislation, the court below held Congress must have had in mind in passing this excise law, saying:

"We must assume that Congress well knew the distinction between a *completely* manufactured thing, or part of a thing, and a *partial* manufacture of that thing. Many revenue acts have levied a tax upon manufactured articles or parts thereof, and others have levied a tax upon a partial manufacture."

On the other hand, in the Worth Bros. Company Case, decided above, the court below held these tariff decisions did not affect the construction of this statute, saying:

"The rule has been applied in the classification of articles of merchandise imported and subject to customs duties or upon which drawback is allowed. There are decisions as to what constitutes a manufactured article, what constitutes a part of a manufactured article, what constitutes a partially manufactured article, what constitutes a manufacture of certain material, and what constitutes a wholly manufactured article, dependent upon the terms of the law under which a tax is laid upon the article itself, or under which a drawback or other privilege is allowed. I cannot perceive that these cases have any bearing upon the question arising in this case, unless the terms of the act imply that the tax is to be imposed only upon the business of manufacturing to completion shells or parts of shells, and there is no such limitation in its terms. The clear purpose of the act is through taxation of the business or occupation of manufacturing munitions of war to reach the profits of all those engaged in such manufacture, whether engaged in manufacturing to completion or engaged in any part of such manufacturing."

We are of opinion the latter court was right in so regarding these customs decisions, for when the objects which Congress had in view in framing the customs acts and this excise law are considered it will be seen they were wholly different. In customs law the primary object of Congress in their passage was to protect domestic against foreign labor, and to effectuate this object, the customs duties were so imposed that where all the work necessary to be done upon the imported article to fit it for use in the United States had been done abroad, such article, or the part so completed and fitted for use, was to carry out that primary intent, held to be a manufactured article, or a manufactured part, and therefore subjected to the duty. On the other hand, if work upon the imported article, or imported part, before it was fit for use, remained to be done in this country, such article or part was held not to be a manufactured article within the scope of the law, and therefore not subject to the tariff duty. The necessity of bearing this primary purpose in view in construing customs acts was set forth in Tide Water Oil Co. v. United States, 171 U. S. 216, 18 Sup. Ct. 839, 43 L. Ed. 139, where the Supreme Court, referring to a customs act, said:

"The object of the section was evidently not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries. In determining whether the articles in question were wholly manufactured in the United States, this object should be borne steadily in mind."

Indeed, it is, on the one hand, this presence of work already done which has fitted an object for use, or it is, on the other hand, a residue of work necessary to fit the object for use, which brings the article within or without the description of the manufactured article of the tariff law. This is well summarized in Tide Water Oil Co. v. United States, 171 U. S. 216, 18 Sup. Ct. 839, 43 L. Ed. 139, where it is said:

"Raw materials may be, and often are, subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings, and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for which the article so manufactured receives a different name. The material of which each manufacture is formed, and to which reference is made in section 3019, is not necessarily the original raw material—in this case the tree or log—but the product of a prior manufacture; the finished product of one manufacture thus becoming material of the next in rank."

From these decisions it will be seen that these tariff laws deal with manufactured articles, from the standpoint of protecting domestic labor, and the imposition of import duties is an incident in effectuating that main purpose.

But in the excise law in question Congress is dealing with the imposing of taxes as the main object, and with the work done as a mere incident to aid in determining the tax. In that aspect the quantum of the work done is immaterial.

Indeed, from a study of customs decisions, it will be seen that, from the basic standpoint of protecting domestic labor, the imposition of import duties is a mere incident or means to effectuating such main purpose, and the term "manufactured article" must therefore be construed and applied with such purpose in view. It follows, therefore, that in such case the quantum of labor done, or left to be done, is all-important in the practical administration of customs laws. On the other hand, the whole purpose of excise law is to produce revenue, and it is the fact of manufacture, and not the quantum of labor, that is the determining factor. Indeed, the object of the statute, viz. the raising of revenue, may be reached where a minimum of labor is used in the manufacturing taxed; for, as the net profit is the basis of taxation, it follows that the smaller the relative amount expended in physical labor in a manufacturing operation the greater may be the relative net profit which determines the tax. Moreover, it will be apparent that a manufacturing operation in which much labor has been used may not involve any net profit, while another, involving much less labor, may result in taxable net profits. It will therefore be apparent that, in an excise tax on manufacturing measured by net profits, the crucial question is not the quantum of the manufacture measured by steps, but the fact of manufacture resulting in profits. Gauging the operations of the Forged Steel Wheel Company by this standard, it would seem clear that in doing the basic shell work it did that company was, in the broad and general sense of fulfilling this contract, a "person manufacturing * * * shells, * * *" and, by virtue of the particular manufacturing stage it completed in the making of such shells, the company fell within the class of a "person manufacturing * * * any part of any of the articles mentioned." Such being the case, the excise tax was lawfully laid on the "net profits actually received or accrued"

for said year from the sale or disposition of such articles manufactured within the United States. It follows, therefore, the judgment recovered by it below was erroneous, and must be reversed.

LIPMAN, WOLFE & CO. v. PHŒNIX ASSUR. CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1919.)

No. 3262.

1. Money Received ⟹1—Grounds of Action.
   Assumpsit for money had and received will lie in general, whenever defendant has received money which is the property of plaintiff, and which the defendant is obliged by natural justice and equity to return; it being unnecessary that there be an actual contractual relation.
2. Payment ⟹82(1)—Recovery—Voluntary Payments.
   One cannot recover money voluntarily paid with full knowledge of all the facts, although no obligation existed; but money may be recovered where paid under circumstances of fraud, misrepresentation, and threats amounting to duress, which prevents the free exercise of the will, or where it is paid on a wrongful demand to save the party paying from some great or irreparable mischief or damage, from which he could not otherwise be saved.
3. Payment ⟹89(3)—Recovery—Complaint—Sufficiency.
   Complaint seeking to recover from an insurance company an amount which the inexperienced officers of plaintiff corporation repaid to the company, when they were threatened by a committee of the leading insurers with publication of charges that the insurance money had been fraudulently obtained, etc., *held* to state a cause of action.
4. Limitation of Actions ⟹28(1)—Running of Statute—What Statute Governs.
   An action to recover from an insurance company moneys repaid to it by plaintiff, because of threats of a committee of leading insurers that they would publish charges that the money had been fraudulently obtained, falls within the six-year period of limitation established by L. O. L. § 6, for actions upon contracts or liability express or implied, and not within the two-year period prescribed by section 8 for injuries not arising on contract.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Action by Lipman, Wolfe & Co., a corporation, against the Phœnix Assurance Company, Limited. From a judgment dismissing the complaint, plaintiff brings error. Reversed and remanded.

The plaintiff in error alleged in its complaint that it was engaged in business conducting a department store at Portland, Or., and that on March 3, 1903, it suffered loss from a fire in adjacent premises, and upon the adjustment of the loss the defendant in error paid to the plaintiff in error on its insurance policy on the stock of merchandise the sum of $5,117.69; that thereafter, on March 24, 1910, owing to threats made by a committee known as the Gallegos Committee, acting on behalf of the defendant in error and some 40 other insurance companies, to publish charges that said insurance money had been fraudulently obtained, that there was no real or actual injury to said stock of merchandise, that the plaintiffs in error dishonestly and fraudulently procured an adjustment and appraisal of loss when there was no loss, and other similar charges and threats of suit to recover said money and to publish

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

to the world the alleged fraudulent acts of the plaintiff in error, and by the concerted action of all said insurance companies to expose to public opprobrium the officers of the plaintiff in error, the latter, in order to save its credit and the good name of the former owners of the business and its own, and to avoid the threatened injury to its future prosperity and success, was induced and compelled to repay to the defendant in error the said sum of money so received in adjustment of said loss; that all of said charges so made against the plaintiff in error and its officers were false and fraudulent; that to further oppress the plaintiff in error, and compel it to comply with said demands, the Gallegos Committee unjustly and without cause, and with intent to impair the insurance and financial credit of plaintiff in error, caused to be canceled policies of insurance on the property of the plaintiff in error amounting to more than $100,000; that the business of the plaintiff in error was founded in 1880 by Solomon Lipman and Adolphe Wolfe; that on July 7, 1909, Solomon Lipman died, leaving surviving him his widow and two sons, W. F. and I. N. Lipman, both young, who succeeded to his interest in the corporation; that, at the time when the defendant in error obtained from the plaintiff in error the money which is sued for, Adolphe Wolfe was absent from the state, caring for his sick wife; that W. F. and I. N. Lipman were in a state of nervous tension for the success of the business left them by their father; that all executive matters in said business had theretofore been handled by their father and Adolphe Wolfe, and that their business judgment was palsied, their sense of business proportion paralyzed, and their faculties for caring for the interests of the plaintiff in error were entirely overpowered, and they were then arranging for the construction of a large ten-story department store building, all of which circumstances were taken advantage of by the said Gallegos Committee, at a time when the said W. F. and I. N. Lipman were mentally confused and incapable of getting any full comprehension of the circumstances and deprived of free and voluntary will in the matter; that the defendant in error, in so obtaining said money by duress and threats, acted through the Gallegos Committee, which represented, not only the defendant in error, but numerous other insurance companies which had policies of insurance, and which likewise paid the plaintiff in error losses for the injuries resulting from the fire; that in the year 1910, in another suit pending in a state court of the state of Oregon, the said false, untrue, and unfounded allegations against the plaintiff in error were made public. And the complaint alleged that the defendant in error is indebted to the plaintiff in error in the said sum of $5,-117.69, as for money had and received, and judgment was demanded for said sum and interest thereon from the date of the payment thereof. A demurrer was interposed to the complaint on the grounds (1) that it does not contain facts sufficient to constitute a cause of action; (2) that the action was not commenced within the time limited by the Code of the state of Oregon; and (3) that the plaintiff had been guilty of laches in commencing the action. The demurrer was sustained on the second ground, the court ruling that the action was barred by section 8, Lord's Oregon Laws. To review the judgment thereupon entered, dismissing the complaint, the cause is brought before us by writ of error.

William C. Bristol, of Portland, Or. (F. E. Grigsby and Ernest W. Hardy, both of Portland, Or., of counsel), for plaintiff in error.

W. F. Magill, of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The first question which arises is whether the complaint states a cause of action. In Cary v. Curtis, 3 How. 236, 247 (11 L. Ed. 576), the court said:

"The action of assumpsit for money had and received, it is said by Lord Mansfield, Burr. 1012, Moses v. MacFarlen, will lie in general whenever the

defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in Stratton v. Rastall, 2 T. R. 370, 'that this action has been of late years extended on the principle of its being considered like a bill in equity, and therefore, in order to recover money in this form of action, the party must show that he has equity and conscience on his side, and could recover in a court of equity.' These are the general grounds of the action as given from high authority."

In Bither v. Packard, 115 Me. 306, 312, 98 Atl. 929, 932, the court said:

"It is elementary law that, when one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such cases an action for money had and received may be maintained. This form of action is comprehensive in its reach and scope, and though the form of proceeding is in law it is equitable in spirit and purpose and the substantial justice which it promotes renders it favored by the courts. It lies for money paid under protest, or obtained through fraud, duress, extortion, imposition, or any other taking of undue advantage of the plaintiff's situation, or otherwise involuntarily and wrongfully paid. Where the defendant is proved to have in his hands the money of the plaintiff which, ex æquo et bono, he ought to refund, the law conclusively presumes that he has promised to do so"—citing Mayo v. Purington, 113 Me. 452, 455, 94 Atl. 935.

To the same effect are Gaines v. Miller, 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 466; Taylor v. Currey, 192 Ill. App. 502; Early v. Atchison, T. & S. F. Ry. Co., 167 Mo. App. 252, 149 S. W. 1170; Cullen v. Sea Board Air Line, 63 Fla. 122, 58 South. 182; Knight v. Forbes, 19 Ga. App. 320, 91 S. E. 445, in which the court said that such an action needs for its support no actual contractual relation, for the law will imply a quasi contractual relation to uphold it whenever the circumstances so require.

[2, 3] One cannot recover money voluntarily paid with a full knowledge of all the facts, although no obligation to pay existed, but money may be recovered where paid under circumstances of fraud, misrepresentation, and threats amounting to a duress which prevents the free exercise of the will, or where it is paid on a wrongful demand, to save the party paying from some great or irreparable mischief or damage from which he could not otherwise be saved, and while money paid under apprehension, or induced by threats of suits or actions, is not in general paid under such duress as to make the payment compulsory, such threats may, in connection with other circumstances, such as the inexperience of the person threatened, or the peril to which his business is exposed, if the threats are carried out, constitute such duress that money paid under the influence thereof may be recovered as for money had and received. Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Lehigh Coal & Nav. Co. v. Brown, 100 Pa. 338; Guetzkow Bros. Co. v. Breese, 96 Wis. 591, 72 N. W. 45, 65 Am. St. Rep. 83; Vyne v. Glenn, 41 Mich. 112, 1 N. W. 997; Baldwin v. Hutchison, 8 Ind. App. 454, 35 N. E. 711; Brown v. Worthington, 162 Mo. App. 508, 142 S. W. 1082; Rees v. Schmits, 164 Ill. App. 251; Sartwell v. Horton, 28 Vt. 370; Parmentier v. Pater, 13 Or. 121, 9 Pac. 59.

Here the complaint alleges the inexperience of the officers of the plaintiff, their mental disturbance in view of the threats and fraudulent representations, the large pecuniary interest involved in their business, and the powerful combination arrayed against them, represented by the Gallegos Committee, acting for and on behalf of more than 40 insurance companies, practically the whole insurance world, with power to destroy the credit of the plaintiff in error, and to prevent it from obtaining insurance upon its property. The combination against the plaintiff in error which is set forth in the complaint is not unlike that which was condemned in Carew v. Rutherford, supra, and we think the facts alleged are sufficient to constitute a cause of action for money had and received.

[4] The second question here is which of the two following provisions of the statute of limitations of Oregon applies to the cause of action,

"Sec. 6. Within six years: An action upon a contract or liability express or implied * * *"

"Sec. 8. Within two years: An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not herein especially enumerated."

The action for money had and received has always been regarded as an action in assumpsit, based upon a promise to repay which the law implies, where one has possession of money which in equity and good conscience belongs to another. "Having money that rightfully belongs to another, creates a debt; and whenever a debt exists without any express promise to pay, the law implies a promise, and the action always sounds in contract." Byxbie v. Wood, 24 N. Y. 607, 610. In that case it was held, that where one person fraudulently procures money of another, the law will imply a promise to repay it, and the injured party need not sue in tort, but may sue in assumpsit for money had and received. In Brewer v. Dyer, 7 Cush. (Mass.) 337, 340, the court said:

"The law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded."

That there is in such a case an implied promise to pay is generally recognized in the authorities, and it is so held in the state of Oregon. First National Bank v. Hovey, 34 Or. 162, 55 Pac. 535; Hornefius v. Wilkinson, 51 Or. 45, 93 Pac. 474. In 1 Wood on Limitations (4th Ed.) page 95, it is said:

"Without multiplying instances, generally assumpsit lies for the breach of any simple contract, and in all cases where a contract or promise exists by express act of the parties, or where the circumstances are such that the law will imply a promise; and it may be said that under this head a recovery may be had for tortious acts properly embraced under the head of actions ex delicto in all those cases where, from the circumstances of the case, the law will imply a promise on the part of the wrongdoer to reimburse the party injured by his act."

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"In cases where a tort may be waived, and assumpsit brought therefor, the latter action will lie, even though an action for the tort is barred by the statute."

Among the cases cited are Ivey's Adm'r v. Owens, 28 Ala. 641; Lamb v. Clark, 5 Pick. (Mass.) 193; Kirkman v. Philips' Heirs, 7 Heisk. (Tenn.) 222; Miller v. Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264; Whitaker v. Poston, 120 Tenn. 207, 110 S. W. 1019; Fanson v. Linsley, 20 Kan. 235; Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782.

We may assume that the statute of limitations of Oregon was framed with a view to existing recognized forms of actions, and that when a limitation of six years was placed upon the commencement of actions "on a contract or liability express or implied," it was intended to apply the same to all actions in assumpsit including that for money had and received. Such seems to have been the construction placed upon similar statutes of limitation in other states. In Trower v. City and County of San Francisco, 157 Cal. 762, 109 Pac. 617, the court said:

"The action is one to recover moneys unjustly exacted and retained by defendant. It is assumpsit for money had and received, and therefore an action 'upon a contract, obligation or liability not founded upon an instrument in writing.'"

In Kentucky it was held that an action for money had and received was governed by the statute of limitations applicable to cases "arising on a contract express or implied." Clark v. Logan County, 138 Ky. 676, 128 S. W. 1079. In Missouri, the statute barred after five years all actions on "contracts, obligations or liabilities, express or implied." It was held that the action for money had and received was governed thereby. Garrett v. Conklin, 52 Mo. App. 654. In Leather Manuf. Bank v. Merchants' Bank, 128 U. S. 26, 9 Sup. Ct. 3, 32 L. Ed. 342, the action was brought to recover money paid on a forged check. The court held that under the New York statute the action was one on a "contract, obligation or liability, express or implied." The action in the present case, having been commenced within six years, we think the cause of action was not barred.

The judgment is reversed, and the cause is remanded to the court below for further proceedings.

THE DANIEL McALLISTER.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

Nos. 134, 135.

1. COLLISION ⚷71(2)—TOW LEAVING SLIP—NEGLIGENT TOWAGE.
A tug, which negligently attempted to take a coal barge out of a slip in East River on a strong flood tide on a hawser instead of alongside, *held* solely in fault for a collision between her and vessels lying at the end of the pier and resulting collisions between such vessels, which were broken from their moorings, and others.

2. COLLISION ⚷71(3)—CONTRIBUTORY FAULT—VESSELS TYING AT END OF PIER.
The fact that barges were tied up at the end of a pier in violation of the statute *held* not a contributory cause of a collision between them and a barge being towed from an adjoining slip, where there was ample room for the tow to pass safely if properly navigated.

3. NEGLIGENCE ⚷62(1)—PROXIMATE CAUSE OF INJURY—INTERVENING ACT.
If there is an unbroken connection between the act and the injury, the act causes the injury, and an intervening act is not the proximate cause of the injury unless it is efficient to break the causal connection.

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

Suits in admiralty for collision by John D. Lohman against the steamtug Daniel McAllister with others impleaded, and by Charles H. Castle against the steamtug Daniel McAllister and others. Decree for libelants, and McAllister Bros., claimants, appeal. Affirmed.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellants.

Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellee Lohman.

Macklin, Brown & Purdy, of New York City (William F. Purdy, of New York City, of counsel), for appellee The Kaaterskill No. 2.

Harrington, Bigham & Englar, of New York City (George E. Hargrave and T. Catesby Jones, both of New York City, of counsel), for appellees Clayton and New York Cent. R. Co.

Charles M. Sheafe, Jr., of New York City, for appellee New York, N. H. & H. R. Co.

Herbert Green, of New York City, for appellee Erie R. Co.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] On February 1, 1916, at about 4 p. m., the steamtug Daniel McAllister undertook to shift the coal barge Ruth C. Lohman from the slip between piers 31 and 32, East River, intending to get her a berth on the northerly side of Pier 32. Here, she was to discharge her cargo of coal, nearly 500 ton. The barge was lying, stern out, on the northerly side of Pier 31, about halfway up the slip, at the bulkhead. After making fast on a bridle hawser some 50 to 75 feet in length, the tug towed the barge, stern

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

first. The weather was fair and clear and with little wind. There was a strong flood tide. Before making fast, the captain of the McAllister expressed doubt, to an officer of the coal company near by, whether it was safe to take the barge out of the slip in view of the tide. He, however, proceeded to do so in the manner described. The barge was about 97.4 feet in length and 21 feet in width. The McAllister was about 24 feet wide. The space between the southerly end of the rack and the northerly corner of Pier 31 was about 106 feet, and this, with the exercise of care in navigation, particularly if the barge was tied alongside, would permit proper control of the movements and insure a safe passage. The tugboat went straight out, instead of pulling down against the tide. This made her tow shear toward some covered barges which were moored at the end of Pier 32. The McAllister did not head into the tide as soon as she should have done in order to offset it, and, when she attempted it, she did not have power enough to overcome the tide. The tide struck the Lohman as soon as she passed beyond the pier end, and, when she was about one-third part of the slip, her stern swung upstream coming in collision with the barge Clayton. At the end of Pier 32 and nearest to the pier, in the order named, were the Erie barge No. 223, Lehigh Valley barge No. 27, the Clayton, and the Kaaterskill. They were overlapping both the pier end and the rack, having been shifted some 15 feet by the lighter Graylock from a position right at the end of Pier 32, to a position in which they overlapped the rack so that they were 50 feet north of its slanting wing. The collision was of sufficient force to cause damage to the Clayton and drive the four barges adrift.

The flotilla in turn struck three or four barges at the end of Pier 33, breaking their fasts. The drifting flotilla carried away other boats at Pier 36. Alarms were blown by the McAllister, and the transfer tug No. 9 and transfer tug No. 7 of the New York, New Haven & Hartford Railroad Company, which were lying at Piers 38 and 40, came to the rescue. The No. 7 picked up some drifting boats. The No. 9 undertook to land the rest of the flotilla, and, while so doing, one of the flotilla struck the Haines then lying at Pier 41. The Haines was damaged and is the subject of a companion suit to be considered hereafter in this opinion. While this drifting took place, the Lohman was fast to the McAllister by the starboard line, as the line of the barge's port line parted shortly before the boats came to Pier 41. The Clayton struck and damaged the Haines which was lying outside of the end of the car float on the northerly side of Pier 41; the transfer No. 7 assisted the McAllister in towing the Lohman to Pier 32 for the reason, as stated by the McAllister's captain, she was not strong enough. In landing her tow at this, her original destination, the McAllister broke another part of the Lohman's rail by a collision with the stern of the covered barge. It was while the No. 9 was getting these boats in shore that the Clayton came in contact with the side of the Haines and the Lohman got under the bow of the Kaaterskill or the Clayton. There are divergent views as to which boat actually struck the Haines, but this is not important. It was while in this position that the McAllister swung alongside the Lohman and attempted to

push her ashore against the southeasterly corner of Pier 41 and across the forward corner of the Haines which, at that time, was partly down across the end of Pier 41. It is claimed, however, that the transfer No. 9, which was assisting in this maneuver and trying to avoid the drifting of the boats, was negligent in the manner in which she attempted to land the boats, allowing them to bump against the side of the Haines. The McAllister interpleaded the Lehigh Valley barge No. 27, the Erie barge No. 223, the New York Central barge Clayton, and the barge Kaaterskill No. 2. The Kaaterskill No. 2 denies any responsibility on her own part and alleges the fault to be that of the McAllister or the New York Central, which was the charterer of the barge Kaaterskill at the time and had moored her at the place named by one of its own tugs. The New York Central, on the other hand, denies that it was in charge of the barge Kaaterskill No. 2, and denies that it was at fault for the collision because of the presence of either the Kaaterskill No. 2 or the Clayton at the time of the disaster. The Erie Railroad denies fault, and alleges that the four boats off the end of the pier had but shortly been in that position, having been placed there by the Graylock. The McAllister denies fault on its part and contends that the collision was caused by the position of the barges at the end of the pier which, it says, was in violation of section 879 of the City Charter (Laws N. Y. 1901, c. 466). This statute forbids boats lying across pier ends in the North and East Rivers "except at their own risk of injury from vessels entering or leaving any adjacent dock or pier." It is a fault under the maritime law, irrespective of the section of the charter, to unnecessarily interfere with vessels entering or leaving slips. Westernland (D. C.) 24 Fed. 703.

[2] Responsibility for damage by barges thus found at the end of piers depends upon circumstances, but its distance in or out, as governed by the boats lying between it and the end of the pier, cannot determine liability. To be sure, each boat, beginning with the one on the outside, is responsible for the remaining ones moored off the pier end to the extent as the position in which it is moored violates the section of the charter. The Lohman struck the Clayton, the third boat out, and therefore the two inner boats, the Lehigh Valley barge No. 27 and the Erie barge No. 223, were not in such a position as to interfere with the movements of the Lohman in attempting to come out of the slip. They should therefore not be held at fault. Their presence simply made part of the physical situation which required the mooring of the Clayton and the Kaaterskill in a position further out at the pier's end. But the position of the Clayton and the Kaaterskill was not the proximate or producing cause of the collision. It sufficiently appears that the McAllister was negligent in attempting to leave the slip in a flood tide, having the barge made fast on a bridle hawser instead of alongside. The captain of the McAllister knew, or should have known, that he could not successfully buck the tide with the Lohman. He says he intended merely to drop back so as to drop her in at the pier to which she was destined. He thought he would swing clear of the barges that he knew were lying off the end of

Pier 32. He must be condemned for attempting to undertake a maneuver, such as this, in too small a space and in failing to prepare to meet the force of the tide and direct his navigation accordingly.

As was to be expected, the Lohman and the McAllister drifted back immediately as they rounded Pier 31 and thus diminished the space in which the Lohman could swing out into the river, even though the space was wide enough to allow her to make the turn if the tide had less force. Such a collision as this record discloses, indicates an absence of good seamanship and due performance by the tug of its duty to the tow. Such a result may be a safe criterion by which to judge of the character of the act which caused it. Steamer Webb, 81 U. S. (14 Wall.) 406, 20 L. Ed. 774. To make the attempt when the captain knew he had not sufficient power to keep or regain control of his tow is, of itself, a fault, for the tug impliedly represents herself as having sufficient power for the services she undertakes. Chas. B. Sandford, 204 Fed. 77, 122 C. C. A. 391. If the tide was too strong, the McAllister should have waited for a slack water. The Margaret, 94 U. S. 494, 24 L. Ed. 146; The Potomac (D. C.) 147 Fed. 293.

The fact that the Clayton and the Kaaterskill were in a position which, to some extent, may have interfered with the carrying out of the maneuver attempted by the McAllister and reduced the room to navigate as intended, cannot fix liability upon either boat. The occurrence was in the daytime. The tide was known; the danger was observed by the captain of the McAllister. There was no sudden emergency, such as a storm or other vessels navigating to reduce the space. The presence of the barges at the pier's end did not give the McAllister the right to dispense with care. The Cincinnati (D. C.) 95 Fed. 304. It has been recently decreed by this court that a vessel is not absolutely prevented from lying at the pier end and therefore prevented from recovering from manifest tort-feasors, and, further, that a violation of the statute is sufficient evidence and sufficient reason for imputed fault to the violator, and the consequence of such violation is that the violator cannot recover for injuries inflicted by vessels entering or leaving any adjacent pier. The New York Central No. 18, 257 Fed. 405, 168 C. C. A. 445, decided Feb., 1919. There Judge Hough said:

> "A departure therefrom [the statute], 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. Undoubtedly, such violation * * * can be invoked only by vessels of the class enumerated in 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."

We think that the presence of the barges at the end of the piers was not a contributory cause of the collision, and that the proximate and producing cause was the negligent navigation of the McAllister, and she is held solely at fault for the damage done the Lohman by reason of this collision. We therefore conclude that the McAllister was to blame for the collision and causing the barges to go adrift.

[3] In the second action in which the owner of the Haines seeks

to recover for damages done to that vessel, we are of the opinion that the McAllister is solely at fault. Transfer No. 9 came to the rescue and was unable to avoid the collision with the Haines because of the drift of the tide. The damage was done by the boat striking the Haines' port side and driving her starboard side against a car float. Whether that boat was the Lohman or the Kaaterskill is in dispute. The Haines was damaged by this flotilla striking against her, and it makes little difference which boat it was. There was nothing which was done by the transfer No. 9 which changed the general direction of the flotilla in its drift toward the pier where the Haines was moored. The McAllister set in motion a train of events involving this series of collisions which, with the added impetus due to the tide, must be charged against the McAllister. Her negligent operation was the proximate cause which set the other causes in motion. If there is an unbroken connection between the act and the injury, the act causes the injury and the intervening act is not the proximate cause of injury unless it is efficient to break the causal connection. Muller v. Firemen's Ins. Co., 246 Fed. 759, 159 C. C. A. 61.

Decree affirmed.

THE NEW YORK CENTRAL NO. 28.

(Circuit Court of Appeals, Second Circuit. March 24, 1919.)

No. 153.

1. COLLISION ⚿50—INLAND RULES—OVERTAKING VESSEL—"FINALLY PAST AND CLEAR."

An overtaking vessel, which had passed the one overtaken half or three-quarters of a mile before changing course, and was then 300 to 500 feet ahead, was "finally past and clear," within article 24 of the Inland Rules (Comp. St. § 7898), and relieved of the burden of keeping out of the way.

2. COLLISION ⚿102—OVERTAKING VESSELS—NEGLIGENT NAVIGATION.

A collision between a ferryboat and steam lighter, both passing down Hudson river, *held* due to faults of both vessels; the ferryboat, which was ahead, for unnecessarily changing her course across that of the lighter, and the latter for proceeding at full speed, without paying any attention to the passing signals and positions of the vessels ahead.

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

Suit in admiralty for collision by the Erie Railroad Company, owner of the ferryboat Chautauqua, against the steam lighter New York Central No. 28; the New York Central Railroad Company, claimant. Decree for respondent, and libelant appeals. Modified.

Park & Mattison, of New York City (Samuel Park, 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 appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

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

ROGERS, Circuit Judge. This suit is brought to recover damages occasioned by a collision which occurred on January 27, 1917, in the Hudson river between the ferryboat Chautauqua, owned by libelant, and the steam lighter New York Central No. 28, owned by the New York Central Railroad Company. The District Judge entered a decree dismissing the libel, on the ground that the Chautauqua was solely in fault.

It appears that the Chautauqua left Weehawken Cove at Seventeenth street, Hoboken, bound for her slip at the foot of Chambers street, New York. The tide was a strong ebb, the weather clear, and it was about 7 a. m. when the Chautauqua started on the trip. On her way down the river, and at about Pier 28 she overtook and passed lighter No. 28 going down on her port side on a parallel course. The Chautauqua was proceeding through the water faster than No. 28, which was making about 8 miles per hour. The Chautauqua passed the No. 28 on the Chautauqua's port side. When the Chautauqua was about 1,200 feet from her slip at Chambers street, the New York Central steam lighter No. 29, which was proceeding down the river ahead of the No. 28 and upon the port bow of the Chautauqua, without any signal, ported her wheel and changed her course across the bow of the Chautauqua, and between the Chautauqua and the steam tug Jersey Central, bound up the river below the Chautauqua, with a car float upon her port side. The Jersey Central was ahead of the Chautauqua and about 1,000 feet further down the river. The Chautauqua had previously exchanged a signal of two blasts with the Jersey Central coming up with a float on her port side. When No. 29 changed her course, to go between the Chautauqua and the Jersey Central, the engines of the Chautauqua were put at slow speed to avoid a collision with the No. 29, and the wheel of the Chautauqua was moved one or two spokes to starboard. The Jersey Central starboarded her wheel after an exchange of signals of two whistles with the Chautauqua, and was compelled to stop her engines in order to let No. 29 cross her bow. When the signals of two whistles were exchanged between the Chautauqua and the Jersey Central, the No. 28 was from 300 to 500 feet on the port quarter of the Chautauqua. The No. 28 kept on at full speed, apparently unmindful of the situation ahead of her, and especially of the No. 29 changing her course to starboard in order to go between the Chautauqua and the Jersey Central, compelling the Chautauqua to reduce her speed, until in the jaws of collision with the Chautauqua. The No. 28 stopped and reversed her engines, but too late to avoid a collision; the stem of the No. 28 coming into contact with the port side of the Chautauqua.

[1] The District Judge dismissed the libel on the ground that the Chautauqua was the overtaking vessel at the time she put her wheel slightly to starboard. He said:

"The Chautauqua was originally the overtaking vessel, and did not cease to be so under Inland Regulation No. 24 (Act June 7, 1897, c. 4, § 1, 30 Stat. 101 [Comp. St. § 7898]) until fully past and clear of No. 28, which she was not when she starboarded. Therefore I find her at fault."

The rule referred to may be found in the margin.[1]

This court is satisfied that the Chautauqua is not within the limitations of the inland rule, but had been relieved of the duty of keeping clear of No. 28; she being "finally past and clear" of that vessel when she starboarded. The answer of No. 28 admits this, for in the seventh article it states:

"No. 28 was a considerable distance ahead of the Chautauqua, but as the Chautauqua was a faster vessel than No. 28 she overtook and passed No. 28 when No. 28 was about off the Lackawanna Terminal at Hoboken. Stokes, the master of the No. 28, states that the Chautauqua was a faster boat than the No. 28 and she kept gaining on the No. 28."

And the testimony of the master of No. 28 supports the answer in this respect, as does all the other testimony in the case. The evidence shows that the Chautauqua passed No. 28 a half or three-quarters of a mile from the place of collision. So that we conclude that the Chautauqua was not, as the court below held, the overtaking vessel.

[2] The action of No. 29 in changing her course to starboard in order to go between the Chautauqua and the Jersey Central has been mentioned. This conduct on the part of No. 29 was atrocious. The testimony that it happened is not to be doubted. It is shown by the testimony of those on both the Chautauqua and the Jersey Central, and no one was called from No. 29 to contradict it. This conduct of the No. 29 made it necessary for the Chautauqua and the Jersey Central to slow up to avoid the No. 29, in cutting across the bows of both vessels.

The Chautauqua, however, is not without fault. As she was proceeding on her way down the river and was about opposite Pier 25, she altered her course to port and without warning to the vessels on her port side. The action of No. 29 in crossing the bow of the Chautauqua made it necessary for the latter to slow down, which she promptly did, but that it necessitated a change of course is not true. In fact, the change of course was not made until No. 29 had proceeded on her way. In starboarding her helm the Chautauqua directed her course, as we have said, across the bow of the vessels on her port side, including No. 28. In so doing the Chautauqua, then the overtaken vessel, did an unnecessary thing, and swung without warning or signal across the path of the oncoming No. 28. The result was a collision; the stem of No. 28 striking the Chautauqua just forward of amidships on the port side.

[1] "Art. 24. Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

"Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such position, with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

"As by day the overtaking vessel cannot always know with certainty whether she is forward of or abaft this direction from the other vessel, she should, if in doubt, assume that she is an overtaking vessel and keep out of the way."

We have not overlooked the fact that the Chautauqua denies a swing of more than two points. We think it probable she changed more than two points; but, if she changed only two points, it does not appear that even that change was necessary to avoid the Jersey Central.

It appears to us that No. 28 was also at fault. It is evident that she was at the time in charge of incompetent persons. There were three deckhands in or about the pilot house, who were in charge of her navigation, none of whom was a licensed man. A competent lookout upon the No. 28 would have paid some attention to the exchange of the signal of two whistles which the Chautauqua gave to the Jersey Central, and which the latter immediately answered; and a competent lookout would have observed the maneuver of No. 29 in crossing the bow of the Chautauqua and of the Jersey Central. But no one in charge of the navigation of No. 28, so far as the record discloses, paid any attention to the conditions existing in front of her, and she was allowed to continue on her course at full speed until the danger signals given by the Chautauqua warned her of the impending collision. The mate, an unlicensed man, who was in the pilot house and in charge, says that he did not hear the exchange of whistles between the Chautauqua and the Jersey Central, and he did not see the No. 29 pass the bow of the Chautauqua, and that he did not change the course of the No. 28. No slow bells were given and her speed was not reduced until she was right in the jaws of the collision. He admitted that he knew nothing about the inspectors' rules or the United States statutes regarding navigation. When the signals were exchanged between the Chautauqua and the Jersey Central, No. 28 was within 300 or 500 feet from the port quarter of the Chautauqua. The situation was such as unquestionably made it the duty of No. 28 to stop and reverse, and if that had been done the collision might have been avoided. The language of the Supreme Court in The New York, 175 U. S. 187, 207, 20 Sup. Ct. 67, 74 (44 L. Ed. 126), is applicable to the facts of this case. The court said:

> "The comments we have made upon the failure of the Conemaugh to stop and reverse are equally pertinent to the case of the New York. If she did not hear the whistles of the Conemaugh, she ought to have heard them; but, irrespective of this, there was enough to apprise her of her danger in pursuing her course with unabated speed. * * * Her conduct was inexcusable. The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn; but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that those repeated admonitions must ultimately have some effect. We cannot impress upon masters of steam vessels too insistently the necessity of caution in passing or crossing the course of other vessels in constricted channels."

The District Judge thought that in the situation in which No. 28 was placed she could not have safely starboarded on account of the Vigilant, nor safely ported on account of the Chautauqua. But, as we have already pointed out, her duty was to stop and reverse; this she did not do until it was too late. As both vessels were at fault the damages should be divided.

The cause is remanded to the District Court for the Southern District of New York, with directions to modify its decree in accordance

with this opinion, and, as so modified, the decree is affirmed. Costs will be divided equally in the court below. In this court the appellant has the costs of this appeal.

MANNERS v. MOROSCO.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 201.

1. COPYRIGHTS ⚷50—CONTRACTS—CONSTRUCTION—CONTRACT GRANTING RIGHT TO PRODUCE PLAY.
A contract by which the author of a play granted to another "the sole and exclusive license and liberty to produce, perform and represent" the play in the United States and Canada, and in which the grantee agreed to continue the play "for at least 75 performances" during the ensuing season and "for each theatrical season thereafter for a period of five years," and that, if during any one year the play had not been produced for 75 performances, his rights should cease and determine and revert to the grantor, *held* not to terminate at the end of five years, but to continue in force so long as its obligations were performed by grantee.

2. COPYRIGHTS ⚷50—CONTRACTS—CONSTRUCTION—CONTRACT GRANTING RIGHT TO PRODUCE PLAY—ASSIGNMENT OR LICENSE.
An agreement for production rights in a play binding the parties, heirs, executors, assigns, administrators, and successors, is an assignment and not a mere license.

3. COPYRIGHTS ⚷50—CONTRACTS—CONSTRUCTION—CONTRACT GRANTING RIGHT TO PRODUCE PLAY.
A contract granting "the sole and exclusive license and liberty to produce, perform and represent" a play, *held* to carry the motion picture rights.

Ward, Circuit Judge, dissenting in part.

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

Suit in equity by J. Hartley Manners against Oliver Morosco. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 254 Fed. 737.

Certiorari granted 249 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

Walter C. Noyes and David Gerber, both of New York City, for appellant.

William Klein and Charles H. Tuttle, both of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge [1] The appellant is the author of "Peg O'My Heart." He is the husband of Laurette Taylor, the star of that very successful play as dramatized.

On January 19, 1912, the parties entered into a contract which in part provided and granted to the appellee "the sole and exclusive license and liberty to produce, perform and represent the said play in

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

the United States of America and the Dominion of Canada." The third paragraph provided:

"The party of the second part (appellee) agrees to produce the play not later than July 1, 1913, and to continue the said play for at least 75 performances during the season of 1913-1914 and for each theatrical season thereafter for a period of five years."

The fifth paragraph provides:

"That the said party of the second part (appellee) further agrees that if during any one theatrical year such year to begin on the first day of October, said play has not been produced or presented for 75 performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part."

After the contract was made, the play was produced and ran continuously and successfully for a period of 74 weeks up to May 30, 1914, in New York, with Laurette Taylor in the star part. On July 20, 1914, the parties entered into an agreement modifying in some respects the agreement of January 19, 1912. By the modification, arrangement was made for the production of the play without Laurette Taylor in the star part and for other productions in more than one company. It was further provided that the appellee be permitted to lease, stipulate, assign, transfer, or sell to any one, any of his rights under either contract. And it was specifically covenanted that the issue now presented between the parties as to the ownership of motion picture rights was to be determined by reference to the original contract. After the execution of this contract, a number of companies gave performances in various parts of the United States and Canada. Payment under the terms of the contract was duly made to the appellant.

When the theatrical season of 1917-1918 expired, the appellant, claiming that the appellee no longer had any interest in any of the producing rights, brought this action to restrain further production of the play by the appellee, both on the stage and in motion picture form. Two questions are presented by counsel on this appeal: First, the date, if any, of the termination of the contract; and, second, whether the appellee under the contract is entitled to the motion picture rights.

It is claimed by the appellant that only a license, revocable at his option, was contracted for with the appellee under the third paragraph of the first contract, and that the contract expired at the end of the theatrical season in May, 1918. But that is not what was contracted for. It was not an agreement for personal service or for a mere license, but was a bargain and sale of the sole and exclusive right to produce, perform, and represent the said play in the United States and Canada. Property was thereby granted and conveyed. It may be intangible, but it has a value and is the subject of proprietorship. It is not a conveyance which is revocable at will or for a temporary period, but for the time provided for in the terms of the contract.

The third paragraph is a covenant setting forth the least that the appellee would do in performing the contract. In other words, it sets forth the appellee's assurance of his bona fide endeavor or attempt to

make the play a success and thus secure to the appellant some substantial royalties. A mere reading of the paragraph will indicate that the parties fixed a minimum and not a maximum of endeavor on the part of the appellee to make for success. It is not an agreement of the most that the appellee agreed to do to make for success. In this connection, the fifth paragraph must be considered and read with the third paragraph. Plainly, if the appellee had failed to present 75 performances of the play "during any one theatrical year," then all rights of the appellee ceased and determined and the play reverted to the appellant. There is harmony between the first and third paragraphs and the intent of the parties that the appellee's rights should not be limited to any definite period is quite plain. The grant was perpetual if the obligations of the contract, particularly paragraphs 3 and 5, were complied with.

[2] The modified contract made on July 20, 1914, reaffirmed the first contract and provided in the ninth paragraph that, at least four years after its date, the original contract was still in force, as a conveyance of all the production rights, and that neither party would produce the play in motion picture form without the consent of the other and until such time, when, after the expiration of four years, the question of motion picture rights should be determined pursuant to the terms of the original agreement.

This clearly negatives the claim of the appellant that under the third paragraph the contract expired after five years from January 19, 1912. An agreement for production rights binding the parties' heirs, executors, assignees, administrators, and successors, is an assignment and not a mere license. Photo Drama Motion Picture Co. v. U-Film Corp. (D. C.) 213 Fed. 374, affirmed 220 Fed. 448, 137 C. C. A. 42.

Since the contract is not revocable by will by either party or otherwise limited as to its duration by its express terms or by the inherent nature of the contract itself with reference to its subject-matter, it is presumably intended to be permanent or perpetual in the obligation it imposes. Western Union Telegraph Co. v. Penn. Co., 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968.

[3] In determining the production rights conveyed, whether it included the right to produce in motion picture form or not, we must confine our study to the contract itself. The intention of the parties must be secured from the language employed in the instrument itself. Such intention means the accepted reasonable and judicial settled content of the words employed. If the parties have erred in the use of the words, this kind of action cannot grant relief. The words employed, "the sole and exclusive license and liberty to produce, perform and represent the said play," have received judicial construction. A motion picture performance is a stage representation of the play and violative of the rights of an owner of the exclusive right of production. Frohman v. Fitch, 164 App. Div. 231, 149 N. Y. Supp. 633.

Ordinarily, one may "produce or perform" a spoken play upon the stage, but "to represent" seems to be peculiarly appropriate to a motion picture representation of a play. Dramatic rights were held to include the motion picture rights in Frohman v. Fitch, supra, in the

absence of other words narrowing the meaning of the contract. An author of dramatic composition is protected by section 4952 of the Revised Statutes of the United States as to not only the sole right of printing it, but also the sole right of "publishing, performing or representing it or causing it to be performed or represented by others." Nor need we be confined in our determination to a strict legal use of the words employed as heretofore judicially determined. It is apparent that the parties intended the results here pronounced. We think the parties intended a conveyance of the entire right to place the play before the American public in any form. It seems inconceivable that the parties intended to reserve to the appellant the right of production in motion picture form when they gave no such expression of reservation in the language of the contract, and particularly when the language employed indicated a comprehensive grant of all producing rights.

In paragraph 10 of the first contract, the author reserved the right to print and publish the play, but his right was not to be exercised within six months after the production of such play in New York City unless by written consent of the manager. So, too, reservations were made as to leasing and sub-letting the play. By the tenth paragraph, the author reserved the right of publication in book form.

An expression in the contract of one or more things of a class implies the exclusion of all not expressed, although all would have been implied had none been expressed. 13 Corpus Juris, 537.

In view of what appears in this record of the cost and expense of successfully dramatizing this play and what appears to be a lucrative contract resulting to the appellant, this court should be reluctant to give a construction not warranted by the language nor intended by the parties, which would permit of competition by the appellant in the production of this play in motion pictures. Frohman v. Fitch, 164 App. Div. 231, 149 N. Y. Sup. 633.

Appellant, however, says that Klein v. Beach, 239 Fed. 108, 151 C. C. A. 282, supports his views. In that case, it was recited, "whereas the manager wishes to engage the services of the author to dramatize the said book for presentation on the stage," and the novelist granted to the author "the sole and exclusive right to dramatize the said book for presentation on the stage," and the parties agreed to grant to the manager "the sole and exclusive license and liberty to produce, perform and represent the said play or dramatic composition on the stage," the right to dramatize the novel for presentation on the stage was held not to carry the right to produce in motion pictures. This court, in considering Klein v. Beach, supra, said:

> "The turning point in this case, is the scope of the grant, whether by its terms it conferred upon Klein dramatic rights in the larger sense including presentation, not only by living actors, but also by motion pictures, or whether it was limited to the 'stage' proper."

This court approved Frohman v. Fitch, supra, and upon the authority of Kalem v. Harper, 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285, stated that the dramatic rights included motion picture rights, but such a conveyance of dramatic rights to have

such meaning cannot be narrowed by other limitations. In Klein v. Beach, supra, stage rights only were granted, and this was made plain in the preamble and the provisions of the contract. This court there said in so holding: "In general it is quite clear that this was the prevailing purpose of the parties."

In the case at bar, no distinction is made between the producing rights which the appellant had and those which he conveyed, except where the parties themselves defined it, such as in paragraph 10, to wit, reserving the right to publish the play in book form under conditions there expressed.

We find no error in excluding the contract with Laurette Taylor. This was a contract for the services of Laurette Taylor to perform as a leading female character, not only in this play, but in other plays that might be suited to her talent and ability. It provided for a three-year period with an option of three more. It was no evidence indicating a limitation upon the contract between the parties to this litigation and was properly excluded.

The identity of the person who drew the agreement of January 19, 1912, was unimportant. The contract was bilateral. Responsibility for ambiguity in a contract should be borne by the party who caused it, but there is no ambiguity. It was not important to know the identity of the party who drew the contract.

Holding these views as we do, the decree must be affirmed.

WARD, Circuit Judge (dissenting in part). The grant in the contract under consideration is of an exclusive right "to produce, perform and represent" a play. There has been no judicial construction of any of these words so as to make them technical without reference to the terms of some particular contract. Harper Bros. v. Kalem Co., 169 Fed. 61, 94 C. C. A. 429 (Kalem Co. v. Harper Bros., 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285), was not a case of contract but of infringement of copyright, the question being whether a moving picture show was a dramatization of an author's work. In Frohman v. Fitch, 164 App. Div. 231, 149 N. Y. Supp. 633, the exclusive right to "produce" a play was construed in the particular contract to cover moving picture rights, whereas in Klein v. Beach, 239 Fed. 108, 151 C. C. A. 282, we held the grant of an exclusive right to "produce, perform and represent" a play "on the stage" did not cover moving picture rights. The other words "perform and represent" in that contract and in the contract now under consideration have appeared in our Copyright Act since 1870 (U. S. Rev. Stat. 4966), long before moving picture shows were dreamed of. Therefore the question is: When the parties used the words "produce, perform and represent" the play, what were they intending to cover by those words? It seems to me perfectly plain from the contract that they were intending to cover the spoken play only and, if so, the words they used, however large, must be confined to the thing they were contracting about.

The third article of the contract speaks of theatrical seasons, which exist for spoken and do not exist for movie plays.

The fourth article provides for royalties on the gross weekly receipts of the box office, which was held in Harper Bros. v. Klaw (D. C.) 232 Fed. 609, 612, to be inapplicable to "any method of photoplays in commercial use or known to witnesses or counsel." The trial judge refused to permit the plaintiff, over his objection and exception, to prove this fact.

The fifth article refers again to theatrical seasons.

The sixth article provides for the production of the play in first class theaters and on the road with Miss Taylor in the title rôle, which applies in my judgment to the spoken play only.

The eighth article provides that the rehearsals and productions shall be under the author's direction, which does not apply to movie shows.

The eleventh article provides that should the play fail in New York or on the road it should be released to stock theaters, which applies to the spoken play only.

On the other hand, I find not a word in the contract indicating an intention to transfer the movie rights though they were perfectly well known by both parties. Therefore though the words of the grant are large enough to cover them, I think the words are to be restricted to what the parties were contracting about, viz., the spoken play.

UNITED STATES v. BIRMINGHAM TRUST & SAVINGS CO.

In re STANDARD HOME CO.

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

No. 3304.

1. BANKRUPTCY ⚷328—CLAIMS OF UNITED STATES.
The United States may present a claim in a bankruptcy case at any time while the bankruptcy is pending and the funds thereof are not distributed.

2. BANKRUPTCY ⚷315(1), 317—CLAIMS PROVABLE—"PENALTY"—COSTS.
A fine adjudged against a corporation on its conviction for using the mail to promote frauds, under Criminal Code, § 215 (Comp. St. § 10385), is a "penalty," within the meaning of Bankruptcy Act July 1, 1898, § 57j (Comp. St. § 9641), not provable in bankruptcy; but the United States is entitled to prove all the costs which it paid or incurred in the prosecution as a pecuniary loss sustained by it (citing Words and Phrases, First and Second Series, Penalty).

Walker, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

In the matter of the bankruptcy of the Standard Home Company. Petition by the United States that an order be made requiring the Birmingham Trust & Savings Company, as trustee of the bankrupt estate, to pay the amount of a fine and costs adjudged against the bankrupt on its conviction under an indictment. From a decree deny-

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

ing the petition, the United States appeals. Reversed and remanded, with instructions.

This is an appeal from a decree denying the prayer of a petition of the United States that an order be made requiring the trustee of the bankrupt estate of the Standard Home Company, a corporation, to pay the amount of the fine and costs adjudged against that corporation on its conviction under an indictment against it charging a violation of section 215 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. § 10385]). The cause was submitted on an agreed statement of facts, which disclosed the following:

A verdict of guilty of the charge mentioned was rendered on the 20th day of February, 1915, whereupon, on motion of the defendant in that case, the imposition of the sentence was deferred until the 24th day of February, 1915, on which day, that defendant having filed a motion for a new trial, on its motion the hearing of the motion for a new trial and the imposition of the sentence were postponed to March 20, 1915. On February 22, 1915, that defendant, not having sufficient property to pay all its debts, executed a voluntary assignment of all its property for the benefit of all its creditors. On the same day a petition in bankruptcy was filed against that corporation by certain of its creditors. On the 2d day of March following that corporation was duly adjudged to be bankrupt. On March 20, 1915, the motion for a new trial in the criminal case was overruled, and the defendant corporation was sentenced to pay a fine and the costs of the prosecution. A writ of error to obtain a review of that judgment was sued out, which resulted in an affirmance by this court on October 4, 1917.

On May 15, 1915, the appellee, the Birmingham Trust & Savings Company, was duly elected and appointed as trustee of said bankrupt estate, and is still performing the duties of such trustee. The taxed costs of the prosecution of the above-mentioned criminal case amount to the sum of $9,024.25. No part of the fine or costs has been paid. Before the filing of the petition in this proceeding the United States demanded of said trustee in bankruptcy the payment of said fine and costs. The trustee failed and refused to pay the same, or any part thereof. The trustee now has, and at all times since its appointment as such trustee has had, in its possession and control, assets of the bankrupt greatly in excess of the amount necessary to pay said fine and costs, together with all taxes legally due and owing by the bankrupt to the United States, state, county, district, and municipality, and all debts given priority by subdivision "b" of section 64 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 563 [Comp. St. § 9648]).

The record discloses the claim of the United States in this case was first presented to the referee, who rejected the same as not provable in bankruptcy. Then, on review, the District Judge in an elaborate opinion affirmed the report of the referee disallowing the claim. From that decision the appeal in this case is taken, and the following errors assigned:

"A. The District Judge erred in his order disallowing and expunging the claim of the United States to have said fine paid as a claim entitled to priority.

"B. The District Judge erred in his order disallowing and expunging the claim of the United States to have said costs paid as a claim entitled to priority.

"C. The District Judge erred in his order disallowing and expunging in toto the claim of the United States to have said fine paid by the trustee in whole or in part as the law might require.

"D. The District Judge erred in his order disallowing and expunging in toto the claim of the United States to have said costs paid by the trustee in whole or in part as the law might require.

"E. The District Judge erred in his order holding that petitioner was not entitled to priority of payment either as to the fine or costs of said prosecution.

"F. The District Judge erred in his order that the United States was not entitled to a payment of said fine ratably with other creditors.

"G. The District Judge erred in his order that the United States was not

entitled to a payment of the costs accruing before bankruptcy ratably with other creditors.

"H. The District Judge erred in his order that the United States was not entitled to a payment of the costs accruing after bankruptcy ratably with other creditors.

"I. The District Judge erred in his order disallowing and expunging said claim of the United States.

"J. The District Judge erred in his order that the claim of petitioner as to the fine fell within section 57j of the Bankruptcy Act.

"K. The District Judge erred in his order that the United States must prove its claim in the common form to get the benefit of section 57j of the Bankruptcy Act.

"L. The District Judge erred in his order that the United States could not prove its claim to an allowance under section 57j of the Bankruptcy Act after the expiration of one year.

"M. The District Judge erred in his order that the procedure adopted in this matter by the United States was not a sufficient proof of its claim to secure the benefit of section 57j of the Bankruptcy Act."

Oliver D. Street, Sp. Asst. U. S. Atty., of Guntersville, Ala.

John P. Tillman and Wm. Bew White, both of Birmingham, Ala., for appellee.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PARDEE, Circuit Judge (after stating the case as above). [1] The right of the United States to present a claim in a bankruptcy case at any time while the bankruptcy is pending and the funds thereof are not distributed cannot be disputed.

[2] The right of the United States to claim priority under section 3466, R. S. (Comp. St. § 6372), was unquestionably modified and restricted by section 57j of the Bankruptcy Act (Comp. St. § 9641). Guarantee, etc., Company v. Title Guaranty, etc., Company, 224 U. S. 152–160, 32 Sup. Ct. 457, 56 L. Ed. 706. And see Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174. Section 57j of the Bankruptcy Act reads as follows:

"Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

Under the provision of this section it seems clear the right of the United States to claim the penalty or a forfeiture is denied, except as to the actual pecuniary loss suffered by the United States. The fine of $1,000 claimed in this case is unquestionably a penalty. C. C. § 215. See Words and Phrases, vol. 6, verbo "Penalty"; United States v. Reisinger, 128 U. S. 398, 9 Sup. Ct. 99, 32 L. Ed. 480. As there is no question or suggestion that in the matter of this penalty the United States suffered any pecuniary loss, it cannot be allowed.

As to the costs claimed, a different question is presented, to wit, for the pecuniary loss suffered by the United States in the prosecution and conviction under which the penalty was inflicted. The suggestion made that the costs incurred in such prosecution should be in-

cluded as a part of the penalty, because when awarded the matter was in the discretion of the court imposing the penalty, does not seem to need consideration. Under the showing made the United States suffered pecuniary loss in all the costs of the case which they paid or incurred in the prosecution of the suit.

The judgment appealed from is reversed, and the cause is remanded, with instructions to permit the United States to prove all their pecuniary loss as charged.

WALKER, Circuit Judge (dissenting). I concur in the conclusion that the decree should be reversed, but not in the conclusion that the claim asserted is not entitled to priority, so far as the amount of the fine adjudged against the bankrupt is concerned.

The question is: Was it intended by section 57j of the Bankruptcy Act to deal with such penalty as the one imposed on the bankrupt corporation following its conviction of the criminal offense charged against it? The language of the provision, considered in the light of the connection in which it was used and of the previously existing law, which was not expressly repealed or modified, furnished some basis for an inference that the subject intended to be dealt with was debts due as penalties or forfeitures arising out of an act, transaction, or proceeding in which creditors of a class mentioned had some pecuniary interest, and that the object was to limit the amount allowable to such a creditor out of the debtor's estate in bankruptcy to the amount of the pecuniary loss sustained, whatever may be the amount of the penalty or forfeiture incurred. The claim asserted in this case is not based on a forfeiture. It is based on a judgment assessing a fine and costs on conviction of a criminal offense. The transaction out of which such penalty arose was one which did not affect the claimant in a pecuniary way. It was the crime of using the mails in the execution of a scheme to defraud parties other than the United States. The language of the provision is such as to indicate that it was assumed or presupposed that the act, transaction, or proceeding referred to is one in which the beneficiary of the penalty or forfeiture has a pecuniary interest. The effect of the provision is to limit the amount allowable to such beneficiary out of the debtor's estate in bankruptcy.

To say the least, it is not made clear that a penalty for criminal misconduct, at any rate such misconduct as does not pecuniarily affect the party entitled to enforce the penalty therefor, was in contemplation. Penalties may be divided into two classes, namely: First, such as are prescribed to secure compliance with pecuniary or contractual obligations; and, second, such as are imposed for breaches of duty without regard to pecuniary loss resulting from such breaches to the party entitled to enforce the penalties. It is not uncommon for a penalty or forfeiture incurred by a violation of a contractual or pecuniary obligation to the United States, a state, a county, a district, or municipality, to subject the party in default to greater loss or damage than the breach caused to the party in whose favor the obligation was incurred. An effect of the above-quoted provision of the

Bankruptcy Act is that debts so owing to the public bodies mentioned are not allowable out of the debtor's estate in bankruptcy, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with costs and interest, though the penalty or forfeiture incurred may have entitled the beneficiary of it to recover more from the debtor if the latter had not been adjudged bankrupt. The provision is one determining the extent to which claims of a stated class are allowable. The terms of it being such as to indicate that it was intended to deal with penalties and forfeitures arising out of acts, transactions, or proceedings involving some pecuniary loss to the parties entitled to enforce such penalties or forfeitures, there is some basis for an inference that penalties otherwise arising were not in contemplation. In the absence of a clear expression of a legislative intention to repeal or modify the provision contained in section 3466 of the Revised Statutes, it is not to be implied that that provision was repealed or modified by the subsequently enacted statute, except in so far as the latter is plainly inconsistent with the former.

In some respects the priority given by section 3466 of the Revised Statutes to debts due to the United States is affected by the Bankruptcy Act. Section 64 of the latter act subordinates debts due to the United States, other than taxes legally due and owing, to certain payments required to be made in full, in the order prescribed, out of the estates of bankrupts. Guarantee Co. v. Title Guaranty Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706. Section 57j modifies the priority as it existed previously by limiting payments of the class of debts stated to the amount of the pecuniary loss sustained by the creditor, costs, and interest. The priority, as it previously existed, is not affected except by express words to that effect. United States v. Herron, 20 Wall. 251, 22 L. Ed. 275. A debt due to the United States is not required to be proved in bankruptcy. It may be enforced out of the bankrupt's estate without a compliance with requirements applicable to other claims against the bankrupt. Lewis, Trustee, v. United States, 92 U. S. 618, 23 L. Ed. 513; Collier on Bankruptcy (11th Ed.) 990. The judgment in question for the fine and costs is a debt due to the United States. 13 Cyc. 398. If section 57j of the Bankruptcy Act has the meaning attributed to it in behalf of the appellee the United States has no priority at all with reference to the penalty adjudged, as that penalty arose out of conduct involving no pecuniary loss to the United States. Under the construction contended for, the convict's bankruptcy, instead of giving rise to a priority as to the amount adjudged, would have the effect of depriving the United States of any priority at all. The government's position would not have been better if the judgment of conviction had been rendered before the bankruptcy. As the penalty awarded by the judgment arose out of the commission of the crime, there would have been no right to have the amount adjudged given any priority, if priority is limited to the amount of a pecuniary loss caused by the commission of the crime to the party in whose behalf the penalty was enforced, as no such loss was sustained.

Not even the costs adjudged can be regarded as a pecuniary loss sustained by the commission of the crime out of which the penalty arose, as they arose, not out of the commission of the crime, but out of the prosecution for it. As so construed, the provision in question would have the effect, so far as the convict's estate in bankruptcy is concerned, of subordinating such a claim as the one asserted to debts of the bankrupt not belonging to any class to which priority is expressly given. In effect that would be the same thing as making the convict's estate in bankruptcy exempt from the payment of a debt owing as a penalty arising out of a crime not involving pecuniary loss to the party in whose favor the penalty was adjudged. A construction leading to such results is not to be adopted if, consistently with the language used in the provision in question, it may be given a meaning not involving such consequences. The language of section 57j of the Bankruptcy Act is not such as to call for the conclusion that so complete a reversal of the policy evidenced by section 3466 of the Revised Statutes was intended to be effected. The first-mentioned provision is given a field of operation within a meaning fairly attributable to its language, if it is held to have reference only to debts owing as a penalty or forfeiture prescribed as a means of preventing pecuniary loss. It fairly may be regarded as evidencing a policy of protecting the creditors at large of bankrupts by making such a debt allowable only for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with costs and interest, without affecting whatever priority previously existing law gave to a debt due as a penalty or forfeiture not prescribed as a means of preventing pecuniary loss.

For reasons above indicated, the conclusion of the writer is that section 3466 of the Revised Statutes is still effective to give such priority as was claimed to such a demand as the one asserted.

FITTER et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 214.

1. CRIMINAL LAW ⟹1129(2)—APPEAL—ASSIGNMENTS OF ERROR.
The record should not be burdened with dragnet assignments of error the purpose of the rule requiring assignments of error being to enable the court and opposing counsel to see on what points reversal of a judgment is sought and to limit discussion to those questions.

2. CRIMINAL LAW ⟹718—TRIAL—ARGUMENT.
Language that might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi judicial officer, and whose duty it is to act in the interest of justice; so where a prosecuting attorney's appeal for a conviction is upon considerations which have no legitimate bearing on the case, and which the jury have no right to consider, a conviction should be reversed unless it is apparent that no possible harm has resulted.

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

3. CRIMINAL LAW ⚷1171(1)—APPEAL—HARMLESS ERROR—ARGUMENT.

In a prosecution for conspiracy to defraud the United States, argument of counsel for the United States, in so far as it appealed for a conviction on improper grounds, *held* harmless, in view of the overwhelming evidence of defendant's guilt.

4. SEARCHES AND SEIZURES ⚷7—WITNESSES ⚷298—PRIVILEGE OF ACCUSED—UNLAWFUL SEARCHES.

Under Const. Amend. 4, declaring against unreasonable searches and seizures, and Amend. 5, declaring that no person shall be compelled to be a witness against himself, it was an arbitrary and unlawful violation of defendant's constitutional rights for officers of the secret service to demand from his wife ledgers and delivery slips for use as evidence in a prosecution for conspiring to defraud the United States, and, where the wife delivered the same on demand, such documents are inadmissible in evidence.

5. CRIMINAL LAW ⚷1166(1)—APPEAL—CONVICTION—HARMLESS ERROR.

Though a seizure of defendant's ledgers without warrant was a violation of the rights guaranteed by Const. Amends. 4, 5, a conviction will not be reversed where neither the ledgers nor their contents were admitted in evidence, and witnesses were not allowed to testify as to information derived therefrom, etc.

6. CRIMINAL LAW ⚷1165(1)—HARMLESS ERROR—EVIDENCE—VIOLATION OF CONSTITUTIONAL RIGHTS.

Though the seizure of defendant's ledgers and books was an invasion of his rights guaranteed by Const. Amends. 4, 5, the introduction in evidence by defendant of the only pages in the ledger examined by the United States Attorney cured the error, if any existed, based on their having been for a time in the custody of government agents.

7. CRIMINAL LAW ⚷730(1)—CONDUCT OF COUNSEL—ACTION OF COURT—HARMLESS ERROR.

Where it was doubtful whether the jury heard an alleged improper remark by the prosecutor, who consented that it should be stricken, and the court instructed them if they heard it to disregard it, the error was harmless.

8. WITNESSES ⚷48(1)—COMPETENCY—CONVICTION OF CRIME—WITHDRAWAL OF PLEA OF GUILTY.

It was the judgment of conviction of an infamous crime which at common law made the convict incompetent as a witness; hence defendant cannot complain that two of those indicted with him who had pleaded guilty were allowed to withdraw their pleas and permitted to testify, though they had confessed themselves guilty of a felony.

9. WITNESSES ⚷48(1)—COMPETENCY—CONVICTS.

The testimony of persons convicted of crime is admissible in the federal courts, and the conviction goes simply to the credibility and weight of their testimony.

10. WITNESSES ⚷52(1)—COMPETENCY—TESTIMONY OF WIFE FOR HUSBAND.

In a prosecution for conspiring to defraud the United States, the fact that the trial court declined to allow defendant's wife to testify, on the ground that the competency of witnesses in a criminal case is governed by the common-law rules in force when Judiciary Act 1789 was passed, is no ground for reversal.

11. CRIMINAL LAW ⚷520(1)—EVIDENCE—CONFESSIONS.

In a prosecution for conspiring to defraud the United States, confessions made by alleged coconspirators to a naval intelligence officer, who stated that it was the best thing for such persons to tell the truth, cannot be excluded as involuntary where no inducements were held out.

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

12. CRIMINAL LAW ⇔368(1), 423(1)—EVIDENCE—ACTS AND DECLARATIONS OF COCONSPIRATORS.
Where two or more persons were associated for the same illegal purpose, any declaration or act of one of the persons in reference to the common object is admissible, when they are in furtherance of the common object or constitute a part of the res gestæ.

13. CRIMINAL LAW ⇔780(4)—INSTRUCTIONS—ACCOMPLICE'S TESTIMONY—CORROBORATION.
In a prosecution for conspiring to defraud the United States, where the jury had been charged that the testimony of confederates and accomplices should not be accepted unless corroborated, a further charge that the confessions of such confederates might be considered as corroboration was improper, allowing the confessions of his alleged co-conspirators which were not in furtherance of the conspiracy to be used against defendant.

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

John Fitter and others were convicted of conspiring to defraud the United States, and the named defendant alone brings error. Reversed.

O'Gorman, Battle & Vandiver, of New York City (George Gordon Battle and Rogers B. Wood, both of New York City, of counsel), for plaintiff in error.

James D. Bell, U. S. Atty., of Brooklyn, N. Y. (Vine H. Smith, Sp. Asst. U. S. Atty., of counsel), for the United States.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff in error, hereinafter called the defendant, was indicted with five others for having conspired to defraud the United States. They were all tried together, and all were found guilty. The defendant Fitter was sentenced to imprisonment at Atlanta for one year and nine months and to pay a fine of $5,000.

[1] He alone has sued out a writ of error, and there are 62 assignments of error, which occupy 12 printed pages of the record. We think this a good occasion to call attention of counsel to what the Supreme Court has said on several occasions in reference to the practice of burdening the record with dragnet assignments of error. In Phillips & Colby Construction Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341, the assignments of error were 10 less than the number found in this case, and the court said:

"The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points the plaintiff's counsel intend to ask a reversal of the judgment, and to limit the discussion to those points. This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on. We can only try to respond to such points made by counsel as seem to be material to the judgment which we must render."

In Central Vermont Ry. Co. v. White, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252, the court recurred to the subject again, quoting from the earlier case which we have cited.

The practice condemned is not conducive to the better administration of the law, and embarrasses, rather than promotes, the cause of justice.

The defendant at the time the alleged conspiracy was formed was a dealer in supplies and provisions in the borough of Brooklyn. Two of his codefendants were employés of the United States in the service of the Navy Department at the City Park Barracks in Brooklyn, where it was their duty to examine and check incoming supplies purchased by the United States government for delivery at the City Park Barracks, and to issue receipts for the provisions and supplies, and to report the amount of the same to the paymaster in the United States Navy Yard so that he might be informed of the payments proper to be made by him from the funds of the United States in his custody. Three other of the codefendants were employés of the defendant, whose duty it was to drive the defendant's trucks.

The conspiracy alleged was that defendant should agree to sell and deliver provisions and supplies to the United States for the use of the Navy Department, and that only a part of such provisions and supplies should be actually delivered, and that it should be made to appear by the issuance of false receipts that such provisions and supplies had been delivered and were in the possession of the department.

Two of the codefendants who were in the service of the Navy Department, and who had issued false receipts showing the delivery of greater quantities of butter, eggs, meat, and poultry than were received, pleaded guilty and gave testimony on behalf of the government. The alleged method which the conspirators adopted was for the defendant to have the correct quantity of provisions brought to the Navy Yard on defendant's trucks, and then, after receipts had been issued purporting to show the delivery of the entire quantity, the drivers were permitted to carry back to defendant's store substantial portions of the supplies for which receipts had been issued. Three other codefendants, drivers of Fitter's trucks, confessed to the frauds perpetrated, and their sworn confessions were introduced in evidence at the trial.

The testimony in the case, if the jury believed it, certainly proved by overwhelming evidence the guilt of the defendant. The government claims that it not only proved its case beyond a reasonable doubt, but proved it beyond any possible doubt.

[**2, 3**] The defendant seeks a reversal, and he raises certain objections to the indictment, and to rulings of the court, and to parts of the summing up of the attorney for the prosecution. In a case where the evidence of guilt is so overwhelming, the objections of the defendant must be serious and clearly prejudicial to justify the court in reversing the judgment and compelling the government to put this man again on his trial.

The defendant mainly relied in his effort to obtain a new trial upon certain remarks addressed to the jury by the Assistant United States Attorney in his summing up. The remarks complained of are the following:

"You have got your duty to do, and I have got my duty to do, and your work is just as sacred and just as dear to your country as the man who is

over in France to-day and fighting that fight from the front; that it would be unworthy for me to mention the name of my country and your country in the prosecution of this case. I do not think he meant that, because he is a better American than that. Why, this contract, gentlemen, that is distinctly a war contract. This, gentlemen, is a contract that was founded and entered into for the only purpose of helping us in the prosecution of this great world war"—

At this point counsel objected, and a colloquy between counsel ensued, and at its close counsel for the government resumed, saying:

"Gentlemen, these facts are given you for your consideration so that you may, in your integrity and upon your oaths as jurymen, do your duty as you see it. We who are not on the battle-lines are here in this country enjoying peace: enjoying all those liberties that only men who are allowed to do business and make a profit while the war is going on on the other side; but I say to you, gentlemen, woe be to the vulture that uses as his carrion the profits derived by illegal sale of the government's goods."

Here counsel for defendant renewed his objection on the ground that it was an appeal to the passion and prejudice of the jury. Then followed another short colloquy between counsel, and counsel for the government appealed to the court that he be permitted to draw his own inferences of the testimony that had been adduced. Whereupon the court observed:

"Gentlemen, you will so understand."

And counsel for defendant excepted.

Later on in his argument counsel for the government said:

"Gentlemen, this does hurt, I know; but I want it to hurt. I want it to go right down to the heart of these men. I want them to feel it as I feel it, gentlemen. Think of your children now trying to sell Thrift Stamps as my children and some of your children are, stopping people on the highways to help in the successful prosecution of this great war. Think of you. Think of me. Think of these men in the courtroom, going to their theaters or places of amusement to-night, and listening to some speaker to-night asking them to buy Liberty Bonds, and think of some thief that would steal the money that you put into that Liberty Bond in order to make the war a success, and ask yourselves the question: Is this prosecution under these circumstances just, and have I the right to expect a verdict in this case of guilty as charged in the indictment? What is the country, gentlemen? Is the country that we live in—is it these buildings; is it the shores of California, with its wonderful, velvety grass; is it the mountains; is it the material that we use to fight the terrible Hun with and barbarian; is it the guns; is that our country? Why, no. You are what we call our country. The men in the courtroom. The human beings that go to make this country what it is. That is your country. I tell you that when men violate this law at this time, and they come before twelve honest, intelligent jurors, and we give them the fair trial that they have had, we give them everything that they are entitled to. We say, this shall not continue, because it is the wrong, thieving crime that will hinder or delay the uplift of a great world and make it a better place to live in, and must be stamped out in its inception; and let us say as we leave the courtroom tonight that no contractor in this district, or anybody that does business with the government, will do it hereafter, except on the level, because we are going to make our verdict ring true and clear in the ears of every contractor."

Counsel for defendant again interposed on the ground that it was an appeal to the prejudice and passion of the jury, and he asked for

the withdrawal of a juror on the ground that the jury may have been prejudiced. The court denied the motion, and an exception was taken.

The court in instructing the jury charged:

"I expressly charge you that you are to disregard any remarks of counsel made throughout the trial, or during the summing up, so far as they may affect your verdict, because your verdict can only be reached upon the evidence itself as presented at the trial."

On the argument in this court counsel asserted that the remarks were such as to preclude the possibility of a fair and impartial trial. It was also urged upon us as quite probable that the appeal to render a verdict from patriotic motives might have had a greater effect upon the jury than the evidence presented by the government.

In Dunlop v. United States, 165 U. S. 486, 498, 17 Sup. Ct. 375, 379 (41 L. Ed. 799), the Supreme Court, having under consideration certain remarks alleged to be improper and which were made by counsel in his address to the jury, said:

"There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. In such cases, however, if the court interfere, and counsel promptly withdraw the remark, the error will generally be deemed to be cured. If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation."

There are numerous cases in which courts have deemed it necessary to set aside verdicts because of prejudicial and improper remarks made by counsel in arguments addressed to juries. We shall not undertake to refer to them even by mere citation. We may observe, however, that the courts have said that language might be permitted to counsel in summing up a civil action which could not with propriety be used by a public prosecutor, who is a quasi judicial officer representing a state or the United States, as the case may be, and whose duty it is to act impartially in the interest only of justice. People v. Fielding, 158 N. Y. 542, 547, 53 N. E. 497, 46 L. R. A. 641, 70 Am. St. Rep. 495. Prosecuting attorneys should be careful not to depart from their line of duty, and it is the plain duty of the trial court not to allow an appeal to be made to a jury for a conviction upon considerations which have no legitimate bearing upon the case and which the jury would have no right to consider. And where this duty has not been performed it is the plain duty of the appellate court to set aside the judgment unless it is convinced that no possible harm has resulted.

In Chadwick v. United States, 141 Fed. 225, 245, 72 C. C. A. 343, 363, Judge Lurton, speaking for the Circuit Court, said:

"There is a degree of liberty allowable to counsel, whether for the government or the accused, in respect to the line of argument they shall pursue and the inferences to be drawn from the evidence, which a trial judge should respect until the facts of the case are overstepped or arguments used which plainly abuse the privilege. But when facts not in evidence are stated to the jury or arguments advanced plainly not justified by the evidence, and calculated to arouse prejudices incompatible with even-handed justice or an orderly

course of procedure, it is the right and privilege of the counsel for the accused to object and ask the interference of the court, and to except when the court denies the appeal. But to entitle the accused to a réversal when objection is made and the language not withdrawn, it must appear that the matter objected to was plainly unwarranted and so improper as to be clearly injurious to the accused."

He added:

"It cannot be seriously claimed that the argument and influence of counsel complained of were so grossly unwarranted and improper as to be palpably injurious to the accused. Unless this does appear, a reviewing court should not reverse upon such an assignment of error."

The language complained of in the case now before the court is certainly no more objectionable than that complained of in Diggs v. United States, 220 Fed. 545, 555, 136 C. C. A. 147, 159. In that case the Circuit Court of Appeals in the Ninth Circuit declared that they discovered nothing "so offensive or inflammatory in the remarks of counsel for the government as to require us on that ground to reverse the judgments."

The cases show that a prosecuting officer, while he may not appeal either to the fears or the vanity of a jury, and so seek to coerce or cajole them into a verdict of conviction, and in this case he did neither, may legitimately appeal to them to do their full duty in enforcing the law. In so far as counsel went beyond that legitimate appeal we are not inclined upon this record to say that the defendant was prejudiced so that the verdict should be set aside. If the evidence of guilt was less overwhelming, and any possible and reasonable doubt of guilt existed, there would be better reason for asking the court to reverse; but, in view of the evidence which we find in the record, we do not deem it proper, in the due administration of criminal justice, to reverse the judgment on the ground assigned.

[4] The defendant claims that he was forced to furnish incriminating evidence against himself, and that he has been convicted upon evidence secured in an unlawful and illegal manner and in violation of his constitutional rights. It appears that, acting under instructions given by the United States Attorney or his assistant, an officer belonging to the United States secret service came to the defendant's place of business in the absence of Fitter, and demanded that Fitter's wife allow him to examine the ledger, delivery slips, receipts, and check books. This demand was complied with, and certain slips and papers were taken away. An hour later an automobile drove up, and two men entered the store, one of them wore a naval uniform, the other one said he was a secret service agent. They entered the back office and called for "Ledger, ledger, contract ledger." Mrs. Fitter at that time was working on the ledger. The man in uniform grabbed the ledger and carried it out of the store. And as the two left, one of the men said he was going to bring the ledger back after comparing it with the delivery slips. Mrs. Fitter did not see the delivery slips, papers, and contract ledger again, however, until she saw them in the office of the United States Attorney on November 27, 1917.

On November 14, 1917, four days after the illegal seizure of the defendant's ledger and papers, the United States Attorney for the

Eastern district of New York was requested to return the ledger, and an offer was made to preserve the ledger in its then condition. No attention was paid to this request, and the ledger was not returned.

Thereafter, and before the trial of this action, a motion was made for the return of the ledger, papers, and slips which had been unlawfully seized, and by direction of the court the ledger and some of the papers were turned over by the United States Attorney to counsel for the defendant.

Neither of the men who examined the defendant's books and papers had a search warrant authorizing them to examine or to seize either the books or the papers. The testimony of the officers is that no forcible seizure was made, but that a request was made which was acceded to by Fitter's wife. What was done was undoubtedly an arbitrary and unlawful violation of Fitter's constitutional rights. The Fourth Amendment of the Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides, inter alia, that no person—

"shall be compelled in any criminal case to be a witness against himself."

[5, 6] The defendant relies upon Flagg v. United States, 233 Fed. 481, 147 C. C. A. 367, which was decided by this court. Flagg was arrested charged with having devised a scheme to defraud and with using the mails in furtherance thereof. At the time of his arrest all the books and papers at his place of business were seized by the federal authorities, who retained them in their possession for several years notwithstanding the accused made demands for their return. The papers at last were returned but in the prosecution of Flagg secondary evidence gleaned from the seized documents was received in evidence. This court reversed the conviction on the ground that as the seizure of the papers was illegal, being without warrant, the evidence derived therefrom was incompetent against the accused, and that a conviction based thereon should be reversed. And in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, the court unanimously held it to be reversible error to admit in evidence documents which had been obtained by a marshal without a search warrant.

If the facts in this case brought it within the principle of the Flagg and Weeks Cases it would be clearly the duty of this court to follow the doctrine they announced. But this case is clearly distinguishable from those to which reference has been made. And we are not inclined to extend the doctrine of those cases to the facts of this. The illegal acts of subordinate agents of the United States should not afford to the clearly guilty a means of escape from a just punishment unless conviction has been secured through the use of documents or other evidence containing self-incriminating matter obtained

by illegal means. That has not been done in this case. The papers and book which the officials of the government took into their possession were not used at the trial by the government or in preparation therefor. The only pages in the ledger examined by the United States Attorney were two, and those were put in evidence by the defendant. Their introduction in evidence by the defendant cured any error, if any existed, based upon their having been for a time in the custody of the government's agents. Finnegan v. United States, 231 Fed. 561, 567, 145 C. C. A. 447.

In the case at bar the trial judge was very particular that no evidence should be received which was derived by the government from any paper or book which the government had taken into his possession by the illegal "seizure." This appears very clearly throughout the trial, but we will refer to but one passage, which sufficiently shows the care of the trial judge in this respect:

"The Court: None of the testimony that you have given, I take it, is based upon information which you acquired from papers seized by the government from the defendant Fitter; is that so?

"The Witness: None whatsoever.

"The Court: Either directly or indirectly; and none of the papers that you produced are papers taken by the government in that way?

"The Witness: None whatever. All are from our own files.

"The Court: At this time I will be very careful to cover this fully with each witness, and I have also instructed the district attorney not to offer any evidence of that sort. Will it not be possible during the rest of the trial for you, or your associate, to direct the attention of the court to any testimony of this sort which you think is being given; otherwise I shall have to caution each witness.

"Mr. Battle: I think, your honor, it would be safer to caution each witness.

"Mr. Beer: At the conclusion?

"The Court: I think it would be better to do so in the beginning, and I shall be obliged to any of you gentlemen to call that to my attention."

Attention is also called to the instruction given to one of the officials of the government, who was one of the officers who was engaged in the seizure of the books. When he was called to the stand to testify the court said:

"Now, Ensign Fitzgerald, you have been called by the United States government to testify at this prosecution against Fitter and others on trial. Some time ago the authorities of the government seized certain books and papers, property of Fitter, and the court directs attention to your testimony. If you acquired any information as the result of any examination you may have made of these papers, or any information that you may have learned indirectly as the result of the contents of those papers, you are to omit all such testimony during your examination.

"The Witness: I see, sir."

And the United States Attorney stated that the book and papers which the government officials illegally took into their possession were of no value in the prosecution of the case and in procuring the necessary evidence.

[7] It appears that during the examination of a witness the counsel for the government asked defendant's counsel whether he had slips which the witness on the stand referred to. The extract from the record follows:

"Mr. Beer: Have you got those slips?

"Mr. Wood: We object to the District Attorney calling upon the defendant to produce slips, and take exception to it.

"Mr. Beer: I will consent to it being stricken out, and ask the court to disregard the remark at this time.

"The Court: I did not hear the remark. If any juryman heard it, I instruct them to disregard it. The District Attorney has withdrawn it.

"Mr. Wood: The defendant excepts, and insists that the exception go on the record."

The defendant's counsel appears at the trial to have made much of a remark which the court had not heard and which it is doubtful if any member of the jury had heard. In view of the fact that the counsel for the government at once withdrew the remark, and that the court immediately cautioned any juryman to disregard it if he heard it, we do not regard the occurrence as one which would justify a reversal. The circumstances are such as to plainly distinguish the case from McKnight v. United States, 115 Fed. 972, 977, 54 C. C. A. 358, where the demand for the production of an incriminating document was made by counsel for the government acting by direction of the trial judge, and where there was no direction to the jury to disregard the error. The Circuit Court of Appeals in that case said very properly that the compulsory production of a criminating document by the accused when on trial for crime is compelling him to testify against himself within the meaning of the Fifth Amendment to the Constitution.

[8, 9] It is objected that Will and Goodman, who were jointly indicted with Fitter, and were placed on trial with him, but at the opening of the trial withdrew their pleas of guilty, should not have been permitted to testify, having confessed themselves guilty of felony. The common-law rule made a person incompetent as a witness who had been convicted of an infamous crime. In 40 Cyc. 2207, the rule is laid down that "It is not the guilt, but the judgment thereon, which disqualifies the witness; and therefore a person who has not been sentenced is competent, although he has been found guilty of felony, or has pleaded guilty to a charge thereof," citing the cases. And in the case at bar the two witnesses complained of had pleaded guilty, but had not been sentenced at the time their testimony was received. Moreover, the rule in the courts of the United States since Rosen v. United States, 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406, was decided, makes the testimony of persons convicted of crime admissible, and the conviction simply goes to the credibility and weight of their testimony.

[10] It is also objected that error was committed in excluding the testimony of Fitter's wife, who was called to give evidence for the defense. The common-law rule made husband and wife incompetent as witnesses for or against each other in either civil or criminal proceedings. In some of the states the disqualification arising from the relation of husband and wife has been removed by statute, but no statute has been passed on this subject by Congress. In United States v. Reid, 12 How. 361, 13 L. Ed. 1023, the court held that the competency of witnesses in criminal trials in United States courts

must be determined by the rules of evidence which were in force in the respective states when the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 73) was passed. In Rosen v. United States, supra, the court concluded that "the dead hand of the common-law rule of 1789 should no longer be applied" to exclude the testimony of convicted felons. It may perhaps be said with equal reason that "the same dead hand" should no longer disqualify husband and wife except as respects confidential communications. If the trial judge had permitted Mrs. Fitter to testify, this court would not readily have been inclined to hold that error had been committed. But this judgment of conviction certainly cannot be set aside because the court still adhered to the rule of the common law.

We come now to the consideration of what we regard as the most serious questions which the case presents. The defendant objects to the admission in evidence of confessions alleged to have been made by three of the defendants. This testimony is objected to on the ground that the confessions were obtained by inducements held out by those in authority, and so were not voluntary. It is also objected that the admissions of co-conspirators which are alleged to have been made after the conspiracy came to an end were received in evidence.

[11] The prosecution claims that the confessions were voluntary and that they were not made after the conspiracy was concluded. The evidence that they were not voluntary is based on what was said by one Fitzgerald, an ensign attached to the Naval Intelligence of the United States Navy at the Navy Yard in Brooklyn, and who was questioning the defendants concerning their connection with the alleged offense. The conversation took place prior to their arrest. Fitzgerald's testimony was that he said to defendant Will that Goodman had made a confession implicating himself and Will, and "I want your story from you and the best thing you can do is to tell me the truth." Then he went over to the Navy Yard and found Prager. He told him that he had a couple of confessions that he had been delivering short weights at the City Park Barracks, and that he wanted to have a talk with him. They went into one of the buildings at the Navy Yard, and Fitzgerald testified he said, "Prager, if you have been delivering the stuff at the direction of Fitter, you know the best thing you can do for yourself is to come across." Prager confessed. Then Wittholm was brought in, and the officer said: "Wittholm, we have a confession of George C. Goodman and the chief commissary steward at the City Park Barracks to the effect that they have been receiving money from John Fitter for accepting shortages at the City Park Barracks. Prager has just admitted to me that he delivered goods to the City Park Barracks at the full amount of the consignment signed for, whereas he knew that he only delivered part of it, and you better come across and tell us the truth also, as we know you have been implicated in it." The court asked him to repeat what he said to Wittholm, and his version then was "the best thing that you can do is to tell the truth. You will make it just that much easier for yourself to tell the truth." We think that the evidence shows that Fitzgerald was mistaken in saying that

he used the words, "You will make it just that much easier for yourself to tell the truth," as will appear as we proceed. Then Katz was brought in and informed that Goodman and Will had confessed and had implicated him, and "we want you to tell the truth; come across and tell the truth." An officer who was attached to the Naval Intelligence Bureau, and who was present at the conversations above detailed and heard them, denied positively that Fitzgerald, who questioned Prager, told him that he "had better come across and tell the truth; it will be easier for you." And he testified that to the best of his knowledge what was said was, "Tell the truth."

Goodman on cross-examination was asked whether Fitzgerald said to Prager, "You had better come across; it will be easier for you." He replied: "I don't remember 'easier.' He said the best thing to do would be to come across and tell the truth." Goodman also testified that he had received no promises from any one.

An assistant paymaster in the navy, who was present when Fitzgerald talked with Prager, testified that he did not hear him say, "You better come across; it will be much easier for you if you do." It is quite unimportant whether the words, "You better come across," were used; for the evidence disclosed that it was a slang expression, meaning to tell the truth.

The defendant Will testified at the trial that no promise whatever had been made to him, and that he did not confess until after he and defendant Goodman had talked the matter over between them, and concluded to make a statement to the United States Attorney a week before the trial began.

The civil and common law regarded differently the question of the admissibility of confessions in evidence. The civil law assumed that an innocent person would not confess to the commission of a crime he had not committed. It therefore regarded confessions as evidence of the most satisfactory kind, and as conclusive evidence of guilt in all cases not capital, unless there was overwhelming proof to the contrary. Domat's Civil Law, § 2086. But the common law took quite a different view of the subject, and was disposed to regard confessions with distrust. At one time the courts in England, as Sir James Fitzjames Stephen in his History of the Criminal Law of England, vol. 1, p. 447, points out, "were disposed to take almost any opportunity to exclude evidence of confessions, almost anything being treated as an inducement to confess. In 1852, however, the law was considerably modified by the decision in the case of R. v. Baldry, 2 Den. 430, since which time the disposition has been rather the other way." The English rules of evidence, incumbered as they originally were with what Stephen calls "all manner of irrational matter," excited the indignation of Bentham, who thought that all objections to evidence ought to be objections, not to its admissibility, but to its weight. And his influence has had much to do with the modification of these rules in England.

In this country our courts have been inclined to take a more liberal view of the subject of confessions than the English courts took.

In Hopt v. Utah, 110 U. S. 574, 584, 4 Sup. Ct. 202, 207 (28 L. Ed. 262), the court, speaking of the admissibility of confessions, said:

"While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain, as observed by Baron Parke in Regina v. Baldry, 2 Den. Cr. Cas., 430, 445, that the rule against their admissibility has been sometimes carried too far, and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy."

In Commonwealth v. Chance, 174 Mass. 245, 249, 54 N. E. 551, 553 (75 Am. St. Rep. 306), the court, speaking through Chief Justice Holmes, held certain conversations between an accused person and a police officer voluntary and properly received in evidence, and said:

"We have no disposition to make the rule of exclusion stricter than it is under our decisions. It goes to the verge of good sense, at least."

The rule in regard to the admission of confessions is stated by the Supreme Court in Bram v. United States, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, as follows:

"But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * *

"A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted. * * *"

The question, therefore, is whether the testimony already referred to must be considered as amounting to such an inducement or improper influence as should have caused the trial court to exclude the confessions from evidence. We think this question must be answered in the negative.

In Wharton's Criminal Evidence (Ed. 1912) vol. 2, p. 1344, § 647, it is said that "a mere adjuration to speak the truth does not vitiate a confession, when neither threats nor promises are applied."

The same authority in volume 2, § 654, p. 1358, states the law as follows:

"As to admonitions to tell the truth, even where coupled with the statement that to tell the truth is best, it has been held in this country that the confession is voluntary; but in England the words, 'You had better tell the truth,' seem to have acquired a sort of technical meaning, importing a threat or a benefit. As anomalous as it may seem, the explanation is that, while the accused is advised to tell the truth, he supposes that what the authorities mean is that he is to say that he is guilty, and this, coupled with the statement that it would be better to tell the truth, furnishes the temptation to make an unworthy statement, hence an involuntary confession. In this country, however, the weight of authority is that an inducement cannot be implied from the mere exhortation that it is better, or is best, to tell the truth, nor under the advice that if the accused is guilty a confession could not put him in any worse condition, and that he had better tell the truth at all times."

In Sparf & Hansen v. United States, 156 U. S. 51, 55, 56, 15 Sup. Ct. 273, 39 L. Ed. 343 (1895), the accused was told that when the right time came to "tell the truth." And the Supreme Court said

that "this was not offering to the prisoner an inducement to make a confession. Littledale, J., well observed in Rex v. Court, 7 Car. & P., 486, that telling * * * the truth is not advising him to confess anything of which he is really not guilty. See, also, Queen v. Reeve, L. R. 1 C. C., 362."

In Lucasey v. United States, Fed. Cas. No. 8588a, decided in the Circuit Court for the District of Columbia in 1852, the accused was told "it would be better for him to tell the truth," and thereafter he told where the stolen property was. The court, over objection, had admitted the evidence, and the judgment of the trial court was affirmed. It does not appear whether the person who told the accused that it would be better for him to tell the truth occupied any official relation.

In Hintz v. State, 125 Wis. 405, 104 N. W. 110 (1905), the sheriff said to the prisoner: "You might as well tell the truth, Charlie. I think it would be better for you." The prisoner said: "Do you think it would do me any good?" And the sheriff replied: "I think the truth is always the best." The confession was held properly received. In Roszczyniala v. State, 125 Wis. 414, 104 N. W. 113 (1905), the inspector said to the accused, "You better tell the truth about this matter;" and it was held the confession was admissible.

In Huffman v. State, 130 Ala. 89, 30 South. 394 (1900), the officer who arrested the defendant said to him: "If you have stolen the cotton, it will be better for you to tell the truth about it." The court held that this did not render the confession involuntary and inadmissible. And the court cited a number of Alabama decisions to the like effect.

In State v. Habib, 18 R. I. 558, 30 Atl. 462 (1894), an accomplice said to the accused, who was under arrest: "It's no use trying to get out of it; they've got us dead; we have all been arrested, and you might as well tell the truth." The accused then confessed, and his confession was held properly received in evidence.

In State v. Nagle, 25 R. I. 105, 54 Atl. 1063, 105 Am. St. Rep. 864 (1903), a statement made to the mittimus officer by one accused of murder while in custody on the way to jail was held to have been improperly admitted in evidence and to constitute reversible error. The statement was made after the officer had told her that "the truth, whatever that might be, ought to be told; that it was always the best, except where it would be the means of conviction, and that even then he should prefer it if it were his case; * * * that there was ample proof that" the accused had bought the revolver, "and that, having mentioned the place where she bought it, she might just as well say whether or not she bought it." While the court held the admission in evidence of what the woman said was under the circumstances reversible error on the ground that her statement was not voluntary, it declared that "we do not wish to be understood in what we have thus said, however, as deciding that a mere request, advice, or admonition to tell the truth will render a confession induced thereby inadmissible in evidence; for the strong current of authorities, as well as the better reason, is to the contrary. * * * Those

decisions which have gone to the extent of so holding have certainly gone 'to the verge of good sense, at least.' But where the request or admonition is given in such language and under such circumstances that the prisoner might naturally have understood it as recommending a confession, the confession induced thereby will be inadmissible in evidence."

In State v. Kornstett, 62 Kan. 221, 61 Pac. 805 (1900), the court held that mere advice or admonition to the accused to speak the truth, which does not import a threat or benefit, will not render a confession then given incompetent.

In Rizzolo v. Commonwealth, 126 Pa. 54, 17 Atl. 520 (1889), a subordinate detective told the prisoner that "he had better tell the captain all he knew; that it would be better for him." Later the captain told him: "If you have anything to tell me, in God's name tell me the truth; if not, tell me nothing. * * * I can make you no promise; I cannot even ask you to tell me a word; but I tell you now, anything you say to me I shall use against you. * * *" The confession received under these circumstances was held properly admitted in evidence.

In State v. Anderson, 96 Mo. 241, 249, 9 S. W. 636, 639, the court held a confession admissible, saying that confessions are inadmissible which are forced from the defendant by flattery of hope or torture of fear, adding: "But mere adjurations to tell the truth furnish no ground for excluding them. State v. Hopkirk, 84 Mo. 278." In the Anderson Case the accused was told by one of his guards: "Ed, if you are innocent, stick to it; if guilty, acknowledge it, and it will probably go easier with you."

In State v. Meekins, 41 La. Ann. 543, 6 South. 822 (1849), the court sustained the admissibility of a confession, saying: "The bill discloses nothing impairing the free and voluntary quality of the confession. Neither threat nor promise was made, but it was given on the simple advice of the officer that 'he had better tell the truth.'"

In Heldt v. State, 20 Neb. 493, 30 N. W. 626, 57 Am. Rep. 835, a detective in the guise of a friend told a suspected party that he had consulted an attorney, who said: "He [the prisoner] had better tell the facts of the case and that they would be likely to do him as much good as anything he could do, and that there was no use lying about it, and he had better tell the truth," and the court held the confession admissible.

In State v. Staley, 14 Minn. 105 (Gil. 75) (1869), the court held that a confession made in answer to a question assuming the guilt of the person confessing, or which was obtained by artifice, falsehood, or deception, or procured by a caution to the accused to tell the truth, if he said anything, did not render a confession inadmissible. It was declared that "unless there is a positive promise of favor, made or sanctioned by a person in authority, or the inducement held out is calculated to make the confession an untrue one, I think it may be laid down as a rule based on reason, and deducible by the late authorities, that the confession will be admissible."

The fact that the confessions were made by defendants while they

were in the naval prison is emphasized by counsel as a matter of consequence in determining the admissibility of the confessions. These men were not at the time under arrest, and were not in a cell or in the prison proper, but in a room used for hospital purposes. In Sparf & Hansen v. United States, supra, counsel contended that a confession could not be voluntary if made while a defendant is imprisoned and in irons under an accusation of having committed a capital offense. The court held otherwise, saying: "We have not been referred to any authority in support of that position." And "confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises."

In Wilson v. State, 19 Ga. App. 759, 769, 92 S. E. 309, 313, the court said: "Telling a prisoner that it will be better for him to tell the truth can hardly, by any process of right reasoning, be interpreted as an invitation to him to make an untrue confession."

[12, 13] We come in conclusion to inquire whether there was error in admitting in evidence the confessions of the codefendants. The general rule was stated in American Fur Co. v. United States, 2 Pet. 358, 365 (7 L. Ed. 450), Mr. Justice Washington speaking for the court. He said that, "where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the res gestæ, may be given in evidence against the others." So in Wiborg v. United States, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289, the court declared that the declarations must be made in furtherance of the common object, or must constitute a part of the res gestæ of acts done in such furtherance. And as this court held in Erber v. United States, 234 Fed. 221, 228, 148 C. C. A. 123, admissions or confessions made after a conspiracy is at an end cannot be received as against a coconspirator. In this case confessions made after the conspiracy was at an end were received in evidence for the purpose indicated in the court's charge to the jury, which was as follows:

"Now, gentlemen, you have also to consider that proof has been offered by the government that the defendants Goodman, Katz, Prager, and Wittholm have made so-called confessions of their participation in this alleged conspiracy; and while the confessions themselves are only to be received by you as evidence against the defendant himself for making the confessions, so far as the confession is concerned, nevertheless the court charges you that that confession is some corroboration of the testimony given by the defendants Will and Goodman where it applies thereto; and it is for you to determine whether there has been produced by the government, and offered in evidence, sufficient corroboration to satisfy you that the testimony given by the defendants Will and Goodman is correct, and that the guilt of the defendants has been established beyond a reasonable doubt."

To so inform the jury, and then immediately add that the confessions might also be used as some corroboration of the testimony given by Will and Goodman, was inconsistent and confusing. The jury had been told that the testimony of Will and Goodman, being the testimony of confederates and accomplices, should not be accept-

ed unless corroborated. And then they were informed in the portion of the charge above set forth that the confessions might be accepted as some corroboration of the two witnesses, Will and Goodman. This was permitting the confessions to be used against Fitter.

And as the conspiracy was at an end when the confessions were made, they could not be so used. The objection to their admission in evidence was properly taken at the time and the error requires a reversal.

Judgment reversed.

PROVIDENT LIFE & TRUST CO. et al. v. FLETCHER et al.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 231.

1. USURY ⚷37—PURCHASE OF CONTINGENT LEGACY.
   A transaction by which a legatee 44 years old, who had been refused life insurance by various companies, assigned an interest in a legacy payable only in case he reached the age of 55 for less than one-tenth of legacy's amount *held* not usurious.
2. WILLS ⚷743—ASSIGNMENT OF LEGACY—GROUNDS FOR EQUITABLE RELIEF—"CATCHING BARGAIN."
   When a well-educated man 44 years old, with independent means, conveys his interest under a contingent legacy for a small fraction of the legacy's amount, the transaction will not be set aside as a "catching bargain," which merely describes that kind of fraud often perpetrated upon young, inexperienced, or ignorant people.
   [Ed. Note.—For other definitions, see Words and Phrases, Catching Bargain.]
3. EXECUTORS AND ADMINISTRATORS ⚷524(2)—SUIT IN FOREIGN JURISDICTION—FEDERAL COURTS.
   Foreign executors, who have filed papers required by Code Civ. Proc. N. Y. § 1836a, may sue in a federal court in New York to recover funds of the estate.
4. EXECUTORS AND ADMINISTRATORS ⚷524(2)—SUIT IN FOREIGN JURISDICTION—FILING LETTERS—NEW YORK STATUTE.
   Code Civ. Proc. N. Y. § 1836a, requiring foreign executors to file copies of letters, is a condition subsequent to a suit, and may be complied with at such time as the court permits.
5. ASSIGNMENTS ⚷43—EFFECT OF WRONG DATE—"FORGERY."
   An assignment dated a year before it was actually made, through a clerical error which has done no harm, is not invalid as a forgery, since a "forgery" consists of the false making or material alteration of a writing which, if genuine, would be of legal effect, and doing so with intent to defraud.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Forgery.]
6. WILLS ⚷743—ASSIGNMENT OF LEGACY—EFFECT ON PRIOR ASSIGNMENTS.
   An absolute assignment of certain rights in a legacy under a specified item of a will did not extinguish rights previously secured through an assignment pledging an interest in legacy under another item of same will.
7. ASSIGNMENTS ⚷46—RECORDING STATUTE—RETROACTIVE CONSTRUCTION.
   The New York statute regulating the recording of assignments of interests in estates is not retroactive.

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

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

Suit by the Provident Life & Trust Company and Catherine Stewart Wood, as executors under the last will and testament of William Brewster Wood, deceased, against Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, and Conrad Morris Braker and Daniel P. Ritchey. Decree for complainants (237 Fed. 104), and defendants Braker and Ritchey appeal. Affirmed.

This action as originally brought by the Provident Company et al., as executors of Wood, was a suit to enforce an assignment of a contingent interest under the will of Conrad Braker, Jr., deceased. The parties defendant are the same as in Brown v. Fletcher, 253 Fed. 15, — C. C. A. —, here as there Fletcher the trustee is a mere stakeholder, and the basis of litigation is another of Conrad Morris Braker's transfers of contingencies under his father's will, in consideration of small cash payments. The decision appealed from is reported in 237 Fed. 104, and the statement of facts prefixed to Judge Learned Hand's opinion is adopted by this court.[1]

Subsequent, however, to the decision just cited, one Ritchey was permitted to intervene, and set up by cross-bill a claim arising as follows: On March 5, 1902, New York Finance Company borrowed from one Banes, trustee under the will of Banes, deceased, $5,000, and executed and delivered to said Banes its promissory note for that amount, bearing interest at 6 per cent. and due February 25, 1905, contemporaneously assigning as collateral to said note, and to said Banes, "all the estate, right, etc., of any kind, form, or description which the said New York Finance Company now has or hereafter may have in the estate of Conrad Braker, Jr., deceased," by virtue of Conrad Morris Braker's assignment of February 25, 1902, to said Finance Company. Thus Banes, trustee, had as security for his $5,000 note what, if Conrad Morris Braker lived long enough, would amount to $35,000, out of the sums coming to him under the fifteenth and sixteenth articles of his father's will.

On August 12, 1907, the Finance Company, "in consideration of a certain agreement dated July 2, 1907," between itself and Banes, trustee, transferred to said Banes absolutely all its right, title, and interest in the estate of Conrad Braker, Jr., deceased, "subject, however, to all existing and prior assignments thereof." The agreement of July 2, 1907, is not in evidence. By mesne assignments, not necessary to enumerate, Ritchey, the intervener, became the owner of whatever Banes, trustee, had by the transactions recited.

Subsequent to the loans to Finance Company, which are the basis for both Ritchey's and the Provident Company's demands, it became legal in New York to record in the office of the appropriate surrogate such transfers of shares in estates as those by Finance Company to Banes and Wood section 32, Personal Property Law (Consol. Laws, c. 41). Thereupon the owners for the time being of what are now the claims of both Ritchey and Provident Company recorded these conveyances, but both the Banes-Ritchey transfers (of 1902 and 1907) were recorded before either of the Wood-Provident Company transfers (of 1903 and 1912).

The intervener Ritchey also showed, or called to the attention of the court, that the "written assignment as collateral security" by Finance Company to Wood, accompanying the note of July 5, 1903, and transferring all Finance Company's "right arising by virtue of the assignment of Conrad Morris Braker of February 25, 1902" (237 Fed. at page 105), purported to be executed March 5, 1902, and was signed by one as president of Finance Company who was not such president on said March 5, but was so on September 18, 1903, when he acknowledged its execution.

On this record, Ritchey then joined with Provident Company in asserting that Finance Company's transaction with Braker on February 25, 1902, was

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[1] The report in 237 Fed., on the ninth line from foot of page 105, contains a confusing typographical error. The date July 5, 1912, should read July 5, 1903.

not a loan, nor tainted with usury, and did render Finance Company absolute owner of Braker's expectations under the fifteenth and sixteenth articles of his father's will to the extent of $35,000; but he opposed Provident Company's claim to $15,000 and interest therefrom, and demanded the whole fund, with its accumulations pendente lite, because:

(1) The transfer accompanying the Wood note of July 5, 1903, is a "forgery."

(2) The absolute conveyance of 1912 to Wood extinguished the note and collateral assignment of 1903, and the Provident Company's claim must stand on the later transfer only; which

(3) Is inferior to the Banes transfers, because later in time of execution, as well as later in date of record; and the statute compels such assignments as these to rank in the order of recording, even though executed and delivered before enactment of the recording act.

Braker urged a defense, as against the plaintiff only, not appearing in Brown v. Fletcher, supra, viz. that plaintiffs were executors of Wood, appointed in the state of Pennsylvania, who had never obtained ancillary letters in New York, and did not comply with section 1836a, Code Civ. Proc. N. Y., until long after suit begun; i. e., at the trial below. The Code section in question permits foreign executors and administrators to sue in New York on producing and filing in the "office of the clerk of the court" a duly authenticated copy of their letters, "in default whereof, all proceedings * * * may be stayed until such duly authenticated copy of such letters shall be so filed."

The trial court overruled all Braker's defenses, and held that out of the whole $35,000 (and interest) arising under the fifteenth and sixteenth sections of the Braker will, Ritchey should be first paid the $5,000 Banes note and interest, then Provident Company et al. should receive the principal and interest of the $15,000 Wood note and interest, and the balance go to Ritchey. Both Braker and Ritchey appeal.

Safford A. Crummey, of New York City, for appellant Braker.

Davis, Donohue, Thompson & Deitz, of New York City (Robert L. Luce and Seward Davis, both of New York City, of counsel), for appellant Ritchey.

Miller, King, Lane & Trafford, of New York City (Perry D. Trafford, Wolcott G. Lane, and Orrin C. Isbell, all of New York City, of counsel), for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] Using the word "usury" with reference to the statutes of New York, it disposes of Braker's major defense to refer to our decision in Brown v. Fletcher, supra. The present transaction shows no insurance procured at Braker's expense, nor any covenant on his part to pay at all events. This leaves the main inquiry one of fact, viz. whether Braker did in form absolutely sell and assign his expectancy, knowing what he did and intending to do it.

On this point it is of no importance whether he liked to sell, or preferred to borrow. Many an act is voluntary in the legal sense, although induced by unwelcome and distasteful circumstances. With the court below we find it amply proven that Braker did sell to Finance Company his expectancies under the fifteenth and sixteenth articles of his father's will, with full knowledge of what he was doing, and intending to do what he did. That he also contemporaneously intended to deny such willingness and knowledge, should he live to be 55 years old, is, we think, also proven, but is quite immaterial, except as a reflection upon Braker's character.

[2] There remains a renewed appeal to the doctrine of catching bargains. The material facts on this point do not differ from those in the Brown case, except that Braker was about a year older. This doctrine (in so far as it does not rest upon a desire to preserve to the heir the family estate) is but an aid to equity when endeavoring to apply what Justice Bradley called "a principle of law, as well as of natural justice," namely, that "greater consideration and care are due to persons known to be unable to take care of themselves than to those who are fully able to do so." Graffam v. Burgess, 117 U. S. 185, 6 Sup. Ct. 686, 29 L. Ed. 839.[2]

In so far as decisions have been based on judicial desire, confessed or obvious, to preserve and perpetuate family estates, we decline to follow the same, regarding such doctrine as wholly unsuited to our national spirit, and certainly unsupported by any ruling of our highest court.

It having been agreed for a long time that mere inadequacy of price is not enough to set aside the sale of an expectancy, the inquiry always is whether an unconscionable advantage was taken by or through means inequitable, even though legal. Thus "catching bargains" becomes no more than a phrase convenient to describe the kind of fraud often capable of perpetration upon the young, the inexperienced, or the absolutely ignorant. For a good example, see Hallett v. Collins, 10 How. 184, 13 L. Ed. 376. When such circumstances are proven, and it is insisted "that the proceedings were all conducted according to the forms of law," the comment of Justice Bradley (Graffam v. Burgess, supra) is always appropriate. He said:

"Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

But where, as here, the man who in due form sells that which may be much, in consideration of that which is very little, is upwards of 40 years old, of good education, well to do according to any reasonable standard of expenditure, and under no other coercion than that of his own bad habits, we are still agreed that to such a man the doctrine of catching bargains has no application, and neither by reason nor authority are we compelled to assist him in escaping from a predicament of his own creation.[3]

[3, 4] The point that these plaintiffs have not shown a right to sue as foreign executors under Code Civ. Proc. § 1836a, is without substance. The reason for a foreign executor's inability to sue is not that the court cannot hear him, but that he is officially confined to his own jurisdiction. When that disability is removed by the Legisla-

[2] The cases on this subject are, we think, all collated in 11 Corpus Juris, p. 32. See, also, the earlier view that the doctrine is one primarily for the benefit of "an heir expectant." Bouvier's Law Dictionary (12th Ed.) sub nom. "Catching Bargains."

[3] See the treatment of a not dissimilar transaction with a much younger man, per Justice (then Vice Chancellor) Pitney, in Dixon v. Bentley, 68 N. J. Eq. 124, 59 Atl. 1036. The purchasers were the same men who as New York Finance Company dealt with Braker.

ture, he may address any court sitting within the territorial area of legislative power. Thus the statute of New York in effect entitles these plaintiffs as nonresidents to sue in the courts of the United States. It was so held under similar circumstances in Beaumont v. Beaumont (C. C.) 144 Fed. 288. That the production and filing of the exemplification of letters required by the statute is a condition subsequent to suit, and may be complied with at such time as the court permits, was decided in respect of this particular statute in Lecouturier v. Ickelheimer et al. (D. C.) 205 Fed. 683, which decision we approve.

[5] In respect of Ritchey's effort to exclude Provident Company et al. from all participation in this fund, we are of opinion that the original transfer by way of collateral security to Wood, deceased, was not a "forgery." Counsel seems to use that word rather to indicate invalidity than to accuse of crime, and such invalidity rests wholly upon the admitted or proven fact that an instrument bearing date March 5, 1902, was neither created nor delivered until July 5, 1903. But a forgery (irrespective of any statute) consists essentially in the false making or material alteration of a writing which, if genuine, would be of legal efficacy, and of doing this with intent to defraud. We find as facts that there was no intent to defraud, and that nothing was falsely made. The erroneous date was no more than a draftsman's error, which has done no one any harm. Nor did this document even purport to minimize or interfere with any rights in or belonging to Banes at the date when it took effect, to wit, its delivery on July 5, 1903.

[6] The absolute conveyance to Wood's executors of 1912 did not, and did not purport to, extinguish the rights obtained by Wood through his note and the accompanying agreement of hypothecation. It attempted to make the executors absolute owners of any $20,000 that might accrue under the sixteenth article of the Braker will; but it did not in the least affect their position as pledgee in respect of the fifteenth article. The attempt was idle, because of the earlier assignment to Banes; but Ritchey surely cannot complain of that.[4]

Nor can it be held that Wood's executors unwittingly surrendered what they already had, in consideration of something of no worth after the transfer to Banes of 1907.

[7] The New York statute permitting and regulating recording of assignments of the interests in estates is not retroactive. Such is the general law; it was so held in respect of deeds in this state. Jackson

[4] The collateral assignment to Wood (erroneously dated March 5, 1902) begins with a recital to the effect that Braker had sold to the Finance Company his interest under the sixteenth article of the will to the extent of $20,000; and then in the habendum clause assigns to Wood all the "estate, right, title, and interest" of the Finance Company in the estate of Braker, deceased. In point of fact the Finance Company had an estate under the Braker will in respect of both the fifteenth and sixteenth articles thereof. The plaintiffs pleaded a right to be reimbursed out of the funds arising under both articles. As neither in pleading nor by argument has it been asserted that the conveyance by way of pledge was limited by the recital above mentioned, we do not advert to the point.

v. Chamberlin, 8 Wend. (N. Y.) 620. It follows that, the transfer by Braker to the Finance Company having been absolute and valid, the conveyances of parts thereof made before the existence of a recording act are enforceable in the order of time of making, and that the decree of the court below was substantially right. It is therefore affirmed, with one bill of costs to the appellees, to be assessed against both appellants.[5]

GILSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 215.

1. CRIMINAL LAW ⚷825(2)—INSTRUCTIONS—NECESSITY OF REQUESTS.
Instruction in a conspiracy case that commission of one of the overt acts alleged by one or more of defendants would sustain a conviction, etc., *held* not erroneous, because authorizing a conviction on an overt act not proven, or committed by a codefendant who had been acquitted, where no further instruction was requested.

2. CRIMINAL LAW ⚷1059(1)—REVIEW—EXCEPTIONS IN LOWER COURT.
In a conspiracy case, exception to part of charge stating it would be sufficient if any one or more of alleged overt acts was established *held* insufficient to raise on writ of error question that charge allowed a conviction based on overt act not proven, or committed by a codefendant who had been acquitted.

3. CRIMINAL LAW ⚷844(1)—INSTRUCTIONS—EXCEPTIONS.
Exception to charge in criminal case must be specific, and not general.

4. CRIMINAL LAW ⚷1048—ERRORS NOT RAISED BY EXCEPTION.
While plain error not raised by exception may be noticed on appeal, right to do so will not be exercised, unless it is evident that serious injustice will otherwise result.

5. CRIMINAL LAW ⚷1056(1)—ERROR NOT RAISED BY EXCEPTION—INSTRUCTIONS.
Any error in an instruction in a conspiracy case, claimed to permit jury to consider unproven overt acts, does not authorize a reversal, in absence of an exception, where numerous overt acts were established by evidence.

6. CONSPIRACY ⚷47—EVIDENCE—SUFFICIENCY.
Indirect evidence regarding defendant's participation in a conspiracy to defraud United States, by substituting inferior materials in army service hats, *held* to sustain a conviction.

7. CRIMINAL LAW ⚷1159(2)—REVIEW—QUESTIONS OF FACT.
Where record in a criminal case contains sufficient evidence on part of prosecution to require submission to jury, any reasonable doubt raised by accused's evidence is solely for jury, and will not be re-examined by appellate court.

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[5] As the fund in the trustee's hands is large enough to pay both the Banes and Wood notes, with interest, and leave a surplus to Ritchey, we leave unnoticed, as merely academic, the inquiry whether Ritchey, as Banes' assignee, could not be compelled to stand wholly upon his assignment of 1907, instead of his note plus the assignment of 1907. The court below regarded the 1907 instrument as of no effect at all for lack of consideration. It is certainly arguable that the Finance Company could give away what they owned absolutely, and that they in effect did so; but, as the fund is ample, the order of payment becomes immaterial.

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

Arthur C. Gilson and Thomas J. Duffy were convicted of conspiring to defraud the United States, and they bring error. Affirmed.

The indictment is against numerous persons and corporations for a conspiracy (Criminal Code [Act March 3, 1909, c. 321] § 37, 35 Stat. 1096 [Comp. St. § 10201]) to defraud the United States. It was charged and proven that several firms and corporations (whose names are of no importance) contracted with the United States, through proper officers of the War Department, to make about a million "service hats" for army use. The several contracts calling for this quantity of headgear were made at divers times between June, 1916, and June, 1917; that is, both before and after the declaration of war by the United States against Germany. The indictment having been severed as to some of the defendants, the earlier contracts became unimportant, when Gilson and Duffy, with two other men, were tried.

Many, if not most of the hats contracted for were made at two factories; one in Peekskill, N. Y., and the other in New Jersey. Gilson was an employé of the United States and inspector at the Peekskill factory; Duffy was similarly employed and stationed at the New Jersey establishment. Their duties were to see that the United States got what it had contracted for, and particularly that the said "service hats" were made of the material (viz. the hair or fur of certain specified animals in certain definite proportions) agreed on in contract and specifications. The two men who were tried with Gilson and Duffy were employés of one or the other of the factories above named.

The fraud alleged to have been the object of the conspiracy, and actually perpetrated according to the evidence, consisted in substituting inferior hair or fur, or deficient quantities of the more expensive qualities of hair, in that mixture of divers sorts of commercial hairs which, when felted, makes "hat-bodies." The result of the fraud was a hat cheaper than, and inferior to, that contracted and paid for.

The evidence for the prosecution tended to show that one John J. Slattery, named as a defendant in the indictment, but who died before trial, was the man most actively concerned in, if not the originator of, this scheme of fraud. He went from one factory to the other, giving directions or making arrangements for the preparation of the inferior hair mixtures above referred to. It was not contended below, nor is it argued here, that the fraud did not occur. The defense of the four men tried was that they were no parties to the scheme, were not aware of any wrong, and were therefore not conspirators with Slattery, deceased, or any one else.

Of the four defendants tried, two were acquitted; Gilson and Duffy were convicted, and brought this writ.

Harrison P. Lindabury, of Newark, N. J., for plaintiffs in error.

Francis G. Caffey, U. S. Atty., and Frank M. Roosa, Sp. Asst. U. S. Atty., both of New York City.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The indictment charges as overt acts eight several happenings occurring at sundry dates between June 26, 1916, and October 1, 1917. None of the overt acts alleged to have taken place in 1916 were proven; most of those not proven being appropriate (if at all) only in respect of the defendants as to whom there had been a severance.

[1-3] In his colloquial charge the learned trial judge called the attention of the jury to the fact that the indictment set forth "some eight overt acts." He described certain of the overt acts aforesaid as to which evidence had been given, and further stated:

"If one of these overt acts was performed by one of the parties, or one or more of the parties, then that is sufficient under the statute, providing you find there is a conspiracy, to make out the crime as charged."

He also said:

"If any of these overt acts that I have called your attention to, and such others as you may find from the evidence here, were performed by any of the defendants after the conspiracy had been entered into and during the life of the conspiracy, then, gentlemen, that overt act is binding upon them all, because that you may say was an act in furtherance of the conspiracy."

At the close of the charge counsel for the plaintiffs in error took this exception:

"I desire to except to that part of your honor's charge in which you said that it will be sufficient for the purpose of the charge, as against these defendants, if any one or some of the overt acts alleged in the indictment is established."

It is now asserted that under this charge Gilson and Duffy may have been convicted of a conspiracy without the jury's finding as a fact the commission of an overt act by any conspirator; and this is said to follow from the generality of the court's language, which left the jury to fasten upon some overt act that had not been proven, or one performed by a codefendant who was acquitted, as a means or ground for convicting Gilson and Duffy or one of them.

On due request the trial judge might, and doubtless would, have descended into greater particularity in respect of the overt acts charged and proven. But as a general proposition of law the charge was so plainly right as to need no justification; and in so far as it was insufficient, or too general in respect of this particular case or these particular defendants, the exception did not fairly or at all direct the attention of the court to the insufficiency now complained of. The exception was not sufficiently definite to call the court's attention to the particular matter objected to, and give opportunity to correct it. Hindman v. First National Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108. It is the rule that an exception must be specific, and not general (Morse v. Tillotson, 253 Fed. 340, — C. C. A. —, 1 L. R. A. 485), and there is no difference on this point between the civil and criminal side of the court.

[4, 5] While a plain error as to which no exception is taken may be and often has been noticed by this court, our right so to do "will not be exercised, unless it is evident that very serious injustice will result; the right is not lightly to be invoked, in either a criminal or a civil case." Gruher v. United States, 255 Fed. 478, — C. C. A. —. In this instance no injustice was done The evidence was such as to require the submission of the case to the jury, and it is in our opinion a very far-fetched suggestion that the jury might have attached importance to an unproved overt act, when there were so many (far more than the indictment number) of overt acts amply shown by the evidence submitted to them.

Much reliance is placed by plaintiffs in error upon Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232. That case arose

under the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. §§ 8820–8823, 8827–8830]), and the jury were charged to "consider carefully all the means which the indictment charges" to produce the condition or act denounced by the statute. We think the difference between such an instruction as this and the careful reference of the court below to the overt acts proven is apparent.

In various forms the plaintiffs in error assert that there was no evidence or no sufficient evidence of a conspiracy on their part.

[6] It was undoubtedly a fair question for the jury whether Gilson and Duffy were or were not guilty of no more than stupidity, ignorance, or neglect of duty, or whether they knowingly and willfully assisted in the scheme of Slattery, deceased, to defraud the United States. The evidence on this point was necessarily indirect, as it nearly always is in conspiracy causes. Very rarely do conspirators make an explicit written, or even oral, statement of the nature and object of their agreement.

[7] The jury rendered verdict against these plaintiffs in error, no reasonable doubt was found, and we are not authorized to re-examine that question. The record contains sufficient evidence on the part of the prosecution to require submission to the jury; such reasonable doubt as might have been generated by the evidence for the accused was for the jury alone. Looker v. United States, 240 Fed. 932, 153 C. C. A. 618.

Judgments affirmed.

WILLIAMS v. EDWARD GILLEN DOCK, DREDGE & CONSTRUCTION CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1919.)

No. 3256.

1. NAVIGABLE WATERS ⚷19—OBSTRUCTIONS—DUTY.
   Any one placing an obstruction such as a breakwater in a navigable lake outside of a much-used harbor is bound to exercise reasonable care for the safety of all persons making use of the harbor, and such duty requires the placing and maintaining of a suitable warning light at night.

2. NEGLIGENCE ⚷55—CONTRACTORS—LIABILITY OF OWNER.
   After a contractor has turned over the work and it has been accepted by the owner, the contractor incurs no further liability to third persons; the responsibility for maintaining it and of giving notice or warning of dangers being then shifted to the owner.

3. NAVIGABLE WATERS ⚷19—CONTRACTORS—LIABILITY OF OWNER.
   The United States government, which engaged a contractor to construct a breakwater outside the Cleveland harbor, *held* to have accepted the section of the breakwater already constructed, so that the contractor was not liable for the death of one on a vessel which struck the breakwater, due to the absence of warning lights.

4. EVIDENCE ⚷245—ADMISSIONS—STATEMENTS OF GOVERNMENT ENGINEER.
   In an action against a contracting company, which was building a breakwater for the government, evidence that the government engineer in charge of the work, after the accident, stated that the government was maintaining a light on the end of the breakwater for the accommodation of the defendant, is admissible only for the purpose of impeaching the tes-

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

timony of the government engineer that the section of the breakwater against which the vessel collided had been accepted by the government, etc.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Action by Kathryn Williams, administratrix of the estate of G. A. Williams, deceased, against the Edward Gillen Dock, Dredge & Construction Company, a corporation. There was a judgment for defendant, and plaintiff brings error. Affirmed.

S. H. Holding, of Cleveland, Ohio, for plaintiff in error.

H. D. Goulder and Thos. H. Garry, both of Cleveland, Ohio, for defendant in error.

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

WESTENHAVER, District Judge. Plaintiff in error, also plaintiff below, brought this action to recover damages for the wrongful death of one G. A. Williams. A trial to a jury was had, and after all the testimony for both sides had been introduced the District Court, on motion, directed a verdict for the defendant. This action of the court below is the only error assigned.

The decedent was an employé on a lake steamer named Junior. This steamer on the night of May 9, 1915, between 11 and 12 o'clock, as it was entering Cleveland harbor, struck against the inside corner of the east end of the breakwater. As a result the boat sank and the decedent was drowned. This collision of the steamer with the breakwater, it is contended, was due to the absence of any light on or near its east end, and on this hearing counsel for both parties make the answer to the question involved to turn on whether or not the duty rested on the defendant to maintain such a light.

The defendant on July 2, 1914, had made a contract with the proper engineering officer of the United States government to complete the construction of 6,601 feet of the east breakwater extension of the Cleveland harbor, including the east end against which this steamer collided. This work was divided into seven sections, numbered from west to east and from 1 to 7, inclusive; the first six sections being each 1,000 feet in length, and the seventh 601 feet in length. These sections were to be constructed in the order given, from west to east, and work was prohibited on more than two sections in advance of the completed superstructure, except by special permission of the engineer in charge. This engineer, however, directed that the work first to be done should be the completion of the east end in the inverse order stated. By December 1, 1914, not less than 1,800 feet at that end was completely finished, and in such a manner that no further work or labor was required thereon by the defendant under its contract. The contract also provided that acceptance would be made by the engineer on the written request of the contractor, when a continuous length of 100 feet had been completed, as was required, and to his entire satisfaction. A request was made of the engineer in charge

for an acceptance of the 1,800 feet thus completed, and December 16, 1914, the engineer certified in writing that 1,800 linear feet at the east end had been satisfactorily completed and that the same was thereby accepted.

The contract also required defendant to maintain at its own expense lights and signals required by the engineer or by the regulations of the United States Lighthouse Board. The regulations of the United States Lighthouse Board were not introduced in evidence, and the record does not indicate clearly what specific requirements, if any, the engineer in charge made as to lights during the period of construction. A gas buoy light was, however, maintained by the defendant at the east end of the breakwater from the time it began work until about December 1, 1914, when all construction work on the breakwater was, owing to weather conditions, suspended for the season. The defendant then removed its gas buoy light and stored it on the United States government pier in the Cleveland harbor. Maj. P. S. Bond, the government engineer in charge of this work, established, upon the removal of the gas buoy, a light on the east end of the breakwater. An upright pole with a cross-arm was erected, with devices to raise and lower the light. Thereafter, and until the lake was frozen over, and again as soon as the ice disappeared in the spring, the engineer, and subordinate employés under his direction and control, maintained and took care of this light.

The evidence tends to show that on the afternoon of May, 9, 1915, at about 3 o'clock, these employés filled the lamp, lighted it, and placed it in position; but, in our opinion, there was sufficient evidence to go to a jury tending to show that during the night, and preceding the time of the accident, it was not lighted or burning.

[1] No question seems to be made by counsel for defendant that if, on these facts, a duty rested on defendant to maintain this light after the acceptance by the engineer in charge of the east 1,800 feet of the breakwater, the issues should have been submitted to the jury. This is also our opinion. The lake at this point was used more or less by all kinds of craft plying to points east of Cleveland to enter and leave the harbor. This use of the lake at this point was known to the engineer in charge and to the defendant and its servants. A legal duty, according to well-settled principles of law and numerous cases, was thereby imposed upon any one constructing an obstacle in water thus used to exercise reasonable care for the safety of all persons making use of the harbor, and this duty obviously required the placing and maintaining of a suitable warning light. Casement v. Brown, 148 U. S. 615, 623, 13 Sup. Ct. 672, 37 L. Ed. 582; Harrison v. Hughes (D. C.) 110 Fed. 545, approved and affirmed on appeal (3 C. C. A.) 125 Fed. 860, 60 C. C. A. 442; Wright & Cobb Lighterage Co. v. Snare & Triest Co. (3 C. C. A.) 239 Fed. 482, 152 C. C. A. 360. Defendant, however, contends, and the court below held, that after the completion and acceptance by the engineer in charge of the east 1,800 feet no further duty or obligation rested upon it to guard or protect that end by a warning light, but that all duty in that behalf became thereafter the obligation of the owner, and that in point of fact

the owner, through its proper officer, assumed this obligation and undertook to perform it.

[2] The general rule of law, subject to certain exceptions not now material to note, is that, after the contractor has turned over the work and it has been accepted by the owner, the contractor incurs no further liability to third persons by reason of the condition of the work, but the responsibility for maintaining it and protecting third persons against danger therefrom, or the use of it in a defective condition, or failing to give notice or warning of dangers to be apprehended from its existence, is then shifted to the owner. This rule of law does not seem to be disputed; in fact, counsel for both parties cite and rely in part on the same cases. See Salliotte v. King Bridge Co. (6 C. C. A.) 122 Fed. 378, 381, 58 C. C. A. 466, 65 L. R. A. 620, writ of certiorari denied 191 U. S. 569, 24 Sup. Ct. 841, 48 L. Ed. 306; Thornton v. Dow, 60 Wash. 622, 111 Pac. 899, 32 L. R. A. (N. S.) 968, and note; Philadelphia, etc., Railroad Co. v. Philadelphia, etc., Towboat Co., 23 How. 209, 16 L. Ed. 433; Richards v. O'Brien, 1 Ga. App. 111, 57 S. E. 907; Erie & Western Transportation Co. v. City of Chicago, 178 Fed. 42, 101 C. C. A. 170.

[3] The considerations relied on by plaintiff to take the present case without this general rule are, as we understand them, that the defendant's construction contract is an entire contract; that the obligation required thereby and also by the general rules of negligence law to maintain signals and lights, such as were required or necessary in the interest of the safety of third persons, continued until the contract was performed in its entirety; that the work had not been fully completed, turned over, and accepted; and that the completion and acceptance of the east 1,800 feet only, even if authorized, did not bring defendant within the protection of the general rule above stated. These contentions are supported by invoking the general rules of law as to what is an entire contract, and certain provisions of this contract, the most material of which are cited in the margin.[1]

[1] 17. *Payments.* Payments will be made monthly on estimates of such stone as has been placed in the work in accordance with the specifications and not included in any prior estimate, except that ten (10) per cent. of the amount of each estimate will be retained until the contract work is fifty (50) per cent. completed, after which the amount of reserve will remain unchanged until the full completion of the contract.

22. *Changes.* No changes in the character of the material or workmanship herein described will be permitted, unless specially authorized by the engineer. Should it be found desirable to materially modify or change the plans or designs of the work, such modification or changes must be embodied in a supplementary contract with the consent of bondsmen, and must receive the approval of the Secretary of War, before becoming effective.

29. *Order of Work.* The work will be divided into sections 1,000 feet in length. These sections will be constructed in order from west to east, as far as the funds provided will fully complete. Work will not be permitted in more than two sections in advance of the completed superstructure, except by special permission of the engineer.

30. *Acceptance and Responsibility.* The contractor will be held responsible for and required to maintain and repair the work until it has been accepted by the engineer in writing. Such acceptance will be made by the engineer on the written request of the contractor, as follows: Each length of 100 feet

We have examined these provisions and have duly weighed the considerations urged upon us. The change in the order of constructing the sections is, in our opinion, within the authority of the engineer and permitted by the terms of the contract. The engineer in charge is by the contract itself defined to be the contracting officer. He is expressly authorized to make such minor changes in execution of the work to be done as in his judgment may be necessary or expedient to carry out the intent of the contract, provided that the unit cost is not thereby increased. The modifications or changes which he may not make, without a supplementary contract consented to by the contractor's bondsmen and approved by the Secretary of War, are such as materially modify or change the plans or designs or increase the unit cost of the work. A change in the order in which the sections were to be constructed is not a change of the plans or designs and does not increase the unit cost. It is, on the contrary, a minor change in the execution of the work to be done under the specifications. The change was, in the judgment of the contracting officer, expedient in order to lessen the danger of an unfinished obstacle to navigation below the surface of the water at the east end of the breakwater.

An acceptance by him of a part of the work, when completed according to the requirements of the contract and to his satisfaction, is also expressly authorized and is not outside of his authority. Each completed length of 100 feet may be accepted. The severance of such

continuously from the western end, when the same has been completed as herein provided and to his entire satisfaction.

The contractor will be required to maintain at his own expense, the lights and signals required by the regulations of the United States Lighthouse Board, or by the engineer.

35. *Minor Modifications.* The right is reserved to make such minor changes in the execution of the work to be done under these specifications as, in the judgment of the contracting officer, may be necessary or expedient to carry out the intent of the contract: Provided, that the unit cost to the contractor of doing the work shall not be increased thereby, and no increase in unit price over the contract rate shall be paid to the contractor on account of such changes. No change which will materially affect the cost of doing the work will be made and no greater or lesser unit price than the contract rate will be paid, except upon formal written agreement between the parties, approved by the Chief of Engineers and the Secretary of War, as provided in the form of contract to be entered into.

7. If at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification shall involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

10. Until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

an accepted portion is thus duly authorized, regardless of whether the contract itself is entire or divisible. The force and effect of this acceptance is not, in our opinion, controlled or modified by the reservation of a part of the contract price or the right reserved thereafter and prior to full completion and payment to reject defective work or material, or to require the fulfilling of any of the terms of the contract. This view of the terms of the contract makes unnecessary any discussion of the cases relating to the power and authority of the engineer to change or waive the provisions of a contract. This acceptance was accompanied by a taking of possession of the east 1,800 feet, so far as possession can be taken of such a structure. This possession was accompanied by the assumption thereafter by the engineer in charge of the owner's duty and obligation of constructing and maintaining a warning light. Nothing thereafter remained to be done by the contractor on this east 1,800 feet, and, in point of fact, it thereafter neither did nor was required to do anything. The contractor did not thereafter fail to comply with any requirement of the engineer for maintaining a warning light.

The duty imposed by this contract to maintain a warning light is no greater than the common-law duty. It becomes unnecessary, therefore, to consider whether or not provisions in a construction contract for the safety of third persons are available to them as supporting an action based on negligence. For discussion of this proposition see the following: Consolidated Coal Co. v. Knickerbocker Co. (D. C.) 200 Fed. 840; Harrison v. Hughes (D. C.) 110 Fed. 545, affirmed 125 Fed. 860; Styles v. F. R. Long Co., 67 N. J. Law, 413, 51 Atl. 710, on second appeal 70 N. J. Law, 301, 57 Atl. 448; Williams v. Stillwell, 88 Ala. 333, 6 South. 914; Earl v. Lubbock [1905] 1 K. B. 253. The final solution of the question involved turns, in our opinion, on whether or not the contractor had fully performed his contract as to the east 1,800 feet, and whether or not it had been turned over to and accepted by the owner and possession and control thereof taken by the owner. All this had been done, and, in our opinion, with proper authority and without violating any provision to the contrary.

[4] Two other considerations are urged by plaintiff which call for brief comment. Three witnesses testify that after the accident they called on Maj. P. S. Bond, the engineer in charge, and that he stated to them that the government was maintaining a light at the east end of the breakwater for the accommodation of the defendant. Maj. Bond denies having said that the light was maintained for the accommodation of the defendant and testifies that in point of fact, this east end had been accepted and taken over, and that the light was being maintained by him or his employés on behalf of the government. Inasmuch as Maj. Bond was not, when making this statement, an agent or officer of the defendant, this evidence was admissible only for the purpose of impeaching his testimony and goes only to its weight. Even if it should be regarded as so weakening his testimony as to justify entirely disregarding it, there still remains the supporting testimony of two witnesses to the same effect and none in conflict with it.

When defendant resumed construction work on the other sections

about May 21, 1915, 12 days after the accident, this gas buoy light was, at the request of Maj. Bond, towed by the defendant from the government pier to the east end of the breakwater and anchored there. During this time the government was constructing a pier for a harbor light at that point. It remained in this position until a date some time later than the final completion and acceptance of the remainder of the breakwater. Maj. Bond says that the gas buoy light while there was maintained by the defendant, whereas defendant's witnesses say that it was placed there as a loan to the government at the request of Maj. Bond, who offered to pay the expense. This buoy, when once charged with gas, burns for a period of some 300 days at an estimated expense of 15 cents a day. We do not find in these statements anything which modifies or controls the conclusion already expressed. Even if the jury would have been warranted in drawing the inference that the gas buoy was replaced because required by the engineer under the authority of the contract, this would not control the status existing after the original acceptance and taking possession and control, which continued up to and until after the accident.

The judgment of the lower court is affirmed.

SALES v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5207.

POST OFFICE ⟹32—FEES—OBSCENE LETTERS.

In a prosecution for mailing an obscene, lascivious, and filthy letter, contrary to Criminal Code, § 211 (Comp. St. § 10381), the letter itself must directly or indirectly disclose its evil character, and it is improper to allow the jury to convict for an undisclosed, unexpressed intent in the mind of accused.

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

R. B. Sales was convicted of mailing an obscene, lascivious, and filthy letter, contrary to Criminal Code, § 211 (Comp. St. § 10381), and he brings error. Reversed and remanded for new trial.

W. B. Dickinson, of Buffalo, N. Y., for plaintiff in error.

Sam O. Hargus, Asst. U. S. Atty., of Kansas City, Mo. (Francis M. Wilson, U. S. Atty., of Kansas City, Mo., on the brief), for the United States.

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

HOOK, Circuit Judge. The plaintiff in error was convicted of mailing an "obscene, lascivious, and filthy" letter, contrary to section 211 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1129 [Comp. St. § 10381]), and brings the case here for review.

The letter need not be set forth. The trial court charged the jury that "it is not contended that the letter contains in itself filthy or indecent terms or expressions"; that they need not be confused if, upon examining it in the jury room, they would say, "I don't see anything dirty or filthy about that"; also that the question was of its general intendment and purpose. But in discussing "purpose" and "motive" the court did not confine the jury to the letter, but expressed itself so broadly that it left them at liberty to convict for an undisclosed, unexpressed intent in the mind of the accused, and we think it not unlikely that the verdict came the latter way. The door was open for the jury to draw an inference that there was an ulterior purpose in the mind of the accused, which brought him within the law, regardless of the language of the letter.

It is not enough that a letter or publication be offensive to the feelings or the pride of those into whose hands it may come. Considerations of caste or social position do not enter into the law. The evil character of the letter or publication declared nonmailable by the clause of the statute under consideration must be reasonably apparent or discernible on its face. It need not be in particular words, but may appear in the structure of the sentences, and either directly or indirectly by innuendo or suggestion, or in the thought conveyed. Dunlop v. United States, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799, involved newspaper publications of the latter character. Instances of suggestive letters held to offend the statute may be found in Parish v. United States, 159 C. C. A. 258, 247 Fed. 40, and United States v. Moore (D. C.) 129 Fed. 159. We approve of those decisions. But we know of no case under this clause of the statute in which it has been held that, if the letter or publication in itself is not objectionable, an undisclosed motive or intent of the writer may be found to convict him. In Knowles v. United States, 95 C. C. A. 579, 170 Fed. 409, we held that a good motive was no defense to an evil publication. The converse is measurably true. If an undisclosed evil motive or intent can bring within the statute a letter or publication that is innocent and mailable upon its face, convictions could be sustained in cases of simple newspaper "want ads," upon proof of an evil "ultimate purpose, motive, or intent" in the mind of an advertiser or publisher who employed the mails. Doubtless that would be a proper field for legislation, but we do not think the statute before us goes so far.

Cases like Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, and De Gignac v. United States, 52 C. C. A. 71, 113 Fed. 197, are not in point. They arose under the clause of the statute making nonmailable any written or printed card, letter, circular, etc., giving information directly or indirectly where, how, or from whom certain articles might be obtained. There a letter may have a perfectly clean face, and yet its mailing be a violation of the law.

The sentence is reversed, and the cause remanded for a new trial.

RADER v. STAR MILL & ELEVATOR CO. et al.

PATTON v. SAME.

In re GAGE ROLLER MILLS.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1919.)

Nos. 5286, 5291.

1. JUDGMENT ⚷678(1)—CONCLUSIVENESS—DECREE ESTABLISHING LIEN—EFFECT AS TO TRUSTEE IN BANKRUPTCY—ESTOPPEL.
A decree against a corporation, which was subsequently adjudicated a bankrupt, establishing and foreclosing a vendor's lien on real estate, estops the bankrupt, its trustee, and general creditors from asserting or maintaining, not only every matter offered, but also every admissible matter that might have been offered, in the foreclosure suit to defeat the plaintiff's claim.

2. BANKRUPTCY ⚷198—LIENS—LIENS DISSOLVED BY BANKRUPTCY.
A vendor's lien on property of a bankrupt, although established by a decree rendered within four months prior to the bankruptcy, is not one obtained through legal proceedings, and is not defeated by Bankruptcy Act 1898, § 67 (Comp. St. § 9651).

3. ESTOPPEL ⚷98(1)—ACTS OF CORPORATION—ESTOPPEL OF STOCKHOLDERS.
A stockholder of a corporation, who held a valid vendor's lien on its real estate, *held* not estopped by the fact that he was a stockholder from asserting such lien as against a void mortgage, which the corporation attempted to make without his knowledge.

4. MORTGAGES ⚷151(6)—VENDOR'S LIEN—RIGHTS AS AGAINST THIRD PARTIES.
Under Rev. Laws Okl. 1910, § 3847, giving a vendor's lien for unpaid purchase money subject to the rights of purchasers and incumbrancers in good faith, the lien of a vendor to a corporation *held* not displaced by an agreement by the corporation, made before it obtained the deed and without the vendor's knowledge, to give a mortgage to another, who did not know nor inquire as to the condition of the title.

5. LIENS ⚷22—ABANDONMENT OF LIEN—EVIDENCE TO ESTABLISH.
The legal presumption is that one who has a legal and equitable lien on property intends to maintain and enforce it, and his abandonment thereof may not be adjudged without clear and convincing evidence of his intention to abandon.

6. ESTOPPEL ⚷52—EQUITABLE ESTOPPEL—ESSENTIAL ELEMENTS.
Two of the indispensable elements of an estoppel in pais are that (1) the party claiming estoppel relied upon the action of the party estopped, and was thereby induced to change his position or course, and that (2) he has been or will be injured on account of that change, if the party estopped is permitted to pursue the course or have the relief he seeks.

7. BANKRUPTCY ⚷184(1)—LIEN—LACHES.
A creditor of a bankrupt, holding a void mortgage on property, but which during more than a year, and while debts to other creditors were accruing, took no steps to reform its mortgage or assert a lien, *held* not entitled to a lien as against general creditors.

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

In the matter of the Gage Roller Mills, bankrupt; H. W. Patton, trustee. From an order denying a lien, G. M. Rader appeals; and from an order establishing a lien in favor of the Star Mill & Elevato: Company, the trustee appeals. Reversed on both appeals.

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

Frank B. Burford, of Oklahoma City, Okl. (Burford, Robertson, Hoffman & Burford, of Oklahoma City, Okl., and H. L. Adkins, of Higgins, Tex., on the brief), for appellant Rader.

E. L. Foulke, of Wichita, Kan. (J. D. Wall, of Wichita, Kan., on the brief), for appellant Patton.

C. B. Leedy, of Arnett, Okl., for Star Mill & Elevator Co.

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

SANBORN, Circuit Judge. The Gage Roller Mills, a corporation, was adjudged a bankrupt on June 15, 1915, upon an involuntary petition against it filed on May 15, 1915. On May 15, 1915, it owned real estate upon the undivided three-fourths of which G. M. Rader claimed a vendor's lien for unpaid purchase money, which he insisted attached to it on August 4, 1913. On December 19, 1914, he had brought a suit against the Roller Mills for a foreclosure of this lien and a sale of the real estate to pay it in the district court of Ellis county, Okl., and on March 6, 1915, that court had rendered a decree in that suit, of the subject-matter of and the parties to which it had jurisdiction, to the effect that the Roller Mills was indebted to him and that he should recover from it $6,273.35, that this was the unpaid balance of the purchase money due him for this land, which the Roller Mills had bought of him and Elden Carper, that he had a vendor's lien for this purchase money from August 4, 1913, upon the undivided three-fourths of this land, which he owned and sold to the Roller Mills on August 4, 1913, that this lien be foreclosed, and that this undivided three-fourths of this land be sold and its proceeds applied to the payment of this lien.

Between October and December 1, 1913, the Star Mill & Elevator Company, a corporation, loaned to the Roller Mills $10,000, and on November 3, 1913, R. T. Harvey, the president of the Roller Mills, made, signed, and acknowledged, as president thereof, a mortgage upon this real estate in the name of that corporation as mortgagor to the Star Company to secure the payment of this loan, and this mortgage was recorded in the office of the register of deeds on December 11, 1913. This mortgage was not attested by the signature of the secretary of the corporation, or by its seal, as required by section 1187 of the Revised Laws of Oklahoma, and was void.

Mr. Rader presented to the bankruptcy court his claim for the allowance and enforcement of his vendor's lien upon the undivided three-fourths of the land for the amount of his decree of foreclosure. Mr. H. W. Patton, the trustee in bankruptcy of the estate of the Roller Mills, filed objections to any such relief. The Star Company presented to and filed with the bankruptcy court a claim and application for the allowance to it of a secured claim and first lien upon the land of the Roller Mills Company for the sum of $6,264.35 and interest, based on its loan and mortgage. To this claim the trustee filed objections. Pursuant to stipulations of the parties this real estate was sold by order of the bankruptcy court for $5,000, and the respective

liens and claims of the parties were transferred from the real estate to the proceeds thereof.

The respective claims of the parties were tried out before the referee and he decided: (1) That Rader had a prior and superior vendor's lien for $6,385.35 on three-fourths of the $5,000 proceeds of the sale of the lands; and (2) that the Star Company had no lien upon any of the proceeds of the land, but was entitled to the allowance of a general unsecured claim. Upon a review of these conclusions the court below adjudged that the Star Company held the superior lien upon the $5,000, and that G. M. Rader held a second and inferior lien thereon. Rader and the trustee appealed from this decree.

[1] Counsel for the trustee presented many objections to the allowance against him and the unsecured creditors he represents of the vendor's lien of Rader. But an examination of them discloses the fact that they rest upon acts or omissions prior to March 6, 1915, when the final decree of the state court, in the suit of Rader against the Roller Mills, that the lien Rader claimed was valid, that it attached on August 4, 1913, that it be foreclosed, and that three-fourths of the land be sold to pay it, was rendered. If any of these objections ever were tenable, they are not available to the trustee now, because they arose before that decree, and might have been pleaded and tried in that suit, and, as against Rader, that decree estops the Roller Mills, the trustee, and the general creditors he represents, who stand in the shoes of the Roller Mills, from asserting or maintaining, not only every matter offered, but also every admissible matter that might have been offered, in the foreclosure suit to sustain or defeat Rader's claim. Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195; Board of Commissioners v. Platt, 79 Fed. 567, 571, 572, 25 C. C. A. 87.

[2] The trustee took his interest in the property subject to the final decree against the Roller Mills, and he has no rights or equities against Rader superior to those which the bankrupt had when the petition in bankruptcy was filed, about two months after the final decree of foreclosure. Rader's lien was not obtained through legal proceedings, and consequently was not defeated by section 67 of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 564 [Comp. St. § 9651]), although the final decree was rendered within four months preceding the filing of the petition in bankruptcy. Farrell et al. v. Wysong et al., 246 Fed. 281, 282, 283, 159 C. C. A. 11; Hurley v. Atchison, Topeka & Santa Fé Ry., 213 U. S. 126, 132, 133, 29 Sup. Ct. 466, 53 L. Ed. 729. The trustee and the unsecured creditors he represents are therefore entitled to no relief against the decree of the court below sustaining the vendor's lien of Rader against them.

[3] But the Star Mill & Elevator Company, which was not estopped by the foreclosure decree, made the claim, which the referee denied, and the court below allowed, that it had a subsequent lien by virtue of its loan of $10,000 to the Roller Mills in October and November, 1913, which was superior in equity to Rader's vendor's lien. That court based its decision upon two propositions: First, that although the mortgage to the Star Company was void, and created no lien upon the property, by reason of the failure of the mortgagor

corporation to attest it by the signature of its secretary and its corporate seal (1 Revised Laws of Oklahoma, § 1187), and the decisions of the Supreme Court of Oklahoma (Craggs v. Earls, 8 Okl. 462, 465, 58 Pac. 637; Randall v. Glendenning, 19 Okl. 480, 481, 92 Pac. 158), which upon this question of the construction and effect of that state's statutes are controlling in the federal courts, and although the proved fact was that Rader had no notice of the loan by the Star Company, or of the attempt to make the mortgage or give the equitable lien to the Star Company which it claims, until after that company had paid out the entire $10,000, yet merely because Rader was a stockholder in the Roller Mills for something less than $4,000, and the president of that corporation signed its name to and acknowledged the execution of the void mortgage, and the corporation received the $10,000, and Rader presumptively shared in the benefits of it, though without the knowledge of it, he was estopped from maintaining that his vendor's lien was superior in equity to the alleged equitable lien of the Star Company; and second, that, conceding the invalidity of the mortgage, there was at least an agreement between the manager of the Roller Mills and its board of directors, on the one hand, and the Star Company, on the other, that the former should make a mortgage on the real estate to secure the loan of the $10,000, and equity will treat that as done which should have been done, and will enforce the lien of the mortgage it thus treats as made against all but innocent parties, and that therefore it will enforce it against Rader.

To the first proposition no authority has been cited or discovered, no persuasive reason has been given and none has been found for the position that one who has, as Rader had, an established equitable and legal lien upon the real estate of a corporation in which he is a stockholder, is, by the mere fact that he is such stockholder, deprived of that lien, and estopped from enforcing it by the subsequent attempt to make or the subsequent making by the corporation, without his knowledge, of either a legal or equitable lien upon that property. The general rule is that an officer of a corporation, though he be a stockholder, does not, by waiver, estoppel, or otherwise, deprive himself of or injuriously affect his individual claims against it or his individual liens upon its property by his acts on behalf of the corporation as its officer. "An act done in a representative capacity will not estop one in his individual capacity." 16 Cyc. 780. Much less will the illegal or ineffective acts of such officer on behalf of a corporation estop a mere stockholder thereof, who has no notice of them until after third parties have acted upon them, from enforcing against the latter his just, equitable, and legal claims, or deprive him of the benefits thereof.

Again, the estoppel of a mere stockholder by the acts of his corporation may not extend beyond the estoppel of the corporation, and if the Roller Mills was not, by the agreement to make the mortgage and the abortive attempt to do so, estopped from performing its duty to pay its prior debt to Rader, and to respect and abide by Rader's equitable lien until it paid that debt, then Rader is not estopped from enforcing that debt and lien.

[4] As to the second proposition of the court below, conceding that the board of directors of the Roller Mills orally agreed that that corporation should make a mortgage to the Star Company to secure the $10,000, and that equity will treat that as done which ought to have been done, does it follow that, in view of the principles and rules of equity jurisprudence, a mortgage or equitable lien ought to have been imposed upon this real estate for $10,000, subsequent in time, but superior in equity, to the prior lien of Rader, without notice to him, and without opportunity to enforce his lien?

Rader owned an undivided three-fourths of this property. He sold his interest in it to the Roller Mills for a purchase price of about $10,000, of which a balance amounting, with interest, to more than $6,000 has always remained unpaid. He delivered possession about August 4, 1913, and executed a deed of his interest, which he did not deliver until about January 15, 1914. The Star Company knew in August, 1913, that the Roller Mills purchased this property of Rader and Carper, and that the Roller Mills owed more than this $10,000. The Star Company made an oral agreement with the manager of the Roller Mills to advance to it $10,000 to purchase wheat on drafts upon it, secured by accompanying invoices of the wheat bought, that this wheat should be stored by the Roller Mills, that the two corporations should share in the profits of the transaction, and that the Roller Mills should give a real estate mortgage to secure the advances. But these advances or this loan of the $10,000 was induced by and made in reliance, not upon the expected real estate mortgage, but upon the wheat and the invoices thereof. Mr. Hyberger, the secretary and treasurer of the Star Company, after describing the agreement to advance on the drafts and invoices, testified that that was the way the Star Company had transacted Mr. Rader's and Mr. Carper's business for years before, that he was dealing with the same Carper, that that arrangement was satisfactory. Asked, "Now since that arrangement was satisfactorily explained, why did you require a mortgage on this property?" he answered, "Because he offered it together with a mortgage on the three plants they owned, Higgins, Shattuck, and La Verne." Asked, "Not knowing Mr. Tillotson, do you think you would have advanced this money without the mortgage?" he answered, "Yes, sir; on a storage proposition, particularly when the invoices were sent." Asked, "It does not make any difference to you, so long as you got the invoices, whether you had the real estate mortgage or not?" he answered, "No, sir."

All the Star Company's advances were made before December 1, 1913. The void mortgage was made November 3, 1913. The Star Company did not inquire whether or not the Roller Mills had any title to the real estate described in the mortgage, or any deed to it, and it had no notice or knowledge of Rader's lien until after it had advanced its money, except such notice as the law charges it with on account of the facts heretofore stated. Rader had no notice or knowledge of the negotiations or agreements about the $10,000 loan or the void mortgage until after the Star Company had advanced the $10,000. Section 3847, 1 Revised Laws of Oklahoma 1910, provides that:

"One who sells real property has a special or vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured, otherwise than by the personal obligation of the buyer, subject to the rights of purchasers and incumbrancers in good faith, without notice."

The Star Company was not a purchaser, and because its alleged mortgage was void it was not an incumbrancer. If this statute had not been enacted, Rader would nevertheless have had an equitable lien for the unpaid purchase price of this real estate, and by virtue of this statute he had a legal lien thereon from August 4, 1913. It is true that in furtherance of justice equity sometimes treats that as done which should have been done; but it is difficult to perceive why the void mortgage of the Star Company ought to be transformed into a valid one, or why its lack of lien ought to be changed into a lien superior to the prior equitable and legal lien of Rader, to the destruction thereof, or how a more just or equitable result would be secured in that way.

In the absence of the affirmative action of a court of equity, Rader's vendor's lien is prior and superior, both at law and in equity, to the claim of the Star Company. In truth, the Star Company is here appealing to this court of equity to strike down this equitable and legal lien of Rader and to supersede it with its own claim. If the equities of these parties were equal, Rader's legal lien would prevail, for where equities are equal the law prevails. But they are not equal. Rader had not delivered his deed, and he neither knew of the negotiations for the purchase of the wheat or the contemplated making of the mortgage, nor had he notice of any facts calling upon him for any inquiry upon that subject, until after the Star Company had advanced all its money and the legal and equitable rights of the parties had become fixed. He was secure in his lien until he delivered his deed without the statute, and the statute secured his lien to him notwithstanding his delivery of the possession. When the Star Company had paid over all its money, he had done nothing and omitted nothing in violation of his duty to it, and "a court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction." Boone v. Chiles, 10 Pet. 177, 209, 210, 9 L. Ed. 388; Steinbeck v. Bon Homme Mining Co., 152 Fed. 333, 339, 81 C. C. A. 441.

On the other hand, while the Star Company did not know that Rader had his vendor's lien on this real estate until after it had advanced its $10,000, yet knowledge of facts and circumstances which would put a person of ordinary prudence and intelligence on inquiry is, in the eyes of the law equivalent to a knowledge of all the facts which a reasonably diligent inquiry would disclose.

"Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient knowledge to lead him to a fact, he shall be deemed conversant with it." Kennedy v. Green, 3 Mylne & Keen, 266; Wood v. Carpenter, 101 U. S. 135, 141, 25 L. Ed. 807; Swift v. Smith, 79 Fed. 709, 713, 25 C. C. A. 154.

In August, 1913, the Star Company was about to loan to the Roller Mills $10,000, and to take a mortgage on this real estate to secure

it, and it paid over the money on this loan before December 1, 1913. In August, 1913, it knew that the Roller Mills had recently bought this real estate of Rader and Carper, and that it was indebted to one or more parties to the amount of more than $10,000. The statutes of Oklahoma, of which it must take notice, informed it that, if any part of the purchase money of that property was unpaid, Rader and Carper had vendors' liens thereon therefor, and that a mortgage of a corporation, which was not attested by the signature of its secretary and its corporate seal, was void. It is incredible that these facts and circumstances would not have put a person of ordinary prudence and diligence, in the Star Company's situation, upon inquiry as to the payment of the purchase money of this property to Rader and Carper, as to the delivery of the deed from Rader to the Roller Mills, and as to the attestation of the mortgage, and such an inquiry would inevitably have disclosed to the Star Company, before it made its advances, the vendor's lien of Rader, the fact that his deed had never been delivered, the absence of title to the property in the Roller Mills, and the invalidity of the mortgage tendered to the Star Company, and would have resulted in the proper execution of another mortgage, or an immediate suit in equity to reform the void mortgage, or to establish and enforce an equitable lien. The Star Company was not induced to make its advances by, nor did it rely upon, this mortgage, but it relied, as security for its loan, upon the wheat bought, so it made no inquiry about the vendor's lien or the title to the property until after it invested its money. In December, 1914, Rader brought his suit to foreclose his vendor's lien, and the Star Company then knew he claimed it. That suit went to decree of foreclosure in March, 1915. But, while the Star Company asked for a foreclosure of its void mortgage, never at any time before the title to this real estate passed to the trustee in bankruptcy did it bring any suit or pray any court either to reform that mortgage, to enforce its claimed agreement for a mortgage, to treat its agreement for a mortgage as performed, or to enforce any other lien than what it claimed to be the legal lien of the void mortgage.

Nothing but conscience, good faith, and reasonable diligence will move a court of chancery to effective action, and because the alleged equity of the Star Company and its diligence, or rather its lack of diligence, appeal to the conscience less strongly than the equity and diligence of Rader, which are buttressed by his statutory lien and his prompt decree of foreclosure, the priority in time and the superiority in equity of that lien over the claimed lien and equity of the Star Company ought not to be avoided, but should be and must be sustained.

[5] Before reaching this conclusion the claims and arguments of counsel for the Star Company that Rader abandoned, waived, and is estopped from maintaining his lien against that company (a) because he, as a stockholder of the Roller Mills, must have received a share of the benefits to that corporation of the $10,000 loan; (b) because he delivered his deed to the Roller Mills in January, 1914, without giving any notice to the Star Company of his vendor's lien; (c) because he became in January, 1914, the manager of the Roller

Mills, and continued so to be until July, 1914; and (d) because on September 9, 1914, he, as a stockholder of the Roller Mills, voted to authorize its officers to sell its property to pay its debts, have been considered. But the legal presumption is that one who has a legal and equitable lien on property intends to maintain and enforce it, and his abandonment thereof may not be adjudged without clear and convincing evidence of his intention to abandon, and there is no evidence in this case of any such intention by Rader. Waiver is but another name for estoppel, and where there is no estoppel there is no waiver.

[6] Two of the indispensable elements of an estoppel en pais, and there was no other estoppel here, are that (1) the party claiming the estoppel relied upon the action of the party estopped and was thereby induced to change his position or course; and that (2) he has been or will be injured on account of that change, if the party estopped is permitted to pursue the course or have the relief he seeks. Neither of these elements exists in the case at bar, and Rader never waived his lien, nor is he estopped from enforcing it. He is entitled to a decree that he has the first lien—a lien superior to that of the Star Mill & Elevator Company, the trustee, and the unsecured creditors—on the undivided three-fourths of the proceeds of the sale of the real estate in question.

[7] A single question remains. Is the Star Company entitled to the allowance and enforcement of a preferred claim on the proceeds of the sale of the real estate subject to the superior lien of Rader as against the trustee and the unsecured creditors he represents? Because the void mortgage to the Star Company created no such lien, and its record gave no notice of such a lien to the creditors before the bankruptcy, and while the debts to them were accruing; because, before the bankruptcy, the Star Company brought no suit and asked no decree for the reformation of its void mortgage, or for the enforcement of an equitable lien or claim upon any of the property of the bankrupt, on the ground that the Roller Mills had made an agreement to give it a mortgage, and it had advanced the consideration—this question must be answered in the negative. Foerster v. Citizens' Savings & Trust Co., 186 Fed. 1, 3, 4, 5, 108 C. C. A. 267; Davis v. Harlow, 130 Md. 165, 100 Atl. 102, 104; Potter Mfg. Co. v. Arthur, 220 Fed. 843, 844, 136 C. C. A. 589, Ann. Cas. 1916A, 1268.

The decree of the court below must therefore be reversed, with costs against the Star Mill & Elevator Company, and the trustee. This case must be remanded to the court below, with directions to enter a decree allowing G. M. Rader the first lien on three-fourths of the proceeds of the real estate, less the necessary costs of administration chargeable to it, and allowing the claim of the Star Mill & Elevator Company as an unsecured claim, but disallowing its claim for any lien upon any of the proceeds of the real estate or for any preferential payment therefrom.

It is so ordered.

MAUPIN v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 3, 1919.)

No. 1681.

CRIMINAL LAW ⚷789(4)—INSTRUCTIONS—REASONABLE DOUBT.

An instruction in a criminal case on the subject of reasonable doubt and the presumption of innocence *held* correct.

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

Criminal prosecution by the United States against A. R. Maupin. Judgment of conviction, and defendant brings error. Affirmed.

G. T. Graham, of Lexington, S. C. (Timmerman, Graham & Callison, of Lexington, S. C., on the brief), for plaintiff in error.

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

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The plaintiff in error was convicted of illicit distilling in violation of sections 3258, 3279, and 3281 of the Revised Statutes (Comp. St. §§ 5994, 6019, 6021). The case is brought here on the narrowest technical ground. On the subject of reasonable doubt and the presumption of innocence, the following instruction was given to the jury:

"Where a defendant is placed on trial charged with an offense, the law presumes that he is innocent, and it devolves on the government to prove every material fact necessary to constitute the offense charged against him to the satisfaction of the jury beyond a reasonable doubt, and if the government has failed to do that then it is the duty of the jury to acquit the defendant."

This covers the subject fully, and it is of no consequence that the instruction was not in the language requested by counsel. Of course, there is nothing in the point that the charge should have been that it devolves on the government to prove every material ingredient necessary to constitute the offense instead of every material fact.

Affirmed.

GUIGNARD v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 24, 1919.)

No. 1680.

1. INTERNAL REVENUE ⚷47—PROSECUTION FOR ILLICIT DISTILLING—SUFFICIENCY OF EVIDENCE.

   Evidence *held* sufficient to support a conviction for illicit distilling.

2. CRIMINAL LAW ⚷778(2)—INSTRUCTIONS—BURDEN OF PROOF.

   That an instruction charges that it devolves on the government to prove "every material fact" necessary to constitute the offense, instead of "every material ingredient," does not constitute error.

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

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

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

G. T. Graham, of Lexington, S. C. (Timmerman, Graham & Callison, of Lexington, S. C., on the brief), for plaintiff in error.

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

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. [1] Defendant was convicted on an indictment containing four counts charging him with being engaged in illicit distilling in violation of sections 3258, 3281, and 3279 of the Revised Statutes (Comp. St. §§ 5994, 6019, 6021).

The testimony against the defendant was, in substance, this: On March 20, 1918, the witnesses Fanning, Austin, and Coleman, federal and state officers, and one Whitworth, while driving along a community road in Lexington county in a northerly direction toward Columbia, saw two men come out of a swamp about 250 yards from the road they were on. The automobile was stopped, and Austin and Fanning pursued the two men, who had turned and run back into the swamp upon seeing them. By tracks and the noise he made in going through the thick undergrowth, Fanning was able to follow defendant across the swamp where he had stopped upon being hailed. Fanning identified him as the taller of the two men he had seen run from the opposite side of the swamp. Defendant was then brought back to the point from which he had run, and thence was taken some 50 yards along the creek or swamp to the still which he is charged with having in his possession and operating. At the still, two fermenters, some beer, caps, several jugs containing a small quantity of illicit whisky, a worm, and other distilling apparatus were found. The pots, or stills, were warm, and their supports too hot to handle. Defendant was placed under arrest and carried back to the automobile. A flask containing a small quantity of illicit whisky was found on him, and his clothes were soiled with soot and beer at the time of his arrest.

No exception was taken to the refusal to allow the introduction of the drawing or plat offered by defendant, and therefore the question of its admissibility is not before us.

It was not error on the part of the court to charge that:

"This case is not, as has been said, a wholly circumstantial case. There are circumstances, but the mass of testimony is conflicting positive testimony."

The testimony as to the defendant's identity, his flight and capture was direct evidence.

Fanning testified that he found a half pint bottle containing "a little bit of whisky" in defendant's pocket at the time he was ar-

rested. Coleman testified that the bottle admitted in evidence was not the same as that found upon the defendant, but that it contained the same whisky. The defendant himself admitted having a bottle in his pocket when arrested, but testified that he counted it empty. Since the material circumstance was not that the whisky was produced in court in the same bottle as that found upon defendant, but that defendant had illicit or blockade whisky upon his person at the time of his arrest, it was not error for the court to so charge.

[2] There is nothing in the point that the charge should have been that it devolves on the government to prove every material ingredient necessary to constitute the offense instead of every material fact. Maupin v. United States, decided April 3, 1919, 258 Fed. 607, — C. C. A. —; Davis v. United States, 160 U. S. 469–493, 16 Sup. Ct. 353, 40 L. Ed. 499. In defining reasonable doubt the court said:

"Reasonable doubt is that which would control you in all important actions in your own affairs. It is frequently said a jury must find a man guilty without a doubt. You may find him guilty although you have some doubt, but you must not have any reasonable doubt."

Charges similar to this have been sustained by the Supreme Court and this court. Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708; Perkins v. United States, 228 Fed. 420, 142 C. C. A. 638; Hendrikson v. United States, 249 Fed. 34, 161 C. C. A. 94.

Affirmed.

THE ELIZABETH MONROE SMITH.

(Circuit Court of Appeals, Fourth Circuit. April 28, 1919.)

No. 1710.

1. MARITIME LIENS ⚿65—REPAIRS—EVIDENCE.
   Evidence *held* to sustain a decree establishing a maritime lien for repairs under Act June 23, 1910, § 1 (Comp. St. § 7783).
2. INTEREST ⚿39(1)—MARITIME LIENS—REPAIRS.
   In a suit to establish a maritime lien for repairs, interest is properly allowed from the time the work was finished.

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 the Norfolk Shipbuilding & Dry Dock Corporation against the steamer Elizabeth Monroe Smith; the Martinez-Butler Navigation Corporation being claimant. Decree for libelant, and claimant appeals. Affirmed.

Edward R. Baird, Jr., of Norfolk, Va. (Wesselman & Kraus, of New York City, on the brief), for appellant.

A. L. Roper and Henry Bowden, both of Norfolk, Va., for appellee.

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

ROSE, District Judge. The appellee, the Norfolk Shipbuilding & Dry Dock Corporation, hereinafter called the repairman, on the 11th

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

of May, 1918, libeled the steamer Elizabeth Monroe Smith for a repair bill of many items, all set forth in an annexed account and amounting in the aggregate to upwards of $13,600. The appellant, the Martinez-Butler Navigation Corporation, asserting that it was a body corporate of New York, and hereinafter called the owner, appears to have intervened as claimant and owner, and by furnishing a stipulation for the ship procured its release. The case came up for trial below on the 19th of December, more than seven months after the ship had been arrested. It was not until that day that the owner answered, or, so far as it appears, in any way disclosed its defense, and the answer then filed was to the last degree vague. It amounted to little more than a general denial of all the plaintiff's allegations and to a demand for proof of them. The only explanation it gave of why it knew nothing more on the subject was that at the time the repairs were made the ship was on a voyage from New York to South America, and that those in charge of the steamer, who, it was said, could not then be communicated with, were not authorized to contract for the expenditure upon the ship of anything like the sum for which the libel was filed. Who these persons were, or what was their relation to the ship or to its owner, was not disclosed. No explanation was vouchsafed as to how the ship could have been in a repair yard at Norfolk for six weeks without the owner knowing anything about it, if, indeed, the answer is to be understood as implying that the owner did not. It is but rarely that the admiralty sanctions an answer which tells in substance nothing more than would the plea of the general issue to a declaration at common law. In marine cases, whether for tort or contract, the witnesses are so likely to be widely scattered, the expense and difficulty of procuring their testimony is often so great, that the parties should be required by their pleadings to make a showing of the facts in their knowledge, so that the issues may be narrowed to the matters really in dispute.

[1] At the hearing before the learned judge below the owner offered no testimony, and relied there, as it does here, on what amounted to a demurrer to the evidence for the repairman. It asserts that it was not proved that the repairs were ordered by any one having authority so to do. It appears from the testimony of the shipbroker who negotiated the sale of her to the owner that he brought the ship from Philadelphia to the repairman at Norfolk for the purpose of having made to her the repairs recommended by the underwriters, and certain others which the owner itself wanted done, and one of the owner's representatives was on the ground directing the work. In the absence of any countervailing testimony, this was quite enough to entitle the repairman to the benefit of Act June 23, 1910, c. 373, 36 Stat. 604 (Comp. St. § 7783). The owner more seriously stresses what it claims were failures of the repairman to prove that the work and materials charged for were done or furnished. The record shows that various foremen in the employ of the repairman identified bundles of time sheets and requisitions signed by them, or by men under them, and that they had personal knowledge that such labor and materials went into the job. In its assignment of errors the owner asserts that

for many of these items, aggregating more than $4,000, the time sheets or requisitions were not signed at all, or were signed by some people who were not produced as witnesses. It is conclusive to say that the assignment of error is not a part of the record, in such a sense that statements of alleged facts therein can be accepted as true, when the record discloses no other evidence of their truth. It should be added, however, that in this case it would not follow that, because the time sheets or requisition forms were not signed by a witness who was examined, the furnishing of the labor or material has not been sufficiently proved, for the testimony shows that witnesses examined said that they had personal knowledge as to the accuracy of statements appearing on the slips signed by their subordinates. When this testimony was offered, no objection was made to it, if it was open to objection. The prices charged are proved to be those then current in Norfolk.

[2] Interest was properly allowed from the date the work was finished. American Iron Co. v. Seaboard Air Line, 233 U. S. 261, 34 Sup. Ct. 502, 58 L. Ed. 949; Kinston Manufacturing Co. v. Freeman, 247 Fed. 54, 159 C. C. A. 272.

Affirmed.

HARLAN v. HOUSTON (HUTCHISON, Intervener).

(Circuit Court of Appeals, Eighth Circuit. May 22, 1919.)

No. 5229.

1. COURTS ⟹312(5)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—"SUIT ON NOTE AND MORTGAGE."

A suit to redeem from a foreclosure sale of land and for an accounting by defendant as mortgagee in possession is not one on the note and mortgage within Judicial Code, § 24 (Comp. St. § 991[1]), and where there is diversity of citizenship between the parties a federal court has jurisdiction, although the payee of the note was a citizen of the same state as complainant.

2. COURTS ⟹312(4)—JURISDICTION OF FEDERAL COURTS—CONSTRUCTION OF STATUTE.

The change of language in Judicial Code, § 24 (Comp. St. § 991 [1]) from a suit "to recover the contents of any promissory note" as in Rev. St. § 629, to a suit "upon any promissory note" has not changed the law, and the old construction is still applicable.

3. COURTS ⟹365—FEDERAL COURTS—STATE DECISION AS LAW OF CASE.

Where the highest court of a state has determined that a particular foreclosure sale was void and the purchaser a mortgagee in possession, such decision is the law of a subsequent case in a federal court involving the validity of the same sale.

4. INTEREST ⟹59(1)—PARTIAL PAYMENTS.

The rule of the federal courts in case of partial payments is that interest shall be calculated whenever a payment is made, and the payment first applied to such interest, the balance, if any, to be applied on the principal; if the payment fall short of the interest due the balance of interest is not to be added to the principal so as to produce interest.

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

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

Suit in equity by A. C. Houston against Richard D. Harlan, executor of the will of Phineas Prouty, deceased, J. G. Hutchison, intervener. Decree for complainant, and defendant appeals. Affirmed.

R. M. Hamer, of Emporia, Kan. (H. E. Ganse, of Emporia, Kan., on the brief), for appellant.

Gilbert H. Frith, of Emporia, Kan. (J. Harvey Frith, of Emporia, Kan., and A. L. Berger, of Kansas City, Kan., on the brief), for appellee Houston.

William T. Jamison and J. G. Hutchison, both of Kansas City, Mo., for appellee Hutchison.

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

HOOK, Circuit Judge. A. C. Houston, a citizen of Kansas, sued Richard D. Harlan, a citizen of Illinois and executor of the will of Phineas Prouty, deceased, for an accounting by the latter as a mortgagee in possession of a tract of land in Lyon county, Kan., and for the enforcement of a right of redemption. Plaintiff began the suit in a state court in Kansas, and defendant removed it to the court below upon the ground of diversity of citizenship. Defendant asserted title to the land through a suit in the state court to foreclose the mortgage commenced in 1894, completed in 1895, and resulting in a judgment, foreclosure sale, and a sheriff's deed in which he, the defendant, was grantee. With an exception that need not be detailed, the defendant has been in possession of the land under the sheriff's deed ever since 1896. J. G. Hutchison, who claimed an interest in the land, intervened and objected to the jurisdiction of the trial court. The trial court denied the objection of the intervener, held that the foreclosure sale and sheriff's deed to defendant were invalid, and awarded plaintiff the right of redemption with an accounting. The defendant appealed. The questions involved are of the court's jurisdiction, the plaintiff's right of redemption, and the terms of the accounting.

[1] The objection to the jurisdiction: The original payee from whom defendant's testator acquired the note and mortgage was a citizen of Kansas the same as plaintiff. The intervener therefore asserts that since the federal court could not have had original jurisdiction of a suit upon the note and mortgage had the original payee not assigned them, the suit at bar was not removable from the state court by defendant. Sections 24 and 28, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091–1094 [Comp. St. §§ 991, 1010]). The question finally is whether this is a suit upon the note and mortgage within the meaning of section 24. The answer must be found in the nature of the suit, and the relief sought by the plaintiff. The plaintiff is not here seeking to enforce the stipulations of the note and mortgage, but, on the contrary, is assailing their continued effectiveness. His main object is the clearance of his title to the land by annulling the foreclosure sale and sheriff's deed to defendant and accomplishing his right of redemption from defendant's mortgage lien. The suit is more like the common one to quiet title upon the doing of equity than one for the enforcement of a right of action founded on a contract containing

within itself the contractual promise or obligation that is broken. A suit to redeem from a mortgage in the nature of a suit to quiet title has been held not within the statute. Power & Irrigation Co. v. Ditch Co., 141 C. C. A. 390, 226 Fed. 634. There is also an analogy to a suit to recover possession of a specific thing mortgaged, likewise held not within the limitation. See, generally, Corbin v. County of Black Hawk, 105 U. S. 659, 26 L. Ed. 1136; Deshler v. Dodge, 16 How. 622, 14 L. Ed. 1084; Bushnell v. Kennedy, 9 Wall. 387, 19 L. Ed. 736.

[2] The slight change in the statutory language from a suit "to recover the contents of any promissory note," etc., as it was formerly, to a suit "upon any promissory note," etc., as it is now in the Judicial Code, has not changed the law. Brown v. Fletcher, 235 U. S. 589, 35 Sup. Ct. 154, 59 L. Ed. 374. The old construction is still applicable. The intervener's objection was therefore rightly denied.

[3] The invalidity of the foreclosure sale and sheriff's deed to defendant because the order of sale was not authenticated by the seal of the court, and that defendant became a mortgagee in possession instead of owner, were settled for this controversy by Stouffer v. Harlan, 68 Kan. 135, 74 Pac. 610, 64 L. R. A. 320, 104 Am. Rep. 396. Stouffer was plaintiff's predecessor in title and his action was in ejectment. The court said: "The omission of the seal rendered the order of sale and all proceedings under it null and void." We must take the case at bar in that way, although if the question were open we would follow on principle as well as authority the later decision of the same court that the omission of the seal of a court is an irregularity cured as against collateral attack by confirmation of the sale. Carter v. Hyatt, 76 Kan. 304, 91 Pac. 61. Harlan defeated Stouffer's action in ejectment upon the expressed ground of a mortgagee in possession, and we cannot escape that conclusion as the law of the case. In the later case of Stouffer v. Harlan, 84 Kan. 307, 114 Pac. 385, defendant was still regarded as a mortgagee in possession.

[4] The record does not clearly disclose all the details of the accounting, but we think it went in accord with the following rules: In Kansas a mortgagee in or out of possession may pay taxes, if the owner does not, and have interest at 12 per cent. The rental value of the property is chargeable to a mortgagee in possession as payments upon the mortgage debt and his tax claims. As a general rule, the debtor has the right to direct the application of his payments; if he does not do so, the creditor may; if neither does so before a controversy has arisen, the court will apply them according to its notions of justice, exercising a sound discretion. Holly v. Missionary Society, 180 U. S. 284, 292, 21 Sup. Ct. 395, 45 L. Ed. 531; National Bank of the Commonwealth v. Mechanics National, 94 U. S. 437, 439, 24 L. Ed. 176. It is to the public interest that taxes upon which the government relies for its maintenance be promptly paid, and the inducement of the rate of interest to a mortgagee is in accord with that principle. An application by a court of payments first to tax claims and then to mortgage debt cannot be said to be contrary to a sound discretion. The making of periodical rests in which balances of accrued interest after partial payments are added to the principal for future

computation is not favored in the courts of the United States. "The correct rule, in general, is, that the creditor shall calculate interest, whenever a payment is made. To this interest, the payment is first to be applied; and if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment fall short of the interest, the balance of interest is not to be added to the principal so as to produce interest." Story v. Livingston, 13 Pet. 359, 370 (10 L. Ed. 200). See, also, United States v. McLemore, 4 How. 286, 288, 11 L. Ed. 977.

There are some other matters, including defenses of laches and limitation, but we do not think the court erred in regard to them.

The decree is affirmed.

THE O'BRIEN BROTHERS.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 223.

1. COLLISION ⟹99—FAULT OF TUG—LOOKOUT.
   A tug towing barges entering Hempstead Harbor was at fault for not maintaining a vigilant lookout to discover a drifting motorboat ahead, having no way on account of engine trouble; observers on bluffs several hundred feet from the scene of collision having been able to see all the vessels concerned with accuracy.
2. COLLISION ⟹11, 71(3), 99—FAULT OF VESSEL AND OWNER.
   Where the owner of a motorboat, without crew, having engine trouble, and with an anchor insufficient to hold her, though his attention was called by a passenger to the obvious danger of an approaching tug and her tow, merely went to his engine to make repairs, where he could not see overboard, he and his boat were not without fault in collision with the tug's tow, there being no legal distinction in respect to rules of navigation between pleasure vessels, those operated for profit, large and small boats, or those numerously manned or operated by one man only, and the motorboat was also at fault for maintaining no lookout.
3. COLLISION ⟹144—CONTRIBUTORY NEGLIGENCE—HALF DAMAGES.
   Where the personal negligence of the owner of a motorboat contributed to collision with a tug and her tow, he can recover against the tug only half his damages.
4. COLLISION ⟹144—CONCURRENT NEGLIGENCE OF VESSELS—RIGHTS OF PASSENGERS.
   Third persons injured by the concurrent negligence of two vessels, on one of which they are passengers, are not affected in their rights by the negligence of their vessel.
5. DEATH ⟹99(4)—DAMAGES—AMOUNT—MARITIME ACCIDENT.
   Awards of $5,000 and $6,000, under Code Civil Proc. N. Y. § 1902 et seq., for death of two childless married women, when a tug collided with a motorboat belonging to the husband of one of them, *held* not excessive though the husband suing as administrator was guilty of negligence contributing to the collision.

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

In the matter of the libel and petition of O'Brien Brothers, Incorporated, as owner of the steam tug O'Brien Brothers her engines, etc., for limitation of liability. On exceptions to awards for damages

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caused by the death of two married women, the report of the Commissioners was affirmed (253 Fed. 855), and from the decree the petitioner appeals. Cause remanded, with directions to modify the decree as required.

See, also, 252 Fed. 185.

At dusk of July 28, 1906, with the weather fair, the tug O'Brien Bros. was entering Hempstead Harbor. She had a tow of three scows, two arranged tandem and put on the starboard side of the tug with the third outside the outer two, and also to starboard. This arrangement was chosen because the channel for vessels like the O'Brien Bros. is narrow and practicable only at high water, or nearly so. But the scows being light would float in water on the starboard side of the channel to which the tug was confined.

The foremost of the O'Brien's scows projected a considerable distance beyond the tug's bow, and a lookout was stationed at the forward end thereof. Running lights had been lit, but it was still so light that vessels in the harbor, even very small ones, were visible and easily watched from the bluffs which overlook and closely approach the shore of Hempstead Harbor.

As the tow was about to go through the narrow passage between Bar Beach and the other side of the harbor, the motorboat Zita, 30 feet long and drawing not over 2 feet, was starting from Bar Beach for Glen Cove, Long Island. She had barely gotten under way when her engine broke down. The only anchor she had was a sort of grapnel, weighing but 12 pounds, and, while efforts were being made to start up the engine, we find that the vessel drifted; for, though this small anchor was thrown out, it did not hold.

The crew of the Zita consisted of one man, her owner (Leyare), who (with his wife and four friends) was on board. As soon as the engine stopped, the owner devoted himself to the engine, which was under the deck of the boat. The Zita had no running lights, but there was a lantern hanging on the awning and a light, said to have been bright, in the galley. After the owner began to work on the engine, one of the passengers called his attention to the approaching tow, whereupon he said: "Let them come; there's lots of room." No further attention was paid to the tug and tow until collision was inevitable. The lookout on the tow did not see the motorboat, by his own testimony, until no more than about 30 feet separated the two vessels.

The Zita was caught under the rake of the head scow and turned over. The two women on board were drowned; the men suffered no serious injury, and swam to shore, which was less than a hundred feet distant.

The motorboat was somewhat injured, but, as the damages awarded show, not seriously.

Actions having been begun by the administrators of the deceased women against the owners of O'Brien Bros., this limitation proceeding was brought. The right to limit is not questioned here. The court below held the tug at fault in respect of navigation, exonerated the Zita, and awarded to one administrator $5,000 and interest and to the other $6,000 and interest. These amounts plus costs and small awards to the men including Leyare (for damage to Zita) do not quite exhaust the fund arising from the valuation of the O'Brien Bros., and her freight. The tug's owners appeal.

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

Edward B. Thomas, of Brooklyn, N. Y., for appellees.

Before WARD, HOUGH and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] We agree with the court below that the tug was at fault for not maintaining a vigilant and efficient lookout. It is plainly proven that observers on the bluffs, distant several hundred feet from the scene of disaster,

saw all the vessels concerned and were able to state with accuracy the circumstances of collision.

Appellants urge in excuse that the shadows of the high shores of the harbor rendered it easier to perceive what was going on from the top of the bluff, than from the low deck of the advancing scow. Neither the evidence nor general knowledge justifies the distinction; but, giving all the weight that can be claimed for it, we are still of opinion that any competent lookout could and should have seen the Zita and perceived that she was nearly still, long before the vessels were only a boat's length apart.

[2] We cannot, however, agree that the Zita was without fault. She had an apology for an anchor, yet could hardly be called an anchored vessel; she was assuredly not under control; yet the crew of one man, after having his attention called by a passenger to an obvious danger, did nothing but betake himself to his engine, where he could not see overboard. He acted as if the very smallness of his boat, or some privilege inherent in pleasure craft, entitled him to cast all the burdens of avoiding collision on the other vessel. There is no legal distinction in respect of the rules of navigation between vessels operated for pleasure and for profit, between large boats and small ones, or those with a numerous crew and those operated by one man. The Zita also was at fault for maintaining no lookout, and neglecting all the precautions incumbent upon her whether regarded as anchored or not under control.

[3] This finding of fact requires modification of the decree appealed from so far as it covers the claim of Leyare individually against the owners of the O'Brien Bros. The personal negligence of Leyare contributed to this disaster, and he can recover but half his damages, and against him are awarded the costs of this appeal.

[4] The foregoing, however, does not affect the rights of third parties who were injured by the concurrent negligence of two vessels, upon one of which they were passengers. The Hamilton, 146 Fed. 724, 77 C. C. A. 150, affirmed 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264.

[5] As stated above, one of the passengers was Leyare's wife. She was drowned, and Leyare as her personal representative has been awarded $6,000. The administrator of the other woman passenger has received $5,000.

Appellants insist that the evidence furnishes no basis for awards of this size, or indeed for any substantial recovery. The claims rest on the statutes of New York creating a cause of action for death by wrongful act (Code Civ. Proc. § 1902 et seq.), and the amount of recovery is (in the absence of a jury) "such a sum as * * * the court * * * deems to be a fair and just compensation for the pecuniary injuries resulting from the decedent's death to the person or persons for whose benefit the action is brought."

Both the decedents were women of mature years, married, living with their husbands, and performing the usual duties of housekeepers of families in moderate circumstances. Both were childless, and their surviving husbands are apparently the sole beneficiaries of whatever

recovery may be had herein. Under such circumstances, we think it so plain that the awards were reasonable in amount that no further discussion of the matter is necessary.

It is true that Leyare as administrator thus obtains a substantial recovery for the decease of his wife, to which his own personal negligence contributed. But as he sues in a representative capacity, it is the settled construction of the statutes above referred to that the individual negligence of one who claims in a representative capacity is not to be imputed even though the same person receives individually that for which he sues as representative. McKay v. Syracuse, etc., Co., 208 N. Y. 359, 101 N. E. 885; Braun v. Buffalo, etc., Co., 213 N. Y. 655, 107 N. E. 338.

The cause is remanded, with directions to modify the decree as hereinabove required. The claimants other than Leyare individually, who appeared by one counsel in this court, will recover one bill of costs on this appeal.

EISENBERG et al. v. WEISSKOPF.

In re STERN.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2602.

BANKRUPTCY ⚷288(1)—COURTS OF BANKRUPTCY—SUMMARY JURISDICTION.

Surrender to a trustee of property in possession of third persons claiming ownership thereof cannot be enforced by summary proceeding in the bankruptcy court, over objection of the claimants.

Petition to Review and Revise Proceedings of the District Court of the United States for the Eastern District of Wisconsin.

In the matter of one Stern, bankrupt. Petition by M. Eisenberg and S. Gorenstein against Ignatz Weisskopf, trustee, etc., to revise an order of the District Court. Reversed.

Michael Levin, of Milwaukee, Wis., for petitioners.

N. S. Robinson and Robert A. Hess, both of Milwaukee, Wis., for respondent.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Before the proceedings were instituted which resulted in the adjudication of Stern as a bankrupt, petitioners Eisenberg and Gorenstein were in possession of certain goods. After adjudication respondent Weisskopf, receiver and later trustee, filed a petition for a summary order on Eisenberg and Gorenstein to surrender the goods to the estate. At the summary hearing Stern testified that to evade the levy of an attachment he had put the goods into the possession of Eisenberg and Gorenstein as his agents or bailees to hold possession for him. On the other hand, Eisenberg and Gorenstein testified that the goods, originally theirs, had been put into Stern's retail store on consignment or conditional bills of sale; that under their reservation of title they had taken possession, in order to prevent their goods from coming into the possession of the attaching creditor; and

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that, prior to the filing of the petition in bankruptcy, they were in the physical possession of the goods under their aforesaid right to take and hold them as their own. And thereupon they insisted that they should not summarily be deprived of possession and that their title could only be adjudged in a plenary suit. The referee, although stating that he accepted Stern's testimony as true, found that the facts as sworn to by Eisenberg and Gorenstein would, if true, constitute an adverse claim, under which they could not be deprived of their possession of the goods except as the result of a plenary suit. The District Court reversed the order of the referee dismissing the summary proceeding.

On the authority of In re Goldstein, 216 Fed. 887, 133 C. C. A. 91, and cases there cited, the order of the District Court is

Reversed.

JEONG QUEY HOW v. WHITE, Immigration Com'r.*

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3231.

HABEAS CORPUS ⟹25(1)—EXCLUSION OF ALIENS.

Where claim of right under Rev. St. § 1993 (Comp. St. § 3947), to enter the United States, made by appellant, a Chinese person alleging himself to be a citizen, was not first determined by a special board appointed under Act Feb. 20, 1907, appellant is entitled to a writ of habeas corpus, unless within a reasonable time proceedings are instituted against him in accordance with law.

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

Petition by Jeong Quey How for a writ of habeas corpus against Edward White, as Commissioner of Immigration, Port of San Francisco. Writ denied, and petitioner appeals. Reversed and remanded, with instructions.

George A. McGowan, of San Francisco, Cal., for appellant.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., Ben F. Geis, Asst. U. S. Atty., of Willows, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. Appeal is taken from the order of the court below denying the appellant's petition for a writ of habeas corpus. The appellant made application to enter the United States as a citizen thereof, claiming to be the foreign-born son of Jeong Sun, a native-born citizen of the United States, and thus entitled to enter the United States under section 1993 of the Revised Statutes (Comp. St. § 3947). The appellant was first caused to be examined under the general immigration law, and was found admissible. He was then caused to be examined under the Chinese Exclusion Act, whereupon his application to enter the United States was denied, for want of sufficient proof that he was the son of Jeong Sun, his alleged father.

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*Rehearing denied October 14, 1919.

The examination under the Chinese Exclusion Act was had before the immigration inspector. In Quan Hing Sun v. White, 254 Fed. 402, — C. C. A. —, this court held that the claim of right to enter the United States, made by a Chinese person alleging himself to be a citizen of the United States, must first be determined by a special board of inquiry appointed by the Commission of Immigration, consisting of three members selected from the immigration officials under Act Feb. 20, 1907, c. 1134, 34 Stat. 898. This right was denied the appellant, and on the authority of that decision it follows that the judgment of the court below must be reversed, and the cause remanded for further proceedings.

The judgment is accordingly reversed, and the cause is remanded, with instructions to entertain the petition and grant the writ, unless within such time as the judge of the court below shall deem reasonable proceedings be instituted against the appellant under the provisions of the law as we have construed them.

STEGER et al. v. ORTH.*

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 73.

1. APPEAL AND ERROR ⟹107—RIGHT OF REVIEW—JUDGMENT ENTERED ON REPORT OF REFEREE.
   Where an action at law is by consent referred to a referee "to hear and determine" in accordance with the New York statute, it is the practice of the federal court to make an order for judgment on the referee's report; but such order is pro forma only, and the fact that the judgment is entered by the clerk without an order does not deprive the defeated party of the right to have the same reviewed on error.

2. SHIPPING ⟹39—CHARTERS—EXPIRATION—FAILURE TO LOAD WITHIN LAY DAYS.
   A charter does not terminate at the expiration of the lay days for loading because loading has not then begun; but where the agreement is to load at a certain rate and thereafter pay demurrage, the ship must wait thereafter for a reasonable time, the demurrage being the agreed compensation.

3. DAMAGES ⟹62(4)—BREACH OF CHARTER—MITIGATION OF DAMAGES.
   To get another cargo as good as can be obtained and as quickly as is reasonably possible is the extreme measure of a shipowner's obligation to mitigate damages on notice by the charterer that he will not load.

4. SHIPPING ⟹52—BREACH OF CHARTER—MITIGATION OF DAMAGES.
   Where a charterer refuses to load the cargo contracted for, the owner is under no obligation to accept a different cargo from him on different terms.

5. SHIPPING ⟹183—DEMURRAGE—INTEREST.
   Interest is allowable on demurrage based on charter party agreement, whatever the form of action.

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

Action at law by Mountford S. Orth against Edward D. Steger and others. Judgment for plaintiff, and defendants bring error. Affirmed.

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*Certiorari denied 250 U. S. —, 40 Sup. Ct. 11, 64 L. Ed. —.

Addison S. Pratt, of New York City, for plaintiffs in error.
Alfred S. Barnard, of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. A motion to dismiss the writ or affirm the judgment must be disposed of before considering the merits. The substance of argument is that, owing to procedural defects, we are without power to do more than grant the motion.

[1] The action is at law, and as soon as issue was joined the case was referred to a referee "to hear and determine," by an order duly entered in the court below on the written consent of the parties. This method of trial needs no explanation to a practitioner under the New York Code of Civil Procedure. Plaintiff below (defendant in error) prevailed before the referee, upon whose report judgment was entered by the clerk in strict conformity with state practice.

It is now said that such a judgment is not reviewable in this or any other federal court, because the findings of fact and conclusions of law upon which the judgment rests were not adopted by the court below, nor did that court by any explicit order, made after the referee had submitted his report, direct the entry of the judgment complained of. For this doctrine it is sufficient to refer to Boogher v. New York, etc., Co., 103 U. S. 90, 26 L. Ed. 310.

It is true that the practice pursued in entering this judgment was erroneous, and it may be noted that the defendant in error presumably entered it; i. e., the same party who now moves to dismiss.

The question of adjusting trials before consent referees (common in many states of the Union), not only with R. S. § 914 (Comp. St. § 1537), and R. S. §§ 649 and 700 (Comp. St. §§ 1587, 1668), but also with the legislation creating and regulating the Circuit Courts of Appeal, is not new. The Fourth circuit, in Swift v. Jones, 145 Fed. 489, 76 C. C. A. 253, held that such method of trial was or ought to be unknown to the federal court; but in Tiernan v. Chicago Life, etc., Co., 214 Fed. 241, 131 C. C. A. 284, and Philadelphia, etc., Co. v. Fechheimer, 220 Fed. 408, 136 C. C. A. 25, Ann. Cas. 1917D, 64, the Eighth and Sixth circuits substantially held that, if the court approved or adopted the findings and conclusions of the referee, a judgment so obtained and entered was subject to review in the same manner as are judgments founded upon findings by the judge after trial of a common-law action with jury duly waived in writing.

This opinion and the practice resulting therefrom has long obtained in this circuit. The method of transforming the referee's findings into the action of the court and making the judgment recommended by the referee a judgment directed by the judge has not always been the same. Sometimes a motion for a new trial has been made; sometimes judgment has been applied for on the referee's report; sometimes two orders, one denying a new trial and the other directing judgment, have been entered.[1]

[1] See the remarks of the court in Parker v. Ogdensburgh, etc., Co., 79 Fed. 817, — C. C. A. —; while the records in David Lupton's, etc., Co. v. Automobile Club, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699, and Homer Ramsdell Co. v. Compagnie Generale, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155, will exhibit the practice of this circuit and its variations.

But this procedure is merely formal, and how thoroughly it is no more than a method of insuring to the party defeated before the referee that right of appeal which he never expected or intended to surrender appears in the opinion of Lacombe, J., in Kilduff v. Roebling's, etc., Co., 150 Fed. 240. That learned judge said:

"Although it is the practice here to make an order for judgment upon the report of the referee, instead of allowing the clerk to enter judgment without direction of the court, such order is pro forma only. The court will not undertake to modify or review the conclusions of law any more than it would the findings of fact. Indeed, the very object of a reference is to relieve the judge at circuit from considering or passing upon any of the questions which have to be determined in arriving at the final conclusion, which is to be embodied in the judgment."

What, therefore, should have been done was to procure a formal order, signed as of course, directing the clerk to enter the very judgment that was entered. But this mistake could have been corrected any time within the term of entry of judgment or any lawful extension thereof. The mistake was as much that of the defendant below as of the plaintiff, and we do not think that defendant in error can be heard to make the objection now.

In Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085, an action at law had been referred (in the United States Circuit Court) to several arbitrators pursuant to the practice of the state of Ohio.

"Two of the three referees only signed the award, but the attention of the court was not called to the fact when the report was confirmed, and judgment was entered. The omission was amendable, and non constat but that the amendment could and would have been made, if the objection had been suggested. It would be fair neither to the court nor to the other party to permit the objection to be raised here for the first time. Under the circumstances, it must be held to have been conclusively waived."

In that case it was the plaintiff in error who sought to insist upon the proposition that the judgment under review was a nullity; in this case it is the defendant in error who asserts what is practically the same thing. The distinction does not entail a difference, and for the reason above quoted we decline to entertain the motion to dismiss.

The record at bar contains no bill of exceptions, nor is any of the evidence even sought to be presented. Our duties, therefore, are limited to the inquiry as to whether the referee's findings of fact support his conclusions of law and the judgment following thereupon. Hudson River, etc., Co. v. Warner, 99 Fed. 187, 39 C. C. A. 452. This measure of investigation may be obtained without a bill of exceptions (Flagler v. Kidd, 78 Fed. 341, 24 C. C. A. 123); nor will it be necessary to advert to the pleadings, which (on both sides) were by formal order amended during the course of the trial "to conform to the proof," which proof or evidence is not before us.

It is not thought necessary even to mention most of the assignments of error, nor to consider all the propositions of the briefs, after consideration of which we think the material points are as follows:

Defendants below (hereinafter called Steger) had toward the close of April, 1915, a contract with the republic of France to deliver at one or more of sundry cities in France a large quantity of baled and pressed hay to be shipped from either Galveston or Texas City, Tex.

Steger made a contract with a corporation to transport said hay, and plaintiff below (Orth) guaranteed the performance of said corporate contract, both as originally made and subsequently modified. Later Orth became the assignee of this corporate contractor, and he may for all purposes be spoken of as if he had originally made the agreements out of which this litigation arose.

Orth furnished ships to carry Steger's hay, but it was specifically found by the referee that he did not furnish any of the vessels in respect of which claims are advanced in this action under or pursuant to either the original contract above referred to or any other written agreement. On the contrary, by parol, the four steamships which ultimately carried a large portion of the hay were chartered to Steger, three of them on June 22, 1915, and the fourth, the Benwood, at some time prior to June 24th.

Steger's contract with the French government provided that the last of the hay should be shipped from America before July 20, 1915. On July 11, 1915, the Benwood and another steamer called the Aagot arrived at Galveston in the performance of Orth's parol charter arrangements with Steger.

The rate of loading was admittedly to be "700 tons per day." Whether this meant that number of tons per day for each steamer on the berth, or said number of tons to be divided among all the steamers that might be simultaneously loading, was a mooted question at the trial. As to which was the correct interpretation we express no opinion, for the referee adopted the latter contention, which was naturally that of Steger, and he cannot now complain of it. As matter of fact, the Aagot, which arrived about an hour ahead of the Benwood, was loaded first, and Steger made no attempt to put anything on the Benwood until after the Aagot's loading was complete.

The Aagot was loaded on July 30th, whereupon Orth refused to let her sail unless Steger instantly settled certain demands in respect of not only the Aagot, but the Benwood, and still another steamer. This contest was settled by agreement, but not until August 13th, when the Aagot sailed. In the meantime, and on August 7th, Steger notified Orth that no hay would be furnished for the Benwood. Subsequently the steamer provided herself with a cargo of staves, and defendants filled up the steamer with a comparatively small lot of hay. With this cargo she sailed for France in September, and her hay was delivered and received under Steger's contract with the French government. It is specifically found by the referee that—

"It is not established by the evidence that it was impossible for [Steger] to supply a cargo of hay for the Benwood; * * * the utmost that can be inferred is that to have obtained hay in order to load the Benwood within a reasonable period after her arrival would have been expensive, and probably would have cost defendant in demurrage a large sum of money."

The large judgment now complained of, and rendered in favor of Orth and against Steger, consists (so far as it is necessary to specify) of (1) damages for breach of contract to load hay on the Benwood, and (2) demurrage on the Benwood and other steamers; demurrage being computed after lay days at the rate of one for 700 tons of cargo-carrying capacity.

We notice the following alleged errors urged by Steger: (a) The charter of the Benwood was dependent on and collateral to Steger's contract with the French government. (b) The charter of the Benwood expired by limitation with the expiration of her lay days, calculated as above, viz. July 27th. (c) Orth's losses on the Benwood were due to his neglect of the duty imposed by law to mitigate damages by seeking other employment for his steamer. (d) Orth's conduct in refusing to let the Aagot sail, until his demands in respect of other steamers were satisfied, operated as a release of Steger from further liability in respect of the Benwood's charter. (e) Interest was not allowable upon the items constituting the principal of Orth's judgment below.

(a) It is argued under this head that because Steger had agreed to ship the last of his hay by July 20th, and by that date had put nothing on board the Benwood, he was therefore relieved of further dealings with that steamer.

This singular contention may be disposed of by pointing out that it is inconsistent with the admitted dealings between the parties hereto both before and after July 20th; as is said by the referee, the parties "apparently assumed, what appeared to be the fact, that the French government would not refuse to accept delivery of hay shipped after July 20th."

But such a contention as this can rarely rest merely upon a reading of certain papers, and when (as here) the agreement regarding the Benwood was in parol, it effectively disposes of the contention to point out that it has no finding of fact made by the referee upon which to rest.

It may be further noted that one of Steger's own requests to find was apparently intended to cover this point, and was refused by the referee. This fact is noted, to disapprove of the practice of burdening a record with such declined findings. When we have no power to do more than ascertain whether the judgment is supported by that which was found, we are not interested or concerned with what the referee did not find. Therefore such matters ought not to be inserted in the record.

[2] (b) It is reported as a fact that Steger did not, "in the negotiations which preceded the final termination of the [Benwood's] contract, take the ground that the contract was broken when the lay days expired; * * * up to August 6th[2] [Steger] claimed to control the Benwood, and had the right to load her with either hay or staves."

Under this finding of fact the contention now made is not open to plaintiff in error, but as matter of law it is wrong. It would indeed be a singular construction of so well-known a document as a charter party to hold that the charter necessarily terminates with the expiration of lay days. Doubtless an agreement may be made in such terms that, if no cargo is furnished before the expiration of lay days, the shipowner may cancel and seek other business. Where the agreement is to load at a certain rate and thereafter pay demurrage, demurrage

[2] (Note.—This date is an obvious clerical error for August 7th).

is the agreed compensation for the use of the ship for a reasonable time after the expected period of her loading is completed. For such reasonable time the ship must wait. Wilson v. Thoresen's Linie, [1910] 2 K. B. 405. Cf. the discussion of the relation of charterers and consignee in Milburn v. Federal, etc., Co., 161 Fed. 717, 88 C. C. A. 577.

[3] (c) The duty of a plaintiff who has been injured by a defendant, whether through tort or violation of contract, to mitigate or minimize damages, is not doubted. But what are reasonable and proper efforts in respect of such mitigation present nearly always (and certainly in this case) a question of fact; and here plaintiffs in error are concluded by the findings below above cited, and the further finding that—

"There was no unreasonable delay on the part of [Orth] in securing a cargo for the Benwood after receiving [Steger's] notice that they would not supply hay for that vessel."

To get another cargo, as good a cargo as they could, and as quickly as was reasonably possible, was the extreme measure of the carrier's obligation to mitigate damages.

[4] It is specifically urged that Steger offered in substance to put on the Benwood a cargo which would not pay as large a freight as the hay, and then to make good the difference between such cargo and a hay cargo. It is admitted that on the hay cargo, as per contract, Steger was obliged to pay freight in advance; he refused to pay the equivalent freight in advance. This offer was made before August 7th. We entirely agree with the referee that such an offer (as matter of law) Orth was under no obligation to accept, whether it be called in mitigation of damages or substitution of occupation.

(d) Orth's conduct in respect to the Aagot's sailing was indefensible. The referee so found. Orth thereby subjected himself to some losses, which according to the findings below he must bear himself. But the charter of the Benwood was a separate and independent agreement. When Orth refused to let the Aagot sail, the Benwood was awaiting her turn to load, and we fail to discover in any fact reported to us any connection between what Orth did about the Aagot and damages for a proven, if not admitted, breach of the Benwood's charter on August 7, 1915.

[5] (e) However interesting may be the question of interest upon unliquidated damages, it is not open for discussion to these plaintiffs in error; it being specifically reported to us that interest was computed on items both of damages and demurrage by stipulation.

In respect of demurrage, even if there were no stipulation, interest should have been computed under our decision in Milburn v. 36,000 Boxes, 57 Fed. 236, 6 C. C. A. 317. That decision was in a cause promoted in admiralty, but the form of the action makes no difference. Interest is allowable upon demurrage based on charter party agreement.

Judgment affirmed, with costs.

ORTH v. STEGER et al.

(District Court, S. D. New York. June 2, 1919.)

1. CERTIORARI ⟹47—STAY OF EXECUTION—DISCRETION OF FEDERAL DISTRICT COURT.
The District Court has power in its discretion to stay issuance of an execution on a judgment pending application for a writ of certiorari to the Supreme Court, in cases not reviewable by such court as a matter of right in any other way, notwithstanding the absence of statutory provisions authorizing a stay.

2. CERTIORARI ⟹47—NATURE—SUPERSEDEAS.
A writ of certiorari is in the nature of a writ of error, and under the common law operates as a supersedeas.

3. CERTIORARI ⟹47—STAY OF EXECUTION—DISCRETION OF FEDERAL DISTRICT COURT—SUFFICIENCY OF SHOWING.
In exercising its discretion to grant a stay of execution pending application to the Supreme Court for a writ of certiorari, the District Court must be satisfied of the good faith of the applicant, and must provide for sufficient security and for a prompt presentation of a petition for the writ.

At Law. Action by Mountford S. Orth against Edward D. Steger and others, composing the firm of Steger & Co. Judgment was rendered for plaintiff, and defendants move, by way of order to show cause, to stay execution pending application to the Supreme Court for a writ of certiorari. Motion granted, on conditions.

Addison S. Pratt, of New York City, for the motion.
Alfred S. Barnard, of New York City, opposed.

MAYER, District Judge. This is a motion (by way of order to show cause) to stay the issuance of execution to enforce the collection of a judgment in favor of plaintiff. The action was at law and plaintiff prevailed in the District Court. On review, the judgment was affirmed by the Circuit Court of Appeals. Steger v. Orth, 258 Fed. 619, — C. C. A. —. In due course, the Circuit Court of Appeals sent down its mandate in familiar form, and this court, in accordance with its duty, obeyed the directions of the mandate.

The cause is one where there can be no review by the Supreme Court of the United States as matter of right, but only by way of certiorari. Defendants assert that they intend to apply to the Supreme Court for a writ of certiorari, and pending such application they ask for stay of execution, offering to give any undertaking which the court may think adequate.

[1] Plaintiff insists that this court has no power in this case to make the order asked for. It is true that there is nowhere any statutory provision authorizing a stay of execution in circumstances similar to those in the case at bar, yet the power to stay in the discretion of the District Court has long been accepted in this district as matter of practice. In Foster's Federal Practice (5th Ed.) vol. 2, § 427, p. 1348), the author states:

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

"Stays of proceedings, pending an application to the Supreme Court of the United States for a writ of certiorari, are often granted, when security has been given pending the review by the Circuit Court of Appeals."

The only case cited by Foster to sustain the proposition, supra, is Boston & M. R. Co. v. Gokey (D. C.) 150 Fed. 686; but that case is one decided in this circuit, and, whether right or wrong, is in conformity with the practice here, and is entitled in this court to respectful consideration. But, in addition, there is substantial authority in support of the contention advanced by defendants' counsel. Freeman on Executions (3d Ed.) §§ 32, 32a; Blackburn v. Reilly, 48 N. J. Law, 82, 2 Atl. 817. The opinion of Van Syckel, J., in the Blackburn Case, supra, exhibits the reasoning in support of a stay so clearly and fully as not to require elaboration.

[2] A writ of certiorari is in the nature of a writ of error. Harris v. Barber, 129 U. S. 366, 9 Sup. Ct. 314, 32 L. Ed. 697. In Kountze v. Omaha Hotel Co., 107 U. S. 378, 381, 2 Sup. Ct. 911, 914 (27 L. Ed. 609) the court said:

"By the common law a writ of error, without any security, was of itself a supersedeas of execution from the time of its allowance or recognition by the court to which it was directed."

In 6 Cyc. 800, 801, it is stated:

"Except where the common-law rule has been changed, a certiorari to a subordinate court or tribunal or an officer operates as a stay of proceedings from the time of its service or of formal notice of its issue, unless the judgment or order complained of has begun to be executed."

See, also, Bailey v. Lansing, Fed. Cas. No. 738, 13 Blatchf. 424.

Finally, refusal of the right of this court to stay execution would seem to be inconsistent with the right to apply for a writ of certiorari. Facts might readily exist where failure to stay would result in complete loss, by paying to an irresponsible party a judgment which the Supreme Court later might have held was erroneously rendered. Further, if the judgment is fully satisfied, the case might become moot so far as concerns consideration by the Supreme Court of a petition for a writ of certiorari.

[3] I conclude, therefore, that this court has discretion to grant the stay. This court cannot assume to weigh the merits of the petition itself, for that would be another way of assuming to perform a duty of the Supreme Court; but, in the exercise of discretion, the court must be satisfied of good faith (and such it believes exists here), and by its order must provide for sufficient security, and for prompt presentation of the petition for the writ of certiorari.

Motion granted, on condition that sufficient security be given, and that the petition for the writ shall be promptly served and submitted. The details can be disposed of in the order, which may be settled on two days' notice.

NESTLE PATENT HOLDING CO., Inc., v. E. FREDERICS, Inc.

(District Court, S. D. New York. July 1, 1918.)

No. 14—122.

1. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—HAIR WAVING.
Aldworth patent, No. 1,186,533, relating to compound tube used in so-called permanent hair waving, *held* valid and infringed.

2. PATENTS ⚷283(2)—INFRINGEMENT—RIGHT TO INJUNCTION—ABANDONMENT.
That a patent infringement, testified to and proven, was abandoned before suit was brought, does not take away right of injunction in order to prevent repetition.

3. PATENTS ⚷328—INFRINGEMENT—HAIR WAVING.
Aldworth patent, No. 1,186,533, covering a compound tube used in so-called permanent hair waving, *held* not infringed by a device consisting of a borax pad to be wrapped around the coiled hair, and covered with a heat conducting, but noninflammable, tube impervious to water.

4. PATENTS ⚷328—INFRINGEMENT—APPARATUS—HAIR WAVING.
Nessler apparatus patent No. 1,052,166, claims 3 and 6, relating to the art of so-called permanent hair waving, *held* not infringed.

5. PATENTS ⚷328—VALIDITY—APPARATUS—HAIR WAVING.
Nessler apparatus patent, No. 1,052,166, claim 5, relating to the art of so-called permanent hair waving, *held* void as made up of a combination all old but a single element.

6. PATENTS ⚷26(1)—VALIDITY—COMBINATION OF APPARATUS AND PROCESS.
If a process displays invention over the prior art, it does not necessarily follow that the apparatus wherewith to practice it required invention also, still less is it a result that the combination claimed is valid.

7. PATENTS ⚷328—COMBINATION OF PROCESS AND APPARATUS—INFRINGEMENT.
Nessler process patent, No. 1,052,167, in combination with Nessler apparatus patent, No. 1,052,166, claim 4, relating to the art of so-called permanent hair waving by the vaporization of a lotion in a heated tube, *held* not infringed.

In Equity. Action by the Nestle Patent Holding Co., Incorporated, against E. Frederics, Incorporated. Decree directed for plaintiff in part.

Final hearing in equity. Action on Aldworth patent, No. 1,186,533, claims 1 to 7, on all the claims of Nessler process patent, No. 1,052,167, and on Nessler apparatus patent, No. 1,052,166, claims 3 to 6, all owned by plaintiff.

Charles Neave and Willis Fowler, both of New York City, for plaintiff.

Thomas Ewing and Charles H. Wilson, both of New York City, for defendant.

HOUGH, Circuit Judge. All these patents relate to what has been oftenest called herein the art of "permanent hair waving." It is as well to state in limine, as a finding of fact, that in the literal sense of the words, there is no such thing.

Human hair is a substance having, so far as known, attributes or elements closely akin to horn, or finger nails. Heat, moisture, and

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pressure will change its shape; but it will not only grow anew in its natural shape, but heat, moisture, and pressure, which suddenly applied together changed shape quickly, will (when encountered successively or in less powerful combination) remove or dissipate the contour artificially produced.

Permanent, therefore, means no more than enduring longer than other hair waving; and how enduring that is depends also on the particular kind of hair treated, i. e., whether coarse or fine, strong or weak. This finding is thought to be fully supported by the evidence herein.

It is also proven, and, indeed, admitted by both sides, that personal skill, the almost artistic touch, and recognition of the different kinds of hair encountered on the heads of different persons, contribute very largely to the "permanency" or excellence of the unnatural curl or wave produced by the hairdresser's labors. These patents, singly or collectively, do not supplant or do away with the skill of experience. This is true of many patents and in many arts; but it is more than usually important in consideration of this cause.

[1, 2] The Aldworth patent stands by itself, and may be considered first. The seven claims in suit cover "a new article of manufacture," viz., a tubular body or structure, or a "compound" tube, the compounding consisting in the use of two or more plies of material, having a "reagent" between the plies, said plies, or the innermost ply, being of such a nature that it will permit the reagent "to alter" its condition, or be "changed from its normal condition," and, when so changed or altered, to "act upon" hair inserted in the tube.

Every claim but No. 2 requires the reagent to be a "constituent part" of the article, and the second claim demands that the reagent be "located" within the wall of the tubular body.

The specification shows clearly that all this means that Aldworth invented a portable, durable, ready-to-use tube, capable of withstanding heat externally applied, and having, beneath a porous inner skin or ply, borax. When this tube was plunged in water, put over hair, and heated, the hair had a bath of steam charged with borax or a solution thereof. It would seem plain from the disclosure alone that the invention in this "new article" consisted in embodying the portable and ready-to-use thought; but that it was this idea that carried the patent through the office is also shown by the file wrapper contents (especially paper No. 5, filed January 20, 1916, of defendant's Exhibit P).

Nothing is found in the record invalidating this patent; the man Frederics substantially admits infringement (Ev. pp. 48 and 49), and the corporate defendant offered the infringing article for sale (Plaintiff's Exhibit No. 11). Evidently the infringement thus testified to and proven was abandoned before suit brought, but that does not take away plaintiff's right to injunction in order to prevent repetition.

The usual decree may therefore pass on this patent.

The principal question of infringement, however, is whether what Frederics did to the hair of Misses Albes and McPherson in March, 1917, amounted to a violation of plaintiff's rights under some or all

of the patents in suit. Taking the evidence of these witnesses in conjunction with Frederics' exposition of his own methods in open court, what was done, and is being done, is so clear that I shall not recount evidence.

[3] So far as the Aldworth patent is concerned, the question is whether Frederics' borax pad, when wrapped around the coiled hair and covered with a heat conducting, but noninflammable, tube impervious to water, is the equivalent of the Aldworth tube.

Whether it accomplishes the same result is denied, and may be doubted, as it is probably true that *some* undissolved borax gets into the hair; but, entirely apart from this question of fact, I think Aldworth's claims are so limited to making the borax (reagent) a constituent part of the neat portable ready-to-use tube of his patent, that a pad and tube separately made and sold, and united only for use, respond neither to the claims literally read nor to the spirit of the patent.

If this be too narrow a reading of the specification language, it would, I think, be easy to confine the patent within these limits on the showing of prior art; but decision is based on the ground above stated.

The two Nessler patents represent one inventive effort on the patentee's part, and may be studied accordingly; but it seems to me that the division of original application required by the office was right, for this is not a case where the only conceivable method of infringing the process patent is by using the specific apparatus disclosed.

The extensive display of prior art (other than patents and publications) made in court convinces me that boiling or steaming hair, heating it, and while being heated in any way exposing it to borax in solution, were all very old matters in the ancient art of hair dressing.

An incomplete but not inaccurate description of Nessler's thought is to call it "piping" (Crain, 138,995), or nearly piping, hair on the head. This means that he simultaneously applies heat and moisture, and heat *through* moisture, to hair under pressure, i. e., under the torsion of the hair round the curler. As he put it in his evidence, heat alone is not enough—you must have steam.

It is to me very evident that what renders near piping possible is the electric heater, with its intense, but localized, temperature.

But the claims in suit do not depend on this antecedent and underlying truth, and therefore plaintiff's counsel summarize their contention thus:

"*Inside* of a heater, heated in any way, Nessler places a tube which incloses absorbent material surrounding hair tightly wound on a curler."

This attractive method of statement omits any mention of what it is that the absorbent material absorbs. Just as written, it describes a heating process without moisture. It will appear, I think, that in the moisture, and the way of generating the same, or applying it to the hair, lies the crux of this litigation, which, trivial as the subject-mat-

ter seems to elderly men of scanty locks, does affect the livelihood of a quite numerous class.

By way of what is denounced as infringement, Frederics (the man) has done three things: (1) Used a tube which was practically Aldworth's; (2) put "flannel against the hair" and a tube over all (Ev. p. 52); and (3) wrapped hair and curler with his "borax" or "steam" pad, and placed a tube over that. Each of these acts is said to infringe both the Nessler patents.

I inquire what were the teachings of the prior art, and what advance or change therefrom does Nessler both disclose and claim, in so much of his patents as are here in suit?

The patentee himself discloses as prior art (1,052,167, p. 1, l. 14) a method in which the hair on the curler receives a "suitable lotion," is covered with a tube, and heat externally applied.

The evidence of divers witnesses at trial establish that curlers were long ago covered with cloth or flannel; that hair when wound was so covered; that hair and flannel were intermixed in the winding; that lotions or washes, usually containing borax, were applied to the hair or the cloth, or both; and heat was then applied to the inside of the curler. Nessler starts from this knowledge.

His disclosure is that he completely covers the hair with (e. g.) flannel "moistened with water"; he then puts "lotion" in the tube, allowing it to "collect in the closed end"; applies heat externally, and thus permits only "the gases or vapors liberated by the heat" to get at the hair through the flannel.

He nowhere specifies any particular lotion, or gives any suggestions as to its components.

On this disclosure are founded three process claims, of which the first and third literally follow the specification, and the second does not require the absorbent covering of the hair to be moistened on application.

The apparatus claims in suit vary. They are all for combinations, of which in Nos. 3 and 6 a vent for gases at the handle end of the heater, said gases to issue from the opposite end of the tube, is a stated element; and Nos. 4 and 5 leave out the vent, but include (4) an absorbent covering over hair or curler; and (5) means for binding the tube at its "open" end. All these combinations are said to define or describe apparatus for carrying out Nessler's process (page 1, l. 11); but nowhere is any reference made to a lotion in the claims, nor is the absorbent material required to be moistened. This, however (or one wetness at all events), must be implied (see page 1, 1. 41 et seq.), or else there can be no gases to escape through the specified vent.

[4] Considering these claims somewhat technically, perhaps, the third and sixth apparatus claims are not infringed, because, assuming that good combinations are stated, Frederics' heater has no vent; nor can I think that the end of his projecting tube pricked, and lightly stuffed with cotton, is the equivalent of a vent in the heater furnishing exit for gases issuing from the inner or head end of the tube.

[5] The fifth apparatus claim describes absolutely (so far as it goes) what Nessler himself discloses as prior art, except for "means for binding" the tube at its open end. The means disclosed are to "tie down on the hair" said "open end"; in other words, to fasten the mouth of a bag with a string. When a combination is all old but one element, and the addition of that element is not invention, the claim is void. Such is the case here.

[6] The fourth apparatus claim describes (when a steam producing liquid is assumed) something that may be used to practice the patented process. If the process displays invention over prior art, it does not necessarily follow that the apparatus wherewith to practice it required invention also, still less is it a result that the combination claimed is valid.

Whether any of these apparatus claims show (in the light of the disclosure and evidence) a new function evolved from the combination, or anything more than an aggregation, I very much doubt; thinking that the recent decision in Grinnell, etc., Co. v. Johnson, etc., Co., 247 U. S. 426, 38 Sup. Ct. 547, 62 L. Ed. 1196 (June 10, 1918), has firmly called us back to simple and rigid rules regarding claims of this class; and the calling was much needed.

[7] But whether I am right or not in this view of combinations, it is certainly generous to the patentee to consider the process claims in conjunction with the fourth apparatus claim as one invention. When this is done it seems to me plain that all Nessler did was to take a known apparatus, of curler tube and heater, and, instead of applying "lotion" to the hair direct, put it inside the tube, first covering the hair with flannel or the like, and then heat as before. The result sought was to allow the "lotion" to get at the hair only in vapor form and only through the flannel; but, judging from the difference between the process claims, it was indifferent whether water (on wet flannel) touched the hair or not.

The broadest possible statement of this invention (disregarding technicalities of claim language) is that Nessler was the first to "treat" coiled hair with vaporized lotion only, and that lotion may mean solution of borax or plain water—in short, anything that steams. On this reading Frederics' borax pad is not an infringement; it is a different principle, viz., to mix the borax with, or scatter it into, the hair. No more was his placing of borax between folds of flannel, and for the same reason. Using Aldworth's tubes would infringe the process, thus broadly interpreted.

I cannot, however, interpret the claims now under consideration so broadly. It is true that "lotion" may mean water alone, and a borax solution, whether fluid or vaporized, on application is a "lotion," as defined in dictionaries.

But Nessler plainly meant something else by lotion, i. e., something which by its ingredients assisted in curling; if this were not so, he would never have differentiated between the water which moistened his flannel and the lotion to be vaporized in his tube. Indeed, in his testimony he seems to me substantially to admit the use of a

preparation regarded by him as sufficiently valuable in "permanent curling" to be kept secret. (Ev. pp. 41 and 43.)

If, then, the vaporizing of a lotion is an essential part of the patented process, Frederics' does not infringe, and never did; and I make this finding.

Finally, assuming that Nessler's process wave is the most permanent known, I think that by his own evidence he has relegated Frederics' to a lower and less permanent class.

Misses Albes and McPherson went to Frederics', paid apparently full price, received what by Frederics' own demonstration was his most permanent *adornment*. One wave lasted about three months; the other was reduced to a remnant at the hair end in a year. Hair grows about six inches in a year, as testified; and I took judicial notice that the young woman's hair was over a foot long. Therefore Frederics' best curl wore out in much less than a year, and of it Nessler said "it was a bad job" (pages 155-156).

Assuming this to be true, the truth depends on one of two things—either Frederics' principle was wrong, and different from that underlying Nessler's patented process, or the matter is mostly one of semi-artistic skill. I personally incline to the latter opinion, but neither solution of Frederics' "bad job" helps out these patents in this suit.

Plaintiff may take a decree on Aldworth; the bill as to the Nessler patents is dismissed—on claim 5 of 1,052,166 because it is void, on all others because not infringed; no finding is made as to invalidity of other Nessler claims. No costs will be allowed to and including entry of decree.

CHASE v. UNION & NEW HAVEN TRUST CO.

(District Court, D. Connecticut. May 27, 1919.)

1. PATENTS ⟹328—INFRINGEMENT—CHAIN LINK CONNECTOR.
   Reissued patent No. 14,361, based on original McLaughlin patent No. 1,166,068, for a chain link connector, limited to a narrow range of equivalents, in view of the prior art, *held* not infringed.
2. PATENTS ⟹241—INFRINGEMENT—ESSENTIALS.
   For a device to infringe a patent for an improvement, it must accomplish the same broad result by substantially the same means and in substantially the same way.

In Equity. Suit by Cassius S. Chase against the Union & New Haven Trust Company, trustee of the estate of Henry Horton, for infringement of United States letters patent, reissue No. 14,361. Decree for defendant.

Edward D. Robbins, of New Haven, Conn., and R. E. Babcock, of Buffalo, N. Y., for plaintiff.

John S. Powers and James L. Norris, both of Washington, D. C., for defendant.

MANTON, Circuit Judge. This is a bill in equity charging infringement of letters patent, reissue, No. 14,361, granted to the plain-

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

tiff by assignment of September 18, 1917, on an application filed April 20, 1917, pursuant to original letters patent No. 1,166,068, granted December 28, 1915, jointly to William H. McLaughlin, as inventor, and Charles Tole, as assignee of a half interest. The Rowe Calk Company, plaintiff's licensee, manufactures nonskid devices. The defendant is the executor and trustee of Henry Horton, deceased. The bill charges that Horton infringed the patent in suit. These devices were manufactured by the Arrow Grip Manufacturing Company, a New York corporation doing business in that state. It is the real defendant in interest, and has openly entered into the case and defended this litigation.

The patent in suit is an improvement for a chain link connector which was sold in connection with a completed device for attachment to wheels of motor trucks to prevent skidding. Claims 4 and 5 are in issue and are as follows:

"4. A device to connect the links of a chain, consisting of a part having two hooks presented toward each other, leaving an open space between their adjacent ends and adapted to receive strain or pull in opposite directions, in combination with a guard pivotally connected to said part at one end and, in closed position, guarding said open space and extending down between the adjacent ends of the hooks, to prevent the passage of an endless article from one of said hooks to the other, said guard being provided with a pair of resilient plates to grip between them a portion of said part for the purpose of holding said guard in closed position.

"5. A device to connect the links of a chain, consisting of a part having two hooks presented substantially toward each other, leaving an open space between their ends and adapted to receive chain links, said hooks being connected by a body portion in combination with a guard permanently mounted on said part, and, in closed position, guarding said open space and extending between the adjacent ends of said hooks toward said body portion, to prevent the passage of an endless article from one of said hooks to the other, said guard being provided with a pair of resilient plates to engage said part, to hold said guard in closed position."

The principal defenses interposed are (a) that defendant's device does not infringe; (b) that claims in issue are anticipated by the prior art; and (c) that the claims are void because of defendant's intervening rights.

[1] Both the original and reissue patents provided in the specifications that the invention related to a chain link connector of the snap hook type, and point out as one of its objects to provide a strong solid section with a pivoted sheet metal guard, to keep the respective end links of the two ends of the chain in the respective hooks of the connector, thus guarding against their being superposed and by twisting move the guard on its pivot. It is evident that the essential characteristic of the McLaughlin device is that there must be a snap hook, and there is the characteristic that, but for the particular construction of the guard, a chain link might pass from one hook to another. The patentee calls his device a chain link connector. The plaintiffs' device might well be called a snap link. The device as shown in the drawings is the open link, which is designed to be held in suspension between the adjoining chain links and as a snap hook feature of the movable guard normally bridging the terminals of the hooks. The guard used, which undoubtedly is the only improvement, when in place and locked,

will prevent the passage of a chain from one hook to the other. As shown in the drawings, the characteristic features indicate an open link which is designed to be held in suspension between the adjoining chain links having the snap hook feature of a movable guard normally bridging the terminals of the hook, the guard being pivoted on one of the hooks. The patentee regarded the suspended characteristic of his snap link as an essential feature. The specification describes and suggests only one way of operating the connector with the adjacent links. It says:

"These two links slipping together over the free end of the connector, the link being slipped over the central dividing point between the two hooks and coming to a stop in the eye against the inner edge of the end hook or section of the connector, and the link retaining its position in the other eye, bearing against the inner edge of the end hook or section of the connector."

To operate the connector in the manner suggested by the specifications, it is indispensable that the connector shall have the suspended characteristic, thus the necessity of preventing either link from passing from the hook with which it is initially engaged to the other hook. This improvement is directed to a snap link of the floating or suspended type, for the purpose of overcoming the disadvantage of a chain link passing from one end of the closed snap to the other. This bar or guard, pivoted to one of the hooks, bridges the hook terminals and closes the link as an entirety and a projection, extending inwardly and bridging the bar and the central portion of the link, functions to occlude the hooks from one another. It functions as a locking means for the closure.

The manufacturer, using this device, uses two of them in connection with the construction of his nonskid device. They act to hold the chains passed under the felly of the wheel upon a securedly placed fastener to the spoke of the wheel. But in my opinion, the chain connector covered by the reissue patent, as used by the Rowe Calk Company, is but a part of their completed nonskid device.

The defendant, on the other hand, uses a completed nonskid device. It is used as such for automobile trucks. The device is not used as making part of the chain, which may be used for purposes other than nonskid devices. I think it is fundamentally different in its nature from the device of the patent in suit. It is intended and used in a limited field. The object of defendant's device is to provide a clamp applicable to a wheel spoke having an open link carried thereby and means readily movable in relation to the ends of the links, to prevent accidental disengagement of the cross or tire chain links therefrom, and whereby, also, a cross or tire chain may be quickly and practically applied over a tire and secured in operative position in an expeditious manner. The link is the part of the clamp applicable to the spoke, and the guard is provided, which is not pivoted upon the link itself, but upon the clamp, and operates in a longitudinal way between the ends of the link, and there securely holds the ends of the chain, which are wrapped around the felly, and thus prevents the accidental disengagement of the chain links. The guard, mounted upon the fixed or chanored part of the center of the wheel, greatly facilitates in reduc-

ing the time required for removal or replacement of the cross-chains. The clamp is held firmly to the spoke of the wheel, which, together with the pressure upon the felly, takes the stress resulting from the pull of the chain while in operation. It is a much stronger and more durable device than that placed on the market by the plaintiff. The defendant's device could not be used as a chain connector of general utility, such as McLaughlin's chain connector. In defendant's device, the link passage or opening is closed by one guard, which is mounted on the clamp for movement in the common plane of the spokes, and the guard, when closed, securely engages with a projection provided on the flange or web which carries the hooks. It will be noted that the plaintiff has two hooks. It requires two operations and two guards, whereas in defendant's device one guard and therefore one operation, alone is necessary to operate the device.

In claim 4 the guard is defined as extending down between the adjacent ends of the hooks to prevent the passage of an endless article from one of said hooks to the other, and in claim 5 as extending between adjacent ends of said hooks toward said body portion to prevent the passage of an endless article from one of said hooks to the other. In defendant's device there is no such danger of the passage of links from one hook to the other, the danger being the possibility of entire disengagement of the chain with the hook, and to prevent this the guard is used.

The defendant's device does not, therefore, exercise the function of preventing the chain link from passing from one hook to the other. It is not pivoted to a part having two hooks. In plaintiff's device the guard is necessary to prevent the endless article from passing from one hook to another; whereas in defendant's device the guard is used. The defendant's device does not, therefore, exercise the function of preventing the chain link from passing from one hook to another, where in defendant's device the guard is used to close the connector, so as to prevent disengagement of the links.

Having in mind the diminishing space between the spokes as they approach the hub and the closeness of the spokes in the wheels of motor trucks, it is preferable to have an attachment as compact as possible, and to have the guard so located as to make it easy of access, so that it may be opened. The defendant's device requires but one operation, the opening of one guard, and there is ample room or clearance for its opening movement by reason of its location. The features of the defendant's device, by virtue of which a link cannot pass from one hook to the other, are features which are intimately related to the character of the device of the nonskid appliance, and are but incidental to the means for preventing disengagement of the chain from the hooks. The defendant's device is devoid of the suspended or floating relation contemplated by the McLaughlin patent.

In McLaughlin's device, as stated above, the guard is pivoted to a part of what is referred to as two hooks; whereas in defendant's device the closure is pivoted to the clamp, which is an element quite distinct from a part having two hooks and involving an arrangement not compatible with the snap hook type. The plaintiff must be limited

to a connector which is of the suspended connector type, having for its object preventing a chain link from passing from one hook to the other, and one in which the guard is pivoted upon one of the hooks.

[2] In view of the prior art and use, particularly of the Manson patent and the Weed connector, the plaintiff's improvement of a chain link connector must be limited to a narrow range of equivalents. The defendant's device lacks the essential characteristics of the claims of the plaintiff's device, and, in my opinion, does not infringe. It is not enough to support the claim of infringement that the alleged infringing device shall accomplish the same broad result. It is necessary that it accomplish that result by substantially the same means and in substantially the same way. There must be identity of means and identity of operation, which must be combined with identity of result to constitute infringement. Kokomo, etc., v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689. The defendant's device does not perform the same service or produce the same result in substantially the same way. Werner v. King, 96 U. S. 218, 24 L. Ed. 613.

Decree for defendant.

T. L. SMITH CO. et al. v. CEMENT TILE MACHINERY CO.

(District Court, N. D. Iowa, E. D. July 17, 1919.)

No. 28.

1. PATENTS ⟹318(6)—INFRINGEMENT—ACCOUNTING—CREDITS ALLOWABLE.
In action of accounting for profits due to infringement by defendant of complainant's patent, defendant was properly allowed credit, in excess of amount received for machines, the money expended in making infringing machines, as well as cost of certain patterns, jigs, and templets necessarily made in producing infringing machines.

2. PATENTS ⟹319(1)—INFRINGEMENT—PUNITIVE DAMAGES.
Infringements not being wantonly or willfully made, but made through a supposed right, compensation to patentee in an accounting suit should be limited to actual damages sustained.

3. PATENTS ⟹319(1)—INFRINGEMENT—AMOUNT OF RECOVERY.
Defendant, which in all of the machines manufactured by it for which plaintiffs are entitled to recover in suit for accounting included elements covered by plaintiffs' invention, should be held accountable for the value of the machines as manufactured without deduction for parts not covered by patent infringed.

4. EQUITY ⟹394—MASTER'S COMPENSATION—WHEN PAYABLE.
The master is entitled to his compensation and expenses without awaiting the result of any appellate proceedings.

In Equity. Suit by the T. L. Smith Company and others against the Cement Tile Machinery Company. On exceptions by both plaintiffs and defendant to master's accounting and report thereof. Exceptions overruled.

Edwards, Longley, Ransier & Harris, of Waterloo, Iowa, for plaintiffs.

John E. Stryker, of St. Paul, Minn., for defendant.

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

REED, District Judge. This matter was referred to a special master to take an accounting for the plaintiffs' profits or damages because of the infringement by the defendant of the complainant's patent, which he has done, and has filed his report of such accounting, and reports that the plaintiffs are entitled to recover from the defendant damages in the sum of $2,184.08, and recommends that judgment be entered therefor in favor of the plaintiffs against the defendant. To this report both plaintiffs and defendant have filed exceptions.

The summary of the master's report and the basis of the allowance to the defendant are as follows:

Total amount received by defendant from sales of mixing machines infringing plaintiffs' patent during each year which it continued to so infringe plaintiffs' patent:

Year.	Amount Received.	Costs or Expense Paid by Defendant in Manufacturing Such Machines.
1912	$ 363 58	$ 625 65
1913	7,485 99	8,220 20
1914	13,997 22	12,518 52
1915	20,310 29	19,124 51
1916	22,124 61	22,010 60
1917	4,118 82	3,716 95
Total rec'd	$68,400 51	
Total cost	66,216 43	
	$ 2,184 08	

—balance to which plaintiffs are entitled to recover.

It thus appears that during the years 1912 and 1913 the defendant expended $996.28 in making the infringing machines more than he received therefor, and this amount was allowed to the defendant by the master as a credit upon the amount received by it during the six years it was manufacturing and selling the infringing devices of plaintiffs' patent.

[1] First. The plaintiffs except to the allowance of this credit to the defendant upon the ground that it was an ordinary loss in conducting the business which it should stand and not be allowed credit therefor. But it was a loss incurred by the defendant in making the infringing machines, and lessens to that extent the amount of its gains or profits in making the infringing structures, and is a legitimate credit upon the amount received by it for the damages it is required to account to the plaintiffs.

Second. It next appears that the master allowed the defendant a credit of $2,975 as the costs of certain patterns (or repairing the same), jigs, and templets necessarily made by it in producing the infringing machines for which the plaintiffs are allowed to recover in this suit. The plaintiffs except to this allowance of credits upon the ground that the defendant wrongfully infringed the plaintiffs' patent; that expenses incurred by it in so doing are but losses which it must bear; and upon the further ground that the items for which the amounts were so expended are as valuable to it to-day as when made, and that it can use them for any purpose desired. But the patterns, jigs, and

templets were made for the special purpose of producing the infringing machines for which plaintiffs are entitled to recover, and are of no value to the defendant for any other purpose, and are a legitimate item of expenditure for producing the machines for which plaintiffs are entitled to recover in this suit.

[2] There is no evidence or claim that the infringing structures were wantonly or willfully made by the defendant to injure the plaintiffs, or for any other reason than a mistaken one of a supposed right to make them; and in such cases compensation to the patentee for the damages sustained by him, and not punishment of the defendant, should limit the plaintiffs' recovery to the actual damages they have sustained. The exceptions of the plaintiffs to this item are overruled.

[3] Third. The plaintiffs further except to the master's report upon the ground that he has made an improper apportionment of the defendant's profits, in that "all the profits arising out of the sales of mixing machines, including trucks, skids, engines, housings, and loaders, should have been included (in the allowance to the plaintiffs), in which event the profits to be accounted for (to the plaintiffs) would have equaled the sum of $6,512.76 in lieu of $2,184.08, as found by the master as the profits for which the defendant must account."

It is not easy to understand just what is meant by this exception of the plaintiffs, unless it be that the master has not properly apportioned to the plaintiffs the entire damages sustained by them in the infringing structures manufactured by the defendant, but has excluded therefrom certain items which are not covered by the plaintiffs' patent. In other words, that the master has not allowed the plaintiffs the value of certain infringing structures as an entirety, but has excluded therefrom certain items not covered by the plaintiffs' patent. This subject-matter is made a ground of defendant's exception to the master's report, in which it is claimed by the defendant that the master has allowed the plaintiffs for certain items included in the various infringing structures as made by the defendant that are not covered by the plaintiffs' patent, and that plaintiffs have therefore been allowed the value of certain items included in the infringing structures which are not covered by the plaintiffs' patent. As we understand these separate exceptions by the plaintiffs and the defendant, they may be considered together, and are the most difficult questions presented by the exceptions of the respective parties.

As we understand the plaintiffs' contention, it is that the entire commercial value of the infringing machine as manufactured by the defendant is the basis upon which the plaintiffs are entitled to recover regardless of the fact that in the construction of such machine certain items or elements may have been included therein not covered by the plaintiffs' patent. While the defendant's contention is that, the plaintiffs' patent being for an improvement only, it is only the elements used by the defendant in making such machines that are covered by the plaintiffs' patent that the plaintiffs are entitled to recover for. See Mowry v. Whitney, 14 Wall. 639, 652, 20 L. Ed. 860; followed in

Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371. In the latter-named case the Supreme Court says:

"When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated."

And it was held that the failure of the patentee in such a case to so distinguish the separate parts of his structure, so that the benefits derived by him from its separate parts might be distinctly seen or appreciated, was fatal to his rights to recover more than nominal damages. Such rule, however, if not distinctly overruled, is clearly modified by the later decisions of that court. Thus in Westinghouse Electric & Manufacturing Co. v. Wagner Manufacturing Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, followed in the later case of Dowagiac Manufacturing Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398, it seems to be held that where the entire commercial value of the infringing machine as made by the defendant is not due to the use of the patentee's invention, there may be an apportionment of the profits received by the defendant; and where such apportionment has not been made the case may be remanded to the trial court that such an apportionment may be made, and the value of the separate parts, distinguishing between the patentable and the nonpatentable parts, may be ascertained. See Brown v. Lanyon Zinc Co., 179 Fed. 309, 102 C. C. A. 497.

In the present case it seems no evidence was offered by either party in respect to the value of the infringing devices made by the defendant as depending upon the parts thereof covered by the plaintiffs' invention and the parts not so covered. It is the claim of the defendant that, deducting from the infringing devices made by it the parts thereof not covered by the plaintiffs' invention, the plaintiffs would be entitled to recover only about $422.38, while it is the contention of the plaintiffs that the value of the separate infringing machines as made by the defendant should increase the plaintiffs' allowance to $6,512.

It is further stated by defendant's counsel in argument that the testimony shows that the devices made by defendant which do not contain any portion of the plaintiffs' invention sold in the market as readily and substantially for the same value as the machines which do include those elements of the plaintiffs' invention. It is also the defendant's contention that it was open to the defendant to use, in the manufacture of the alleged infringing devices, such parts of the Foster structure not covered by the plaintiffs' invention, and that in any event he should be chargeable only with the value of such machines which do not include any part of the plaintiffs' invention, and that the infringing machines manufactured by the defendant not including any part of plaintiffs' invention would reduce the recovery to some $422.

Admitting, without deciding, this contention to be true, the defendant is not in a position to take advantage of it. It had the option of building a machine that did not include any element of the plaintiffs'

invention, but it saw fit not to do so; and in all of the machines manufactured by it for which the plaintiffs are entitled to recover in this suit it did include elements covered by the plaintiffs' invention. The defendant should therefore be held accountable for the value of the machines as manufactured by it, and such value, as we understand from the master's report, amounts to $2,184.08.

The exceptions of both parties to the master's report are therefore overruled, and such report is approved, and a decree will be entered for the plaintiffs for the amount found by the master, with interest and costs, including the cost of the master's report.

[4] The master's compensation is fixed at $250, and the travel and hotel expenses incurred by him as shown by his report; and this amount, $250, as compensation, and $49.45 travel and hotel expenses incurred by him, should be paid at once in equal parts by the respective parties, as the master is entitled to his compensation and expenses without awaiting the result of any appellate proceedings.

It is ordered accordingly.

SANDUSKY FOUNDRY & MACHINE CO. v. DE LAVAUD et al.

(District Court, N. D. Ohio, E. D. June 7, 1919.)

No. 372.

1. PATENTS ⟹174—IMPROVEMENTS—SPECIFICATIONS.
   One who merely makes and secures a patent for a slight improvement on a device or combination which performs the same function before as after the improvement, and whose patent enters an already crowded art, is protected against those only who use the very improvement that he describes, or a mere colorable evasion of it.
2. PATENTS ⟹328—CONSTRUCTION—INFRINGEMENT.
   The Millspaugh patent, No. 1,058,250, for an alleged novel method of utilizing centrifugal force in molding and casting metals, particularly bronze and ferrous metals, *held* limited by the prior art to the construction disclosed, and, as limited, not infringed by defendant's device.
3. PATENTS ⟹328—CONSTRUCTION—INFRINGEMENT—FILLING TROUGH.
   The Millspaugh patent, No. 1,047,972, for an improvement in the filling trough for a patented device for casting or molding metals, *held* not infringed by defendant's device.

In Equity. Bill by the Sandusky Foundry & Machine Company against D. Seusaud De Lavaud and others. Decree for defendants.

See, also, 251 Fed. 631.

E. W. Marshall, of New York City, and Squire, Sanders & Dempsey, of Cleveland, Ohio, for plaintiff.

Frank J. Kent, of New York City, and Albert Lynn Lawrence, of Cleveland, Ohio, for defendants.

WESTENHAVER, District Judge. The bill in this case is in the usual form, charging infringement by defendents of certain patents, and praying an injunction. The defenses are the usual ones of invalidity for lack of novelty and lack of invention and noninfringement.

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

Complainant's bill is based on United States letters patent No. 1,058,-250, issued April 8, 1913, to William H. Millspaugh, and No. 1,047-972, issued December 24, 1912, to William H. Millspaugh, and by him assigned to the complainant. Claims 1, 2, and 4 of the first, and claim 1 of the last, mentioned patents only are in issue.

[1, 2] Broadly stated, the invention described and claimed in patent No. 1,058,250 relates to an alleged novel method of utilizing centrifugal force in the treatment of metals and other materials, and in molding and casting materials or other substances which are susceptible of being formed into different shapes under pressure. Specifically, the invention describes and claims several forms of apparatus, two of which only are material, by means of which it is said these objects may be obtained. On this hearing the controversy reduced itself to an apparatus for casting pipe from molten metal, particularly bronze and ferrous metals. The invention, however, is not limited to this specific purpose.

Centrifugal force as a process for casting metals and other plastic materials is old and well known in the patent art. A British patent, No. 3,197, for this process, was issued February 28, 1809, to Anthony George Eckhardt. Another British patent, No. 3,819, was issued September 27, 1878, to Taylor and Wailes, fully describing this process and the advantages claimed for it, and specifying an apparatus whereby it may be practiced.

Numerous other patents were also introduced in evidence on this hearing, describing and claiming different types of apparatus for the practicing of this process, not only as applied to metals, but to other materials and substances susceptible of being formed into different shapes under pressure. No showing, however, was made on this hearing that any of these devices, as applied to metals, had ever gone into general commercial use. The disclosures of this prior art are such that on this hearing the validity of complainant's patent was conceded to turn on what is called the "filling trough," particularly on the manner of mounting the trough and introducing it into and withdrawing it from the hollow rotary member or cylinder used for casting the metal into the form of pipes or tubes.

Claim 1 of patent No. 1,058,250 consists of the following elements: (1) A hollow rotary member (called a cylinder) having an internal surface of definite shape surrounding the axis of rotation; (2) a driving mechanism therefor; (3) a filling trough alleged to hold a predetermined amount of material rotatably and slidably supported, projecting into said member; and (4) a means for moving said trough. All these elements, except the third, are concededly old, and no invention is present or claimed, except as the combination of elements turns on the exact character of the filling trough, particularly the mounting of it in a rotatable and slidable manner. Claims 2 and 4, also in issue, are not sufficiently different to require separate notice.

Two forms of apparatus and two methods for introducing the molten or plastic material into this hollow rotary member or cylinder are described and specified in this patent. One is described in Fig. 1. No

claim is made that this construction is infringed, or that it is within the terms of the three claims now in issue. In point of fact, this type of construction seems to me to be fully anticipated by the disclosures of British patent No. 5,009, issued November 15, 1881, to Fox and Whitley. For these reasons no further mention need be made of it. The other construction is that shown in Figs. 5, 6, and 7 and described in lines 90 to 130, page 2, and lines 1 to 14, page 3, of the specifications. The filling trough in this construction is preferably made in the form of a circular pipe, closed at the ends and having a longitudinal opening along one of its sides. It is supported by axially aligned shafts, which, it is said, are rotatably and slidably mounted in pedestal bearings, one at either end and outside of the cylinder. Literally this trough is not rotatably mounted, but is mounted to turn or tilt to an angle of 180 degrees. It may be partly slid out of the cylinder, and in operation this is necessary in order to permit the molten material to be poured into it. This trough, after being slid back into the cylinder, may be rapidly and quickly tilted or turned upside down, thus dropping the molten or plastic material into the cylinder. At the time the material is thus dropped, the cylinder is rapidly revolving. It is claimed for this method of introducing the molten metal that it distributes the same equally and uniformly, thus producing a finished pipe of uniform thickness throughout its length, and also that it affords a simple method of measuring or predetermining the quantity of material required to cast a pipe or tube.

An examination of the drawings and specifications conclusively shows that this construction allowed the withdrawal of the filling trough from the cylinder a sufficient distance only to permit it to be filled, and that no provision is made for removing either the trough or the pipe from the interior of the cylinder, but that after each operation an entire dismantling of the apparatus is required to remove the trough and the pipe. The pedestal supporting the shafts or trough is stationary and permanent, and is on a height in line with the center of the cylinder. Apparently one end plate is solid, prohibiting the withdrawal of the shaft at that end (see Fig. 7, *40–B*). The cylinder itself is built in two sections, bolted together, and is driven by a chain running over a sprocket wheel, which surrounds the cylinder at or near its center. This cylinder is supported on two rollers (*42*) in fixed positions, and a third roller (*43*) resiliently supported, to allow for expansion of the cylinder, is placed above it to hold it in position.

The criticism made by defendants of this construction is undoubtedly sound, namely, that a complete dismantling of it after each operation is necessary, apparently to remove the trough, and certainly to remove the pipe. As a consequence, it is contended that complainant's alleged invention is inoperative and impracticable. Before considering this contention, the prior art relied on, either as an anticipation of complainant's alleged invention or as limiting or narrowing its construction, will be briefly considered.

Numerous prior art patents were introduced in evidence on this hearing, of which those claimed by defendant to be most pertinent

only will be noticed. British letters patent No. 5,009, issued November 15, 1881, to Fox and Whitley, shows an apparatus with a cylinder or hollow rotary member and driving mechanism therefor, a runner or gate for introducing the molten metal into the cylinder and distributing it equally over the interior surface of the mold, and means for moving the runner or gate. This runner or gate is not, however, a filling trough, but rather a spout or conduit, and it is not tiltably or rotatably mounted. The runner or gate is introduced or projected through an opening into the cylinder, and the molten metal is brought to the gate or runner in a ladle operated back and forth upon tracks outside of the cylinder. This, as already noted, is substantially the construction of Fig. 1 of complainant's patent.

British letters patent No. 8,578, issued June 4, 1884, to Fox and Whitley, is for an improvement on their earlier patent. This patent discloses a runner or gate designed to hold a predetermined amount of material, and also means for rotating or tilting it on its axis within the mold, so as to dump the material evenly and uniformly.

United States letters patent No. 866,712, issued September 24, 1907, to C. D. Campbell, discloses a feed trough so mounted as to permit it to be slid into and withdrawn from the revolving cylinder, and also so as to permit it to be tilted or dumped. This apparatus was not designed to cast metals by centrifugal force, but was designed to practice the process with concrete and similar plastic materials. Complainant urges that the invention is not in the same art, but in an art so remote as to be without effect as an anticipation. Defendants, on the other hand, contend that complainant's patent, by its terms, is so broad as to make relevant all patents designed to practice the process, whether as applied to metals or to other plastic materials. In my opinion defendants' contention is correct.

United States letters patent No. 538,835, issued May 7, 1895, to S. L. Kneass, is, however, in the metal-casting art. The specifications (lines 70 to 125, page 2) describe a feed trough rotatably mounted, and apparently also slidably mounted, although this latter method of operation, as a means of filling the trough or introducing material into a revolving cylinder, is not specifically mentioned or claimed. It is, however, designed to measure the quantity of material and to distribute it evenly and uniformly within the mold. The filling trough is so constructed that a part of it even when in position to be dumped, projects beyond the cylinder or mold, and dependence is placed upon the shape of the trough and the heights of its sides to insure the dropping of the material within the mold and to prevent the spilling of a part of it outside thereof.

These are the most pertinent patents in the prior art. Differences between the inventions therein described and that of complainant's patent are apparent with respect to the other elements, but the similarities thereof with the element upon which the validity of complainant's patent depends, namely, the filling trough, are sufficiently pointed out by the foregoing review. If they do not anticipate this element, they at least call for an application of the doctrine stated in Adams Electric Railway Co. v. Lindell Railway Co. (8 C. C. A.) 77 Fed.

432, 23 C. C. A. 223, and Railway Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053. Judge Sanborn, in the case first cited, says:

"This is a broad claim, and it must be determined by the limitations placed upon this patent by the state of the art when the invention it protects was made, and by the specification and claims of the patentee which it contains. One who invents and secures a patent for a machine or combination which first performs a useful function is protected thereby against all machines and combinations which perform the same function by equivalent mechanical devices; but one who merely makes and secures a patent for a slight improvement on a device or combination, which performs the same function before as after the improvement, is protected against those only who use the very improvement that he describes and claims, or mere colorable evasions of it. 'If one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute. But if the advance towards the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs.'"

Defendants' construction alleged to infringe contains a hollow rotary member of the same kind as is claimed in complainant's patent, a mechanism for driving the same, a filling trough rotatably and slidably mounted projecting into the hollow rotary member, and means for moving said trough. This filling trough differs, however, from the construction of Fig. 5 of complainant's patent. It may be filled, introduced into the cylinder, and withdrawn therefrom after the casting operation is complete, without dismantling the apparatus, either in whole or in part. The cast pipe or tube may likewise be withdrawn, and a special device at the end, opposite the filling end, is designed and attached for that purpose. This filling trough is not designed primarily to be withdrawn from the cylinder to be filled, although defendants' apparatus is so constructed as to admit of that method of operation. The filling is designed to be done by means of a hopper, with a conduit leading therefrom through the end plate into the filling trough. No question is made as to the efficient and successful operation of defendants' apparatus.

In view of the fact that complainant's construction must be held as limited by the prior art to that specifically prescribed, otherwise it must be held invalid for anticipation, I am of opinion that defendants' construction does not infringe, for the reason that the construction, mounting, and operation of the filling trough is so different that the two elements cannot be regarded as equivalent. In addition thereto, the water-cooling jacket surrounding the cylinder, the substitution of a sand core for an end plate and supporting shaft at the end opposite the filling end, and the provision of grappling hooks and apparatus for removing the pipe after casting at that end, create a new type of construction, so far different from complainant's and so much superior in practicability and operativeness, that it cannot be said to be an infringement of the crude and inoperative construction described and claimed by its patent.

Complainant, however, produced at the trial a model which it claims is its commercial form of apparatus. It is introduced in evidence as

Exhibit C. This apparatus is so constructed as to permit the complete withdrawal of the filling trough, both before and after each operation, without dismantling the apparatus. Provision is also made in it for the removal of the pipe from the end opposite the filling end. The defects of its patented construction are thereby partly, if not wholly, obviated. If this construction had been described and claimed in complainant's patent, the question of infringement would be much closer; it would depend on whether or not the addition of the water-cooling jacket, the substitution of the sand core for the end plate, and the provision of grappling hooks and other devices for removing the casting are merely additions to complainant's combination of elements within the rule of Weed Chain Tire Grip Co. v. Cleveland Chain & Manufacturing Co. (C. C.) 196 Fed. 213.

Complainant urges that the changes from its patented construction to its commercial construction are such changes and modifications as would have been obvious to any mechanic of ordinary skill, attempting to construct an apparatus according to the drawings and specifications of its patent. This contention cannot be admitted. In the first place, as already pointed out, complainant's invention is in a crowded art, in which many persons were working to accomplish the same result, and, if valid at all, can be sustained only for the specific type of construction therein disclosed and claimed. In the second place, as much, if not more, invention is required to obviate the defects in the patented construction, and to substitute therefor its new construction, as would be required to adapt any one of the several rotatably and slidably mounted troughs of the prior art to the uses and purposes for which the filling trough was adapted and designed in complainant's invention.

My conclusion is that complainant's patent No. 1,058,250, if valid, must be limited to the specific construction therein described and claimed, and that, in view of the narrow constructions thus required, and the impracticable, not to say inoperative, character of its apparatus, defendants' device cannot be said to infringe. In reaching this conclusion I am not overlooking the claims made by complainant of commercial success for its device. The evidence shows that complainant's device has not been manufactured, put on the market, and sold, but that, on the contrary, it has been used exclusively by complainant in its own foundry; that it has altogether constructed and used therein some six of its commercial form of apparatus, and that three licenses only have been granted by it to others to practice the centrifugal process of casting pipe or tubes.

Complainant also contends that it has manufactured and sold pipe commercially by use of its apparatus. The only support for these statements is the testimony of the inventor himself. How much pipe has been manufactured altogether, what part, if any, of it has been sold, when or during what periods of time the manufacture and sale have taken place, are not disclosed. This information was within the control of complainant. Defendants had developed and constructed their apparatus in a completed form prior to September, 1916, had advertised and described it fully in "The Iron Age," a technical journal

read by all persons interested in the metal-casting art, and had exhibited and demonstrated a completed apparatus at the Foundrymen's Convention in Cleveland in September, 1916. The licenses issued by complainant are of a subsequent date, and, under the circumstances, in the absence of a showing to the contrary, the inference cannot be permitted that such use and success as complainant's commercial form of apparatus has had is of an earlier date.

In my opinion no commercial success of complainant's apparatus, or public acquiescence therein, or any acceptance by those skilled in the art of this device as a solution of the problems involved in casting metals by centrifugal force, is shown, tending to support the validity of complainant's patent, or warranting a broad construction of its claims.

[**3**] Complainant's patent No. 1,047,972, although of an earlier date, was issued on an application filed later than the application which resulted in patent No. 1,058,250. It is for an improvement of the filling trough. Its object is to provide an apparatus for holding a large supply of molten metal in a position to be quickly dumped into a centrifugal casting machine. Two elements are provided to accomplish this object. One is a reservoir attached to the filling trough and outside of the cylinder. This element may be wholly disregarded, because no contention is made that it is used by defendant. The other element consists in partly closing the filling trough at each end, and leaving the opening through which the metal is dropped or poured of a lesser length than the trough; in other words, a section of the trough at each end is covered with a roof. In this way a certain proportion of the molten metal is confined within two closed ends, and is spilled out through the opening shorter in length than the filling trough. The supply of molten metal is thereby increased proportionately within the section of the mold corresponding to the opening in filling trough. Defendants do not use this form of filling trough.

The contention that defendants infringe rests upon a very flimsy foundation. As already stated, defendants' novel method of filling the trough is by means of a hopper connected by a conduit leading from the bottom thereof, through the end plate at the filling end, to the filling trough. A part of this conduit is of a lower level than the top of the filling trough, as a result of which a small quantity of the molten metal remains therein, and when the trough is dumped will either spill into the cylinder through the opening of the filling trough, or will spill outside of the cylinder through the open end of the conduit. Complainant asserts that, inasmuch as the conduit is roofed over by the end plate of the cylinder, this creates the equivalent of the roofed-over portion of the closed end of its filling trough.

This contention, in my opinion, is frivolous. This result was not designed, but is accidental, and, the evidence shows, was not an advantage, but a disadvantage so great, perhaps, as to make the filling device inoperative. The evidence of Mr. Wendt, who made defendants' first apparatus in the United States, tends to show that this method of filling was so far unsuccessful that defendant was obliged to abandon it, and partly to withdraw the filling trough from the cylin-

der in order to fill it, thereby practicing the same method of filling as that described in Fig. 5 of patent No. 1,058,250. Be that, however, as it may, infringement of claim 1 of patent No. 1,047,972 is not shown by these facts.

A decree may be taken in conformity herewith, dismissing complainant's bill, at its costs.

UNITED STATES GYPSUM CO. v. BESTWALL MFG. CO.

(District Court, N. D. Illinois, E. D. July 21, 1919.)

No. 779.

PATENTS ⚷328—VALIDITY AND INFRINGEMENT—PLASTER BOARD.

The Ulzman patents, No. 1,029,328 and No. 1,034,746, respectively for a process of making plaster board and a plaster board product, disclose invention, which is in the turning over and sealing the edges of the bottom layer of paper, to prevent the breaking of the edges in handling the board; also *held* infringed.

In Equity. Suit by the United States Gypsum Company against the Bestwall Manufacturing Company. On final hearing. Decree for complainant.

Hill & Hill and Edward Rector, all of Chicago, Ill., for plaintiff.
Clarence E. Mehlhope, of Chicago, Ill., for defendant.

SANBORN, District Judge. Infringement suit on two patents, Nos. 1,029,328 and 1,034,746, issued June 11, 1912, and August 6, 1912, to Clarence W. Utzman, and assigned to plaintiff. The inventions relate to the process of making plaster board for building purposes, and to the plaster board product. In the process patent the invention is thus described:

"This invention relates to the method of making plaster board, and aims to produce a board which shall be more durable than any plaster board heretofore made, and which will give better results and more satisfactory service in use, and which will better withstand the handling to which all plaster board is necessarily subjected.

"Plaster boards of various kinds have been made prior to my invention, some of which have been made in molds and others of which have been made by a continuous process, consisting in applying alternate layers of plaster and paper or other fibrous material upon a traveling base sheet. The mold method of making plaster board is objectionable, however, for the reason that the size of each slab of board is necessarily limited, and, furthermore, for the reason that this method of making boards is a slow, tedious, and expensive operation. In the continuous method of making plaster board it has been the practice to superimpose the alternate layers of plaster and paper and then to trim the edges of the board, leaving the raw edges of the plaster and the raw edges of the paper at each side of the board. The paper or covering material in this construction is very easily torn, and the edges of the board are readily chipped or broken, so that after repeated handlings the boards, when ready for use, are usually mutilated to a considerable extent.

"My present invention aims to obviate the disadvantages of the boards previously employed, and to construct a board the edges of which will be entirely inclosed by a sheet of covering material and in which there will be no free or exposed edges of covering material which will be liable to be torn, loosened, or peeled back in the handling of the board."

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

"Referring to Figure 5, it will be seen that the lower edge of the guard is beveled, and it will be evident that as the conveyer travels along, carrying the partially completed board with it, the inturned edge *10* will be gradually compressed into the upper layer of plastic material."

The first claims of each of the patents follow:

No. 1,029,328: "The method of making plaster board which consists in advancing a bottom sheet of covering material, superimposing upon said sheet alternate layers of plastic material and fibrous material, holding the plastic material away from the edges of the covering material so as to leave a portion of said material exposed at each side of said layers, folding the exposed edge portions of said covering material over onto the upper surface of the upper layer of plastic material, applying a separate sheet of covering material over the upper surface of plastic material, said upper sheet being of a width sufficient to partially cover the inturned edges of said bottom sheet, applying pressure to said upper sheet to cause the plastic material to flow between the edges of said sheet and the inturned portions of the bottom sheet, and preventing said plastic material from escaping at the edges of said upper sheet."

No. 1,034,746: "A plaster board comprising a body, a covering of fibrous material adhering to one face of the body, folded to inclose an edge of the body and overlie a portion of the opposite face thereof, and a covering of fibrous material for said opposite face of the body overlying said folded-over portion of the first-mentioned covering, but having its edge spaced from the edge of the board."

It will be noticed that the process claim speaks of alternate layers of plastic material and fibrous material, while the product claim refers only to a body, which, of course, may consist of the alternate layers or of a single slab of plastic material. One defense is that defendant's board is not made in alternate layers, but in a single plastic one. Plaintiff insists that the building up of the body of the board in alternate layers of plaster and paper was not of the essence of the invention, but that the really new thing discovered by Utzman was the upturning of the edges of the bottom layer of paper, and then sealing or impressing the top layer of paper, a little shorter than the completed board, over the upturned ends of the bottom layer, and into the layer of plaster. Plaintiff's counsel contend that the case falls within the rule of Adam v. Folger, 120 Fed. 260, 56 C. C. A. 540, in this circuit, to the effect that an element of a claim not essential to the result which the inventor desired to accomplish is not absolutely requisite in an infringing device. The construction in alternate layers not being essential to the result which Utzman wished to reach, the fact, it is said, that defendant does not use alternate layers in its board is immaterial.

It appears by looking at the prior patents that it was old and common to make "sandwich" board of alternate layers. Utzman did not attempt to claim this as a new feature, but rested his title to invention solely on the turned-over edges, and the impressing of the shorter upper sheet of paper into the plaster, so as to seal up the finished board, and secure the edges against abrasion of the paper. His whole right to invention lies in the new method of binding and sealing the edges, and finishing the board with the top covering of paper. This had never been done before, and the product has utility beyond that shown in the prior art. Here we have novelty and utility, also fol-

lowed by commercial success. These are enough to sustain any patent not a mere aggregation, or where the advance is so slight as to be unimportant.

Since the alternate layer construction is not of the gist of the invention, a broader range of equivalents is applicable. Defendant's process is somewhat different from the patented one, not so finished or complete, and its board is not so well made. The witness Alfreds says:

"I might say here that the finished board comprises a top and a bottom sheet of paper with a layer of plaster between them. The margins of the bottom sheet of paper are turned into the mass of wet plaster in the process of making the board, so as to bind and finish the edge of the board, and to make the margins of the top sheet adhere to the plastic material."

Defendant's counsel thus describes its process:

"It consists of advancing a continuous bottom sheet of paper, of turning over the marginal edges of the bottom sheet, so that they project into a position in a plane spaced above the plane of the bottom sheet (approximately two inches—D. R. 32, Q. 29), of depositing on said bottom sheet a plastic mixture of the required workable consistency and of spreading it roughly over the sheet, so that it covers said sheet and also its turned over edges, mold boards at the side of the sheet limiting the flow or spread of the plaster to the edges of the board to be made, and of passing the bottom sheet together with the plastic mix over a bottom roll and under a top spreading roll, about which is passed a top sheet (narrower than the bottom sheet and of substantially the width of the board to be made), so that said top sheet is engaged with the exposed plaster and adhered to the plastic surface presented across the width of the board.

"The process, if it may be called such, is crude in the extreme, and no attempt is made to provide for any nice or pretty result. The top sheet is attached to the body of the board (consisting of the bottom sheet with its turned over edges and of the plastic body covering the bottom sheet and its turned over edges) in exactly the same manner and by the same method or process as where unbound board is made, consisting of bottom and top sheets with a layer of plaster between."

While there are differences both in process and product, I think defendant infringes both patents, and in all their claims. Some of defendant's board clearly does not infringe claim 2 of the process patent, but in other samples in evidence infringement appears. The alternate layer feature not being of the real spirit of the invention, a wider range of equivalents is applicable, so as to make the defendant's single layer process and board equivalent. Jones v. General Fireproofing Co., 254 Fed. 97, 100, — C. C. A. —.

There should be a decree for plaintiff, finding both patents valid and infringed, and for an accounting of damages and profits on all the claims, with costs.

WALTER S. NEWHALL CO. v. BALTIMORE & O. R. CO.

(District Court, D. Maryland. June 24, 1919.)

1. PATENTS ⚷287—INFRINGEMENT—JOINT TORT-FEASORS.
An infringement is a tort, and any one who aids in it is answerable.

2. PATENTS ⚷316—INFRINGEMENT—INJUNCTION.
Where thawing shed, as originally constructed and experimentally used by contractors, was equipped with certain dampers, which were removed before the shed was turned over to defendant, and the dampers could be put back in a few hours at a trifling expense, plaintiff is entitled to an injunction forbidding replacement of dampers or the equivalents, certain claims of plaintiff's patent being infringed if dampers are replaced.

3. PATENTS ⚷319(1)—INFRINGEMENT—RECOVERY.
Where, with full knowledge of plaintiff's patent and that it would be infringed, defendant gave the contract for erection of thawing shed to another, because the latter was willing to put up the structure at a less cost and to furnish a bond against the consequences of infringement, plaintiff is entitled to be made whole.

In Equity. Suit by the Walter S. Newhall Company against the Baltimore & Ohio Railroad Company. Decree for plaintiff.

Haman, Cook, Chesnut & Markell, of Baltimore, Md., Prichard, Saul, Bayard & Evans, of Philadelphia, Pa., and Albert H. Bates, of Cleveland, Ohio, for plaintiff.

Duncan K. Brent, of Baltimore, Md., and Albert C. Fraser, of New York City, for defendant.

ROSE, District Judge. In an opinion heretofore handed down in this case (243 Fed. 615), it was held that the patent in suit was valid and that the defendant had infringed its claims numbered 20 and 23, by erecting a thawing shed at Curtis Bay. At that time the attention of the court was called to what was said to be a similar structure built at Arlington, on Staten Island, for the Staten Island Rapid Transit Company, which the plaintiff asserted was a mere agency of the Baltimore & Ohio Railroad Company, and had in this, as in most other matters, acted under the Baltimore & Ohio Railroad Company's direction.

After conference, it was agreed that it was not then convenient for either party to present evidence as to the Staten Island structure, or as to who was responsible for its being put up. It was therefore mutually stipulated that no inquiry upon this subject should be gone into, and consequently that no attempt should be made to assess damages to the plaintiff for such part, if any, as the Baltimore & Ohio Railroad Company might have had in its construction, maintenance, and operation. The right of the plaintiff to proceed thereafter against the Baltimore & Ohio Railroad Company, in law or in equity, for any appropriate relief, therefore, was expressly reserved.

The case, on the 19th of November, 1917, went to a decree, in accordance with the conclusions announced in the opinion already mentioned; that is to say, claims 20 and 23 were adjudged valid and

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

infringed, and the actual damages suffered by the plaintiff in consequence were fixed at $5,500, and were increased by $4,000, the estimated amount of legal expenses to which the plaintiff had been put, making a total of $9,500. The decree expressly stated that the award was confined to the thawing shed at Curtis Bay, and did not preclude the plaintiff from enforcing any rights against the Baltimore & Ohio Railroad Company for infringement elsewhere. It was further provided that, upon payment of the $9,500 and the costs of the suit, the injunction heretofore granted should be dissolved as to the Curtis Bay plant, and as to that only. The Baltimore & Ohio paid the money, it took no appeal, and it is not questioned that the decree is binding on all parties to the cause.

On the 1st of February, 1919, the plaintiff, by supplemental bill, charged that the Baltimore & Ohio had infringed claims 20 and 23, by making and using a thawing apparatus at Arlington. At the hearing it was admitted (1) that the Baltimore & Ohio for many years had owned all the capital stock of the Staten Island Rapid Transit Company; (2) that on the 6th day of June, 1916, the third vice president of the Baltimore & Ohio had recommended to his directors an appropriation for the erection of the shed, a recommendation upon which on the succeeding day they acted favorably; (3) that the cost of building the shed was paid out of the money so voted.

[1] It is unnecessary to go further into this branch of the case. An infringement is a tort, and any one who aids in it is answerable for it. The Baltimore & Ohio offered evidence to show certain prior uses at Duluth, Ashland, and Bayonne, for the purpose, as it said, of narrowing the construction of the two claims in suit. The plaintiff objected to its admissibility, asserting that the construction, as well as the validity of the claims, was res adjudicata.

The court ruled that the defendant was at liberty to show, if it could, that the Curtis Bay plant differed from that at Arlington, and that because of such difference the prior uses anticipated the latter, and not the former. The evidence was accordingly admitted, subject to exception, but it was subsequently stricken out; the court being of opinion that whatever probative force, if any, it had, was as applicable to the Maryland as to the New York structure.

[2] As originally planned, constructed, and experimentally used by the building contractors, the Staten Island thawing shed was equipped with certain dampers. Subsequently, and before the shed was turned over to the Baltimore & Ohio, they were taken out, and the spaces in which they operated were closed, and they have since so remained. The dampers could be put back in a few hours and at a trifling expense. With the dampers in place, claims 20 and 23 are infringed. Without these appliances, there is no infringement. If the injunction now in force does not clearly forbid the replacement of these dampers, or any equivalents therefor, the plaintiff is entitled to one that will.

[3] The question most controverted, and indeed the only one upon which, in my view, there is much room for difference of opinion, is as to the amount of the damages to which the plaintiff is entitled. At the

instance of the defendant, plaintiff had had interviews with its officers, including the vice president, who subsequently recommended to the company's directors, the construction of the infringing plant at Arlington. It submitted plans and made a bid for the erection of the Staten Island shed, as it had formerly done for that at Curtis Bay. After all this, and with full knowledge of plaintiff's patent, the defendant gave the contract to another person, because the latter was willing to put up the structure at a less cost, and to furnish a bond against the consequence of infringement. After the Baltimore & Ohio's own counsel had told it that the shed it proposed to erect would infringe plaintiff's patent, it decided to go ahead, stating that, if any recovery was had, the surety would have to pay. Under such circumstances, it is clear that the plaintiff is entitled to be made whole.

The defendant wanted the patented structure. The fact that it paid $146,668 to the people who built it shows that it was ready and willing to pay at least that sum for it. The plaintiff proves that it could have put it up for $128,359. It loses, quite clearly, therefore, the difference between the two sums, or $18,309, by not being permitted to do so. It claims that it is entitled to the difference between what it would have cost to have put it up, and its own bid, which was $155,000. It is possible, although not probable, that if the Baltimore & Ohio could not have gotten it for $146,668, it would not have put it up at all. The Baltimore & Ohio, on the other hand, points out that the sum allowed as compensatory damages for the Curtis Bay infringement was $5,500. It is admitted that the shed at Arlington is twice as capacious and costly. It follows that $11,000 would be the equivalent in this case for the $5,500 allowed for the one at Curtis Bay. The plaintiff calls attention to the fact that such award for the Maryland structure was based upon the peculiarly low figure which the plaintiff had, under special circumstances, there made. That is true, and it was one of the circumstances taken into account in deciding to exercise the statutory authority to increase the damages, so as to cover what was believed to be the actual out of pocket expenditures to which the plaintiff up to that time had been put in enforcing its rights.

In a case presenting the special circumstances here shown, at least that much should be done. I am not, in view of the fact that the plant was never used in its infringing form by the defendant, inclined to do more. That it did not use it, however, is no reason why plaintiff should receive any less, for when it was seeking to build the plant, the defendant wanted and insisted upon having the infringing structure, and it was then that plaintiff suffered its loss.

The plaintiff's expenses in this branch of the case have been $7,418.85. $11,000 plus $7,418.85 foots up $18,418.85. I therefore award to the plaintiff damages in the amount of $11,000 for compensation, and increase the same under the statutory authority to $18,418.85, which exceeds by only $109.85, what appears to have been the smallest possible measure of damage to which the plaintiff could be held in any event to be entitled.

A decree will be passed in accordance with these findings.

In re KAPPES.

(District Court, E. D. New York. June 13, 1919.)

BANKRUPTCY ⚷414(3)—OBJECTIONS TO DISCHARGE—EVIDENCE.
Evidence *held* insufficient to sustain objections to a bankrupt's discharge on the ground of making a false oath in his schedules.

In Bankruptcy. In the matter of Henry Kappes, bankrupt. On application for discharge. Granted.

Charles F. Edsall, of New York City, for objecting creditor.

Bruce R. Duncan, of New York City, for bankrupt.

CHATFIELD, District Judge. The bankrupt applied for discharge, which was opposed on various grounds specified by the objecting creditor. On reference to a special commissioner discharge has been recommended. In the meantime the bankrupt applied for leave to amend his schedules so as to set forth certain checks, books, memoranda, and papers which had been produced by him before the special commissioner, and which made his oath contained in his schedules, that he had no such books or papers, apparently false. Leave was granted to the bankrupt to file an amended schedule. This he has never done, and he is therefore technically in default. This failure to file a paper setting forth the memoranda and papers produced before the special commissioner is however of little moment, in view of the conclusion of the special commissioner that the bankrupt had no intent to deceive his creditors or to conceal from them the knowledge of these papers in making the statement which he put in his schedules. It would avail nothing now to withhold discharge pending the filing of a verified amended set of schedules. But in order to complete the record of the proceedings and for the sake of regularity, and convenience, the bankrupt will be required to fill out and place on file a triplicate sheet, amending Schedule B (6) of the schedules filed March 2, 1918. The only specification of objection which presents a debatable issue on the record before the special commissioner is that in which the bankrupt is alleged to have made a false oath in failing to schedule these books and papers. It appears that the bankrupt did have certain books and papers. He says himself that he had destroyed some of his books and papers, he at one time failed to remember whether he had any, and at another time produced some and was hazy in his recollection about the others. He finally produced a set of books which had been kept by his brother, but which do not appear to have been used either by him or any one else as books for the purposes of business. He conducted a considerable real estate business, and for a period did this under the name of a corporation, and he apparently kept no books either for himself or in the business done by him in the name of the corporation. Examination of the schedules of debt shows that he must have had papers and memoranda, or no attorney could have prepared the set of schedules. His disregard of the proprieties, in the way of con-

ducting a business of considerable size, is apparent all the way through, but the flat and positive finding of the referee that this was all an oversight and without intention on the part of the bankrupt to deceive his creditors, and the conclusion that the specifications of objection have not been sustained, because the testimony does not warrant finding either the making of false schedules or the failure to keep books, with intent to deceive or defraud creditors, cannot be set aside and disregarded merely because ordinarily such things are improbable.

The finding of a master on the question of fraudulent intent should not be set aside by the court, from the standpoint of improbability alone, or upon the opinion of the court as to credibility from reading the testimony without seeing the witnesses.

The special commissioner has had the witnesses before him, has found definitely in his report that he believes the bankrupt's statements, and the only course which the court can pursue, if it takes his findings, which are supported by some testimony, is to confirm the recommendation that discharge be granted. The failure of the bankrupt to properly fill out his schedule was a matter for inquiry by the counsel preparing the schedules, and, as has been indicated, some books and papers must have been available for the preparation of the schedules themselves, but they may have contained no information beyond that in the schedules. The counsel for the bankrupt should have attended to the matter, and schedules should not have been filed with such an apparent inconsistency on their face. But this adds to the conclusion of the special commissioner that the omission was not with intent on the part of the bankrupt to deceive his creditors or to make a false affidavit. The report will be confirmed, and discharge granted.

KESSLER et al. v. WILLIAM NECKER, Inc.

(District Court, D. New Jersey. June 9, 1919.)

1. COURTS ⟹371(2) — FEDERAL COURTS — JURISDICTION — ENFORCEMENT OF EQUITABLE RIGHTS UNDER STATE STATUTES.

   Under Judicial Code, § 24 (Comp. St. § 991), giving a federal District Court jurisdiction of suits at common law and equity where the matter in controversy exceeds, exclusive of interest and costs, $3,000, between citizens of different states, the District Court may administer equitable rights created by valid state statutes, if the enforcement of such rights does not impair any right conferred or conflict with any inhibition imposed by the Constitution of the United States.

2. COURTS ⟹371(1)—FEDERAL COURTS—ENFORCEMENT OF RIGHTS UNDER STATE STATUTES.

   Rights created or provided by the statutes of the states to be pursued in the state courts may be enforced and administered in the federal courts, either at law or in equity, or in admiralty, as the nature of the new rights may require.

3. COURTS ⟹371(2)—FEDERAL COURTS—ENFORCEMENT OF RIGHTS UNDER STATE STATUTES.

   An enlargement of equitable rights by state statutes may be administered by the federal courts, as well as by the courts of the states.

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4. COURTS ⟹372(1)—FEDERAL COURTS—ENFORCEMENT OF RIGHTS UNDER STATE STATUTES.
A party, by going into a federal court, does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality.

5. COURTS ⟹371(1)—APPOINTMENT OF RECEIVER—PROCEEDINGS IN FEDERAL COURT UNDER STATE STATUTES.
Stockholders in an insolvent corporation may in the federal District Court maintain a suit for the appointment of a receiver under Corporation Act N. J. 1896, § 65; other necessary elements being present to give the court jurisdiction.

6. COURTS ⟹37(2)—APPOINTMENT OF RECEIVER BY FEDERAL COURT UNDER STATE STATUTE—JURISDICTION—WAIVER.
Where a receiver was appointed by the federal court under Corporation Act N. J. 1896, § 65, for an insolvent corporation, and the corporation raised no objection to the jurisdiction of the federal court, the jurisdictional question was waived, and could not, after 2½ years, be raised by a receiver in chancery, appointed by the state court, nor by stockholders petitioning for a transfer of property from the federal receiver to the state receiver.

7. COURTS ⟹371(1)—JURISDICTION OF STATE AND FEDERAL COURTS—COMITY.
In receivership proceedings, the practical purpose of courts generally is to see that insolvent estates are administered economically, so that the largest possible dividend may be paid to creditors and the interest of stockholders preserved, and to accomplish such purpose comity between state and federal courts should be extended to its largest limits.

In Equity. Suit by Frederick Kessler and others against William Necker, Incorporated, for the appointment of a receiver. On petition by a receiver appointed in chancery to have the federal receiver turn over to him for administration the property of the corporation. Petition denied.

Smith, Mabon & Herr, of Hoboken, N. J., for chancery receiver.
Heyman & Heyman, of Jersey, City, N. J., for federal receiver.

DAVIS, District Judge. On September 30, 1916, a bill was filed in this court by Frederick Kessler, Frieda Kessler, Isaac Kraus, Theresa McCormack, and John C. Hitchman against William Necker, Incorporated. John C. Hitchman is a creditor and the other complainants are stockholders of the defendant company, which owns and conducts the business of a large undertaking establishment. Some time before the filing of said bill, William Necker, who was a large owner in the company and conducted and practically controlled the same, died. The company was in fact a one-man concern. The complainants, inter alia, allege:

"The death of William Necker, as your orators are informed and believe, has also seriously affected the immediate credit of the company, and many of the creditors of the company have instituted suits, some in the state of New York by attachment proceedings, and others in the state of New Jersey by summons and complaint. A large part of the current indebtedness, consisting of bills payable at banks, bills payable for merchandise, and the general accounts payable, is now overdue or will shortly be growing due, and the creditors holding these claims are pressing for payment, while the defendant is at the present time unable to pay these claims without withdrawing from its business the funds constantly needed to meet labor and other immediate cur-

rent necessities, and it is certain that, if judgments are recovered against the defendant upon the suits already instituted, other creditors holding overdue claims against the defendant will also vigorously prosecute their claims to judgment. The defendant is therefore threatened with judgments upon the suits already instituted and with further suits at the instance of other creditors and with numerous execution sales, all of which will necessarily result in the disruption and suspension of its business, the destruction of its good will and of its business organization, the dissipation and shrinkage of its assets to the great detriment of all the creditors and stockholders. * * *"

And they pray:

"That the claim and interest of your orators in the premises, as well as that of all other creditors and stockholders, may be ascertained and determined, and the assets of said defendant corporation marshaled, and the liens and priorities of all parties in interest therein determined and adjudged, * * * and that the assets of said corporation may be administered as a trust fund for the benefit of your orators and all others having an interest therein, and that it may be adjudged and determined that said business has been and is being conducted at a loss and in a manner greatly prejudicial to the interest of its stockholders. * * *

"May it please your honors, the premises considered, to grant unto your orators the writ of injunction issuing in due form of law to said William Necker, Incorporated, restraining it and its officers and agents from further exercising its franchises and from collecting or receiving any of its debts due to it, or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements, or effects, except to a receiver or receivers appointed by the court."

On the same day, September 30, 1916, the defendant company filed its answer, admitted the allegations of the bill of complaint, joined in the prayer, praying that this court, sitting in equity, might take possession of all the property and business of the defendant, through the appointment of a receiver, and preserve and protect the property from being sacrificed, and empower and authorize such receiver to take possession of the business and property of the defendant, pay all indebtedness due or to become due by the defendant, and otherwise discharge the ordinary duties imposed by the court upon receivers, and that the proceeds arising from the sale of said property of the defendant corporation be applied to its indebtedness, etc. Whereupon this court appointed a temporary receiver, who, upon consent of the corporation, the creditors and stockholders, was made permanent on October 23, 1916.

The receiver continued the business of the corporation from that time until the present, with the consent of the company, the creditors, and stockholders, except the complainants in chancery proceedings, who first made known their objection by filing said proceedings in chancery about April 1, 1919, 2½ years after the receiver was appointed, and more than a month after he had filed his fifth report, wherein he reported that the business could not be continued without loss to the creditors and stockholders, and filed his petition, praying for permission to dispose of the property. Upon rule to show cause why the assets of the company should not be disposed of, and upon notice to all creditors and stockholders, this court, with the consent of the corporation, creditors, and stockholders, directed the receiver to advertise the property for sale. This was done, and on the day of the sale it was reported to the court that no bid could be

secured. The receiver subsequently reported to the court that he had secured a bid upon the property, which, in his judgment, was a good offer and the best that could be obtained, whereupon a rule to show cause why said offer should not be accepted was granted, which was served upon all the creditors and stockholders.

Upon the return day it was intimated that there was a possibility of securing a better offer, whereupon one or two adjournments were had with the consent of all parties interested, in order to ascertain if a better offer could be secured. Apparently no better and not even so good an offer could be secured by the receiver, or any creditor or stockholder, and on or about April 1, 1919, just before the receiver was to accept the said offer, Fred Michel, a creditor, and others, filed their bill in the Court of Chancery of New Jersey, for the purpose of winding up the business and dissolving the corporation, whereupon that court appointed a statutory receiver, who by direction of said court has applied to this court for instructions, suggesting that this court never had jurisdiction of this cause, and, if it ever had, it has been superseded by the proceedings in the Court of Chancery, to which this court should now relinquish proceedings begun and conducted herein, and turn over the property of the company now in the possession of the receiver of this court, after the payment of his fees, to the receiver of the Court of Chancery.

[1] A federal District Court has original jurisdiction of all suits of a civil nature at common law or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, between citizens of different states. Judicial Code (Act March 3, 1911, c. 231) § 24, 36 Stat. 1091 (Comp. St. § 991). When the necessary elements, such as diverse citizenship and the required amount, exist, giving jurisdiction to a federal court, it may administer equitable rights created by valid state statutes, such as those created by section 65 of the New Jersey Corporation Act of April 21, 1896 (P. L. p. 298). National Surety Co. v. State Bank, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394; United States Shipbuilding Co. v. Conklin, 126 Fed. 132, 60 C. C. A. 680; Land Title & Trust Co. v. Asphalt Co. of America, 127 Fed. 1, 62 C. C. A. 23; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Maguire v. Mortgage Co., 203 Fed. 858, 122 C. C. A. 83.

The one inhibition against the enforcement in a federal court of new equitable rights, created by state statute, is that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution of the United States. When the necessary elements giving federal courts jurisdiction are present, the following rules are deducible from the cases relative to the jurisdiction and power of federal courts to enforce rights created and to administer remedies provided for enforcement and administration in state courts:

[2] 1. Rights, created or provided by the statutes of the states to be pursued in the state courts, may be enforced and administered in

the federal courts, either at law or in equity, or in admiralty, as the nature of the new rights may require.

[3] 2. An enlargement of equitable rights by the statutes of the states may be administered by the federal courts, as well as by the courts of the states.

[4] 3. A party, by going into a federal court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. Darragh v. H. Wetter Manufacturing Co., 78 Fed. 7, 14, 23 C. C. A. 609, and the cases there cited.

The complainants in this bill are stockholders and contract creditors, whose claims have not been reduced to judgment. May either class—stockholders or simple contract creditors—maintain the bill; it being admitted that there are the other necessary elements giving this court jurisdiction? Judge Bradford, in the case of Jones et al. v. Mutual Fidelity Co. (C. C.) 123 Fed. 506, in a very careful and well-considered opinion, after reviewing the cases, held that simple contract creditor whose claim had not been reduced to judgment might maintain a bill in a federal court and have the assets of an insolvent corporation administered, where such administration is the enforcement of a purely equitable right by a purely equitable remedy, and where the prior exhaustion of the legal remedy would practically nullify the equitable remedy. The objection that a simple contract creditor whose claim has not been reduced to judgment may not maintain a bill is based upon the Seventh Amendment of the federal Constitution, which provides that:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

In the case of Scott v. Neely, supra, Mr. Justice Field, speaking for the court, said:

> "In the federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact."

That equitable relief can be granted in aid of a legal remedy, only after such remedy has been exhausted, precludes a conflict between legal and equitable remedies in the same suit. The substance of Judge Bradford's opinion, which has been followed in several cases, is contained in the following extract:

> "There is a clear distinction between the exercise of equitable jurisdiction in aid of a legal remedy for the collection of a pecuniary legal demand, and the exercise of equitable jurisdiction in enforcing a purely equitable right by a purely equitable remedy, created by a valid state statute, not in aid of any legal remedy, but wholly independently thereof, though the existence of such equitable right and remedy may presuppose and be dependent on the existence of such pecuniary legal demand. * * * If the procedure and relief are essentially equitable, the circumstance that they bear relation to a legal demand is immaterial. Where the procedure and relief provided by a state statute are essentially equitable, and such relief is impossible of attainment

in any action at law, not owing to the existence of any accidental or abnormal obstacles or difficulties, but by reason of the essential nature of such action and legal process, a case for purely equitable cognizance under the statute is presented. Where equitable rights and remedies under a statute, founded on or bearing relation to pecuniary legal demands, would be defeated by exhausting the remedy at law on such demands, such equitable remedies cannot be considered as in aid of the legal remedy. Under such circumstances an exhaustion of the legal remedy would practically nullify the remedy in equity, and therefore, if force should be given to the statute, it would be not only unnecessary, but improper, before proceeding thereunder to exhaust the legal remedy."

Vice Chancellor Stevenson, in the cases of Gallagher et al. v. Asphalt Co. of America, 67 N. J. Eq. 441, 58 Atl. 403, and Helms v. International Steam-Pump Co. (unreported), distinguished between the New Jersey act and the act of Delaware with which Judge Bradford was dealing. In the New Jersey act, he says, the complainant, the creditor or stockholder, is the Attorney General pro hac vice; he gets nothing by his decree; he has to present and prove his claim before the receiver. The creditor in his conception is a kind of public benefactor, acting in behalf of the public in a semiofficial capacity for its protection. But Judge Archbald, sitting in this district by special assignment, in the case of Jacobs et al. v. Mexican Sugar Co. (C. C.) 130 Fed. 589, speaking of this New Jersey act, said:

"The complainant in such a bill, whether as stockholder or creditor, comes into court to protect his pecuniary interest, which is imperiled by the insolvency of the corporation and its inability to further carry out with success its corporate purposes. He seeks the intervention of the court in its affairs, in the manner provided by the statute, to save himself as far as possible from financial loss. No merely benevolent purpose to shield the general public from imposition by reason of its insolvent condition brings him there; nor does he move in behalf of the state, of which the corporation is a creature as would the Attorney General. * * * The proceeding is prosecuted by the complainant because of the direct personal interest which he has to subserve. If successful, there will, in the final outcome, when the corporate affairs are wound up, be a money decree establishing his right to a share in what is realized if the assets go far enough, or in favor of others who are necessarily brought into court by the proceeding if they do not."

In the New York act, from which the New Jersey act was copied, the Attorney General instituted proceedings, in behalf of the state, to protect the public generally; but in the New Jersey act any creditor or stockholder may file the bill. The purpose of this change was doubtless to enable any creditor or stockholder to maintain the suit in order to protect his own personal interest, without the handicap of having to act through the Attorney General, the purpose of whose action was general, and not individual. In the act of Delaware the bill may be filed by any creditor or stockholder, just as may be done under authority of the New Jersey act. The object of the complainant under both acts is the same, the protection of the individual interest of the complainant.

[5] The Circuit Court of Appeals of the Fourth Circuit in the case of McGraw v. Mott, 179 Fed. 646, 103 C. C. A. 204, following Judge Bradford, held that a simple contract creditor may maintain a bill in the federal court under authority of section 65 of the New Jersey

Corporation Act. Judge Archbald, on the contrary in the case of Jacobs et al. v. Mexican Sugar Co., supra, held that Jacobs, as a simple contract creditor whose claim had not been reduced to judgment, could not maintain a bill in the federal court under the authority of section 65 of the New Jersey Corporation Act of 1896, because it was in violation of the Seventh Amendment to the federal Constitution, but held that, as a stockholder, he could maintain it. It is not necessary, however, to sustain the bill on the ground that the complainants, or any of them, were simple contract creditors. All of them but two, one original and one intervening, were stockholders, and as such may maintain the action. Jacobs et al. v. Mexican Sugar Co., supra; Scattergood et al. v. American Pipe & Construction Co., 249 Fed. 23, 161 C. C. A. 83.

[6] Again, no objection was raised to the jurisdiction of this court by the corporation or any one else on any ground whatever; but, on the contrary, the corporation filed an answer, wherein it admitted the allegations of the bill and joined in the prayer thereof, in asking the court to take jurisdiction and appoint a receiver. The corporation was the proper party to raise any objection on any ground to the jurisdiction of this court. The corporation having waived the jurisdictional question, it may not now be raised by the receiver in chancery. Citizens' Bank & Trust Co. et al. v. Union Mining & Gold Co. (C. C.) 106 Fed. 97; McGraw v. Mott, 179 Fed. 646, 103 C. C. A. 204. Defenses existing in equity suits may be waived, just as they may in law actions, and when waived the cases stand as though the objections never existed. Given a suit in which there is jurisdiction of the parties in a matter within the general scope of courts of equity, and a decree rendered will be binding, though the defenses, if made, would have resulted in a dismissal of the case. Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; Brown v. Lake, 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021. The Circuit Court of Appeals of the Second Circuit held in the case of Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 737, 117 C. C. A. 503, 519, that unless the corporation objected a suit might be maintained on the equity side of a federal court without the necessity of a judgment on a legal demand. "And now," said Judge Noyes, speaking for the court, "that which was formerly regarded as the essential thing—the judgment—is unnecessary unless the corporation objects." In the case of In re Metropolitan Railway Receivership, 208 U. S. 90, 109, 28 Sup. Ct. 219, 224 (52 L. Ed. 403), the Supreme Court held that the fact that a simple contract claim had not been reduced to judgment and execution issued thereon might be waived in a court of equity. Mr. Justice Peckham, speaking for the court, said:

"It is also objected that the Circuit Court had no jurisdiction, because the complainants were not judgment creditors, but were simply creditors at large of the defendant railways. The objection was not taken before the Circuit Court by any of the parties to the suit, but was waived by the defendant consenting to the appointment of the receivers, and admitting all the facts averred in the bill. Hollins v. Brierfield Coal & Iron Company, 150 U. S. 371, 380 [14 Sup. Ct. 127, 37 L. Ed. 1113]. That the complainant has not exhausted his remedy at law—for example, not having obtained any judgment

or issued any execution thereon—is a defense in an equity suit, which may be waived, as is stated in the opinion in the above case, and, when waived, the case stands as though the objection never existed.

"In the case in the Circuit Court the consent of the defendant to the appointment of receivers, without setting up the defense that the complainants were not judgment creditors who had issued an execution which was returned unsatisfied, in whole or in part, amounted to a waiver of that defense. Brown v. Lake Superior Iron Co., 134 U. S. 550 [10 Sup. Ct. 604, 33 L. Ed. 1021]; Town of Mentz v. Cook, 108 N. Y. 504, 508 [15 N. E. 541]; Horn v. Pere Marquette R. R. Co. [C. C.] 151 Fed. 626, 633."

This court has jurisdiction of the parties, whose citizenship is diverse, the requisite amount is in controversy, and the subject-matter is equitable in its nature. It is therefore too late for the complainants in the Court of Chancery, who waived defenses and consented to the jurisdiction of this court for 2½ years, or slept on their supposed rights, to raise the objection at this time that this court is without jurisdiction.

It was held by the Circuit Court of Appeals of this circuit in the case of Scattergood et al. v. American Pipe & Construction Co., supra, that a stockholder's bill in an ancillary jurisdiction will be maintained when the corporation, in a financially embarrassed condition, voluntarily appeared and filed answer, admitting the allegations of the bill. That case lays down the law of this circuit and is binding upon this court. The allegations of the bill in that case are practically parallel with those of the bill in the present case. The reasoning followed and the conclusions reached by the court in that case force the conclusion that this court, in the state and district of the corporation, has jurisdiction under the facts of the present case, and should retain control of the assets in its possession and administer them.

[7] The question of conflicting or concurrent jurisdiction between state and federal courts should always be approached with the utmost care and consideration. It is so easy, when a court is sensitive about its jurisdiction or prerogatives, to enter into conflict to the serious injury of the creditors. The practical purpose of courts generally is to see that insolvent estates are administered economically, so that the largest possible dividend may be paid to creditors and the interest of stockholders preserved. For the accomplishment of this purpose comity between state and federal courts should be extended to its largest limits. In the present case, the receiver has conducted the business of the corporation since September 30, 1916. It is conceded by every one, so far as I am aware, that his conduct of the business has been excellent. There has not been even a hint that the business has not been conducted well. The company is hopelessly insolvent. In the opinion of the receiver, and every one so far as I know, the time has come when the business should be wound up and the property disposed of. The court directed the receiver to advertise the property for sale. This has been done, and he now has admittedly the highest possible offer for it. No better offer, and not even so good, has been secured, though the sale was adjourned several times in order to enable creditors and others, including complainants in chancery, to secure a larger offer but without success. Since September 30, 1916,

the complainants in chancery have consented to, or stood by and watched, the conduct of this business by the receiver of this court, and now, when it is about to be closed up, they come forward and, not denying that the business should be wound up and the property disposed of, say the job should be given to them or their receiver, and the property in the possession of the federal receiver turned over to the chancery receiver. It is difficult for me to understand their motive, for everything that the receiver has done toward winding up the business must be done again by the chancery receiver, if the property of the corporation is turned over to him, all to no purpose, and at the expense of the creditors. Neither on legal principle nor economic policy can I conceive a good reason why this should be done, and under the facts of this case my duty to the creditors demands that I direct the receiver of this court to continue to wind up the business of the said company, in accordance with the order heretofore made.

LEVINSTEIN v. E. I. DU PONT DE NEMOURS & CO.

(District Court, D. Delaware. May 22, 1919.)

No. 1, March Term, 1919.

1. WITNESSES ⚷21—CONTEMPT—REFUSAL TO OBEY SUBPŒNA—DEFENSES.
   In proceedings for contempt against a witness for refusal to obey a subpœna of a federal court issued pursuant to a commission granted by a court of another district to take depositions under Rev. St. § 866 (Comp. St. § 1477), the court cannot inquire into the jurisdiction of the court which issued the commission.
2. WITNESSES ⚷21—CONTEMPT—DISOBEDIENCE OF SUBPŒNA—ADVICE OF COUNSEL.
   That a witness, in refusing to testify in obedience to a subpœna, acted on advice of counsel, is no defense to a proceeding for the contempt, although it may be considered in determining the punishment.
3. CONTEMPT ⚷2—PROCEEDINGS FOR PUNISHMENT—DEFENSES.
   The question whether an act is or is not a contempt does not depend upon whether there was an actual intent to embarrass the due administration of justice, but may be determined from the nature of the act and by the presence or absence of any sound reason for it.

Petition for attachment of Lammot Du Pont for contempt in suit of Edgar Levinstein against E. I. Du Pont de Nemours & Co. Rule made absolute.

See, also, 258 Fed. 667.

Frank H. Stewart, of Boston, Mass., and George N. Davis and Robert Penington, both of Wilmington, Del., for plaintiff.

Elbridge R. Anderson, of Boston, Mass., and J. P. Laffey, of Wilmington, Del., for defendant.

MORRIS, District Judge. A rule was issued directed to Lammot Du Pont, requiring him to show cause, if any he has, why an attachment should not issue against him as and for a contempt of court, as well as for disobedience of the process of subpœna, and

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

receive such orders or punishment as in the premises justice may require.

The order of court directing the issuance of the rule to show cause was based upon a verified petition alleging the pendency in the District Court of the United States for the District of Massachusetts of an action at law wherein Edgar Levinstein, of the state of Massachusetts, is plaintiff, and E. I. Du Pont de Nemours & Co., a corporation of the state of Delaware, is defendant; that on May 8, 1919, a commission duly issued out of the said court for the district of Massachusetts was delivered to Henry C. Mahaffy, Jr., a notary public resident in this state, to take the depositions of certain witnesses therein named, including the said Lammot Du Pont; that upon a petition filed in this court May 12, 1919, an order was made directing the clerk to issue a subpœna to said Du Pont directing him to appear before the said notary at such time and place within this district as said notary might appoint, to be examined on oral interrogatories, in pursuance of the commission aforesaid, and to testify and give evidence on the part of the plaintiff in the above-mentioned cause, and also to bring with him and produce before said notary certain books and papers therein mentioned; that the clerk duly issued the subpœna directing the said Du Pont to appear before the said notary on May 20th; that such subpœna was duly served on May 14th; that notice of the time and place of taking the depositions was served on the attorney for the defendant within the time required by the commission; that said Du Pont appeared before the notary at the time and place appointed, as did the attorneys for the defendant company, and that thereupon the said Du Pont, being called as a witness by the plaintiff, declined to be sworn and to testify under the said commission; and that he was not then privileged from giving testimony.

The rule was duly served, and the witness appeared before the court on its return. The petitioner has filed the certificate of the notary with a transcript of the proceedings had before him. This transcript discloses that the attorney for the defendant company objected to and protested against proceeding with the taking of depositions of the witnesses summoned under the subpœnas, for reasons touching the regularity of the issuance of the commission by the District Court of Massachusetts, and declined to proceed with the taking of the depositions. The said attorney, as appears from said certificate, also advised the witnesses that they should not proceed and not to be sworn, and the witness Du Pont acted in accordance with this advice when called to testify. At the hearing on the return of the rule the following affidavit was filed by the said attorney on behalf of the witness, viz.:

"That he is one of the attorneys for the defendant in the foregoing matter.

"That the date of the writ in this action was the 7th day of May, 1919, calling for the defendant to appear before the District Court of the United States for the District of Massachusetts, to be holden at Boston, Massachusetts, on the fourth Tuesday of June, 1919.

"That said writ was served on the commissioner of corporations on said 7th day of May, 1919, at 3:40 o'clock p. m., and that under the rule of court,

and pursuant to the terms of said writ, the defendant was given 30 days from said 7th day of May, 1919, to plead to said writ.

"That said time to plead has not yet expired, and that no plea has been filed, and no issue in any manner joined.

"That the petition for commission to take depositions was filed on said 7th day of May, 1919; and the petition for a subpœna duces tecum was filed in said District Court of the United States for the District of Delaware on the 12th day of May, 1919.

"That on the 20th day of May a motion to vacate and set aside the above-mentioned order of the court issued, allowing the commission for the purpose of taking depositions, was filed in said United States District Court for the District of Massachusetts, and affiant is informed and believes that hearing thereon has been set for the first Monday in June."

Since the hearing a sworn answer of the witness has been filed in this proceeding, admitting the allegations of the petition, but stating in effect that in declining to be sworn and to testify he was acting under the advice of counsel, with the view of bringing before the court certain questions of law for the ruling of the court thereon, and that none of his acts were for the purpose of willfully violating the terms of the subpœna or the process of the court, and that he was not aware that in declining to testify, under the circumstances, he was committing any act which might be held to be a contempt of court, and offering to testify should this court be of opinion that he should do so.

A willful disregard or disobedience of the lawful process of the court is contempt, and punishable as such. That the witness Du Pont disobeyed the command of the subpœna issued by this court is admitted. He seeks, however, to justify or excuse this disobedience for the following reasons: First, that the commission issued by the District Court of the United States for the District of Massachusetts to the said notary was irregularly issued; second, that his refusal to testify was under the advice of counsel; and, third, that in so refusing he did not intend to commit a contempt of court.

[1] In support of the first reason counsel contends that the commission was not issued in conformity with the requirements of section 863 of the Revised Statutes (Comp. St. § 1472), with the result that the commission and all acts done thereunder or auxiliary thereto are without any force or effect and are wholly null and void. But the commission issued to the notary, as before mentioned, was not issued under section 863 of the Revised Statutes, but was issued under that portion of section 866 (Comp. St. § 1477) which provides:

"In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage."

This conclusion is fortified by the following statement of Judge Shiras in Giles v. Paxson (C. C.) 36 Fed. 882, 883:

"There are two general methods for taking depositions to be used on the trial of law cases provided for in the Revised Statutes; the one being the mode pointed out in section 863, and the other in section 866. When taken under the provisions of the former section, a commission to the officer is not sued out from the court in which the cause is pending, but the party desiring to take the testimony gives notice to the opposite party or his attorney of the time and place when and where the testimony is to be taken, and selects as

the commissioner any one of the parties named in the section. * * * If, however, the depositions are not taken under section 863, but under the authority granted in section 866, then, by the express terms of the latter section, the provisions of sections 863, 864 [Comp. St. § 1473], and 865 [Comp. St. § 1474] are not applicable thereto."

The only requirement of the statute for the issuance of such commission is that it be necessary "in order to prevent a failure or delay of justice." The determination of this question is for the court issuing the commission, and not a question that can be collaterally considered by this court. A similar question was considered by Judge Butler in Re Cole, Fed. Cas. No. 2,975. He there said:

"Two questions were raised: (1) That the Circuit Court of Iowa had no authority to issue the commission. (2) That the communications were privileged. As to the first, I, as a judge, have no authority to inquire into the jurisdiction of the circuit court of Iowa, or whether or not there is there pending a civil action. That court has decided that question, and issued a commission. It would be highly discourteous to look behind its record, and I decline to do so."

As the court issuing the commission had the power and authority to issue it, it is not open to collateral attack in this court, and I cannot go behind it. Furthermore, had there been a desire on the part of the defendant company to raise in the District Court for Massachusetts a question as to the validity of the commission it hardly seems conceivable that an application to set it aside would have been delayed until the very day fixed for taking testimony under it. The record discloses that the commission was issued on the 7th day of May; that the subpœna, disregarded by the witness, was served on the 14th day of May; that no application was made to the court issuing the commission to set it aside until May 20th; and notwithstanding notice of the time and place of taking testimony under the commission was given to the attorneys for the defendant on May 12th, no application was made to this court to question the validity of the subpœna or to relieve the witness from obeying its command. The refusal of the witness to testify under these circumstances is not inconsistent with an attitude of indifference with respect to or even a willful disregard of the subpœna. The first contention, therefore, presents no excuse for refusal of the witness to obey the command of the subpœna.

[2] The witness next contends that his refusal to testify was under the advice of counsel. That advice of counsel is no defense to a proceeding for contempt is so well settled that it is unnecessary to do more than quote the words of Judge Sanborn in Fairfield et al. v. United States, 146 Fed. 509, 76 C. C. A. 591, viz.:

"The duty of a witness to obey the subpœna is not conditioned by his own, or by his counsel's, opinion of the materiality of his testimony, or of the issues of law or of fact which the suit in which he is called involves. His personal privilege and a gross abuse of the process of the court are the only sufficient excuses for his failure to obey."

Where a witness or other person elects to follow the advice of counsel rather than to obey the process or order of a court he does so at his peril. But where the contemnor has acted in good faith

on the advice of counsel, such fact may be considered by the court in determining the punishment.

[3] The witness last asserts as a defense a disclaimer of intentional disrespect or design to embarrass the due administration of justice. Such denial may be considered as purging the contempt, if there be any real justification for the act constituting the contempt. But the question whether a certain act is or is not a contempt does not depend upon whether there is present an actual intent to embarrass the due administration of justice, but may be determined from the nature of the act and by the presence or absence of any sound and substantial reason for its occurrence. No sound reason has been shown by the witness in this case for his refusal to testify. But the absence of an actual intent may properly be taken into account when fixing the punishment.

The case presented by the foregoing facts is radically different from a case certified for the refusal of a witness to answer questions upon the ground of personal privilege, or where it clearly or affirmatively appears that the evidence sought cannot possibly be competent, material or relevant, and that it would be an abuse of the process of the court to compel its production.

The subpœna issued by the clerk was not only a subpœna requiring the production of certain books and papers, but was also a subpœna requiring the witness to appear and testify. Either of these objects may be enforced without the other. Wilson v. United States, 221 U. S. 361, 373, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558. The rule issued in this case is to show cause why the witness should not be adjudged guilty of contempt, not for his failure to produce the books called for by the subpœna, but solely because he declined to be sworn and to testify. It is immaterial to a decision in this proceeding whether or not the command to produce the books was rightfully inserted in the subpœna. Fairfield et al. v. United States, 146 Fed. 508, 76 C. C. A. 590.

Section 868 of the Revised Statutes (Comp. St. § 1479) provides:

"When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or territory, the clerk of any court of the United States for such district or territory shall, on the application of either party to the suit, or of his agent, issue a subpœna for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpœna; and if any witness, after being duly served with such subpœna, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpœna, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpœna to testify issued by such court."

It appears from the foregoing that the commission in question was issued by a court of the United States for taking the testimony of a witness named therein at a place within this district. Further, that the clerk of this court did on the application of the plaintiff issue a subpœna for the witness Lammot Du Pont commanding him to appear and to testify before the commissioner named in the commis

sion at a time and place stated in the subpœna. And it also appears that the witness, after being duly served with such subpœna refused to testify, not being privileged from giving testimony, and such refusal is not only proven to the satisfaction of the court, but is admitted. From this it unavoidably follows that the witness must be adjudged in contempt, and the rule made absolute.

But taking into consideration the disclaimer by the contemnor of any positive or actual intent, and the extent of the penalty shown by the reports to have been imposed in like cases, I am of the opinion that a fine of $500 and costs will meet all the requirements of this case.

An order in accordance with this opinion may be prepared and submitted.

LEVINSTEIN v. E. I. DU PONT DE NEMOURS & CO., Inc.*

(District Court, D. Massachusetts. June 9, 1919.)

No. 1102.

1. DEPOSITIONS ⟹7—FEDERAL COURTS—RIGHT TO COMMISSION BEFORE ISSUE JOINED.
   Rev. St. § 863 (Comp. St. § 1472), does not authorize the granting of a commission to take depositions de bene esse before issue has been joined.
2. DEPOSITIONS ⟹7 — DEDIMUS POTESTATEM — EXAMINATION OF ADVERSE PARTY.
   A dedimus potestatem to take depositions under Rev. St. § 866 (Comp. St. § 1477), which authorizes such commission "where it is necessary in order to prevent a failure or delay of justice," should not be granted ex parte for the purpose of a preliminary examination of the adverse party before trial or issue joined.

At Law. Action by Edgar Levinstein against E. I. Du Pont de Nemours & Co., Incorporated. On motion to vacate order for taking depositions. Order suspended pending hearing.

See, also, 258 Fed. 662.

Robert M. Morse and Frank H. Stewart, both of Boston, Mass., for plaintiff.

Eldridge R. Anderson, of Boston, Mass., for defendant.

MORTON, District Judge. The questions now before the court arise on the defendant's "motion to vacate order for taking depositions," filed in this court on May 20th. The facts on which the motion is grounded are, except as hereinafter noticed, not in dispute, and are as follows: By a writ of this court dated May 7, 1919, Levinstein brought an action against E. I. Du Pont de Nemours & Co., Incorporated. The writ was served on the day of its date on the Massachusetts commissioner of corporations as attorney for the defendant, and on the same day it was entered in this court and an order taken for the defendant to plead within one calendar month thereafter. The plaintiff's declaration was filed with the writ. There were also filed by the plaintiff at the same time two motions for commissions to take depo-

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

*Ruling on submission of affidavits, see 258 Fed. 991.

sitions of certain witnesses at Wilmington and at New York. These motions were, on May 7th, presented to me by counsel for the plaintiff, who stated to me at the time that some, at least, of the witnesses whose testimony it was desired to take were connected with the defendant, and, in answer to a question, further stated that their testimony was desired in good faith in order to establish certain substantial facts in favor of the plaintiff. The motions were thereupon allowed ex parte and the commissions issued.

On the 12th of May the United States District Court in Delaware, on the application of the plaintiff, issued a subpœna duces tecum, directing the witnesses to appear and testify at a time and place to be appointed by a designated notary public, and to produce the books and papers specified in the subpœna. The notary directed the attendance of the witnesses at a certain place and hour in Wilmington, Del., on May 20th. Notice was duly served on the defendant's attorney, and at the time and place appointed, the witnesses, together with counsel for the defendant, appeared. When the first witness was called, he declined to be sworn or testify, upon the ground that he was not obliged to do so. Contempt proceedings were thereupon instituted against the witness in the United States District Court in Delaware. After a full hearing it was held in a careful and elaborate opinion by Judge Morris that the commission was prima facie valid under Rev. St. § 866 (U. S. Comp. St. § 1477), and was not open to collateral attack, and that the witness was in contempt for refusing to testify, and a fine of $500 was imposed upon him. 258 Fed. 662. This decision was made on May 22d. On May 20th the motion now under consideration had been filed by the defendant.

[**1, 2**] It seems clear that the commission cannot be supported under Rev. St. § 863 (Comp. St. § 1472), because issue had not been joined at the time when it was taken out. William Carraway & Son v. Kentucky Refining Co., 163 Fed. 191, 192, 90 C. C. A. 59; Flower v. McGinniss, 112 Fed. 377, 50 C. C. A. 291; Stevens v. M., K. & T. Railway Co. (C. C.) 104 Fed. 934. The question, therefore, is whether it ought to be permitted to stand under Rev. St. § 866, as a commission for the perpetuation of testimony. That section begins:

"In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage."

The authority to issue commissions to take testimony under this section rests on a finding that "it is necessary in order to prevent a failure or delay of justice." No evidence upon that point was submitted to me and I have never passed upon it. As was held in Turner v. Shackman (C. C.) 27 Fed. 183, this section should not be invoked merely for the purpose of a preliminary examination before trial of the adverse party. The character of the subpœna duces tecum taken out by the plaintiff in Delaware shows that the examination is designed to do much more than merely to supply proof of a few formal facts, and is apparently intended to be a thorough cross-examination of the defendant's principal witnesses in connection with its books and papers. Whether this ought or ought not to be permitted, I express no

opinion, but I am clear that it ought not to be permitted upon an ex parte application and without giving the defendant full opportunity to be heard upon that question. Moore v. Stoddard, 206 Mass. 395, 92 N. E. 502.

The case may stand for hearing on the question whether it is necessary to take the testimony of said witnesses at this time, in order to prevent a failure or delay of justice. The facts may be proved by ex parte affidavits filed by each side; the plaintiff to file his on or before June 14th, the defendant its counter affidavits on or before June 21st, and affidavits in rebuttal on or before June 25th. On the record so made the case may be marked for hearing.

It is unnecessary at present to recall or quash the commission, but no further proceedings are to be taken under it until further order of this court.

SCOTT et al. v. FRAZIER et al.

(District Court, D. North Dakota, S. E. D. June 14, 1919.)

1. CONSTITUTIONAL LAW ⟹210, 252—FOURTEENTH AMENDMENT—"PERSON"—STATE.
   The Fourteenth Amendment to the federal Constitution, protecting any "person" in certain rights, is inapplicable to a state.

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

2. COURTS ⟹328(3)—JURISDICTION OF FEDERAL COURT—AMOUNT IN CONTROVERSY—TAXPAYER'S SUIT.
   In suit by taxpayers, in behalf of themselves and other taxpayers, to enjoin state officers from paying out public funds and from issuing bonds of the state, the entire fund represented is not the amount in controversy.

3. COURTS ⟹328(4)—JURISDICTION OF FEDERAL COURT—AMOUNT IN CONTROVERSY—TAXPAYER'S SUIT.
   In suit by taxpayers to enjoin state officers from paying out public funds and from issuing bonds of the state the individual taxpayers though suing on behalf of all taxpayers must each have an interest exceeding $3,000 to give federal court jurisdiction.

4. TAXATION ⟹25—LEGISLATIVE POWER.
   The power of taxation is legislative.

5. CONSTITUTIONAL LAW ⟹48—PRESUMPTIONS—TAX LAWS.
   The presumption that a law is constitutional applies with unusual force to laws enacted under the taxing power.

6. CONSTITUTIONAL LAW ⟹48—PRESUMPTIONS—PURPOSE OF TAXING STATUTE.
   The presumption that a taxing law is constitutional applies with peculiar force to a legislative declaration that the tax is levied for a public purpose.

7. CONSTITUTIONAL LAW ⟹81—POLICE POWER—GENERAL WELFARE.
   The police power includes laws intended to promote public prosperity and general welfare.

8. CONSTITUTIONAL LAW ⟹70(3)—WISDOM OF STATUTE—DEFECT.
   In determining the constitutionality of a statute, the courts are not concerned with the legislative policy or the statute's wisdom or folly, since these considerations belong exclusively to the Legislature.

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

9. CONSTITUTIONAL LAW ⚿283—FOURTEENTH AMENDMENT—NORTH DAKOTA STATUTE.
North Dakota constitutional amendments and statutes authorizing payment of public funds and bond issues, to enable the state to engage in various business enterprises, *held* not to deprive taxpayers of their property without due process of law, in violation of Fourteenth Amendment to the federal Constitution, and a bill so alleging does not state a case arising under the federal Constitution, so as to confer jurisdiction on a federal District Court.

10. CONSTITUTIONAL LAW ⚿48—STATE STATUTES—DOUBT.
State constitutional amendments alleged to violate the Fourteenth Amendment to the federal Constitution will be sustained, if the court is in doubt regarding their validity, for it is only where legislation is palpably unconstitutional that a court is justified in nullifying it.

In Equity. Suit by John W. Scott and others, on behalf of themselves and all other taxpayers of the state of North Dakota, against Lynn J. Frazier, William Langer, and John N. Hagen, acting and pretending to act as the Industrial Commission of North Dakota, and others. Bill dismissed.

N. C. Young, J. S. Watson, and E. T. Conmy, all of Fargo, N. D., and Tracy R. Bangs, Phillip R. Bangs, C. J. Murphy, and T. A. Toner, all of Grand Forks, N. D., for plaintiffs.

Wm. Lemke, of Fargo, N. D., and Frederick A. Pike, of St. Paul, Minn., for Industrial Commission of North Dakota.

William Langer, Atty. Gen., D. L. Nuchols, of Mandan, N. D., and W. S. Lauder, of Wahpeton, N. D., for other defendants.

AMIDON, District Judge. This is a suit in equity to restrain the defendants (a) from paying out public funds in the state treasury amounting to several hundred thousand dollars; (b) from issuing bonds of the state for a much larger amount; and (c) to have two amendments of the state Constitution and the statutes authorizing the above payments and bonds declared null and void. It is charged in the bill that the payments are to be made, and the bonds issued, for private, as distinguished from public, purposes; that they will result in creating debts which can only be paid by taxes upon the property of the citizens of the state.

The plaintiffs are 42 taxpayers, and bring this suit on behalf of themselves and all other taxpayers. They are all citizens and residents of the state of North Dakota. This is also true of the defendants, so jurisdiction cannot be rested on diversity of citizenship.

The jurisdiction of this court is based upon two facts: First, that the amount in controversy exceeds the sum or value of $3,000; and, second, that the suit arises under the Fourteenth Amendment of the federal Constitution. A case showing both these features must be made out by the bill; otherwise, the court is without jurisdiction, and the motion of defendants to dismiss should be granted.

Plaintiffs rest their claim of the first element of jurisdiction, namely, that the amount in controversy exceeds the sum or value of $3,000, upon two grounds:

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

[1] 1. They assert that the suit is brought on behalf of the state to protect it against the unconstitutional use of its funds, and an unconstitutional issue of bonds. That being the nature of the suit, it is claimed that the entire fund is the amount in controversy, and not the right or possible damage of the plaintiffs. This theory presupposes that the state has rights that are protected by the Fourteenth Amendment. If it has no such rights, plaintiffs have no standing in this court as its representatives and must stand on their own feet. Has the state, then, any rights under the Fourteenth Amendment? That question must be answered in the negative. The amendment protects only the rights of "persons." This term has been enlarged by judicial interpretation so as to cover private corporations. It does not embrace public corporations, much less the state. Its language is:

"Nor shall any state deprive *any person* of life, liberty, or property, without due process of law, nor deny to *any person* within its jurisdiction the equal protection of the laws."

It would be a perversion of language to say this language protects the state against acts of the state. It protects persons only, a term which embraces private corporations, but not public corporations or states. It follows, therefore, that plaintiffs, while they assert rights under the Fourteenth Amendment, cannot assert rights of the state because it has no rights that are protected by that amendment. It necessarily results that plaintiffs in this suit represent only themselves.

[2] 2. Plaintiffs assert that in suits to restrain an unconstitutional use of public funds, or issue of bonds, or levy of tax, the amount of the funds or of the bonds or of the tax is the measure of the "amount" in controversy and not the injury to plaintiffs. There is some language in the cases which supports that view. It is, however, at variance with the decision of the Supreme Court in Colvin v. Jacksonville, 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053, and with the uniform practice in federal courts since that decision has become known to the profession. That was a taxpayers' suit. It was brought to restrain a threatened issue of bonds for $1,000,000. It was proven that the amount of taxes which would be levied on plaintiff's property in case the bonds were issued would be less than $2,000, the amount then necessary to confer jurisdiction, and the trial court dismissed the bill for want of jurisdiction. Plaintiff insisted that the amount of the bond issue, and not his tax liability, was "the amount in controversy," and at his instance the court certified the question of jurisdiction to the Supreme Court. Any one who will read the certificate as set forth at page 458 of 158 U. S., 15 Sup. Ct. 866 (39 L. Ed. 1053), in the report, will see that the exact question involved under this heading of the present case was there presented to the Supreme Court. In deciding it, the court says, at page 460 of 158 U. S., at page 867 of 15 Sup. Ct. (39 L. Ed. 1053):

"This leaves the only question to be considered whether the amount of the interest of complainant, and not the entire issue of bonds, was the amount in controversy, and, in respect of that, we have no doubt the ruling of the Circuit Court was correct."

The court then examines Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987, which was cited to me by counsel for the plaintiffs, and then orders decree affirming the decision of the lower court. It is plain, therefore, that the court there regarded Brown v. Trousdale as in harmony with the decision which it was rendering, or that its language ought to be qualified so as to bring it into harmony.

The case of Colvin v. Jacksonville, supra, is not referred to by the Circuit Court of Appeals of this circuit in its opinion in City of Ottumwa v. City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604. Plaintiff's interest in the Ottumwa Case was sufficient to confer jurisdiction, so the language in the second paragraph of the opinion on page 318 of 119 Fed., 56 C. C. A. 219 (59 L. R. A. 604), was obiter, and, as it is in direct conflict with the decision in the Colvin Case, must be treated as an erroneous statement of the law.

Colvin v. Jacksonville has never been qualified or criticized by the Supreme Court or any Circuit Court of Appeals. From the date of that decision to the present time it has been the uniform practice in taxpayers' suits to restrain an issue of bonds, or a levy of taxes, to show that plaintiffs' threatened damage was sufficient to confer jurisdiction. The latest decision on the subject is Greene v. Louisville & Interurban Railroad Co., 244 U. S. 499–508, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88. See, also, Orleans-Kenner Electric Ry. Co. v. Dunbar, 218 Fed. 344, 134 C. C. A. 152, Cowell v. City Water Supply Co., 121 Fed. 53, 57 C. C. A. 393, and Risley v. Utica (C. C.) 168 Fed. 737.

In suits to enjoin a threatened tax levy, and that is the nature of the suit here, in all its aspects, the authorities are uniform that the individual plaintiffs must each have an interest in the amount of $3,000, and that several plaintiffs cannot aggregate their interests for the purpose of making up the $3,000. Wheless v. City of St. Louis (C. C.) 96 Fed. 865; same case, 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583; Rogers v. Hennepin Co., 239 U. S. 621, 36 Sup. Ct. 217, 60 L. Ed. 469.

How, then, are the numerous cases referred to in Dillon on Municipal Corporations (5th Ed.) section 1579 et seq., and cited to the court in argument, to be explained? That is not difficult. None of them asserts rights under the Fourteenth Amendment. They all involve cases in which cities were attempting to levy taxes or issue bonds in violation of state laws or state Constitutions. With the exceptions presently to be mentioned, the cases all arose in state courts. There it is not necessary for a plaintiff to show any particular amount as the basis of jurisdiction. Taxpayers may sue in the state courts, and claim the protection of the Fourteenth Amendment, without showing that they have a personal interest amounting to $3,000. The only object of the averment that they are taxpayers is simply to show that they are not intermeddlers. If the state courts deny relief to taxpayers, thus asserting rights under the Fourteenth Amendment, a writ of error to the Supreme Court of the United States will lie to review the decision. This distinction must be kept constantly in mind in exam-

ing decisions of the Supreme Court: Was the case brought before that court by writ of error from the highest court of the state, or by writ of error or appeal to review the decisions of a federal Circuit or District Court? In one case the amount involved is immaterial, and in the other it is controlling.

It remains to notice two cases which are relied on by plaintiffs. The first is Crampton v. Zabriskie, 101 U. S. 601, 25 L. Ed. 1070. That involved an issue of bonds by the county of Hudson in the state of New Jersey for several hundred thousand dollars. The bonds were illegal because no provision for their payment by tax levy was made as the law required. On certiorari to the board issuing the bonds, a judgment was entered by the Supreme Court of the state, declaring them void. Notwithstanding this judgment, the bonds were issued to the plaintiff, Crampton. He then brought an action at law to collect the bonds in the federal court. Jurisdiction of this action was based upon diversity of citizenship and the complaint showed the requisite jurisdictional averment. Zabriskie and two other resident taxpayers of the county thereupon filed a bill of complaint on the equity side of the federal court, praying that the bonds be declared void and be delivered up, and that the board be ordered to reconvey the property to Crampton, and that he be enjoined from prosecuting the action at law or parting with the bonds in any other way than by surrendering them to the board. This bill was, of course, ancillary, and jurisdiction of the federal court to entertain it rested upon its jurisdiction over the action brought by Crampton. Such being the nature of the suit, two facts are clear: First, that the taxpayers' rights were based on a violation of state law, and not on the Fourteenth Amendment; second, that jurisdiction of the court was based on the original action brought by Crampton, and the complaint in that clearly showed a right in the plaintiff sufficient to confer jurisdiction. What the court says in the passage quoted by counsel about the right of taxpayers to maintain a suit in equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt, is addressed to the question whether taxpayers have a right to maintain such a suit to protect their own interests, and has nothing to do with the question for which the quotation was cited in argument here, namely, the right of taxpayers to assert rights of the state, or of a city. Mr. Justice Field in the language used, is answering the contention that a taxpayer under no circumstances can maintain such a suit. Such is the holding of the courts of New York and several other state courts. Dillon on Municipal Corporations (5th Ed.) section 1585.

The other case cited by plaintiffs here is Davenport v. Buffington, 97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377. That came before the Circuit Court of Appeals of this circuit on appeal from the Supreme Court of Indian Territory. It involved, therefore, no question of jurisdiction of the trial court, as a federal court, depending upon a showing that the plaintiff had a right of the value of $3,000. The suit was brought by taxpayers to prevent the use of property which had been given to a city for a park for other purposes. The taxpayers filed their bill to enforce this trust. No right is asserted under the

Fourteenth Amendment. The passage quoted simply goes to the general question of the right of taxpayers to maintain suits in equity to prevent a misuse of property or funds belonging to a city.

It may be doubted whether taxpayers may maintain a suit against state officers to vindicate alleged rights of a state. I have been unable to find any authority that would support such a doctrine. Such suits have been confined to actions against municipal officers to vindicate the rights of cities. Such are all the cases cited by Judge Dillon in his work on Municipal Corporations, section 1579. The reasons which permit such suits in the case of municipal corporations have no application to states. Municipal corporations exist under special charters and have only such powers of taxation as are specifically conferred upon them. They have many of the qualities of a private corporation, and the right to maintain taxpayers' suits has been rested upon the same ground as the right of stockholders to maintain similar suits in behalf of a private corporation. States are not municipal corporations. Their powers are not defined by charter. They possess all powers except as they are limited by the state and federal Constitutions. This is especially true of their power to tax. The power to maintain taxpayers' suits even against municipal officers has been denied by the courts of New York, Massachusetts, and several other states. Dillon, § 1585 et seq. I can find no justification for extending the doctrines to actions against state officers.

From this examination, the conclusion necessarily follows that plaintiffs must show a personal interest amounting to $3,000 in order to give this court jurisdiction, and as no such showing is made in the present bill, the jurisdiction of the court as a federal court fails.

The other jurisdictional element presents the question whether the bill shows a case arising under the Fourteenth Amendment. That depends on whether the purpose for which the laws here assailed seek to use the taxing power is private or public. When a state enters a new field of taxation, as North Dakota has in these laws, that question is always raised. It was urged against laws to establish public schools, and publicly owned water, gas and electric plants, with the same vehemence as it is now urged against the present laws. The line of legislative power has been steadily advanced as society has come to believe increasingly that its welfare can best be promoted by public as distinguished from private ownership of certain business enterprises. Laws which at one time were held invalid, have at a later period been sustained by the same court. No judge can investigate judicial decisions rendered during the past 10 years without being impressed with the rapid extension of state activity into fields that were formerly private. The twilight zone that separates here permissible from forbidden state action is broad. Business which will seem to one court to be public will seem to another to be private. The decisions on the subject are cited and analyzed by the Supreme Court of Louisiana in the recent case of Union Ice & Coal Co. v. Huston, 135 La. 898, 66 South. 262, L. R. A. 1915B, 859, Ann. Cas. 1916C, 1274. See, also, 27 Yale Law Journal, 824-835, for a scholarly examination of the subject.

McQuillin on Municipal Corporations, section 1809, and the fifth edition of Dillon on Municipal Corporations, volume 3, section 1292, which contain the last word of text-writers on the subject, solemnly inform us that cities cannot be authorized to establish publicly owned coal and wood yards, because that would be using the taxing power for a private purpose. The next edition of these works will strike out this language and inform us that such yards are permissible, because they are for a public purpose and are publicly owned, citing Jones v. Portland, 245 U. S. 217, 38 Sup. Ct. 112, 62 L. Ed. 252, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660. Thus "can" succeeds "can't" in this field of law so rapidly that one can hardly tell which word he is looking at.

What may be done by the state to protect its people and promote their welfare cannot be declared by a priori reasoning. New evils arise as the result of changing conditions. If the state remains static, while the evils that afflict society are changing and dynamic, the state soon becomes wholly inadequate to protect the public. The state must be as free to change its remedies as the evils that cause human suffering are to change their forms. Merrick v. Halsey Co., 242 U. S. 568–588, 37 Sup. Ct. 227, 61 L. Ed. 498.

There are a few great landmarks by which to determine whether laws authorizing taxation are for a public or a private purpose. We shall find our way best by first looking at them.

[3, 4] 1. The power of taxation is legislative. The right of the people to determine the amount and purpose for which taxes may be levied has for centuries in this country and in England been regarded as the peculiar prerogative of the representatives of the people in their legislative bodies. As Marshall said in McCulloch v. Maryland, 4 Wheat. 316, 428 (4 L. Ed. 579):

> "The only security against the abuse of the power is found in the structure of the government itself. In imposing a tax the Legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of the government cannot be limited they prescribe no limits to the exercise of this right, resting confidently on the interests of the Legislature, and on the influence of the constitutents over their representatives, to guard them against its abuse."

This language has been qualified by later decisions of the Supreme Court holding that a tax must be for a public purpose or it is a deprivation of property without due process of law, and that the final decision of whether a tax is for a public purpose is for the courts, and not the Legislature. It is nevertheless true that the presumption that a law is constitutional is applied with unusual force in favor of laws passed in the exercise of the power of taxation. The power of taxation lies in a field of even broader legislative discretion than the "police power" under which constitutional questions have been most frequently raised.

[5, 6] 2. This presumption in favor of laws imposing taxes is, as Judge Cooley says, in his work on Taxation (3d Edition, page 185) "applicable with peculiar force to the case of a legislative decision

upon the *purpose* for which a tax may be laid. For in the first place there is no such thing as drawing a clear and definite line of distinction between purposes of a public and those of a private nature. Public and private interests are so commingled in many cases that it is difficult to determine which predominates; and the question whether the public interest is so distinct and clear as to justify taxation is found embarrassing to the Legislature, and no less so to the judiciary. * * * To justify the court in declaring the tax void, the absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable—so clear and palpable as to be perceivable by every mind at first blush."

3. "Limitations or restrictions upon the exercise of this essential power of sovereignty can never be raised *by implication*, but the intention to impose them must be expressed in clear and unambiguous language." Cooley on Taxation, page 177. What constitutes a public purpose will vary in different communities and different periods. Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 117 Sup. Ct. 56, 41 L. Ed. 369; Clark v. Nash, 198 U. S. 362, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; O'Neill v. Leamer, 239 U. S. 244, 253, 36 Sup. Ct. 54, 60 L. Ed. 249; Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487.

4. The Fourteenth Amendment contains no express language limiting the taxing power of states. Laws have been condemned by holding that a tax for a purely private purpose deprives the taxpayer of his property without due process of law. When is a tax for a "purely private purpose" within this rule?

(a) The only cases in the federal courts in which laws have been condemned are those in which bonds or public funds were given as a mere gratuity to a *privately owned manufacturing enterprise* to encourage its establishment within the city. Such are the cases cited by counsel for plaintiff. Loan Association v. Topeka, 20 Wall. 655, 22 L. Ed. 455; City of Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; Cole v. City of La Grange, 113 U. S. 1, 5 Sup. Ct. 416, 28 L. Ed. 896; Dodge v. Mission Township, 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242.

(b) I have not been able to discover any instance in which the Supreme Court has held invalid an exercise of the taxing power of the state for establishing and maintaining an industry *which was owned by the state or a municipality*. Such is the character of all the laws here assailed. The industries are to be owned by the state or cities. The latest expression of the Supreme Court on the subject is Jones v. City of Portland, 245 U. S. 217, 38 Sup. Ct. 112, 62 L. Ed. 252, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660, sustaining a statute of the state of Maine authorizing cities to establish and maintain wood, coal, and fuel yards for the purpose of selling at cost wood, coal, and fuel to their inhabitants. This decision is the more impressive because a similar law had been held invalid by the Supreme Court of Massachusetts and by some other state courts.

(c) The leading authority in this country declaring a statute un-

constitutional because it authorized taxation for private purposes is Lowell v. City of Boston, 111 Mass. 454, 15 Am. Rep. 39. That case involved an issue of bonds to aid in the rebuilding of the portion of Boston that was destroyed in the great fire of November, 1872. The statute authorized the city to issue its bonds for $20,000,000 and out of the fund arising from their sale make loans to parties upon mortgages to aid in restoring the part of the city that had been destroyed. John A. Lowell and nine other taxable inhabitants brought suit to restrain the issuance of the bonds on the ground that the statute was unconstitutional. The Constitution of Massachusetts (part 1, art. 10), like the Fourteenth Amendment of the federal Constitution protects every individual "in the enjoyment of his life, liberty, and property, according to standing laws." The statute was held to violate this provision. The court decided that, however much the public welfare may be promoted by the use of the taxing power, if the *direct* benefits are to the individuals receiving the money and the public benefits are only *indirect*, the use of the taxing power is invalid. It is a striking illustration of the inconsistency of judicial reasoning that at this very time the courts all over the country were sustaining laws authorizing railroad aid bonds amounting to many millions which were given to the private owners of railroads, and the bonds were justified by the courts solely upon the ground that the public received an *indirect* benefit from the building of the railroads.

Returning, now, to Lowell v. Boston. It was decided in 1873, and has been a precedent for many decisions in Massachusetts and in other states condemning uses of the taxing power which were deemed to be for the public welfare. In 1917 the state held a constitutional convention. Its first action was to adopt an amendment sweeping away this decision. In a convention characterized by the conservatism of Massachusetts, the amendment was carried by a vote of 275 to 25, and was adopted by a popular vote of 261,138 to 52,437. This was the first time that the reasoning of Lowell v. Boston was brought to the judgment bar of the people of the state. That decision had stood for more than half a century as an authority supporting scores of decisions nullifying laws to correct evils from which men, women, and children were suffering and furnishing reasons to even more Congresses, Legislatures, and city councils why other laws should not be passed to correct such evils. And now that the real supreme tribunal of Massachusetts, the people of that commonwealth, has swept all these judicial precedents away in that state, what do we say has happened? This:

"The court was right all the time; but the people have now amended their Constitution and granted the Legislature power to do what the court said they could not do before, and so the Legislature may hereafter enact needed laws."

But does that state the whole truth? I think not. Is it not more true to say that the people of Massachusetts have corrected, if not rebuked, the judges of their Supreme Judicial Court. Have they not really said to their judges:

"You have been wrong all this half century. We never intended those general words in the Constitution to mean what you have been saying they

mean, and we wish you would not use them any more to protect practices that have been proven to be economically, morally, and legally unsound (Ives v. South Buffalo Railway Co., 201 N. Y. 271-287, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156), and nullify laws passed for their correction."

Is not that the real interpretation of what has happened, not only in Massachusetts, but in the adoption in nearly every state in the Union, during the last 15 years, of constitutional amendments to correct decisions made under the general provisions which forbid a deprivation of life, liberty, and property without due process of law?

(d) No court has been so insistent and emphatic as the Supreme Court of the United States against the abuse of the power to declare laws unconstitutional under the general language of the Fourteenth Amendment.

[7] (1) It has restated the scope of the police power. Prior to 1885 that power was restricted by American courts to the public safety, health, and morals. The Supreme Court holds that it embraces also laws intended to promote public prosperity and general welfare. C., B. & Q. Ry. Co. v. Drainage Board, 200 U. S. 561-592, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; Chicago & Alton Railway Co. v. Trambarger, 238 U. S. 67-77, 35 Sup. Ct. 678, 59 L. Ed. 1204.

[8] (2) The courts may not concern themselves with the policy of legislation, or its economic wisdom or folly. Those are considerations belonging exclusively to the Legislature. C., B. & Q. Ry. Co. v. McGuire, 219 U. S. 549-569, 31 Sup. Ct. 259, 55 L. Ed. 328; Price v. Illinois, 238 U. S. 446, 451, 452, 35 Sup. Ct. 892, 59 L. Ed. 1400; Rast v. Van Deman & Lewis, 240 U. S. 342, 357, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Merrick v. Halsey, 242 U. S. 568, 586-588, 37 Sup. Ct. 227, 61 L. Ed. 498.

(3) A law cannot be set aside "because the judiciary may be of the opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government." McLean v. City of Arkansas, 211 U. S. 539, 547, 548, 29 Sup. Ct. 206, 53 L. Ed. 315; Tanner v. Little, 240 U. S. 369-386, 36 Sup. Ct. 379, 60 L. Ed. 691.

[9, 10] In the light of these established doctrines, let us look at some of the general facts that condition this case.

The people of North Dakota are farmers, many of them pioneers. Their life has been intensely individual. They have never been combined in corporate or other business organizations, to train them in their common interests or promote their general welfare. In the main they have made their purchases and sold their products as individuals. Nearly all their live stock and grain is shipped to terminal markets at St. Paul, Minneapolis, and Duluth. There these products pass into the hands of large commission houses, elevator and milling companies, and live stock concerns. These interests are combined, not only in corporations, chambers of commerce, boards of trade, and interlocking directorates, but in the millions of understandings which arise among men having common interests and living through long terms of years in the daily intercourse of great cities. These common understandings need not be embodied in articles of incorporation or

trust agreements. They may be as intangible as the ancient "powers of the air." But they are as potent in the economic world as those ancient powers were thought to be in the affairs of men. It is the potency of this unity of life of men dwelling together in daily intercourse that has caused all nations thus far to be governed by cities.

As North Dakota has become more thickly settled and the means of intercourse have increased, the evils of the existing marketing system have been better understood. No single factor has contributed as much to that result as the scientific investigation of the state's Agricultural College and the federal experts connected with that institution. That work has been going on for a generation, and has been carried to the homes of the state by extension workers, the press, and the political discussion of repeated political campaigns. The people have thus come to believe that the evils of the existing system consist, not merely in the grading of grain, its weighing, its dockage, the price paid and the disparity between the price of different grades and the flour-producing capacity of the grain. They believe that the evil goes deeper; that the whole system of shipping the raw materials of North Dakota to these foreign terminals is wasteful and hostile to the best interests of the state. They say in substance:

(1) The raw materials of the state ought to be manufactured into commercial products within the state. In no other way can its industrial life be sufficiently diversified to attain a healthy economic development.

(2) The present system prevents diversified farming. The only way that can be built up is to grind the grain in the state which the state produces—keep the by-products of bran and shorts here, and feed them to live stock upon the farms of the state. In no other way can a prosperous live stock, dairy, and poultry industry be built up.

(3) The existing marketing system tends directly to the exhaustion of soil fertility. In no way can soil depletion be prevented, except to feed out to live stock at least as much of the by-products of the grain raised upon the state's farms as that grain produces when ground, and thus put back into the soil, in the form of enriched manures, the elements which the raising of small grains takes from it.

The present movement began at least as far back as 1911. In that year an amendment of the state Constitution was initiated, authorizing the state to acquire one or more terminal grain elevators and maintain and operate the same in such manner as the legislative assembly should prescribe. That amendment was adopted in 1913. From that time forward the discussion of the subject of marketing the products of the state has been the main theme of public thought. The movement has gone straight forward, the Constitution has been repeatedly amended, including the amendments here assailed—all having for their object the correction of the existing system of marketing the state's products. Year by year the conviction has deepened, in steadily increasing majorities, that public ownership of terminal elevators, mills, and packing houses is the only effective remedy to correct the evils from which they believe themselves to be suffering. Their decision is not a popular whim, but a deliberate conviction, arrived at as a

result of full discussion and repeated presentations of the subject at the polls. The acts which the court is asked to restrain are not those of public officials, who are pursuing enterprises of their own devising. Those acts express not simply the judgment of the state Legislature. To authorize their enactment the people of the state have redrawn their Constitution. That is the highest and most deliberate act of a free people. These constitutional amendments authorize and direct the state to do what the defendants are threatening to do. Their acts are simply the carrying out of the mandate of those constitutional amendments.

It is hopeless to expect a population consisting of farmers scattered over a vast territory as the people of this state are to create any private business system that will change the system now existing. The only means through which the people of the state have had any experience in joint action is their state government. If they may not use that as the common agency through which to combine their capital and carry on such basic industries as elevators, mills, and packing houses, and so fit their products for market and market the same, they must continue to deal as individuals with the vast combinations of these terminal cities, and suffer the injustices that always exist where economic units so different in power have to deal the one with the other.

The foregoing is what a majority of the people of the state have been persuaded to believe by those whose leadership they trust. Whether their grievances are real or fancied, whether their remedies are wise or foolish, are subjects about which the court is not concerned. The only object in trying to set them forth has been to place the constitutional amendments and laws here assailed in their true relationship to the life and thought of the people by whom they were adopted.

The sole question, then, for the court is: Do these acts of the state constitute a violation of the Fourteenth Amendment of the federal Constitution, as that amendment has been construed by the Supreme Court. I think it is clear that they do not. Even if I were in doubt, it would be my duty to sustain the action of the state, for it is only when legislation is plainly and palpably unconstitutional that a court is justified in nullifying it.

The motion of the defendants will therefore be granted, and a decree entered dismissing the bill, with costs.

FAIRVIEW FLUORSPAR & LEAD CO. v. BETHLEHEM STEEL CO.

(District Court, E. D. Pennsylvania. June 16, 1919.)

No. 6048.

1. REMOVAL OF CAUSES ⚿1—DEFENDANT'S RIGHT TO REMOVAL—ACTS OF CONGRESS—JURISDICTION OF FEDERAL DISTRICT COURT.
   Right of defendant in an action begun in state court to have the cause removed to the federal court, depends on some act of Congress.
2. COURTS ⚿274—FEDERAL COURTS—JURISDICTION—CITIZENS OF DIFFERENT STATES.
   Where plaintiff corporation is a resident of the Eastern district of Illinois, and defendant of the Eastern district of Pennsylvania, the action could have been brought only in the United States District Courts of such districts, unless the defendant waived its privilege.
3. REMOVAL OF CAUSES ⚿14—DIVERSITY OF CITIZENSHIP—ACTION BROUGHT IN A STATE WHERE NEITHER WAS RESIDENT.
   Where a resident of one state had a cause of action against a resident of another state, and brought the action in a court of a third state by property attachment, the nonresident defendant could not secure removal under Judicial Code, § 28 (Comp. St. § 1010), to the federal court of the residence district of either the plaintiff or the defendant, which alone had jurisdiction, since section 29 (section 1011) requires the removal to be to a federal court sitting in the same state as that of the state court, which federal court is without jurisdiction.

At Law. Action by the Fairview Fluorspar & Lead Company, a corporation domiciled in Illinois, begun by attachment in the circuit court of the city of St. Louis, Mo., against the Bethlehem Steel Company, a corporation domiciled in Philadelphia, removed to the United States District Court of the Eastern District of Pennsylvania. On motion to remand. Motion allowed.

J. M. Blayney, Jr., and Walter H. Saunders, both of St. Louis, Mo., and Jos. S. Clark, of Philadelphia, Pa., for plaintiff.
Ralph B. Evans, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The very point in controversy in this case has been ruled in adjudged cases, the number of which is so large as to forbid even citation. We are unable, however, to follow these rulings as our guide, inasmuch as they lead, some of them in one direction, and others in the opposite. The larger number support the contention of the plaintiff, but the number which support the defendant is so respectable that the majority cannot be found to have the weight of authority. We must in consequence perforce align ourselves with those with whose views we find ourselves in accord. Ostrom v. Edison (D. C.) 244 Fed. 228 (Judge Rellstab), and Park Square v. American (D. C.) 222 Fed. 979 (Judge Ray), may be cited as representative of these opposing views. All the practical purposes of a ruling might be met by the simple announcement of our adherence to the one line of cases or the other.

It is, however, the due of the very capable counsel, who have argued the question with helpful thoroughness and fullness, that the reasons

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

should be stated which lead to the conclusion reached, and the discussion may, in some degree, lighten the labors of the court which alone can pronounce judgment with an authoritative voice. The whole field of discussion has been so fully covered by the opinions already rendered, and all phases of the question presented so fully considered, that we enter upon the field with no hope of adding anything of value to the discussion.

The plaintiff is a resident of Illinois, and the defendant of Pennsylvania, but the suit was brought in the circuit court of St. Louis, a state court of Missouri. The process was by writ of foreign attachment, served upon residents of the latter state, who were summoned as garnishees. The defendant applied for a removal to this court, in which the state court acquiesced by transmitting a copy of the record. The plaintiff then moved to remand. This is based upon the proposition that this court is without authority or jurisdiction to adjudge the case, because the cause was not removable to this court, and incidentally is or may not be removable at all.

This statement presents the question for decision. We have confined it to the sole question of jurisdiction or removability, for the reason that sometimes there is a difference in the attitude of the federal courts, born of the fact of whether the state court retains or relinquishes jurisdiction. The state court here is not asserting jurisdiction, but the distinction is of no importance.

[1] In order to have a beginning, we start with the proposition that the plaintiff, having a cause of action, had the right to bring the suit in any state court which had jurisdiction of the subject-matter and of the parties. The Missouri court has such jurisdiction, and no question is raised but that the action was there properly brought. The defendant, however, has no right to have the cause removed unless the right is given it by some act of Congress, and no right to have the cause removed to this court unless it is a court designated by the act of Congress for this purpose. If the plaintiff, instead of choosing to bring its action in the Missouri court, wished to bring it in a court of the United States, it could not do so unless it was given this right by the Constitution and laws of the United States, and the suit, if brought, must be brought in that court which was designated by some act of Congress as a court in which the action might be brought.

The question of the court in which such an action was required to be brought is of importance, as will hereafter appear, in the present inquiry, and might as well be faced now. The judicial power is vested by the Constitution in the Supreme Court and in such inferior courts as Congress may ordain and establish. Congress has established the present system of District Courts, and has defined their powers and jurisdiction. They have such powers as are thus conferred upon them and no more. The Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087), following the provisions of the Constitution, gives to the District Courts jurisdiction in cases arising under the Constitution and laws of the United States, etc., and, along with other controversies, some of those between citizens of different states.

It is admitted that the instant case was one within the grant of this general jurisdiction, but on the sole ground of diversity of citizenship.

[2] This brings us to the question of by what court this jurisdiction could be asserted. One provision of the Code makes the defendant in an action in a District Court suable only in the territorial jurisdiction of which he was a resident. Another section, however, makes him suable in the home jurisdiction of either the plaintiff or defendant. The present case might, under this section (as is conceded), have been brought in the Eastern district of Illinois or the like district of Pennsylvania. We think it further follows (although this is not admitted) that, unless the defendant waived its privilege, the suit could have been brought in no other district. At all events, we have so concluded, for the reasons later stated. The conclusion reached is now stated by way of anticipation.

[3] Resuming the following of the line of thought which we interrupted in order to find in what court the action might have been brought, if it had been originally begun in a court of the United States, we come next to the question of the removal of actions begun in the state courts. We have the principle, before stated, that there is no right of removal except as conferred by some act of Congress, and that the right, if granted, must be asserted and exercised in the mode and manner indicated by Congress. It is also clear that there is neither a logical nor any practical necessity to permit a cause to be removed to a court of the United States merely because it might have been brought there in the first instance. Of course, it is true that, in order to remove a cause to a court, that court must be given jurisdiction to try it, and because of the conformity and other like statutes, later referred to, there is a very great practical convenience in having the United States court, to which a cause is removed, be a court sitting in the same state as that of the state court in which the action was first brought.

We may here again pause to refer to these statutes, as they have some bearing upon the question before us. In giving to the District Courts jurisdiction to try certain cases (for instance, those between private parties who were citizens of different states), Congress had in mind that the state courts would, at the same time, be trying other like cases, and it was, of course, of practical importance that the same law be administered, and that so far as practicable the cases be tried in the same general way. Out of this consideration grew the conformity statutes, and the power given the United States courts to assimilate execution and other like process to that of the state courts. Aside from considerations of the kind referred to, there need be no relation between the right to sue in and the right to remove a suit to a court of the United States.

Congress, by the twenty-eighth section of the Judicial Code (Comp. St. § 1010), granted the right to remove actions from the state courts, limiting the right, however, to nonresident defendants, and requiring that the court to which the action was removed should be a court in which it might originally have been brought.

Applying the provisions of the acts of Congress (so far as we have

thus far quoted them) to the present fact situation, we have this result. The defendant, being a nonresident of Missouri, was within the verbiage of the grant of the right of removal; but the cause must be removed to either the Illinois or this district, because the action must have been brought in one of these courts, if brought in a United States court. The twenty-ninth section of the act (Comp. St. § 1011), however, provides that the removal must be to a court sitting in the same state as that of the state court.

The draftsman of the act neither intended nor had in mind a conflict of definition in the designation of the proper court by the twenty-eighth and twenty-ninth sections, respectively. The twenty-eighth section indicates the proper court to be that court of the United States in which the action, if first brought in a court of the United States, would have been brought. Under the facts of the case before us, this would have been the District Court for the Eastern District of Illinois or this court, because the action might have been brought by the plaintiff in either. Had the action been brought in a state court of the domicile of the plaintiff, no difficulty in determining the proper federal court to which it was removable would have been encountered. The twenty-eighth section would permit the cause to be removed to the home court of the plaintiff. The twenty-ninth section would require the cause to be removed to the same court.

There would have been no conflict between the two sections, because the proper court of the one would have been the proper court of the other. It may have been, and perhaps was, true that the present situation was not anticipated, because it did not occur to any one that, although the action, if brought in a federal court, must be brought either in the Illinois court or this court, if it was brought in a state court, it might be brought in Missouri, the residence neither of the plaintiff nor of the defendant.

This latter fact situation presents the dilemma that, if the cause is removed, we cannot obey the command of the twenty-eighth section without disobeying that of the twenty-ninth. The question presented is, What are we to do? In the first place, we cannot assume Congress did not have in contemplation all possible fact situations. We must conclude that it legislated this very case. What, then, was its will? We find this from what it has done. It has provided for the bringing of actions in the federal courts and designated the court in which suits may be brought. It has provided for the removal of causes from the state courts, and designated the courts to which such causes may be removed. There is, as before stated, no logical necessity to designate the same courts. There is a very great practical convenience, if not necessity, in having them the same. There is, however, neither logical necessity for nor practical convenience in the requirement that every case which may be brought in a federal court should be removable from a state court, if suit is instituted there. Take the fact situation here presented. A resident of one state has a cause of action against a resident of another state and desires to bring an action therefor in still a third state. If the suit be brought in a federal court, it must be brought in the first or second state (unless in excepted cases

or defendant waives his privilege), because Congress has made no provision for bringing it in the third state. It may, however, be brought in a state court of any one of the three states, provided only that process, either in personam or in rem, can be there served. If the action is so brought, and the defendant wishes to have it tried in a federal court, he has, as before observed, no rights in the premises beyond those which the acts of Congress on the subject of the removal of actions give him. Congress may limit them as it deems proper. We know that it has limited them, because, if the action is brought in a state court of the first state, the action can be removed; if it is brought in the second state, it cannot. The reason for making this difference is obvious.

What has Congress provided, however, in case the action is brought in the third state? If the answer is that Congress has made no provision for a case of this kind, the action cannot be removed. It may be observed that the same reason for denying the right of removal exists as in the other case, and the provision that a defendant, sued in a state of which he is a nonresident, is the only defendant who, in any case, has the right to remove, is not necessarily in conflict with this construction.

If this be the proper construction of the acts of Congress, and the effect of the legislation on the subject, no difficulties are encountered either in harmonizing the different provisions of any of the legislation on the subject of conferring jurisdiction or the subject of removals, nor in regulating the practice under either, and all the legislation is consistent. The accomplishment of this desired result is a recognized canon in the construction of statutes. This means the granting of the motion to remand. Why should not this construction be adopted? The answer made (and it is the only answer which could be made) is that the adjudged cases have ruled otherwise.

This takes us to the cases on the subject. It is perhaps proper to state that the above conclusion was suggested by a pure view of the acts of Congress, and independently reached without the aid of the reasoning of the reported cases. Let us see how far the result reached is in accord with the decided cases, and confirmed or corrected by them.

The case upon which much attention is fastened is that of Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. As the inquiry is what this case decides, the facts of the case are of prime importance. It is a coincidence that Wisner, a resident citizen of Michigan, brought an action in the same Missouri court in which the present action was brought. The defendant was a citizen and resident of Louisiana. The process was by writ of attachment, but whether this means what is known to the practice in Pennsylvania as foreign attachment (which we understand the instant case to be), or simply in personam process, with a clause of attachment, such as is the practice in some states, we do not know, nor does the difference seem to be of importance.

The defendant filed a petition for removal to the United States court in the Missouri district. The application was based upon the

fact of diversity of citizenship. The state court surrendered jurisdiction, and the plaintiff moved to remand, basing his application in turn upon the proposition that the United States court did not have jurisdiction. This was because the action could not in the first instance be there brought. The ruling made was that the cause should be remanded. The ground of the ruling was that the United States court had no jurisdiction to adjudge the cause, for the reason above stated. This ruling, then, is decisive of the proposition that the United States court for the Missouri district cannot try the case before us, because of the provisions of the twenty-eighth section and those of the Judicial Code requiring actions brought in a United States court to be brought in the home court either of the plaintiff or defendant. It does not touch the specific question before us of whether, under the twenty-ninth section, the cause may be removed to the court of this the home district of the defendant.

What follows from the Wisner ruling, however, is that the case must go to either the Illinois court or this court, if to any, and (as these courts are on the same footing), if this court has no jurisdiction of it, there is no right of removal. The logic asked to be applied is that if the twenty-eighth section forbids the Missouri district United States court from asserting jurisdiction, by the same token the twenty-ninth section forbids any other United States court to do so.

It is true this results in a denial of the right of removal, but this is no more an obstacle in the way of reaching the indicated conclusion than would be the like denial if the action had been brought in a state court of Pennsylvania. Indeed, the right to remove is withheld in each case on the like ground, that no right to remove is given in cases in which the plaintiff secures no advantage in his choice of the forum.

Some question was raised at the argument (although not discussed in the briefs submitted) of whether the ruling made in the Wisner Case has been since modified by the Supreme Court. The only cases in which the Wisner Case has since been under consideration (beyond its mere citation), so as to be said to have been distinguished, followed, or dissented from, are In re Moore, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, and In re Winn, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873.

In the Moore Case, in the majority opinion at page 495 of 209 U. S. (28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164), and the dissenting opinion at page 512, the Wisner Case is distinguished from the Moore Case on the ground of the absence in the one and presence in the other of the fact element of waiver of the privilege of being sued in the home district of one of the parties to the suit. The authority of the Wisner Case is left clearly unimpaired upon the proposition that an objecting defendant cannot be sued in a United States court in a third district foreign to that of the plaintiff and defendant alike. The Wisner Case holds that he cannot be so sued when he has not waived his privilege, nor submitted himself by consent to the jurisdiction of the court of a third district. The Moore Case deals with cases in which there has been such waiver or consent.

The Winn Case was a removal case. The action was brought in a state court of Iowa. The home jurisdiction of the plaintiff was averred by the petition for removal to be Missouri, and the defendant was averred to be a New York joint-stock association. The cause was removed to the United States court for the Iowa district; the state court not asserting further jurisdiction. The United States court refused a motion to remand, and a petition was filed for a mandamus. The court found the defendant to be, not a corporation, but a limited partnership, the residence of whose members did not appear, and that in consequence diversity of citizenship could not be found.

It was the further fact that the removal was not based upon diversity of citizenship, but upon the ground that the suit was one arising under the laws of the United States. The court held, however, that the cause of action (as disclosed by the statement of claim) was not one based upon the laws of the United States. If those laws were involved, they came in as a basis of the defense. The court reached the final conclusion that the cause was one which could not have been brought, in the first instance, in a court of the United States, and, as a consequence, could not be removed thereto. The Wisner Case figured in the reasoning of the court as authority for the proposition involved in the final conclusion stated (203 U. S. 464, 27 Sup. Ct. 150, 51 L. Ed. 264), and in the comment made in the opinion (203 U. S. 469, 27 Sup. Ct. 150, 51 L. Ed. 264) that the Wisner Case was left untouched otherwise than as authority for the proposition that the right to set up want of jurisdiction in a particular district could under no circumstances be waived. The case must be accepted as an authority confirming the conclusion that the instant case could not have been removed to the United States court for the Missouri district.

The situation before us presents a command that we accept the two propositions, one that this cause, if first brought in a United States court, could not have been brought in the Missouri district, and the other (as diversity of citizenship is present) that it could have been brought in this district. A third proposition would seem to follow (as the Illinois district and this district are on the same footing) that, if it cannot be removed to this district, the cause is not removable at all.

The argument supporting the jurisdiction of this district is that by the twenty-eighth section of the Judicial Code diversity of citizenship confers the right of removal upon the defendant, if he be a nonresident of the state in which he is sued, provided only the cause be removed to a court in which he might have been sued in the first instance. There is here such diversity of citizenship; this defendant has been sued in the state of Missouri, of which defendant is a nonresident, and the suit might have been here brought. Why, then, may not the cause be removed to this court? The only answer to be made is that section 29 provides that the cause, if removed, must be removed to the court of the Missouri district, and this is open to the retort that, as that court has no jurisdiction, to give this effect to the twenty-ninth section is to deny the right of removal given by the twenty-eighth. The soundness of the proposition involved in the retort must be conceded, and the

result accepted. The acceptance of it has support in these (among other) considerations:

1. There is no right of removal, unless it is given by statute, and section 28, which gives, and section 29, which denies, may be read together as meaning in effect that there is no right of removal, unless the plaintiff be a resident of the state in which the suit is brought.

2. The denial is consistent with the withholding of the right, unless the defendant be a nonresident of the state in which suit is brought.

3. It is consistent with the conformity statutes.

4. The ab inconvenienti argument supports it.

5. It has support in that such a finding is in accord with the conclusions reached in a number of cases ruled by other District Courts.

This already overlong opinion leaves no room even for a tabulation of the supporting and opposing opinions. They are so numerous that they must be left to the capable hands of counsel.

As Park v. American (D. C.) 222 Fed. 979, went to the Supreme Court, a word of comment may be helpful. The District Court refused to remand, and a petition for a mandamus was filed. This the Supreme Court refused on other grounds, without expressing any opinion upon the point before us. We do not feel at liberty to assume that, although no opinion was expressed, an intimation was given counsel for their guidance, both in the choice of expressions made use of by the court and by the circumstance that, when the case was previously up on a writ of error (which could not be entertained, because the judgment was not a final one), the court allowed a rule to show cause why a writ of mandamus should not issue.

The motion to remand is allowed.

In re ARCTIC STORES.

Petition of WILLIAM SILVER & CO.

(District Court, D. New Jersey. June 17, 1919.)

1. SALES ⟹201(4)—PASSAGE OF TITLE—GOODS SOLD ON CREDIT.
   Where tomato pulp was sold on credit, title thereto passed to the purchaser on delivery of the pulp to the carrier for transportation.

2. SALES ⟹299—PASSAGE OF TITLE—STOPPAGE IN TRANSITU.
   While the right to stop delivery of goods sold on credit is predicated on the insolvency of the buyer, neither insolvency nor bankruptcy of the buyer works a rescission of the contract of sale, and an effective stoppage in transitu does not in itself annul the sale or divest the purchaser of the title to the goods, which has passed on delivery to the carrier.

3. SALES ⟹296—STOPPAGE IN TRANSITU—EFFECT OF DELIVERY—RIGHTS OF SELLER.
   When goods sold on credit and shipped by carrier reach their destination, the vendor's right to possession by stoppage in transitu is gone, his potential security is lost, and his status in relation to such goods is no different than that of a general creditor of the vendee.

4. SALES ⟹296—STOPPAGE IN TRANSITU—TERMINATION OF TRANSIT.
   Where a carload of tomato pulp is sold on credit, delivered to carrier for shipment under a bill of lading designating a certain siding, and the car-

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

rier has placed the car on such siding, the pulp has reached its destination, and the transit is at an end, so that the right of stoppage in transitu cannot thereafter be exercised.

5. SALES ⚷161—PERFORMANCE OF CONTRACT—DELIVERY.
Where a car of tomato pulp has been sold on credit, and delivered to a carrier for transportation under a bill of lading designating a certain siding on which it was to be placed, the act of placing the car on such siding by the carrier constituted complete delivery.

6. BANKRUPTCY ⚷152—TITLE OF TRUSTEE—DATE OF ADJUDICATION.
The title of a trustee in bankruptcy to the goods of the bankrupt vests by operation of law upon the trustee's appointment and qualification as of the date of adjudication, under Bankruptcy Act, § 70a (Comp. St. § 9654).

7. BANKRUPTCY ⚷101—TITLE TO PROPERTY WAITING QUALIFICATION OF TRUSTEE.
During the time intervening between an adjudication in bankruptcy and the qualification of the trustee appointed, the title to the bankrupt's property, while nominally in the name of the bankrupt, is in custodia legis, awaiting administration, and the receiver is the only person who can legally take possession of the property.

8. BANKRUPTCY ⚷152—POSSESSION OF BANKRUPT PROPERTY—RIGHT OF TRUSTEE.
Upon the appointment of a trustee in bankruptcy, the trustee's right to the possession of goods to which the bankrupt had title relates back to the time possession thereof was taken by the receiver.

9. BANKRUPTCY ⚷140(1)—STOPPAGE IN TRANSITU—POSSESSION BY RECEIVER IN BANKRUPTCY.
A receiver in bankruptcy has the right to take property sold to the bankrupt and shipped by carrier from the carrier on its arrival at destination, and such taking ends the right of stoppage in transitu.

In Bankruptcy. In the matter of Arctic Stores, bankrupt. On review of a referee's order denying the claim of William Silver & Co. to recover the value of certain goods sold by the bankrupt's receiver. Order affirmed.

Charles E. Hendrickson, Jr., of Jersey City, N. J., for petitioner William Silver & Co.
Furst & Furst, of Newark, N. J., for trustee.

RELLSTAB, District Judge. William Silver & Co., a corporation (hereinafter called the petitioner), has brought here for review the referee's order denying its petition to recover the value of a car of tomato pulp sold by the receiver of the Arctic Stores, bankrupt. The pulp was originally sold by the petitioner to the Arctic Stores on credit. From the bill of lading it appears that the car of pulp was consigned to the "Arctic Stores, Cussen's Siding, Marion, New Jersey, f. o. b. Salem, New Jersey." The car arrived at Marion, and was placed on the siding referred to, before 7 o'clock a. m. on October 18, 1917, at which hour it was seen by the consignee's chief clerk on his arrival at the consignee's warehouse. This siding bore the name of the president (Cussen) of the Arctic Stores, and was alongside the latter's warehouse.

About noon of that day, upon the filing of an involuntary petition in bankruptcy against it, and its written admission of inability to pay

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

its debts and willingness to be adjudged a bankrupt, the Arctic Stores was so adjudged. Later in the day a receiver was appointed to take charge of the assets of said bankrupt. On October 19th the receiver had the pulp removed from the car to the bankrupt's warehouse, and later on that day the carrier removed the empty car from the siding. On the following day (October 20th) the petitioner ordered the carrier not to make delivery of the pulp.

The referee found that both actual and constructive delivery of the pulp had been made to the receiver "before the shipper gave the railroad company notice to stop the goods in transit, and that therefore the petitioner's notice to the carrier came too late," and he thereupon made the order here under review. The petitioner seeks a reversal of this order on the ground that the possession of the receiver was not that of either the bankrupt, who, by the adjudication, was bereft of all interest in that property, or of the trustee, who had not yet been appointed, but of the persons who would be ultimately found entitled to the property, and that, as the right of stoppage in transitu was exercised before the appointment of the trustee, it was in time to reinvest the petitioner with the title to, and the right of possession of, the property in question.

[1] The pulp so shipped was sold to the Arctic Stores on credit, and when it was delivered to the carrier for transportation to the purchaser the title passed to the latter. Leonard v. Davis, 66 U. S. (1 Black.) 476, 483, 17 L. Ed. 222; National Bank v. Dayton, 102 U. S. 59, 62, 26 L. Ed. 77; McElwee v. Metropolitan Lumber Co. (C. C. A. 6) 69 Fed. 302, 305–307, 16 C. C. A. 232; Canadian Northern Ry. Co. v. Northern Miss. Ry. Co. (C. C. A. 8) 209 Fed. 758, 760, 126 C. C. A. 482; Benj. on Sales (5th Ed.) 218, 837, 838. See, also, N. J. Uniform Sale of Goods Act, approved May 7, 1907 (N. J. P. L. 1907, p. 311); 4 N. J. Comp. Stat. 4645, § 19, rule 4(2), and section 46(1).

[2] While the right to stop delivery of goods sold on credit is predicated on the insolvency of the buyer, yet neither insolvency nor bankruptcy of the buyer works a rescission of the contract of sale, and an effective stoppage in transitu does not in itself annul the sale or divest the purchaser of the title to the goods, which passed on delivery to the carrier. Sheppard v. Newhall (C. C. A. 9) 54 Fed. 306, 4 C. C. A. 352; Benj. on Sales (5th Ed.) pp. 808, 809, 816; N. J. Uniform Sale of Goods Act, supra, §§ 57, 61. It has been said that "the right of stoppage in transitu is merely an extension of the lien for the price which the vendor has after contract of sale and before delivery of goods sold on credit." Johnson v. Eveleth, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50. A more nearly accurate statement seemingly is that the insolvency of the buyer gives the vendor a right to reobtain possession of the goods from the carrier, while they are on their way to the vendee, and that upon giving notice not to deliver before the carriage is at an end he may retake and retain the goods as security for the price. See Arnold v. Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; N. J. Uniform Sale of Goods Act, supra, § 57.

[3] However, this right to retake only continues while the goods are in transit. When the goods reach their destination, the vendor's

right to repossession is gone, his potential security is lost, and his status in relation to such goods is no different from that of a general creditor of the vendee.

[4] In the instant case, when the carrier placed the car containing the pulp on the siding designated in the bill of lading, it had reached its destination and the transit was at an end. The Eddy, 72 U. S. (5 Wall.) 481, 495, 18 L. Ed. 486; Conyers v. Ennis, 6 Fed. Cas. 377, No. 3149; In re M. Burke & Co. (D. C. W. D. Pa.) 140 Fed. 971, 15 Am. Bankr. Rep. 495; In re W. A. Paterson Co. (C. C. A. 8) 186 Fed. 629, 108 C. C. A. 493, 25 Am. Bankr. Rep. 855, 34 L. R. A. (N. S.) 31; Shepard & Morse Lumber Co. v. Burroughs, 62 N. J. Law, 469, 41 Atl. 695; 2 Kent, Comm. pp. 706, 707; Johnson v. Eveleth, supra; Benj. on Sales (5th Ed.) pp. 906, 907; Scott v. Pettit, 3 B. & P. 469; Ellis v. Hunt, 3 T. R. (D. & E. 464; Kendal v. Marshall Stevens & Co. (C. A.) 11 Q. B. D. L. R. (1882–83) 356; Sawyer v. Joslin, 20 Vt. 172, 49 Am. Dec. 768.

[5] When the carrier placed the car on the designated siding, its duty as a carrier was ended. If that were not a delivery, what would be one on such a shipment? Certainly the carrier would not have to unload the car. It would not be liable to the vendor for failing to stop delivery, for delivery had been made at the very place designated in the bill of lading. If the carrier's placing the car on the siding was a delivery, so as to exonerate it from liability to the vendor, it is none the less so when the vendor invokes a remedy against the vendee necessarily solely predicated on the giving of a notice to stop delivery while the goods are yet in transit, i. e. before delivery made.

The bankruptcy receiver's taking the pulp out of the car the day following its delivery on the designated siding (an adjudication in bankruptcy having taken place in the meantime) was not a necessary act in order to bring the transportation to an end. Such removal was to release the car for further use and to safeguard the property of the bankrupt, which by the delivery of the day before had become absolute.

The referee could have properly denied the petitioner's claim on the ground that delivery had been made to the Arctic Stores before bankruptcy had intervened. However, as noted, he based his denial not upon that ground, but upon the ground that delivery had been made to the receiver before the stop notice had been given to the carrier.

The receiver in thus removing the pulp was acting in the line of his duty. He did nothing more than what the Arctic Stores could have done between the time the car was placed on the siding and the time of the filing of the petition in bankruptcy. In thus dealing with the pulp the receiver was not, as petitioner's counsel claims, taking goods belonging to the petitioner, but property the title to which had vested in the Arctic Stores from the time it was delivered to the carrier f. o. b. the place whence the shipment came, and which had become absolute upon its being placed on the siding referred to.

[6] This title by operation of law vested in the trustee, upon his appointment and qualification, as of the date of the bankrupt's adju-

dication. Section 70a, Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 565 (Comp. St. § 9654).

[7] During the time intervening between the adjudication and the qualification of the appointed trustee, the title, while nominally in the name of the bankrupt, was in custodia legis, awaiting administration. The receiver from his appointment was not only the proper person, but the only person, until the appointment and qualification of the trustee, who could legally take possession of this pulp and the other property of the bankrupt. He might properly be held to be the "legal successor in interest of the buyer," within the meaning of the New Jersey Uniform Sale of Goods Act, supra, § 70, and whose taking property from a carrier ends the transit under section 58 of that act. However, and regardless whether that be so, the receiver's conduct in thus taking the pulp must be treated as in the due administration of the bankruptcy law and on behalf of the trustee to be appointed.

[8] Upon such appointment the trustee's right to the possession of such pulp would relate back to the time the receiver took it over.

To accept petitioner's contention that there was no one between the time of adjudication and the qualification of the trustee to do any act either on behalf of the bankrupt, who by the adjudication was shorn of all power to do anything in respect to the property but recently subject to its dominion, or of the trustee, who could not be appointed for at least 11 days, and might not be for several months, after the adjudication, is to hold that there is a hiatus in the administration of bankruptcy estates during which certain creditors might secure a preference over other creditors, a bare statement of which is sufficient to reject such contention.

[9] That the receiver in bankruptcy has the right to take property from a carrier on its arrival at its destination, and that such taking ends the right of stoppage in transitu, has been held by the following cases: In re Allen (D. C. M. D. Pa.) 178 Fed. 879, 24 Am. Bankr. Rep. 574; In re White (D. C. M. D. Pa.) 205 Fed. 393, 29 Am. Bankr. Rep. 358. This was also the view of District Judge Chatfield in Re Darlington Co. (D. C. E. D. N. Y.) 163 Fed. 385, 20 Am. Bankr. Rep. 800. In this connection see, also, Conyers v. Ennis, supra, and Millard v. Webster, 54 Conn. 415, 8 Atl. 470.

From the foregoing it follows that whether the right of stoppage in transitu be held to have ended on the arrival of the car at its billed destination, or upon the removal of its contents by the receiver, the petitioner's claim that it is exclusively entitled to the proceeds of the sale of the pulp must be denied, as its notice to stop delivery was not given until after the last of these two acts had taken place.

The referee's order is affirmed.

THE NO. 9.

THE ALEX Y. HANNA.

(District Court, D. Delaware. June 21, 1919.)

No. 926.

1. TOWAGE ⚷11(7)—INJURY TO TOW—COLLISION WITH BRIDGE.
The master of a tug, proceeding with a tow toward a drawbridge which had frequently failed to operate properly, should anticipate the probable failure of the draw to open and take timely precautions to protect his tow in that event.

2. TOWAGE ⚷11(7)—INJURY TO TOW—EVIDENCE.
That the master of a tug conveying a tow approached so closely to a drawbridge, which had frequently failed to operate properly, that he was unable to prevent damaging his tow's mast when a span of the bridge failed to fully open, *held* to establish the tug's negligence.

In Admiralty. Libel by the George W. Bush & Sons Company, owner of barge No. 9, against the steam tug Alex Y. Hanna and the members of the Levy Court of New Castle County, Del. Decree dismissing libel as to the Levy Court members, and adjudging the tug Alex Y. Hanna liable for damages and costs.

J. Frank Staley (of Lewis, Adler & Laws), of Philadelphia, Pa., for libelant.

Willard M. Harris, of Philadelphia, Pa., and Harry P. Joslyn, of Wilmington, Del., for the Alex Y. Hanna.

Frank L. Speakman and Percy Warren Green, both of Wilmington, Del., for members of Levy Court.

MORRIS, District Judge. About 2 o'clock in the morning of August 18, 1916, barge No. 9, owned by Geo. W. Bush & Sons Company, libelant, while in tow of the steam tug Alex Y. Hanna, was injured by having its mast brought into contact with the partially raised southern leaf of a bascule bridge, known as Third Street Bridge, built and operated by New Castle county over the Christiana river in the city of Wilmington, New Castle county, Delaware. To recover damages for the injury so sustained the owner of the barge filed its libel against the tug and against the individuals composing the levy court of that county. Exceptions filed by the latter were heretofore sustained, this court holding that a libel in admiralty against the county, its levy court, or the present or former members thereof, cannot be maintained. 246 Fed. 157. No negligence or fault on the part of the tow having been alleged or shown, the sole question now presented is whether the tug was at fault.

The tug having in tow, astern, on hawsers about 25 feet in length, barges No. 9 and Penn, abreast, the former being the port barge, was proceeding from the Delaware river up the Christiana river. No. 9 was about 110 feet long, 21 feet beam, and drawing about 6 feet. The Penn was of like length and draft, with beam of 26 feet. The tug

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

was 64.3 feet long, 15.5 feet beam, and 6.9 feet draft. No. 9 was equipped with a mast extending about 51 feet above the water. The Penn was without masts. Its house extended about 12 feet above the water. The Christiana river is a winding stream having an improved channel 200 feet in width, which is somewhat obstructed just below the bridge in question by the Wilson Line boats lying at their wharf on the north side and by a yacht on the south side. Third Street Bridge was at the time of the accident a new bridge, having been in use only about 18 months. Its draw consisted of two leaves, each 75 feet in length, opening from the center upwards by electric motors operated by a bridgetender. At or near the end of each leaf, the center of the draw, there was a light showing red when the bridge was closed and green when the leaf was raised beyond a certain height. The abutments were marked by lights thereon near the water. There was no overhang of the leaves when the draw was completely open, and the two green lights would, with the leaves in that position, appear at an elevation on each side of the opening and directly above the abutment lights. The clearance of the draw at the water level was 145 feet. About 15 feet upstream from the draw and towards the northern bank stood the unlighted center abutment of the former county bridge, extending 2 or 3 feet above high-water level and probably from 45 to 50 feet within the northern line of the draw extended. It was a clear moonlight night, and objects and lights were clearly visible. Tide was flood and within one to two hours of high water. The tide through the draw was practically straight, with possibly a little set toward the south. There was little, if any, wind. No other shipping was moving near the bridge.

As the tow approached the bridge, the tug, by three blasts of her whistle, signalled the bridgetender to open the draw. The bridgetender answered with a signal of one blast of a whistle, indicating the stopping of bridge traffic, and the tug slowed down and continued under slackened speed until the bridgetender, after the bridge began to open, made further answer by three blasts, whereupon the tug immediately increased her speed and proceeded to pass through the draw. It appears from the testimony of the bridgetender that the signal of three blasts from the bridge was given after both leaves had stopped rising, when the tug was about opposite the Jackson & Sharp shipyard, about 1,200 to 1,500 feet below the bridge. The testimony of the barge captain is that the leaves stopped rising when the tug was about 800 feet away. The master of the tug testified that, when the three-blast signal was given from the bridge, he "would come to the bridge in a minute," and that he was so near that the roof of the pilot house intercepted his view of the green lights while they were still rising; that he did not see the lights stop going up, but that he "was working on the bridgetender's instructions that everything was clear." He further testified that when the green lights passed out of the line of his vision he could not have done anything, other than what he did do; that he "was getting too close." As the tug and tow were going through the draw, the mast of No. 9 struck the southern leaf, the one

on the port side of the tug and tow, breaking off the mast, and otherwise injuring the barge. The bridgetender had, pursuant to instructions given to him the evening before, stopped raising the southern leaf when it had gotten up about two-thirds of the way, in order to protect a scaffolding erected about its understructure for the purpose of making certain repairs to an operative part of the bridge. These repairs had been going on about a week. The bridgetender gave to the tug no signal of his intention to stop raising the southern leaf before it had reached its full height.

Shannon, captain of barge No. 9, Banks, master of the tug Meteor, Davis, master of the tug Martha, and White, the bridgetender, witnesses for the libelant, testified to the effect that the draw had been very undependable; that sometimes one leaf would rise and the other would not, and that at other times one leaf would go all the way up and the other leaf only part way. This testimony is not only not disputed by the respondent, but is corroborated by at least two of his witnesses, namely, Capt. Blocksom and William Cobb, steward of the tug Alex Y. Hanna, the latter of whom testified:

"I have never seen the spans up but once since we have been going through it, and I have been going through it ever since it was there."

It also appears from the evidence that this failure to operate would occur after the giving of the three-blast signal by the bridge. Furthermore, under the regulations prescribed by the Secretary of War to govern the opening of drawbridges for the passage of vessels, which are in evidence, the three-blast signal from the bridge is not a signal that the bridge is opened, but a signal that the draw is ready to be opened immediately. It further appears that the master of the tug Alex Y. Hanna had been going through this bridge with his tug almost nightly for six or seven weeks immediately preceding the accident, and more or less frequently before that time, and consequently was chargeable with knowledge of the imperfect functioning of the bridge.

[1] What, under such circumstances, do prudent navigation and reasonable care require on the part of the master of a tug with vessels in tow? Clearly, to anticipate the probable failure of the draw to open, or its failure to open sufficiently for the passage of the tug and tow, and to take such timely measures of precaution as would enable him to protect his tow, should either of those events occur. This is not only required by the law, but had been observed in actual practice by tug boat captains when approaching the Third Street Bridge, as appears by the testimony of Capts. Banks and Davis. Such imperfect functioning of a bridge and knowledge thereof by the master of a tug prevent a reliance by him upon an assumption that the bridge will be timely opened for passage, or even an acceptance by him of the three-blast signal and the upward motion of the leaves of the bridge as an assurance of a sufficient clearance for the tow, and distinguish this case from The Louise Rugge (D. C.) 234 Fed. 768, and 239 Fed. 458, 152 C. C. A. 336; Clement v. Metropolitan West Side El. Ry. Co., 123

Fed. 271, 59 C. C. A. 289; City of Chicago v. Mullen, 116 Fed. 292, 54 C. C. A. 94, and similar cases.

[2] Did the master of the tug exercise the required care? The crucial factor in this inquiry is whether, when the southern leaf of the bridge stopped going up, the position of the tug and tow was such as to enable the master of the tug, by the exercise of reasonable care, to save his tow from injury. If the position of the tug and tow was then such as to enable the master of the tug, by the exercise of reasonable care, to save his tow from injury, and he failed to exercise such care, and the injury to the tow was caused thereby, the tug was at fault. But I am not satisfied from the evidence that, after the southern leaf of the bridge stopped going up, anything more than was done could have been done to save the tow from injury. Palmer, master of the tug, states that nothing could then have been done, other than what was done, to prevent the mast of the barge from striking the bridge; that he was getting too close. As the tide was flood, the channel of the river just below the bridge narrow, and obstructed on one side by the Wilson Line boats and by a yacht on the other, and the channel through the draw restricted by the unlighted abutment of the old bridge, I am not inclined to question this statement of Capt. Palmer, but accept it as the fact. This fact, however, discloses that the position of the tug at the moment the leaf stopped rising was one of danger to the tow. Assuming the master did all he could at the moment to prevent the accident, yet "this will not excuse him, if, by timely measures of precaution, the danger could have been avoided." The Syracuse Steamer, 12 Wall. 167, 172, 20 L. Ed. 382; Great Lakes Towing Co. v. Shenango S. S. Transp. Co., 238 Fed. 480, 487, 151 C. C. A. 416.

Could the danger have been avoided by timely measures of precaution? This is hardly open to question. The lights of the bridge indicating the position of the draw were visible to those in charge of the tug when she was at least 1,500 feet away, and thereafter remained in full view. There was then and for some time thereafter ample opportunity for those in charge of the tug to take the protective measure shown by the evidence to have been frequently taken by tugs with a tow in approaching this bridge, namely, to turn around. Neither this nor any other sufficient precaution was taken. The tug elected to proceed and did proceed with her tow into a position of danger before the bridge lights showed a sufficient clearance through the draw for the tow. It follows that the tug was at fault and must be held liable for the damage to the barge.

As under a stipulation of proctors, approved by the court, no decree pursuant to the opinion heretofore filed in this case has been entered dismissing the libel against the levy court commissioners, there should now be a decree dismissing the libel as to the individuals composing the levy court of New Castle county, and adjudging the tug Alex Y. Hanna liable for the damages and costs.

An interlocutory decree may be prepared and submitted.

UNITED STATES v. STANDARD OIL CO. OF NEW JERSEY et al. MARYLAND TRANSP. CO. v. UNITED STATES. SAME v. STANDARD OIL CO. OF NEW JERSEY et al.

(District Court, D. Maryland. June 23, 1919.)

1. MASTER AND SERVANT ⚷304—NEGLIGENCE OF SERVANT—FIRE—LIABILITY OF MASTER.
   Where a fireman on a pile driver used by his employer in the construction of a pier in a harbor threw ashes into waters visibly covered by oil, causing a fire which destroyed barges and their cargoes, the employer was liable to the owners.
2. MASTER AND SERVANT ⚷319—WORK OF INDEPENDENT CONTRACTOR—CONSEQUENCES OF DANGEROUS PRACTICE—FIRE.
   Where a fireman on a pile driver used by his employer in construction of a pier in a harbor threw ashes into waters visibly covered by oil, causing a fire which destroyed barges and their cargoes, the company for which the pier was constructed on a cost basis, and which was aware that ashes were thrown overboard, was liable for the consequences, though the employer doing the work was an independent contractor.
3. SALVAGE ⚷34—COMPENSATION.
   Although piers at which scows were lying never took fire, yet where scows were loaded with gasoline and the people thereon were calling for rescue, the service rendered by a tug was of a salvage nature, though the tug which rendered it was in no appreciable danger and a moderate reward should be made.
4. INDEMNITY ⚷6—NEGLIGENCE OF CONTRACTOR'S SERVANT—PRIMARY LIABILITY OF OWNER—CONSTRUCTION OF CONTRACT.
   Under a contract for the construction of a pier for an oil company on a cost basis, expenses of accidents being considered a part of the cost *held*, that the company was primarily liable to the contractor for damage to vessels by a fire caused by the negligence of contractor's employé in throwing ashes into the oil-bearing waters of the harbor.

In Admiralty. Consolidated suits by the United States against the Standard Oil Company of New Jersey and another, by the Maryland Transportation Company against the United States, and by the Maryland Transportation Company against the Standard Oil Company of New Jersey and another. Decree for plaintiffs.

Samuel K. Dennis, U. S. Atty., of Baltimore, Md.

Harry N. Abercromie and J. Craig McLanahan, both of Baltimore, Md., for Maryland Transp. Co.

Kirlin, Woolsey & Hickox and Cletus Keating, all of New York City, and Ritchie, Janney & Stuart, of Baltimore, Md., for Standard Oil Co.

Marbury, Gosnell & Williams, William L. Marbury, and L. Vernon Miller, all of Baltimore, Md., for Raymond Concrete Pile Co.

ROSE, District Judge. These cases, which have been consolidated, are the second group growing out of the fire at the Standard Oil pier in this harbor on the 22d of November last. The opinion dealing with the first appears in The F. Q. Barstow (D. C.) 257 Fed. 793.

We are here concerned with the destruction of two barges belonging to the Maryland Transportation Company, hereinafter called

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

"Transportation," and their cargoes of gasoline and canned goods, respectively, the property of the United States, referred to herein as the "government"; with the claim of the Transportation against the government for salvage services to other scows and the goods on them, and with the contention of the Transportation and the government that the fire was caused by the negligence of the Standard Oil Company of New Jersey, for brevity styled the "Standard" and of the Raymond Concrete Pile Company, spoken of herein as the "Raymond."

Under contract with the Standard, the Raymond had for several weeks before the fire been engaged in the construction of a concrete pier, partly to replace the wooden pier, burned on the day in question, but in larger part to occupy the space immediately adjacent on the north. The Raymond was doing the work on the cost plus basis. It selected the workmen, but the Standard reserved the right to require the discharge of any person employed on the job, a privilege which it does not appear ever to have exercised. It was at liberty at any time, and on short notice, to end the contract. In building the pier, the Raymond used steam pile drivers, which of course produced ashes and clinkers.

Oil frequently floated over the suface of the dock in which they worked. Indeed, at times there was so much oil there and thereabouts that the Standard had men skim it off and bring it to shore, where it was again given commercial value. The quantity of oil in the dock at any particular time depended to a considerable extent upon the direction of the wind, and to a less degree upon the state of the tide. In consequence, the Standard told the Raymond more than once to see to it that all ashes thrown overboard from the pile drivers should be thoroughly wetted down before being cast into the water. The Raymond gave like instructions to those of its employés actually in charge of the work.

It is true that municipal ordinance and federal law prohibit the throwing of ashes into the harbor at all. Doubtless the parties assumed that they were not offending against the spirit of these enactments, as it was the purpose of the Standard thoroughly to dredge the dock so soon as the new pier was finished. Nevertheless the law was broken.

Apart from any legislative expression on the subject, every one knew how dangerous it was to throw live coals upon oil, even when the latter floated upon water. It is true that usually cinders pass through the oil so rapidly that nothing happens; but in this dock, when the wind is blowing from certain directions, chips and other small pieces of wood and similar floating material are likely to gather, and a coal may chance, as on this occasion it apparently did, to light on one of these and to remain on it long enough to set it afire, and then the harm is done.

On the day in question, and before the fire broke out, sight and smell bore witness to the presence of more than the usual amount of oil in the dock. It was noticed, among others, by one of the foremen of the Raymond, and he gave a renewed caution to the fireman on one

of its pile drivers to see that all ashes were wetted before they were thrown overboard. About 3 o'clock in the afternoon, the same fireman cast one or more shovelsful of ashes into the water. Very shortly thereafter a small fire was noticed on its surface. The testimony seems to show that there was an appreciable interval between the throwing over of these ashes and the beginning of the fire. It was doubtless brief—much less than the 5 or 10 minutes which some of the witnesses estimated for it—but still there was an interval; that is to say, there was no sudden flaring up of the oil and no instant explosion of either oil or gas.

When the fire was first seen, it covered a very few inches of the surface of the water. The fireman tried to smother it with two or three shovelsful of ashes, but they seemed rather to spread than to extinguish it. He then turned his hose on it, but that had apparently the same unfortunate effect. Then almost instantly the flames spread across the surface of the water to the covered pier and thence to the Barstow.

The witnesses who described its appearance at this time say that it swept over the face of the water in waves of flame. Some of the experts testify that this peculiar appearance may have been due to the diffusion of a considerable portion of gasoline or naptha vapor through the strata of air immediately above the water. Others equally learned in the chemistry of combustion say that any fire, fed by oil floating on water, may have a like seeming to the eye. Whichever is right, I think there can be no question that the proximate cause of the fire was the ashes thrown from the pile driver by the fireman, an employé of the Raymond. It is quite evident that everybody that saw the fire in its early stage was then of that opinion.

[1] One who throws ashes on the surface of water, visibly covered by oil, is, independent of statute, bound at his peril to make sure that there is no fire left in them. This the fireman failed to do, and for his neglect, his employer must answer to the appellants.

[2] By the Standard's invitation, vessels belonging to other people were in the dock at this and other times. It could not escape liability for any dangerous work which it sanctioned therein. It was, and for weeks had been, aware that ashes from the pile drivers were thrown into the dock. It knew better than most how perilous this practice was. It was having the work done on the costs plus basis. It was therefore directly concerned in keeping down the expense, and had an interest in using this cheap method to get rid of ashes and cinders. It was liable for the consequence of what was done, even though the actual doing was committed to an independent contractor. It, as well as the Raymond, is liable to the government and the Transportation for the damage the fire did them.

What did that damage amount to? In calculating it, it will be convenient first to determine to what salvage the Transportation is entitled. It claims that it saved two scows and their cargoes of gasoline drums, the latter of which belonged to the government, as did also one of the scows. The other was the property of the Tranportation itself, but was chartered to the government. The Transpor-

tation says that this scow was in the military service of the government, and that, if it had been destroyed therein, the government, under the law, would have been bound to pay for it. Since Act Aug. 1, 1912, c. 268, 37 Stat. 242 (Comp. St. §§ 7990–7994) its common ownership of the salving tug and of the salved scow does not prevent its collecting remuneration for the service done. It therefore argues that it is entitled to be compensated by the government for saving its own scow.

It is unnecessary to consider this interesting question, as in the view I have taken of the character of services rendered, and the compensation which should be made for them, the allowance will not be materially affected whether the value of the scow be included or excluded from the total of the property rescued.

[3] The two scows saved lay at the outer end of the north side of the pier, which itself was to the north of that which was burned. The pier at which they were lying itself never took fire. Several vessels on the south side of it, and therefore nearer the fire, remained alongside of it throughout the conflagration, without suffering appreciable damage. On the other hand, the scows to which the service was rendered were loaded with gasoline drums. Men employed on them and other persons on the pier collected at its outer end, fearing to attempt to escape over the pier to land, as smoke and flames then appeared to them to be shooting over the shoreward end of it. They were calling for rescue. The tug, which did the service for which reward is now claimed, was in no appreciable danger, although some of those on it may at the time have thought otherwise. Its master, however, was not among them. He impressed me as being a singularly candid man. He said that he did not think that he did a risky thing. The time consumed was of the briefest. Still the service was of a salvage nature. It was something which ought to have been done, and for which proper, although moderate, reward should be made. An award of $1,000, two-thirds to the owners, one-third to the master and crew, will be a proper allowance. Of the third awarded to the crew, $50 will go to the master, and the rest should be apportioned among the master and crew, in proportion to their wage bill.

The value of the government property destroyed was $12,856.60, to which should be added the $1,000 above allowed for saving the other government property.

The Transportation lost two scows. They were alike, except that one was 9 years old, and the other 10. The evidence shows that a new scow, similar to those burned, would have been worth, at the time of the fire, $7,250. If the usual allowance of 5 per cent. each year off the value at the beginning of that year for depreciation be made, it will make the value of the nine year old scow, on the day it was destroyed, $4,568.95, and of the ten year old scow, $4,340.06, or a total of $8,909.01. For their hulls, $400 has been offered. The net loss to the Transportation was therefore $8,509.01.

For compensation, therefore, the Transportation is entitled to look to the Raymond and to the Standard, as is the government for the value of its property destroyed, plus the $1,000 salvage it is required

to pay, or $22,365.61 in all. Interest on the salvage award should run from the date of the decree, and on the other sums from the day of the fire.

[4] The question most strenuously contested, and upon which a rehearing has been had, is as to what are the rights, as between themselves, of the Raymond and the Standard? Is either primarily responsible and liable to the other, and, if so, which? The Raymond claims that the fire, or its disastrous consequences, were the result of the negligence of the Standard in permitting naptha distillate from the Barstow to escape into the harbor. The testimony leaves it at least doubtful whether there was any such escape, and, if there was, it altogether fails to show that it was attributable to any lack of care on the Standard's part.

Ordinarily this conclusion would close the controversy. Not so here, for the Raymond asserts that before the work began the Standard agreed to answer for any damage to person or property which might occur in the course of its doing. This contention is based upon the construction put by the Raymond upon an express term of the contract between it and the Standard; that construction being, as it says, the only one possible, in view of the general scheme and purpose of the bargain.

An analysis of the agreement shows that the Standard hired the experience, skill, and general executive organization of the Raymond, to organize, direct, and oversee, subject to the instructions of the Standard, the doing of the work for which the Standard was to pay. The Raymond was to receive 12½ per cent. on the cost of the work, with a provision that its fee should not exceed $20,000. In return, the Raymond was to furnish, at its New York office, the services of its executive officers. For practically everything else the Standard was to pay. Some specified heavy tools and machines were to be hired from the Raymond at a per diem rental. The other costs to be borne by the Standard were enumerated in great detail. In short, as the contract itself declares, the Raymond was employed to do the work as the agent of the Standard, and at the latter's charge. The cost of insurance and other expenses incurred in connection with any accident or damage to person or property was expressly mentioned among the things for which the Standard was to pay, and the same point was further emphasized by the declaration of the Raymond, in its letter confirming the acceptance of the contract:

"That any expense incurred in connection with any accident or damage done upon person or property, not covered by insurance, shall be considered a part of the cost of the work, but no fee shall be paid to the contractor on this cost."

It is easy to conceive of accidents which are not the result of the negligence of any one, but after all they are few as compared with the number of those which happen because some one has done that which he ought not to have done, or has left undone that which he ought to have done.

The parties to this contract were aware that it was highly probable that in the doing of the work there would be accidents, damaging life,

limb, or estate. They knew that most of them would be the result of carelessess of some one employed by the Raymond. There could have been no question that, if the work was to be done at reasonable cost, the Raymond would have to use every day people of about the average of care and skill, and that some of them, at some time or other, would be careless, and once in a while would hurt somebody or something. The damage thus done, no matter who paid for it, would be as much a part of the cost of the work as were the sums paid for labor, fuel, or tools. The undertaking by the Standard to assume liability for such damage was of a piece with the whole scheme of the bargain it was making. It was alive to the possible danger it was running, and for its at least partial protection reserved the right to demand the discharge from the work, of any particular employé of the Raymond, although generally speaking, the right of hiring and firing, to use the modern vernacular, was left to the latter. Moreover, on 10 days' notice the Standard might stop the work altogether.

It is asked: Will the law permit any one to contract himself out of the consequences of his own negligence? That he may not is a salutary doctrine, and one not lightly to be tampered with. Very likely it is true that one may not bargain in advance that he may be as careless as he pleases, and not be answerable for the harm he does. He must always use ordinary care. If he is employed because he holds himself out as having special skill, it may be that no language which falls short of a clear disclaimer that he has it will excuse his failure to exercise it.

A corporation cannot act, except through some human agent, and it may be it will not be permitted to stipulate that such of those agents as actually direct and manage its operations may be careless in so doing, without making it liable. If individuals or corporations are carrying on some public service business, or are otherwise so situated that others are not in a position to deal with them on an equal footing, public policy may well forbid their exempting themselves from the consequences of the carelessness of those whom they may employ.

But, assuming all this to be true, does it follow that there is any reason why it should not be held that the Standard is bound by the agreement it made? What did it ask from the Raymond, and what did the Raymond undertake to give? Obviously, careful and skillful use by its executive officers of its special knowledge, organization, and experience in the doing of this kind of work, and that was all. It, of course, was bound to exercise due care in selecting the numerous workmen whom it was to choose and hire, and whom the Standard was to pay, but it is not easy to see anything in the kind of agreement made, or in the relation of the parties to each other, which gives the public any interest in asserting that one, rather than the other, shall insure the persistent carefulness of the men so chosen.

There was no attempt to show any lack of care in the employment of the fireman whose negligence caused the disaster. It was true that the Standard had the right to give such instructions as it saw fit for the management of the work. It may well be, if any such instructions had been given, and the executive officers of the Raymond had failed

to do their best to carry them out, the Raymond would have been liable for the consequences, in spite of the Standard's undertaking to pay for accidents.

It is established that the Standard told the Raymond that the ashes should be thoroughly wetted down. The officials of the Raymond, and its foreman on the job, repeated and emphasized this order. There is no reason to suppose the fireman who started the fire did not suppose the shovelful which did the harm had been sufficiently drenched with water. He simply assumed the wetting had been thorough, without making sure that it was. That is precisely the kind of human shortcoming of which most individuals are likely to be guilty sometime or other, when ordinary men are employed at ordinary wages. The Raymond permitted the dangerous practice of throwing ashes into the oil bearing waters. The Standard knew and apparently approved. There was no willful disobedience by anybody of the Standard's order's. In carrying them out, there was no lack of care on the part of the executive officers, or even of the foreman of the Raymond. There was carelessness on the part of the fireman, who did not thoroughly extinguish every spark in the ashes, but, if what already has been said is sound, the Standard had assumed liability for the consequences of such kinds of negligence on the part of the ordinary employés on the work. There was a chance that throwing ashes into the harbor would do a great deal of harm. It was, perhaps, a small chance. The cost of otherwise disposing of them might have been appreciable. It was a risk which both parties took in order to keep down trouble and expense, a saving which inured almost entirely to the benefit of the Standard.

From what has been said, it follows that the decree should be so drawn as to make the Standard, as between itself and the Raymond, primarily liable.

CARMEN v. FOX FILM CORPORATION et al.

(District Court, S. D. New York. June 30, 1919.)

1. CONTRACTS ⚷2—CAPACITY TO CONTRACT—LAW GOVERNING.
   The law of the state where a contract is executed applies in determining the capacity of the parties to contract.

2. INFANTS ⚷47, 58(1)—CONTRACT FOR SERVICES—DISAFFIRMANCE.
   Under New York Domestic Relations Law, § 2, a contract by a female infant for her services is not void, but voidable at her election, within a reasonable time after reaching majority.

3. TORTS ⚷12—INTERFERENCE WITH PERFORMANCE OF CONTRACT.
   If one maliciously interferes with a contract between two persons and induces one of them to break the contract to the injury of the other, the injured party may maintain an action against the wrongdoer, and where the act was intentional malice in law will be inferred.

4. INJUNCTION ⚷63—RESTRAINING INTERFERENCE WITH CONTRACT.
   A suit in equity may be maintained to restrain inducing breach of a contract by which defendant seeks to profit.

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

5. MASTER AND SERVANT ⚷341—INDUCING BREACH OF CONTRACT OF EMPLOYMENT—DAMAGES.
The measure of damages recoverable for inducing breach of a contract of employment of a moving picture actress is the salary complainant would have earned but for such interference.

In Equity. Suit by Jewel Carmen against the Fox Film Corporation and the William Fox Vaudeville Company. Decree for complainant.

On the 31st of July. 1917, the plaintiff, an actress who performed with considerable success in motion pictures, contracted with the William Fox Vaudeville Company for her services for a period of two years commencing on the 17th of October, 1917, at $100 per week. The contract recites employment for a period of six months, with the option to the defendant vaudeville company, to employ her further for six months and until the employment extended over a period of two years, at stipulated compensation. The contract recites, among other things, that "the services of the party of the second part herein contracted for, are of an unique, peculiar and extraordinary nature and of great value to the party of the first part, and that the talents and services of the party of the second part cannot be replaced by the party of the first part, and that the party of the second part will devote all of her time and attention exclusively to the employment herein described. * * *"

On the same day, a second contract was entered into, to begin on the 17th of October, 1919, at $175 per week, which was made with the Fox Film Corporation. It contained the same provisions as the first contract referred to, excepting that it extended over a different period of time. It was the purpose of the contracting parties to provide employment for four years. It appears that a contract of employment, for more than two years, is void under the California law, and it is conceded that this was the reason for making two contracts, one with each defendant, and one of which extended beyond the period of two years from the date of the contract. The contracts were made, executed, and delivered in New York. The plaintiff was not of age at the time of the execution of the contracts, and did not reach her majority until July 13, 1918. On July 15, 1918, as was her right, she disaffirmed the contracts, sending a notice to the Fox Film Corporation and the William Fox Vaudeville Company, which were duly received.

In February, 1918, she entered negotiations with another motion picture producer, Frank A. Keeney, and on March 28, 1918, engaged her services to begin on July 15, 1918. In April, 1918, Mr. Fox, who is the president of both the defendant corporations wrote to Mr. Keeney, advising him that she was under contract with his companies and could not legally contract with the Frank A. Keeney Pictures Corporation. There was a conference and negotiations between the defendants and the Keeney Picture Corporation, all with the view of endeavoring to dissuade Keeney from carrying out his contract with the plaintiff. Defendants took the position that the contracts were executed in California, and were therefore California contracts, and that the plaintiff was bound to perform because under the statutes of California, at 18, a young woman becomes of age, and has the capacity to make a valid and binding contract.

On August 30, 1918, Keeney secured an affidavit from the plaintiff, in which she affirmed that the contracts were executed in New York. In September, 1918, Keeney featured the plaintiff in advertisements, in a leading motion picture trade paper. In September, 1918, the defendant, William Fox Vaudeville Company, contracted with Frank A. Keeney and the Frank A. Keeney Pictures Corporation, indemnifying Keeney and the Frank A. Keeney Pictures Corporation from loss by reason of their refusal to carry out the terms of the Keeney contract with the plaintiff. The agreement recites that the defendant William Fox Vaudeville Company did engage the services of the plaintiff to pose in motion pictures, that she agreed to do so, and was actually doing so in the performance of her contract, but that the plaintiff claimed the right to abrogate the contract because of her infancy, and signified her

intention so to do; that the defendants "resist her right so to do, and claimed the equitable right to enforce the performance of the contract of the said Jewel Carmen, and did give notice of its intention so to do to the parties of the second and third part, and did notify the parties of the second and third part that it would protect its right by proper suit in equity." And, further, "The party of the first part has requested the party of the second part to refrain from permitting the said Jewel Carmen to render her services under the contract between the party of the third part and the said Jewel Carmen, so that an adjudication of the rights of all the parties involved may be had."

After this contract was executed, Frank A. Keeney and the Frank A. Keeney Pictures Corporation refused to employ the plaintiff.

In this action, the plaintiff seeks to have it judicially determined that the contracts with the defendants are void, having been disaffirmed by her with reasonable diligence after she reached her majority. Further, that each of the defendants, their officers and agents, be enjoined and restrained perpetually from publishing or circulating any assertion, representation, or statement, direct or indirect, that the plaintiff is under contract with the defendants or either of them by reason of said contracts, and that the defendants be restrained from interfering or intermeddling with the plaintiff in following her profession or calling, and particularly from interfering or intermeddling or preventing the plaintiff from enforcing her rights under the contract with the Frank A. Keeney Pictures Corporation.

The defendants have not instituted any action to determine the right of the parties to these contracts.

Nathan Burkan, of New York City, for plaintiff.
Saul E. Rogers, of New York City, for defendants.

MANTON, Circuit Judge (after stating the facts as above). [1] The admission in the answer, by failure to deny, established that the contracts (Exhibits 1 and 2) were signed, executed, and delivered in New York, and therefore the rule of law is applicable that the New York Law controls. The law of the state of New York applies, not only to the matters pertaining to the execution, interpretation, and validity of the contract, but also it applies in determining the capacity of the parties to contract. Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; Brown v. American Finance Co. (C. C.) 31 Fed. 516; Shuenfeldt v. Junkermann (C. C.) 20 Fed. 357; Netherwood v. Raymer (D. C.) 253 Fed. 515.

[2] The testimony taken by deposition establishes (and it is no way controverted) that the plaintiff became of age on July 13, 1918. Plaintiff rescinded the contracts with the two defendants by letters, which are sufficient in indicating her desire to disaffirm the contracts. This she might do, for while the contracts were not absolutely void, they were voidable at her election. International Text-Book Co. v. Connelly, 206 N. Y. 194, 99 N. E. 722, 42 L. R. A. (N. S.) 1115. This rule applies to a female as well as a male infant. Section 2, New York Domestic Relations Law (Consol. Laws, c. 14); Matter of Farley, 213 N. Y. 18, 106 N. E. 756, L. R. A. 1916D, 816, Ann. Cas. 1916C, 494. The plaintiff could negotiate or even contract for services with another before she reached the age of 21 on July 13, 1918, and this she did, and since she has not disaffirmed it, the contract with Keeney is binding.

[3] The contract of the 19th of September, 1918, and the negotiations between the William Fox Vaudeville Company and Frank A.

Keeney and the Frank A. Keeney Pictures Corporation, and the negotiations and correspondence prior to the execution of this contract, established beyond controversy that the defendants, acting through Mr. Fox, procured the breaching of the Keeney contract with the plaintiff. This was a clear violation of the plaintiff's legal rights. She was a star, and had unique capabilities as a motion picture actress. Indeed, the parties acknowledged this in the terms of the contract. It is not necessary that actual malice in the sense of personal ill will or animosity should exist to afford to the plaintiff equitable relief. Bitterman v. L. & N. R. Co., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693. If one maliciously interferes with a contract between two persons, and induces one of them to break the contract to the injury of the other, the injured party can maintain an action against the wrongdoer. Angle v. Chicago R. Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55. That the defendants acted intentionally is proven beyond dispute. The mere fact that they may have thought they had an equitable or legal right so to do is not an answer to an equitable action if they were wrong in this judgment. To do intentionally that which is calculated in the ordinary course of events to damage and which, in fact, does damage another person in his property or trade, is malicious in the law, and is actionable if it is done without just cause or excuse. Hitchman Co. v. Mitchell, etc., 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461.

In Automobile Ins. Co. v. Guaranty Securities Corp. (D. C.) 240 Fed. 222, it was said:

"The Circuit Court of Appeals of this circuit has recently expressed its opinion in the case of American Malting Co. v. Keitel, 209 Fed. 351, 126 C. C. A. 277, to the effect that it is a tort for A. to persuade B. to break his contract with C., and that the federal courts have in numerous cases issued injunctions to prevent the breach of contracts, even though they are ordinary business contracts involving no employment or other distinctly personal relation."

Judge Rogers there said:

"We failed to discover any satisfactory distinction between an attempt to induce employés to break a contract of employment and an attempt to induce customers to break their business contracts for the purchase or sale of goods."

[4] The right to proceed in equity to restrain inducing the breach of contract has been recognized (American Co. v. Keitel, 209 Fed. 351, 126 C. C. A. 277), and a court of equity will interfere if one is seeking profit by procuring the breach of any confidential relation by an employer. Asso. Press v. Internatl. News Service, 245 Fed. 244, 157 C. C. A. 436, affirmed Internatl. News Service v. Asso. Press, 248 U. S. 215, 39 Sup. Ct. 68.

[5] The plaintiff had a right to practice her profession or calling. In addition to the money compensation under the Keeney contract, she had the benefits accruing to her of advertising and experience. What may come to her by way of added reputation because of fulfilling this contract was hers. It is proper for the plaintiff to appeal to a court of equity to have determined the validity of the con-

tracts which she has disaffirmed after reaching her majority, and since the defendants have threatened and were actually asserting that their contracts for her unique services were still binding and in force, she was entitled to have them restrained from continuing such representations. Atlas Underwear Co. v. Cooper Underwear Co. (D. C.) 210 Fed. 347; Mutual Life Ins. Co. v. Pearson (C. C.) 114 Fed. 395.

She has suffered damages and the measure of her damages is the loss of salary which she sustained by reason of her inability to carry out the Keeney contract. But for the defendants' interference, she would have earned such salary as the contract provided. Angle v. Chicago, etc., Ry. Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; Miles Medical Co. v. Park, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502.

A decree may be presented accordingly.

COMMONWEALTH & DOMINION LINE, Limited, v. SEABOARD TRANSP. CO.

(District Court, D. Massachusetts. July 1, 1919.)

No. 1674.

1. Collision ⟾90—"Narrow Channel"—Vineyard Sound.
   Vineyard Sound, at the point of a collision at night, where as delimited by the red sectors, it is about seven-eighths of a mile wide, *held* a "narrow channel" within article 25, International Rules, Act Aug. 19, 1890 (Comp. St. § 7864).
   [Ed. Note.—For other definitions, see Words and Phrases, Second Series, Narrow Channel.]
2. Collision ⟾104—Violation of Rules—Presumption of Fault.
   The presumption of fault against a vessel by her violation of the statutory rule by being on the wrong side of a narrow channel is not conclusive, and she may be exonerated where the other vessel is seasonably apprised of her intention to stay there and might have avoided collision by proper navigation.
3. Collision ⟾57—Tug with Tow—Unnecessarily Long Tow.
   A tug does not acquire anything in the nature of privilege against other vessels by taking on an unnecessarily long tow.
4. Collision ⟾95(7)—Meeting Steamship and Tow—Mutual Faults.
   A collision in Vineyard Sound at night between a tug with a long tow and a meeting steamship *held* due to faults of both vessels, the tug for being on the wrong side of the channel and approaching such side and persisting in such course after seeing the steamer without warning her, and the steamship being in fault for proceeding at full speed although uncertain as to the course of tug.

In Admiralty. Suit for collision by the Commonwealth & Dominion Line, Limited, owner of the steamship Port Hunter, against the Seaboard Transportation Company, owner of the tug Covington. Decree dividing damages.

Putnam, Putnam & Bell and Lord, Day & Lord, all of New York City, for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for respondent.

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

MORTON, District Judge. This suit arises out of a collision between the steamship Port Hunter, a large freighter, and the tug Covington, which took place in Vineyard Sound about 1:45 a. m. on November 2, 1918. The Port Hunter was so injured that she was beached on Hedge Fence shoal to prevent sinking and will probably be a total loss. She was valued at about $700,000. The value of the tug and her pending freight is, by agreement, $100,000, to which sum the liability of the respondent has been limited.

The Port Hunter, fully loaded, was on passage from Boston to New York to join a convoy. She reached Hedge Fence light vessel, near the eastern end of Vineyard Sound, at about 1:30 a. m., and left it about 1,000 feet on her starboard side. Changing course slightly to the north, she proceeded up the Sound. Her speed was about 10 knots through the water, and, the tide being 2 knots in her favor, about 12 knots over the ground. Her lights were properly set and burning. The night was clear, moonless, and star lit, with a moderate northwesterly breeze, and not much sea. The set of the tide in the lower part of the Sound was almost directly with the steamer. Farther to the west it draws towards West Chop and the Middle Ground Shoal.

The Covington was bound east with two loaded barges in tow. Her course, according to her testimony, had taken her well up toward the buoys off Nobska, and she had left them about 1,200 feet on her port side when she made the turn toward the southeast to go down the Sound. The hawsers connecting the tow aggregated about 1,950 feet in length, and the complete tow was nearly half a mile long. There was no necessity for any such length. It might have been shortened half, if not two-thirds, without disadvantage, except possibly a slight reduction in speed. After making the turn, the tug kept well over towards the red sector of Nobska light and proceeded on a course about east southeast, making about three knots per hour over the ground. She was nearly abreast West Chop when the steamer rounded Hedge Fence light vessel, as above described, about 5 miles distant. Shortly thereafter, each vessel, according to her own testimony, discovered the other; and, for a distance of at least 3 miles as they approached, each had the other under continuous observation. Up to this point there is no great controversy as to the facts. Beyond it, as is not uncommon in collision cases, there is irreconcilable conflict between the testimony offered for the steamer and that for the tug.

[1] The weightiest allegation of fault against the tug is that Vineyard Sound at the place of collision is a narrow channel within article 25 of the Inland and International Rules (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 327 [Comp. St. § 7864]), and that she was proceeding upon her wrong side of it.

The navigable width of the Sound at the place of collision is about a mile and a quarter. At night both sides are delimited by red sectors from West Chop lighthouse on the south and Nobska on the north. Between these red sectors there was, at the place of collision, about seven-eighths of a mile. Farther down near Hedge Fence lightship there is a distance between them of about half a mile. It would

not be prudent navigation at night to go into the red sectors, although a pilot well acquainted with those waters might go into the "tinged" line. The tinges would add slightly to the widths just stated, but not enough to effect the present question. The length of this part of Vineyard Sound from abreast West Chop to Hedge Fence lightship is about five miles. There can be no doubt that navigation in it is restricted by dangers on both sides. The practical difficulties which the respondent suggests in applying the narrow channel rule, viz., the approach from the open ocean, the strong tidal currents, the existence of harbors into which vessels might be turning, and so forth, are not peculiar to this waterway and are found on many bodies of water which have been held to be narrow channels. The narrow channel rule has its advantages and disadvantages, and the aim of the courts is to apply it to waters where the advantages preponderate. Where navigation is constricted into a stream of traffic, it is, generally speaking, advisable to apply the rule. In The Alfred W. Booth (D. C.) 127 Fed. 453, Judge Holt has made an interesting review of well-known waterways which have been held narrow channels.

In The Edda, 173 Fed. 436, 97 C. C. A. 638, the place where this collision occurred was regarded by both parties and by the court as a narrow channel to which article 25 applied. On all the evidence I find and rule that Vineyard Sound at the place of collision was a "narrow channel" within the meaning of article 25 of the Inland and International Rules.

[2] There is no doubt that the tug was near the Nobska sector, well over on her wrong side of the channel, where she had no right to be as against an approaching vessel. Being there, instead of giving way, she actively adhered to her position. She was, according to her own evidence, headed slightly toward her port side of the channel and was progressing in that direction; and she continued to hold that course after the Port Hunter's lights had become visible to her. This was a direct violation of article 25 and a statutory fault which throws upon the tug the burden of showing that it unquestionably did not enter into the collision. The presumption of fault from a violation of statute is not conclusive; the burden of proof which it throws upon the offending vessel, though heavy, may be met. A vessel may be so established in her course on the wrong side of a narrow channel, and may so clearly and seasonably indicate to an approaching vessel her intention to stay there, that, if the other vessel have ample opportunity to size up the situation and avoid her, and does not do so, but brings about a collision through her own negligence, the statutory violation is regarded as a mere condition, and the accident as due wholly to the negligence of the vessel which failed to avoid it when she had a clear chance to do so by the exercise of reasonable care. The Clara & Reliance, 55 Fed. 1021, 5 C. C. A. 390.

Such severe requirements for exculpation can, however, but seldom be met. If the approaching vessel acted not unreasonably on the assumption that the other vessel would give way and maneuvered accordingly, or was confused and embarrassed by the other vessel

holding to its wrongful course, exculpation is not made out. The decisions collected in a footnote [1] indicate how reluctant courts have been to exonerate vessels violating statutory rules of navigation. This tendency seems sound and to apply with peculiar force to violations of the rule in question. Marsden, Collisions at Sea (6th Ed.) p. 441. The conditions of modern traffic both on sea and on land are emphasizing the importance of the right-hand rule. "The Golden Rule of navigation is to keep to the right." Haynes, Rule of the Road at Sea (2d Ed.) p. 71.

[3] The Covington had taken her port side of the channel, because, with her long tow, it was to her advantage to do so; but this advantage was not a necessity. Even with her tow as long as it was, and notwithstanding the southerly set of the tide, she could have gone safely on her starboard side of the channel, and by shortening the tow she could have gone well over towards the other edge. Whatever may be the law in the Fourth circuit, it has never been established in this circuit that a tug acquires anything in the nature of privilege against other vessels by taking on an unnecessarily long tow.

[4] On the tug's own testimony, she gave no indication to the steamer that she intended not to give way until just before the steamer made her sudden turn to starboard. The vessels were then so close together as to be almost in extremis. If the tug had given her two-blast signal when they were far apart, and when the steamer still had ample opportunity so to maneuver as to avoid the tug, the case would be very different. Whether the evidence for the tug be accepted and the collision be regarded as the result of a sudden, confused movement of the steamer across the tug's bow, or whether the steamer's evidence be accepted and the collision be regarded as the result of an effort by the tug to hold her course across the steamer's path in violation both of article 25 and of article 19 (Comp. St. § 7858), the result seems to me the same. The steamer was not trying to wreck herself or to sink the tug; she was trying in good faith to avoid collision; and for that purpose went to starboard. Her movement was caused by the persistence of the tug in holding a course which it had no right to take, and in failing seasonably to make clear to the steamer its intention so to do.

On all the evidence I find and rule that the Covington was at fault for being on her wrong side of a narrow channel, and that she has failed to establish that such fault did not enter into the accident.

As to whether the steamer was also at fault: On her own evidence she held her course and her speed of about 12 knots towards an approaching vessel whose sidelights she had not yet made out, until she had come so close to the other vessel that immediately upon the discovery of the green sidelight the situation was an emergency.

[1] Footnote: The Victory, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519; The Vanderbilt, 6 Wall. 225, 18 L. Ed. 823; The Bay State, Fed. Cas. No. 1,149, 3 Blatchf. 48; The Marcia Tribou, Fed. Cas. No. 9,062, 2 Spr. 17; Occidental, etc., S. S. Co. v. Smith, 74 Fed. 261, 20 C. C. A. 419 (C. C. A. 9th Cir.); The Milligan (D. C.) 12 Fed. 338; Green v. The Helen (D. C.) 1 Fed. 916.

This the steamer ought not to have done. The facts that she was well over on her right side of the channel and had the right of way, and perhaps assumed that the other vessel would yield, do not justify her in getting into such close quarters at such speed with an approaching vessel of whose course she was uncertain. Judge Benedict took a similar view of a somewhat similar situation in The Austin, Fed. Cas. No. 663, 3 Ben. 11. Upon all the evidence I find and rule that the steamer was at fault for approaching too closely and at too high speed a vessel whose sidelights and course she had not made out.

These findings are sufficient to dispose of the case. In view of the possibility of appeal, I ought perhaps to add—as I saw many witnesses—that in my opinion the Port Hunter's course from the lightship probably was such that both her sidelights were visible to the tug at the time when the latter gave her two-blast signal, and that at all times after rounding the lightship the steamer had the tug over her port bow, as she says. In the irreconcilable conflict of testimony, I am led to these conclusions largely by my inferences from the clearly established facts. The place of collision is not greatly in dispute. It was not far from the northerly end of the smaller mark which McCollum (mate of the tug) placed upon the chart; i. e., it was far over on the steamer's right side of the channel. Nobody testifies that the Port Hunter ever changed course to port after rounding the lightship. Her witnesses say she made two slight deviations to starboard. Whether she did so, or whether she went straight to the place where she made her last turn, makes little difference. Her red light would have been visible to the tug. It is difficult, if not impossible, to give the steamer any course from Hedge Fence lightship that would close her red light to the tug, except upon the assumption that she went a long distance to starboard on her last swing. It seems highly improbable that a vessel with wide clearance from an approaching vessel on her right and plenty of room on her left would turn short across the bow of the on-coming vessel, as the tug's witnesses say the steamer did—in which they are contradicted by the witnesses for the steamer. The tug's lookout was away from his post during critical minutes preceding the collision, and the men on the barges were under no responsibility for the navigation of the tug. The last movement of the steamer undoubtedly carried her somewhat to starboard of her previous course; but I do not think that the distance was as great as the Covington contends, because I think that the vessels were pretty close together when the movement began. This is strongly indicated by the testimony of the engineer of the tug, who says that from 30 seconds to a minute elapsed between the reverse signal and the shock of the collision. The reverse signal was given as soon as the steamer's movement was observed on the tug. The engineer, not being on deck and his attention not being distracted by the impending collision, was much better placed to judge time correctly than the witnesses on deck. All agree that it is extremely difficult to judge distance on the water at night with accuracy. If the two vessels were on crossing courses and close to-

gether, it is by no means impossible for them to have collided as they did upon a turn to starboard by the steamer.

The two-blast signal was given by the tug under article 18 (Act June 7, 1897, c. 4, § 1, 30 Stat. 100 [Comp. St. § 7892]), according to which it ought not to have been sounded unless both sidelights of the approaching vessel were visible. This is an indication—and I think a strong one—that McCollum saw both the steamer's sidelights, and was holding his course and leaving the other vessel to do the maneuvering to avoid collision. It is in keeping with his conduct in not shortening the tow as he entered this narrow, frequented, and dangerous waterway. Since the abolition of the regulation restricting the length of tows, unlimited length is not illegal; but the dangers which occasioned that regulation are still present, and an unnecessarily long tow constitutes an avoidable menace to other vessels. I do not think that the pilot of the steamer was the worse for liquor before the collision. Whether the steamer could have cleared the barges if she had gone to port, instead of to starboard, is so uncertain that, considering the wide latitude of action permitted in an emergency, I am by no means prepared to hold that the hard aport order was at fault.

The underlying cause of the collision appears to be that the night was so fine and the approaching vessels were so plainly visible to each other, and there was such ample room to clear each other, that the officers of neither had in mind any danger of collision, did not realize how close the courses of the vessels were bringing them, and took no steps to avoid collision until too late.

Decree that each vessel was at fault and for divided damages.

In re MORRIS & RICE.

(District Court, D. Massachusetts. July 2, 1919.)

No. 24442.

1. BANKRUPTCY ⚷186(1)—COSTS OF ADMINISTRATION—ALLOWANCE TO GENERAL ASSIGNEE.

   The rule that a general assignee will be allowed from the estate in bankruptcy for such expenses as were reasonably incurred in the care and preservation of the property will be strictly applied as to expenditures made after the bankruptcy.

2. BANKRUPTCY ⚷186(1)—CLAIMS AGAINST TRUSTEE—EXPENSES OF ASSIGNEE.

   An assignee of a mercantile firm *held* entitled to reimbursement from its estate in bankruptcy for money paid employés in continuing the business until the appointment of a receiver in bankruptcy, except so much as was paid to the bankrupts for their personal services.

3. BANKRUPTCY ⚷186(1)—CLAIMS AGAINST TRUSTEE—EXPENSES OF ASSIGNEE.

   An assignee of a mercantile firm *held* entitled to allowance of his claim for rent paid, although after filing of petition in bankruptcy, where the receiver succeeding continued to occupy the premises.

4. BANKRUPTCY ⚷378—REJECTION OF OFFER OF COMPOSITION—RIGHT TO DEPOSIT.

   Money obtained by bankrupts after filing of petition against them and deposited with an offer of composition does not belong to the estate, and

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

if the offer was made in good faith, although rejected for insufficiency, should not be retained because the continuance of the business pending disposition of the offer resulted in loss to the creditors.

In Bankruptcy. In the matter of Morris & Rice, bankrupts. On petitions for review of various orders of referee.

See, also, 246 Fed. 1021.

Jacobs & Jacobs, of Boston, for petitioners.

Swift, Friedman & Atherton, of Boston, Mass., for bankrupts.

MORTON, District Judge. The various petitions for review in this case bring up: (1) Certain questions concerning the proper settlement of the account between the common-law assignee and the trustee in bankruptcy; (2) the proper compensation to be allowed to the assignee; and (3) whether money deposited by the bankrupts under an offer of composition which was not confirmed should be returned to them. The facts are stated in the certificates of the learned referee. While the evidence on which he acted is reported, the facts on which the decision turns are for the most part not in dispute.

Morris & Rice carried on a retail shop in Lawrence, selling shoes and clothing. On December 23, 1916, their shop was attached on mesne process, and a keeper was placed in charge. Prior to that, however, the bankrupts had realized that they were in financial difficulty, and under the advice of their counsel had turned over their receipts to him, so that he had in his possession on the date of the attachment about $2,000. After the attachment and on the same date the bankrupts made a common-law assignment for creditors to Hayes. The attaching creditor refused to relinquish possession to Hayes, and the latter received nothing except the cash in the hands of the attorney, less $310, deducted by the attorney for his own services and disbursements. On December 28th an involuntary petition in bankruptcy was filed on which adjudication later took place. On January 2, 1917, a receiver was appointed by the bankruptcy court. Adjudication was postponed, and on January 30, 1917, the bankrupts made an offer in composition, which, after some delay, was on April 23d disallowed after hearing, upon the ground that it was inadequate. The offer required a deposit of $4,226.20, of which the receiver deposited $3,500 and each bankrupt $363.10. The referee finds that the composition proceedings and the delay in connection with them caused substantial loss to the creditors.

[1] The assignee did not turn over to the receiver the fund in his possession until March 2, 1917. He then turned over $1,759.75, having deducted $644.40 for expenses incurred by him. He has filed a petition for compensation as assignee. The learned referee disallowed all these payments except $83.24, and directed the assignee to turn over to the trustee $561.16 more. The referee allowed the assignee as compensation for services $75.

The principles by which the account is to be settled are well established. The common-law assignee will be allowed for such expenses as were reasonably incurred in the care and preservation of the

property, and therefore inured to the benefit of the bankrupt estate. Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165; In re Chase, 124 Fed. 753, 59 C. C. A. 629 (C. C. A. 1st Cir.). Before the petition in bankruptcy is filed the rule will be leniently applied, and the assignee will be given the benefit of any fair doubt so long as he keeps within the powers conferred upon him in the instrument of assignment. But after bankruptcy proceedings have been instituted, there is no reason why the rule should not be strictly applied and the assignee be compelled to establish that the payments with which he seeks to be credited did in fact benefit the estate. In re Karp (D. C. Mass.) 228 Fed. 798.

As to the assignee's compensation: As the learned referee points out, the assignee never, strictly speaking, had possession of the goods in the store. He had no responsibility of any kind for its operation, except during the period from December 23d to January 4th, when the receiver took possession. I agree with the learned referee's views on this matter; and his report is confirmed.

As to the charges in the assignee's account: The principal items in dispute are disbursements for pay roll and for rent. The assignment was made on the Saturday before Christmas. One of the bankrupts borrowed $178 to pay the pay roll for that week. This was done on the assurance of the assignee that he would repay the money; and he did so on January 6th. Of this $178, $60 went to the two bankrupts for services in the store during the week. The assignee also paid the pay roll of $130 for the next week ending December 30th, of which $60 went to the bankrupts, and he paid $60 on account of the pay roll for the week ending January 6th, during which (on January 4th) the receiver took charge. The receiver continued to operate the store at the same rental for several months, until after the failure of the offer in composition and the appointment of the trustee, by whom the business was wound up.

All the payments for wages above referred to were disallowed by the learned referee upon the ground that they had added nothing to the value of the estate and were not necessary for its preservation. During the interval between December 23 and January 4, 1917, the attaching creditor was taking the proceeds of sales, and the assignee was paying the expenses; but of course such proceeds, less the legal charges, eventually came to the trustee.

The wages due to employés (other than the bankrupts) up to the time when bankruptcy proceedings were instituted would have been entitled to priority. The assignee was justified in paying them up to and including December 28th. I think also that he was fairly justified in keeping things in statu quo for a few days longer, and that for the sums paid as wages to employés up to the qualification of the receiver he should be credited. The learned referee was of opinion that as the operation of the business pending the offer in composition resulted in a loss of assets, such payments did not preserve or enhance the estate. Strictly speaking, that is true. But the assignee could not foresee, and is not responsible for, the delay and the losses incident to continued operation of the store by the receiver. Judging his

action by the facts then apparent, it seems to me he acted reasonably in keeping the business going.

[2] But I do not approve of his hiring as his employés the bankrupts who had conveyed to him as common-law assignee. If such a practice is to be approved, it must be on a much stronger showing of necessity or advantage in doing so than was made out in this instance. I agree with the learned referee in disallowing the items paid to the bankrupts under the guise of wages.

[3] As to the rent: The month's rent of $225 became due on December 31st, three days after the bankruptcy petition had been filed. The assignee paid it under a threat of immediate eviction by the landlord. It was not necessary for him to do so, because the holding appears to have been under a written lease, and the receiver was entitled to a reasonable time in which to decide whether to affirm or disaffirm the lease. Gardner, Trustee, v. Gleason, 259 Fed. 755, — C. C. A. — (C. C. A. 1st Cir.) June 18, 1919. Eviction pending the application for the appointment of a receiver, and with nobody to represent the creditors, would hardly have been permitted. The receiver, after he came into control, continued to hire the same shop, and, so far as appears, at the same rent. In Re Hays, 181 Fed. 674, 104 C. C. A. 656 (C. C. A. 6th Cir.), it was held that—

"The assignee may not improperly be treated (with respect to the settlement of his accounts) as a quasi receiver during the pendency of the proceedings for adjudication in bankruptcy."

Applying this principle to the present case, the assignee ought to be allowed his payment for rent.

The two trips taken by the assignee to New York had nothing to do with the preservation or care of the estate. The referee properly disallowed that item. This disposes of the questions concerning the assignee's account and his petition for services.

[4] The remaining question relates to the petitions of the bankrupts for the return to them of the sums deposited by them with the clerk under the offer in composition. The offer was pending for about three months before it was finally disallowed as insufficient and not for the best interests of the creditors. During this interval the shop was run by the receiver, and nothing substantial was done in the way of liquidation; and the assets were, as the learned referee finds, diminished by an amount greater than said deposits by the bankrupts. The learned referee held that as the stay in liquidation was at the request of the bankrupts and on account of their insufficient offer, they were chargeable with the resulting loss. He accordingly denied the petitions.

The certificate and report do not state that the money deposited belonged to the bankrupts at the time when the petition against them was filed, or was the proceeds of property then belonging to them. It is said by their counsel that it was not; that the money was borrowed by them for the purpose of composition after the filing of the petition; and I assume that to be the fact. Nor is there any finding that the composition was offered in bad faith, or for the purpose of delay, or

that the final disposition of it was delayed either intentionally or negligently by the bankrupts.

Property acquired by a bankrupt after the filing of an involuntary petition against him on which he is later adjudicated does not pass to the trustee. Collier on Bankruptcy (11th Ed.) p. 1116; Remington on Bankruptcy (2d Ed.) § 1132 et seq. The deposits in question do not belong to the trustee; and he is not entitled to them unless the bankrupts are chargeable with the loss to creditors caused by the offer in composition.

There is no statutory authority for such a charge, unless it be found in Bankruptcy Act July 1, 1898, c. 541, § 12b, 30 Stat. 549 (Comp. St. § 9596), which provides that the bankrupts shall deposit "the money necessary to pay * * * the cost of proceedings." The deposit is to be "subject to the order of the judge." "Costs" have generally been understood to be the statutory fees, and such other expenses as have been incurred in the case, e. g., master's fees. They do not include a loss to creditors caused by delay in converting the assets into cash. Nor do I think that without statutory authority there is power to put such loss upon the bankrupt personally and charge it against property of his, not affected by the bankruptcy, which happens to be within the control of the court, unless he acts in bad faith towards his creditors. Offers in composition are expressly authorized by the act; and, speaking generally, loss due to delay necessarily incident to legal proceedings is damnum absque injuria. If to retain the property pending the offer threatens loss to creditors, they can move for an order directing the receiver to sell out at once unless the bankrupt furnishes security for their protection. No such steps were taken in this case. In the Wiener Case (D. C.) 215 Fed. 278, and (D. C.) 217 Fed. 173, relied on by the trustee, the bankrupt was permitted to withdraw his offer; and in the Miller Case (D. C.) 243 Fed. 242, 40 Am. Bankr. Rep. 155, the practice is said to be to require security from the bankrupt as above suggested.

While the making of an insufficient offer, coupled with intentional or unnecessary delay in pressing it, was evidence of bad faith on the part of the bankrupts, there is no finding of bad faith or intentional delay by them. The findings in the certificate are not attacked by the trustee. Upon them I am of opinion that the bankrupts were entitled to a return of the deposits.

Ordered accordingly.

THE FERM.

(District Court, S. D. Alabama. July 12, 1919.)

No. 1718.

SALVAGE ⚷34—RESCUE OF WATER-LOGGED STEAMSHIP—COMPENSATION.

Services rendered by an ocean tug in towing a lumber-laden steamship, which was water-logged and helpless in the Gulf of Mexico, and, after being towed a distance by a motor schooner, had been anchored where she was in great peril, and by another tug which assisted in bringing her into

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

Mobile Bay to port, *held* entitled to a salvage award of $10,000; the steamship and cargo being valued at $250,000 and the tugs $130,000, and the services being efficiently rendered, but without great danger.

In Admiralty. Suit by M. T. Jackson and others against the steamship Ferm. Decree for libelants.

Frazer & Rickarby and Smiths, Young & Leigh, all of Mobile, Ala., for libelants.

Palmer Pillans, of Mobile, Ala., for respondent.

Alex D. Pitts, of Selma, Ala., for cargo owner.

ERVIN, District Judge. The facts of this case are that the Ferm, which was a wooden steamer, having her engines in the after part of the vessel, with her coal bunkers on each side of the engines, was loaded at Gulfport, Miss., with yellow pine lumber for the Emergency Fleet Corporation. That portion of the cargo which was put under decks was stored forward of the engines, and she had a deck load of something less than half the total cargo, which was fastened down to the deck by having ten 6x6 stanchions on each side, with chains and wire guys running from these stanchions across the deck load; that almost immediately after the sailing of the vessel she commenced leaking, so that by the day after her clearance the water had made such headway in her hold that it put out her fires, notwithstanding that she was working her steam pumps as soon as it was discovered that the water was coming in in considerable quantities. After the steam pumps were put out of commission by the fires being extinguished, the hand pumps were manned and worked in an effort to keep the water down as far as possible, and as the steering gear was operated by steam she had no means of operating this gear. There seems to have been some arrangement on the boat for hand steerage, but this also became disarranged, and the helm became jammed to one side.

The vessel was then in a helpless condition, some miles southwest of the entrance to Mobile Bay, and spoke one passing steamer, who declined to tow her, but agreed to report her condition and position by wireless, as the Ferm had no wireless apparatus. She then sent off one of her lifeboats, with the second mate and five or six seamen, in an effort to get help. Shortly thereafter a motor schooner came up, and gave her a line, and began towing her in an effort to bring her into Mobile; but the wind being from the southeast, and the current also against her, she made very little headway, so the direction was changed, and taking advantage of the wind and tide, the schooner towed her in until she was within five miles of Petit Bois Island, when it was found that the schooner was unable to bring her through the channel on account of the adverse winds and currents, and the steamer was then anchored.

The steamer continued to leak, and at the time the tug Echo reached her she had from 7 to 8 feet of water in her hold, and although, when she was loaded, she was somewhat down by the head, at this time, undoubtedly owing to the fact that the water in her hold had gotten in in sufficient quantities to be affected by the timber cargo in her bow, she had shifted this position, so that she was down by the

stern and was listed considerably to the starboard, so that her starboard rail was awash, and her port rail anywhere from three to six or seven feet above the water line.

The tug Echo, being a sea-going tug, was going into Pensacola towing a dredge boat, when she was met by one of the naval patrol boats and told that her owners wanted her to go in search of a disabled steamer lying some miles south-southwest of Mobile bar. The Echo then continued her tow until she carried it into the mouth of Pensacola Bay, where it would be safe. She then left immediately in search of the steamer, and on arrival at the place where the steamer was supposed to be she failed to find her, but, knowing the direction of the currents and the wind, she proceeded a little to the northwest and came in sight of the Ferm in time to see the power schooner leave the Ferm after she was anchored. The Echo came alongside and reported to the captain, who asked if he had been sent by the naval authorities to tow him in, and on replying in the affirmative the steamer put out her steel cable, making a bridle in front of the bow of the Ferm, to which the Echo shackled her manila hawser, and then commenced towing the Ferm to Mobile. Before leaving, the steamer, being unable to haul in her anchor because of her inability to make steam, buoyed the chain, and then slipped the anchor.

The Echo started from Pensacola about 10 a. m. on October 26th, and reached the Ferm and started towing it at about 5 o'clock the same afternoon, at which time the wind was quiet and the weather fine. Almost immediately after starting the tow, the wind began to freshen from the southeast, and by 1 or 2 o'clock in the morning of the 27th, at which time the Echo with her tow had reached the entrance off Mobile Bay, the wind reached a velocity of from 28 to 40 miles an hour, and one end of the wire bridle broke, and the consequent jerk following this, broke the manila hawser near the wire. The Ferm then drifted for a little distance, until the Echo came up in front of her, and the line was then thrown to the Ferm from the Echo, and, being made fast, she was again taken in tow and towed to a place of safety, where she was again anchored. By this time, the captain of the Echo had concluded that he was unable to tow the Ferm across the outer bar of Mobile Bay without help, owing to her waterlogged condition and inability to steer. After seeing that the anchor of the Ferm was holding, the Echo went in to Ft. Morgan and wired to Mobile for assistance and for an additional hawser.

On the early morning of the 28th the tug Claude, being a smaller tug, reported to the Echo, and the two tugs went out and passed lines to the Ferm, and tried to bring her across the bar. Finding difficulty in this, the Claude dropped astern of the Ferm, so as to hold the Ferm in position and with a line fast to her stern act as a rudder, so that the Echo could tow her across the bar, which was accomplished by this maneuver, and the Ferm was brought to her anchorage in Mobile Bay. Both tugs then lashed alongside of the Ferm on opposite sides and the Ferm was so brought up to the city of Mobile.

The testimony shows that the Ferm continued to make water until she arrived in Mobile, though the rate at which she was making water

gradually decreased during this period of time, owing no doubt to the fact of the buoyancy of the wood cargo under her decks. The testimony shows that the Ferm was then worth about $197,500, her cargo to have been worth about $54,256, and her freight money was $25,512.08. The Echo was worth about $100,000, and the Claude $30,000.

There was, so far as the evidence discloses, no great danger to the tug, nor any great risk assumed by her at any time, except at the time of the parting of the hawser off the entrance to Mobile Bar, at which time the wind was blowing at from 28 to 40 miles an hour, and there was some danger and trouble in passing the line from the Echo to the Ferm, so that the Echo approached the Ferm in such a way as to make the bows point to one another, but enough to the leeward so that, if anything happened to the Echo, she would drift to the leeward of the Ferm. At this time the Ferm was still dragging her steel cable, which had broken, and this offered some danger of fouling the propeller of the Echo.

A good deal of testimony was taken of men experienced in shipping and handling ships, to show the danger the Ferm was in while she was anchored at the place the Echo took her in tow; the water at this place having been shown to have been 9 fathoms deep. This testimony went to show, if the Ferm took in enough additional water to sink her, that owing to the fact that her engines and coal were in the stern, she would first go down by the stern, and then, if her stern struck bottom, she would probably roll to one side and turn turtle. There was also testimony by experts that owing to the construction of the vessel, being of wood, and her cargo being of wood, that she would water-log and remain afloat.

It occurs to me that, owing to the fact of the engines and coal being in the after part of the vessel, the probabilities are that the water in the hold, when it reached the level of the outside water, would have sunk the stern, and the vessel would then either have rolled over, or after the stern post rested upon the bottom, if the wind should then shift, the vessel would have been held from her bow with the anchor in one direction, and, her stern post resting on the bottom straight off, that she could not have swung to meet the change of wind, and she would then either have necessarily rolled over, or the consequent rocking would have caused the deck cargo to shake loose, because of the slope of the deck and the constant rocking by the winds and waves from one side, so that the whole vessel would have been wrecked and the whole deck cargo have been lost.

Reaching this conclusion, I find that the vessel and her cargo both were in very serious and grave danger, though the danger was not at once imminent.

It is urged that, if the Echo had not come to the assistance of the Ferm, she would very shortly have obtained other assistance through the members of the crew who had gone ashore hunting it, or through messages which were sent through the power schooner; but, even if she had gotten this assistance, she would still have been in the same need of assistance, no matter what boat came, and she would have been confronted with the same problems as to her dangerous condition and urgent need of assistance from whatever boat reported.

The testimony shows that the ordinary towing price earned by the Echo, while towing sound vessels, was about $300 a day. It is further shown that the Ferm was towed by the power schooner for hours, and was paid by the Ferm $3,000 for this service.

I find, as above stated, that the Ferm and her cargo were in a very serious and dangerous plight, with great risk of entire loss, if any considerable delay were encountered in relieving her. The service rendered by the tug was efficient and intelligently rendered, and while there was no grave or imminent danger to the tug or her crew, and nothing of heroism in the case, I find that a salvage service, though of a low order, was rendered, and considering all the facts, and particularly the danger the ship and cargo was in if relief was not obtained in a very short period of time, I have reached the conclusion that $10,000 is a fair amount to be awarded as the total salvage.

I reserve the question of the apportionment of the salvage against the ship, cargo, and freight, and in favor of the tugs Echo and Claude and their crews, and if no agreement shall be made between the parties covering these matters, the court will order a reference, at which these matters can be determined.

A decree will therefore be entered in accordance with these views.

In re HOLDEN.

(District Court, N. D. New York. July 12, 1919.)

1. BANKRUPTCY ⟹132—REMOVAL OF TRUSTEE—GROUNDS.
   That the trustee of a bankrupt, appointed by a large majority of creditors, had previously acted for the bankrupt and his wife, who conveyed to him all of their property in trust for themselves and creditors, *held* not ground for his removal, where he executed the trust efficiently and in good faith, and made payments only by direction or with the approval of bankrupt.

2. BANKRUPTCY ⟹132—TRUSTEE—POWER OF REMOVAL.
   Under General Order in Bankruptcy No. 13 (89 Fed. vii, 32 C. C. A. xvii), a referee is without power to remove a trustee, who is removable by the judge only.

In Bankruptcy. In the matter of James A. Holden, bankrupt. On petition of a creditor to review an order of the referee refusing to remove the trustee, who was selected by about 90 per cent. of the creditors. Affirmed.

Henry W. Williams, of Glens Falls, N. Y., for petitioner.
E. M. Angell, of Glens Falls, N. Y., for trustee.

RAY, District Judge. [1] A. Eugene Mason was appointed trustee of the bankrupt September 8, 1917, on petition filed August 18, 1917. He was the vice president and cashier of the Glens Falls Trust Company, a creditor of the bankrupt. December 31, 1914, an agreement in writing was entered into between the now bankrupt James

A. Holden and Mary B. Holden, of the first part, and said A. Eugene Mason, of the second part, wherein it is recited that the parties of the first part had theretofore executed conveyances, subject to certain mortgages, of all their real and personal property to said Mason the party of the second part and also certain securities held by them. The agreement then provides that Mason will hold and use all the said property for the benefit of the parties of the first part and sell, convey, and dispose of same for their best interests after consulting and conferring with the parties of the first part; that he will place same or parts of same as collateral to the debts and obligations of the parties of the first part which are most pressing and keep a true account and account to the first parties—

"for the purpose of paying the obligations of the said parties of the first part and to pay obligations of the said parties of the first part as fast as possible, and to pay taxes and insurance and to pay all expenses in connection with the said property, and to use the property and securities for the purpose of meeting the debts and obligations of the parties of the first part to the full extent that such property and securities may be applicable, and to reconvey and reassign after three years from the date hereof, upon thirty days' demand in writing signed by the parties of the first part, such property, or so much thereof as may remain undisposed of, to said parties of the first part unless the debts and obligations of said parties of the first part shall sooner be paid or reduced to a negligible amount."

The parties of the first part further agreed not to make any promissory notes, and also agreed that said James A. Holden would pay over to Mason one-half the salary he was receiving from the state of New York, to be applied to his debts and to the upkeep and management of the real estate so conveyed to Mason. The agreement also contained the following:

"3. It is further expressly agreed and understood that the party of the second part shall be privileged to apply the proceeds of the said property conveyed to him for the purpose of maintaining and caring for said property in all respects and for his expenses and a reasonable compensation to him *for carrying out the provisions of this trust.* The party of the second part shall have the right and privilege at any time to reconvey to said parties of the first part any of the real property heretofore conveyed to him by the parties of the first part or so much thereof as shall be then remaining and reassign to said parties of the first part such securities as he may have, covered by this agreement, then in his hands, and pay over any moneys belonging to said parties of the first part that shall then be in his possession and terminate this agreement and his responsibility thereunder. The said party of the second part shall not be liable in any way for any mistake in judgment *in the execution of this trust* and shall be liable only for bad faith."

January 2, 1915, James A. Holden had given to said Mason a power of attorney reading as follows:

"Know all men by these presents, That I, James A. Holden, of the city of Glens Falls, Warren County, New York, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, A. Eugene Mason, of the same place, my true and lawful attorney for myself and in my name, place, and stead to execute and deliver any promissory notes or renewals thereof, to sign any papers necessary in the transfer of certificates of stock, bonds, or securities of any nature upon the books of any corporation or transfer agent, and to sign and execute any papers and do any and all acts, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be

done in and about the premises, as fully to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue thereof.

"In witness whereof, I have hereunto set my hand and seal the second day of January, one thousand nine hundred and fifteen.

"James A. Holden. [Seal.]"

Objection was made to Mason's appointment, and then a motion was made to and before the referee to remove him, and hearings were had, and March 8, 1919, the application to remove the trustee was denied.

The petition to review that order was made and filed March 17, 1919. Mr. Mason managed these properties and conducted the affairs of the bankrupt under this agreement down to the time of such bankruptcy, exercising also his powers under the power of attorney. The referee in his return states that Mr. Mason down to the time of the bankruptcy believed Holden to be solvent and that Holden from time to time turned over one-half of his salary. Mr. Mason has filed a statement of all his transactions while so acting. He paid all he could while so acting for Holden.

The referee also certifies that the Glens Falls Trust Company "received only what was realized from the collateral which it held at the time of the making of the agreement." It appears that while acting under this trust agreement Mr. Mason paid some of Holden's debts in full, made small payments on others, but made no payment at all on others. It is contended that under the agreement it was the duty of Mr. Mason to pay Holden's creditors pro rata and that he is liable to the estate in bankruptcy—that is, to Holden's estate—because he did not, or to the creditors to whom he paid nothing. During his lifetime (he having died since his bankruptcy) Mr. Holden carried certain life insurance on which premiums were paid by Mr. Mason from time to time. These policies, except one, had been assigned by him as collateral security for certain of his indebtedness. All payments were made at the request and with the consent and approval of Mr. Holden. It seems that as a general rule, notwithstanding the agreement, Mr. Holden dictated what payments should be made and to whom. But I find nothing in the agreement that makes Mr. Mason a wrongdoer in pursuing this course. This was not either a general assignment for the benefit of creditors, or an assignment made for the benefit of creditors. It created a trust clearly, but did not purport to create a trust for the benefit of creditors, although the assignment was undoubtedly intended to be in the interest of creditors as well as of Holden. It was not intended to hinder, or delay, or defeat, or defraud creditors. Under some conditions and circumstances it might have defrauded creditors. If a creditor had brought suit and obtained judgment, he would have been delayed in its collection, as the title to all of Holden's property had been transferred to Mason, and proceedings other than the issue of an execution and a levy and sale thereunder would have been necessary.

But no suits were brought and no executions were issued. When bankruptcy came, Mason fully accounted, so far as appears, and

turned over all the property remaining. Acting for the real owner, Holden, he, so far as appears, acted according to his directions or with his consent and approval. Clearly Holden had no cause of action against Mason for any of his acts under the agreement. It is not contended that Mason has kept anything back, that he has been guilty of any concealment, or that he has appropriated any of the property to his own use. If any of his acts concerning or done in dealing with this property prior to the bankruptcy were in fraud of creditors, or of any creditor, or worked any injury to a particular creditor, or to particular creditors, such acts were done by him in his individual character and capacity, and he may be sued by such creditor or creditors; but the cause of action is not against him as trustee, nor is it one in favor of the estate in bankruptcy. If any preferences were given within the four months preceding the bankruptcy, Mason may sue to recover them; but no case of this kind is presented. Suit in such case can be brought in his name as trustee, and creditors desiring the suit brought can prosecute it by their own attorney, and this court would so order. However, the record presents no such case or condition.

The appointment of Mr. Mason as trustee was objected to, but made and confirmed, and there was no appeal or review. There is no claim that Mr. Mason is not a competent and able man, or that he is unfit for the position. It is not asserted that he has done anything since his appointment to justify removal, or that he has failed in the discharge of any duty he owes to creditors or the estate he represents.

[2] But, irrespective of all this, General Order 13 (89 Fed. vii, 32 C. C. A. xvii), established by the Supreme Court, provides:

"The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee, or by the judge; *and he shall be removable by the judge only.*"

In view of this General Order the referee was powerless to remove this trustee, and the order refusing to remove him must be affirmed. However, if cause for removal can be shown, the matter should be brought before the judge on petition, and an order to show cause will be granted, and the whole situation gone into. The record now before the court does not show cause for a drastic order of removal, even if the appointment in the first instance was unwise in view of the situation.

MONTGOMERY LIGHT & WATER POWER CO. v. CHARLES et al.

(District Court, M. D. Alabama, N. D. at Montgomery. July 15, 1919.)

No. 233.

1. INJUNCTION ⟹26(4)—MULTIPLICITY OF SUITS—EQUITABLE RELIEF.

Where some 130 landowners, whose premises had been flooded, instituted separate actions for damages against owner of a dam, the federal District Court, to which all the suits of jurisdictional amount had been removed, has equity jurisdiction to restrain the prosecution of the suits at law, where the plaintiffs at law are united by a common tie created by identity of interest in the decision of the same questions of law and fact, the party defendant is the common adversary, and the suits are so numerous that their further prosecution would visit great inconvenience,

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

hardship, and expense upon the defendant in the actions at law. Motion to dismiss for want of equity overruled.

2. WATERS AND WATER COURSES ⟹179(4)—DAMS—FLOODS—SUFFICIENCY OF EVIDENCE.
Evidence that water of defendant's dam rose 10 feet following a 10-inch rainstorm, that plaintiffs' lands were annually flooded, that tributary streams entered river between dam and plaintiffs' lands, etc., *held* not to establish that flooding of plaintiffs' lands was caused by defendant's maintenance of 3-foot flash board on its dam, which impounded a comparatively small quantity of water.

3. WATERS AND WATER COURSES ⟹179(2)—DAMS—RECOVERY OF DAMAGES.
Landowners, seeking to recover damages caused by flood from a dam owner, must show that dam owner's negligence proximately caused the injury.

4. NEGLIGENCE ⟹56(1)—PROXIMATE CAUSE.
To constitute actionable negligence, the causal connection between the negligence and the injury must be by natural and unbroken sequence, without intervening causes.

In Equity. Bill by the Montgomery Light & Water Power Company against T. T. Charles and others. Order for permanent injunction.

Steiner, Crum & Weil, of Montgomery, Ala., Frueauff, Robinson & Sloan, of New York City, and J. M. Holley, of Wetumpka, Ala., for plaintiff.

Rushton, Williams & Crenshaw, Hill, Hill, Whiting & Thomas, and W. A. Jordan, all of Montgomery, Ala., for defendants.

HENRY D. CLAYTON, District Judge. About the year 1900 the plaintiff, the Montgomery Light & Water Power Company, a New Jersey corporation, constructed and has since owned and operated a dam and an electro-hydraulic plant on the Tallapoosa river about 3 miles above the town of Tallassee, Ala., and has been and is now engaged in generating and selling electric power to the public generally at Montgomery and in that vicinity for lighting and industrial purposes.

In the year 1917 the defendants in this case owned or operated the lands situated along the river and below the dam as farms. On August 7 of that year the river overflowed its banks, and the crops growing on these lands were inundated and destroyed. Soon thereafter such farmers who are defendants here, some 130, hereafter referred to as Charles and others, severally brought suits in the circuit court of Montgomery county, Ala., against the plaintiff, who will be called hereafter the Power Company, seeking to recover damages, aggregating about $300,000, alleging that they sustained losses to that extent in consequence of this flood upon their lands and crops. The complaints are the same in form and substance, excepting, of course, the variations in the descriptions of the property alleged to have been damaged and the names of the plaintiffs and the amounts sued for. Briefly stated, it is alleged in each complaint that the Power Company had so negligently constructed or maintained its dam that by reason thereof, and as a proximate consequence, on August 7, 1917, the dam, or a part thereof, broke or gave way, and that as a further proximate result large quantities of water were caused to flow upon plaintiffs' (in the state court) lands, and caused the damage for which a recovery is

sought. Such of these suits as were removable were removed into this court, and are now pending on the law side of the docket, and those not removable (on account of the amount claimed being less than $3,-000) are still pending in the state court.

In this situation the Power Company filed this bill in the nature of a bill of peace in this court against the several plaintiffs at law. It is alleged in the bill, among other things, that by long-continued use the Power Company had acquired a prescriptive right and easement to maintain and operate its said plant and dam and to utilize the waters of said river in operating its hydro-electric plant; that the effect of the numerous suits instituted and others threatened and likely to be brought, as the result of an alleged conspiracy or combination to foment litigation, was, in reality, a denial of and an attack upon the right of the Power Company to use and operate its property, and to appropriate the flow of the river at its dam. The bill seeks to have this right declared and quieted; and, further, it is alleged that without this relief the plaintiff will be repeatedly harassed by useless, wrongful, and vexatious litigation, and that its property rights, business, and credit will be seriously and injuriously affected, and the discharge of its duties to the public hampered and embarrassed.

It is also alleged in the bill that said suits at law are numerous, and that in each case the questions of law and fact are identical; that each of the plaintiffs, and also the defendants therein, had a common interest in the subject-matter of the litigation and in the questions of law and fact involved in these actions at law.

The Power Company, the plaintiff here, denies the averments of fact contained in the several complaints at law, and denies that it was guilty of any negligence, or that it had committed any wrong, or violated any duty that it owed to the plaintiffs in such suits in the circuit court, for or on account of the matters and things therein alleged, and asserts that it has a full and complete defense to the said several suits at law.

Further, the Power Company submits itself to the jurisdiction of the court and prays to restrain the prosecution of the various suits at law now pending in this court by removal, and those pending in the state court, and that the matters and things therein involved be determined in this court.

Other reasons are alleged for equitable intervention, which in the view taken of the case are not necessary to be now mentioned.

The defendants (plaintiffs in the state court) appeared and answered, admitting many of the material averments of the bill, including the right and easement alleged to have been acquired by the Power Company in the use and operation of its dam, etc., but asserted that the damages sought to be recovered in the actions at law were due, not to the negligent operation of the dam, but to the negligent maintenance, on the crest of the dam, of flashboards, which they declared had been improperly and defectively constructed and were allowed to collapse suddenly, releasing large quantities of water upon the lands and crops of Charles and others, with the consequent damage.

The Power Company then amended its bill, denied the negligence charged in the answer, and denied that the alleged damage was in any way attributable to the use of the flashboards. The bill as amended and

the original answer of the defendants were verified; but the defendants failed to verify their answer to the amended bill. Afterwards, during the absence of the writer by proper designation on official business in another district, the plaintiff gave due notice to the defendants, and applied to Judge Grubb, of the Northern district of Alabama, for an injunction pendente lite to restrain the further prosecution of the suits at law in accordance with the prayer of the bill, to the end that the matters therein involved might be litigated in this court. Judge Grubb held that the bill contained equity and granted the writ. It may be said, notwithstanding the defendants have challenged the equity of the bill, that from the evidence in the record it is not too much to observe that the writ was not granted with their expressed assent, but apparently with their acquiescence.

[1] At the outset of the trial before me, however, the attorneys have argued the motion to dismiss the bill for want of equity, and said motion has been considered.

The alleged conspiracy against the plaintiff here is elaborately set out in paragraph 9 of the bill, but consideration of such matters may be pretermitted, for it appears to me that the bill presents a case for equity cognizance, in that it is to enjoin a multiplicity of suits at law, where the plaintiffs at law are united by a common tie created by identity of interest in the decision of the same questions of law and fact, the party defendant is the common adversary, and the suits are so numerous that their further prosecution would visit great inconvenience, hardship, and expense upon the Power Company, defendant in the actions at law. Moreover, such suits at law are in effect a denial of the right of the Power Company to maintain and operate its dam and plant.

There are a contrariety of decisions as to the power of a court of equity to enjoin a multiplicity of actions at law, but it seems that on principle, and in the light of and in harmony with the weight of modern authority, the bill must be sustained. Pomeroy's Eq. Jurisprudence (14th Ed.) § 269, p. 500. Beginning with section 243 of this work, the author reviews the entire subject. In the instant case there are about 130 persons who have sued on their separate and individual claims against the same defendant. All these claims arise from the same common cause, are governed by the same legal rules, involve substantially the same facts, and can be settled in a single suit wherein all the plaintiff persons are made parties to one side of the controversy and the Power Company is made the other party, and where the rights of all may be adjudicated and determined. This, I think, is a fair adaption to the present case of the idea expressed by Pomeroy and quoted with approval by Justice Harlan in Osborne v. Wisconsin Central R. Co. (C. C.) 43 Fed. 825. Here it is undoubtedly true that "the plaintiffs are united by a common tie, created by identity of interest in the decision of the same questions of law and of fact, and have a common adversary." Equity discountenances the multiplicity of suits; and certainly this is true, where as in the instant case, all questions—that is, right of easement and charge of negligence, etc.—can be settled in one suit. That is one of the grounds of this jurisdiction, and aims by restraining a multiplicity of suits to give to the owner of the property the beneficial enjoyment of it and to enable him to get the benefit of

its ownership, rather than fritter it away in many and diverse suits. Hyman v. Wheeler (C. C.) 33 Fed. 629.

In the oral argument on the motion to dismiss the bill for want of equity, the attorneys for Charles and others, the defendants here, insisted that the plaintiffs in the law actions had no more than a mere community of interest, as distinguished from a common right, and that this was not sufficient to confer equity jurisdiction. But I think it may be said that, while the Power Company could make its defense in each of the law cases, this is not a sufficient reason to shut it out of a court of equity, unless the Power Company's right of defense in the law court is adequate, considering all the circumstances of the case.

In Boyce v. Grundy, 3 Pet. 210, loc. cit. 215 (7 L. Ed. 655), the court held that "it is not enough that there is a remedy at law," unless indeed the remedy there is "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." And in Cruickshank v. Bidwell, 176 U. S. 73, loc. cit. 81, 20 Sup. Ct. 280, 283 (44 L. Ed. 377), it is said: "Inadequacy of remedy at law exists where the case made demands preventive relief, as, for instance, the prevention of multiplicity of suits. * * *" Here the defense in one of the separate actions at law with a single claimant would determine nothing beyond the respective rights of the parties in that particular case as against each other; and such a contest with each of the 130 claimants might lead to interminable litigation. The theory upon which the bill is filed in this case is that equity can put at rest the controversy and determine the extent of the rights of the claimants of distinct interests in a common subject, and I think the bill should be sustained, for it appears to be essentially one for peace, and certainly, if it should be found that the Power Company is liable at all, then the claim of each of the persons, plaintiffs at law, can be fairly and fully considered, and, if need be, the amount of damages to be awarded in any case might, in the discretion of the court, be submitted to a jury.

Manifestly, the Power Company, if it defends at all, will defend upon the ground that no negligence on its part caused the crops of Charles and others to be overflowed and destroyed; and therefore it can and must make a common defense to a cause common to all the plaintiffs in the action at law, having a separate interest in a common subject-matter. As was said in the case of Hale v. Allison, 188 U. S. 56, 77, 23 Sup. Ct. 244, 252 (47 L. Ed. 380):

"Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits, and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested, and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation, * * * and will not unreasonably overlook or obstruct the material interests of any."

The following cases are instructive and pertinent: L. & N. R. R. Co. v. Smith, 128 Fed. 1, 63 C. C. A. 1; Sharon v. Tucker, 144 U. S.

533, 12 Sup. Ct. 720, 36 L. Ed. 532; Hale v. Allison, supra; I. C. C. R. Co. v. Garrison, 81 Misc. 257, 32 South. 996, 95 Am. St. Rep. 469; Cumberland Tel. & T. Co. v. Williamson, 101 Miss. 1, 57 South. 559; Church v. Swetland et al., 233 Fed. 891, 147 C. C. A. 565; Home Ins. Co. of N. Y. v. Va.-Car. Chemical Co. (C. C.) 109 Fed. 861, affirmed (C. C. A. 4) 113 Fed. 1, 51 C. C. A. 21.

On the trial of the case the court overruled the motion to dismiss for want of equity, and then proceeded to hear the case on its merits. The testimony of about 75 witnesses was taken, and the court also received in evidence certain documents, maps, photographs, etc. In the decree which will be entered in the case, the motion to dismiss for want of equity will be more formally overruled.

Coming, now, to a consideration of the question of liability vel non of the Power Company in the suits at law, it will be seen that each complaint contains three counts. In the first count it is alleged that during the month of August, 1917, large quantities of water were negligently caused by the Power Company to flow or be upon the lands of the plaintiffs, and, as a proximate consequence, plaintiffs' crops were damaged, etc.; in the second, it is alleged that the Power Company's agent or servant, while acting within the scope of his employment, with reckless indifference to consequences, willfully or wantonly caused the water to flow or be upon plaintiffs' lands, being conscious at the time that his conduct would probably result in the damage complained of; and in the third it is alleged that the Power Company operated or maintained a dam across the Tallapoosa river at or near Tallassee, Ala., and that said dam was so negligently constructed or maintained that by reason thereof, and as a proximate result, on August 7, 1917, said dam, or a part thereof, broke or gave way, and as a proximate result large quantities of water were caused to flow and be upon plaintiffs' lands, destroying their crops, etc. Charles and others, the plaintiffs in the law actions, really rest their right of recovery upon the negligent operation of, or the use of, flashboards on the top of the Power Company's dam.

The testimony, taken orally in the presence of the court and reported, is voluminous. A large number of official records, maps, photographs, blueprints, engineering and climatological data, and the like, were put in evidence. Much testimony came from engineers of large experience in hydraulic work, and who were esteemed for their learning, skill, and character. Considerable testimony of a technical and scientific nature was adduced, and it tended to simplify the questions involved; but, after all, the relevant and material testimony was practically without dispute.

The Power Company's dam is of masonry, and is about 40 feet high and about 620 feet long, about 53 feet of which length is 15 inches higher than the remainder of the dam. The Power Company, by condemnation and the purchase of the flood rights above its dam, acquired the right to construct its dam 50 feet in height. It had in use, on the top of the dam, in August, 1917, and for several years immediately prior thereto, pin type flashboards. These were constructed of ordinary commercial iron piping 2½ inches in diameter and 5 feet long,

let into sockets 15 inches deep, 2 feet apart, on the crest of the dam. In front of these pins were placed ordinary boards or planks, tongued and grooved together, 3 feet high, and fastened to the pins or piping with malleable wire.

The prime purpose of the flashboards was to take care of the fluctuations in the flow of the stream; that is, to impound storage water for use in the case of natural low stage of the river, so as to maintain an effective head on, or force upon, the wheels of the machinery turned by the water and used in the operation of the plant; and the other idea of the flashboards was to release the impounded water in advance of the crest of the flood in case of an unusual rise of the stream. These boards were intended to operate automatically—that is, to overturn, break down, or give way in sections periodically—by reason of the natural force or pressure of the water and other contributing agencies, such as the impact of floating timber, so that thereby the water impounded above the dam would be gradually released. Some of the engineers denominated the flashboards a regulating device.

The preponderance of evidence shows that flashboards of this type are in common use by operators of hydraulic plants in different parts of the United States, and that their use is generally regarded as good engineering; that such regulating device is considered necessary on the crest of all dams, like the one here, regardless of the height of the masonry; and that such flashboards are especially adapted to rivers having the characteristics of the Tallapoosa. This stream has its origin in Paulding county, Ga., and flows generally in a southwesterly direction, finally emptying its waters, with accretions from numerous tributaries, creeks, and many branches, into the Gulf of Mexico. The Tallapoosa and Little Tallapoosa have their junction in Randolph county, Ala., and from there the Tallapoosa river runs into Elmore county, and, beginning at its confluence with the Coosa river, considerably larger, forms the Alabama river. The character of the country at the headwaters of the Tallapoosa, and, as a rule, down to the near neighborhood of the Power Company's dam, is largely hilly and rocky, embracing much cut over land, and many farms on the hillsides and in small valleys. The nature of this section, the topography of the land, and the like, causes the water to run off very rapidly in case of heavy rainfall, especially where the precipitation is of short duration. The country below Milstead, about 7 miles below the Power Company's dam, through which the river runs, has much lowland, generally of an alluvial nature. Broadly speaking, this is true of all the lands contiguous to the stream from Milstead to where it becomes a part of the Alabama river, and even from there all the way of its tortuous course to the Gulf.

About 3 miles below the Power Company's dam there is located on the Tallapoosa river the dam of the Tallassee Falls Company, about 1,500 feet long and 60 feet high. The bed of the river between the two dams contains much rock, many shoals, and a number of small islands, here and there, all of which, together with the two dams, have a natural tendency to retard the flow of the stream. The farms of Charles and others are located on the Tallapoosa and Alabama rivers,

and range, with one exception, from 14 to 86 miles below the Power Company's dam.

On August 5 and 6, 1917, a torrential rainstorm occurred in the upper regions of the Tallapoosa river. It was shown by the undisputed testimony of 30 or more disinterested witnesses residing in that territory that this rainfall was unparallelled in its intensity, and that, while the fall was somewhat limited in area and of only a few hours duration, it was the heaviest and most violent downpour which had occurred in their memory, with the exception of the flood of 1886. From that testimony it appears to have been the only storm of such proportions that had occurred during the crop season since the first rain gauge station was established at Milstead in the year 1897.

From the testimony of these witnesses, the records of the United States Geological Survey, the Weather Bureau, and other data, this rainfall seems to have approximated 10 inches in a comparatively short period of time, and from the United States Geological Report for the month of August, 1917, the precipitation in that locality for that month seems to have been greater than in any other locality in the United States. During this storm large trees were uprooted, dams and bridges, before that undisturbed for years, were washed away, and great damage done to crops. The river gauge, as shown by the United States Geological Survey at Sturdevant, on this river, about 20 miles above the Power Company's dam, shows that this flood produced a maximum rise of over 22 feet, with a rise of 19 feet in 17 hours. The maximum stream flow at that point approximated 57,600 cubic feet per second. At the Power Company's dam the flood reached its maximum of 10.1 feet at 10 o'clock on the morning of August 7, 1917, and the flow of the river at that time approximated 64,000 cubic feet per second. At Milstead, the stream being confined to a narrower channel, the maximum gauge on the night of August 7 was 46 feet, and the stream flow was approximately 65,000 cubic feet per second—thus reasonably accounting for the rainfall in the upper reaches of the river, the slight difference being caused by the water entering the river from intervening tributaries.

During these floods the lands and crops of Charles and others were overflowed, and some to the depth of 15 to 20 feet, and hundreds of square miles of territory were inundated. The average width of the waters below Milstead, covering a distance of about 75 miles in length, was 1½ miles.

[2-4] The insistence of Charles and others, as before stated, is that the Power Company was guilty of negligence in the maintenance of the flashboards; that they simultaneously, or nearly so, collapsed, releasing a large quantity of water, which flooded their lands, and they claim that this would not have happened, had it not been for the use of the flashboards. The evidence does not sustain this contention.

To entitle Charles and others to a recovery, it must, of course, be shown that the Power Company was guilty of negligence which proximately caused the injuries complained of. Milwaukee, etc., R. Co. v. Kellog, 94 U. S. 469, 475, 24 L. Ed. 256; Sloss-Sheffield Co. v. Wilson, 183 Ala. 411, 62 South. 802. The burden of showing that the

Power Company was guilty of actionable negligence in erecting or maintaining flashboards, and that such negligence proximately caused the injury—that is, the flooding of the plaintiffs' lands, and the consequent damage complained of—has not been discharged by Charles and others.

After careful consideration of all the testimony, I am of opinion, and so find the fact to be, that the unusual and exceedingly heavy rain which occurred on August 5 and 6, 1917, was sufficient to produce the same consequences, independent of all other causes, and that the same result would have happened, regardless of the use of the flashboards. The quantity of water impounded by the 3-foot flashboards, about 2,725 acre feet, is too inconsequential in comparison with the total excess flow of the stream. It seems, from the testimony, that the equivalent of the water stored by these boards was flowing into the pond every 30 minutes, and, conceding that the boards collapsed simultaneously, the released water would have had no appreciable effect upon the territory below the dam. I may say, however, that the flashboards, according to the preponderance of the evidence, did not collapse simultaneously. They began to go out on the afternoon of August 6, when the river had reached a stage of about 7 or 8 feet, and they went out automatically, in sections of 8 or 12 feet in length, until dark, when some 8 or 10 sections had gone out. All of the flashboards had gone out by daylight of the next morning. The operator of the plant testified that the flashboards went out as they ordinarily did, and that they had all gone out by 1 or 2 o'clock a. m. on August 7, 1917; the water being then naturally released, or unobstructed in its flow so far as the flashboards were concerned.

The river below the Power Company's dam continued to rise, reaching a maximum stage on August 7 of 10.1 feet at 10 o'clock of that day—some 10 or more hours after the collapse of the boards, and after the water impounded by them had passed the dam. Moreover, the pregnant and indisputable fact remains, as it is shown by the testimony of some of the oldest residents of that region, and as it is commonly known, that this river has overflowed frequently, and that the lands in question have been flooded to practically the same extent year after year from a period long before the erection of the Power Company's dam to the present time, although these floods rarely occurred during the crop growing season. It is also significant that, the river having reached about the same stage in December, 1918, and in February and March, 1919, which it attained in August, 1917, the land was flooded practically to the same extent at these times as it was flooded on August 6 and 7, 1917. During December, 1918, and January and March, 1919, there were no flashboards on the dam of the Power Company. If the plaintiffs in the law actions had succeeded in establishing negligence on the part of the Power Company, it would be impossible to trace the damages complained of to that negligence with any reasonable degree of certainty. In addition to the enormous volume of water flowing down the river from its upper reaches, there were contributions made to the volume by the flow of a considerable number of tributary streams below the Power Company's dam. The river itself and these streams

drained an area of thousands of square miles. It would have been impossible to measure the effect of such a relatively small volume of water impounded by the flashboards on the lands of Charles and others below the Power Company's dam.

In Western Railway Co. v. Mutch, 97 Ala. 194, 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179, it is said:

"To constitute actionable negligence, there must be not only causal connection between the negligence complained of and the injury suffered, but the connection must be by natural and unbroken sequence—without intervening, efficient causes—so that, but for the negligence of the defendant, the injury would not have occurred. It must not only be a cause, but it must be the proximate—that is, the direct and immediate—efficient cause of the injury."

This terse and clear statement of Chief Justice Stone asserts the settled law. Weatherly v. Nashville, etc., Ry. Co., 166 Ala. 575, 51 South. 959; Southern Ry. v. Crawford, 164 Ala. 178, 51 South. 340; Tobler v. Pioneer Co., 166 Ala. 482, 52 South. 86; Cooley on Torts, 70. The recent case of Georgia Railway & Power Co. v. Johns, 20 Ga. App. 780, 93 S. E. 521, seems to be in its facts and essential features like the case now under consideration, and there the decision is the same as in this case.

From what has been said, it follows that the plaintiffs in the suits at law are not entitled to recover, and that the further prosecution of such suits in this court, and in the circuit court of Montgomery county, should be perpetually enjoined.

A judgment and order in harmony with the foregoing opinion and findings will be entered.

UNITED STATES v. NEW ENGLAND FISH EXCHANGE et al.

(District Court, D. Massachusetts. July 11, 1919.)

No. 810.

1. Courts ⟹343—Federal Courts—Parties Defendant—Equity Rule.
   Under equity rule 26 (201 Fed. v, 118 C. C. A. v), providing that several defendants may be joined to promote administration of justice, etc., three corporations were properly made parties defendant in suit seeking their dissolution under Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830) and Clayton Act, where transactions involved all related to conducting fish business in Boston and were so interwoven that three suits, instead of one, would cover substantially same ground and occasion unnecessary expense.

2. Monopolies ⟹24(2)—Bill—Sufficiency.
   Allegations that control obtained through stock ownership of certain fish dealers violated Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), and supplementary acts, *held* sufficiently broad to charge violation of Clayton Act, which supplements Anti-Trust Act.

3. Courts ⟹347—Federal Courts—Bill—Amendment.
   Under equity rule 19 (38 Sup. Ct. xxiii), relating to amendments, a bill brought under Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), and supplementary acts, may be amended to also seek relief under Clayton Act, where that phase of case was fully covered at trial.

4. Monopolies ⟹20—Clayton Act.
   The Boston Fish Pier Company, by acquiring stock of 25 wholesale fresh fish corporations and thereafter conducting the business so that

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competition between them ceased, violated Clayton Act, § 7 (Comp. St. § 8835g), and combination should be dissolved.

5. MONOPOLIES ⟹20—CLAYTON ACT.
The Bay State Fishing Company, by acquiring stock of 8 wholesale fresh fish corporations and eliminating competition between them, violated Clayton Act, § 7 (Comp. St. § 8835g), and combination must be dissolved.

6. MONOPOLIES ⟹17(1)—SHERMAN ANTI-TRUST LAW—VIOLATION.
Action of Boston fish dealers in securing control of a fish pier and fish exchange, which enabled them to centralize and control the interstate trade in fresh fish, *held* to violate the Sherman Anti-Trust Law (Comp. St. §§ 8820–8823, 8827–8830).

7. MONOPOLIES ⟹24(2)—SHERMAN ANTI-TRUST LAW—REMEDY.
The Boston Fish Market Corporation, although operating a fish pier so as to unduly restrain trade in violation of Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), will not be dissolved, if it opens the pier to all persons desiring to purchase fish under reasonable regulations.

8. MONOPOLIES ⟹24(2)—SHERMAN ANTI-TRUST ACT—REMEDIES.
The New England Fish Exchange, which provides a place in Boston where fishermen and dealers may transact business, will not be dissolved because it violates the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), if its rules are reformed, so as to permit all applicants to become members under reasonable regulations.

9. MONOPOLIES ⟹17(1)—FISH EXCHANGE—CHARGE ON SALES.
Since the New England Fish Exchange is an agency for common benefit of those doing business there, burden of maintaining it should be fairly apportioned, and fishermen should not be charged a higher fee on their sales than is necessary to pay expenses and reasonable return on money invested.

10. MONOPOLIES ⟹17(1)—RESTRAINT OF TRADE—FISH EXCHANGE.
A rule of the New England Fish Exchange requiring fishermen to pay a certain percentage on the highest bid made for their fish, although the bid be not accepted, tends to compel a sale, whether fishermen be satisfied with bid or not, and unreasonably restrains trade.

11. MONOPOLIES ⟹17(1)—RESTRAINT OF TRADE—FISH EXCHANGE.
A rule of the New England Fish Exchange assessing dealers a certain amount on fish purchased tends to increase price of fish, and unreasonably restrains trade.

12. MONOPOLIES ⟹17(1)—RESTRAINT OF TRADE—FISH EXCHANGE.
A rule of the New England Fish Exchange, which was construed to preclude commission men from selling fish, except to wholesalers doing business on the Exchange, unreasonably restrains interstate trade.

13. MONOPOLIES ⟹17(1)—RESTRAINT OF TRADE—FISH EXCHANGE.
A rule of the New England Fish Exchange, precluding commission men having privileges of the Exchange from selling to retailers, should be amended to allow sales to all dealers.

14. MONOPOLIES ⟹17(1)—RESTRAINT OF TRADE—FISH EXCHANGE.
The purchase and sale by the New England Fish Exchange of fish on its own account and for others unreasonably restrain trade.

15. MONOPOLIES ⟹17(1)—RESTRAINT OF TRADE—FISH EXCHANGE.
A rule of the New England Fish Exchange, providing that members shall not agree to divide purchases of fish until after purchase has been made, should be strictly enforced, since agreements to refrain from bidding would unreasonably restrain trade.

16. MONOPOLIES ⟹17(1)—RESTRAINT OF TRADE—FISH EXCHANGE.
Rules of New England Fish Exchange, limiting its privileges to wholesale fresh fish dealers, unreasonably restrain trade.

17. MONOPOLIES ⇐17(1)—SHERMAN ANTI-TRUST ACT—VIOLATION.
The Boston Fish Pier Company, composed of 28 out of 40 fresh fish dealers and controlling the fish pier and fish exchange, violates Sherman Anti-Trust Act, §§ 1, 2 (Comp. St. §§ 8820, 8821).

18. MONOPOLIES ⇐17(1)—SHERMAN ANTI-TRUST ACT—VIOLATION.
The Bay State Fishing Company, composed of 8 out of 40 fresh fish dealers in Boston and a trawling fleet which is the only dependable source of supply at certain seasons, violates Sherman Anti-Trust Act, §§ 1, 2 (Comp. St. §§ 8820, 8821).

In Equity. Bill by the United States against the New England Fish Exchange and others. Decree ordered for the United States.

The United States Attorney and Edward F. McClennen, Sp. Asst. Atty. Gen., for the United States.

Blodgett, Jones, Burnham & Bingham and Addison C. Burnham, all of Boston, Mass., for New England Fish Exchange and other defendants.

Henry F. Hurlburt and Arthur P. French, both of Boston, Mass., for defendant Bay State Fishing Co. and others.

Charles T. Gallagher, Albert E. Pillsbury, Gaston, Snow & Saltonstall, and Nason & Proctor, all of Boston, Mass., for various defendants.

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

BINGHAM, Circuit Judge. This is a bill in equity, brought June 21, 1917, by the United States to prevent the defendants named in the margin [1] (all of whom are engaged in or connected with the wholesale fresh fish business) from further violating the act of Congress approved July 2, 1890 (26 Stat. 209 [Comp. St. §§ 8820–8823, 8827–8830]), and commonly known as the Sherman Act, and "acts supplementing such act," by combining and conspiring to monopolize and to restrain, and from monopolizing and restraining, a part of the trade and commerce among the several states in the fresh fish industry of New England, and particularly in that class of fresh fish known as "ground fish" and certain migratory or seasonable fish, of which mackerel is an example. The particular provisions of the Sherman Law of

[1] The New England Fish Exchange, Bay State Fishing Company, F. J. O'Hara & Co., Atlas Fish Company, Boston Fish Market Corporation, Boston Fish Pier Company, Commonwealth Ice & Cold Storage Company, Rush Fish Company, Coleman Son Company, Baker, Boise & Watson Company, Watts & Cook, Incorporated, John R. Neal Company, Taylor & Mayo Company, Haskins Fish Company, Warren Fitch Company, Star Fish Company, Henry & Close Company, Boston Fish Company, F. E. Harding Company, Arnold & Windsor Company, Story-Simmons Company, John Burns Company, E. A. Rich Company, Bay Fish Company, George M. Ingalls Company, Bunting & Emery Company, Whitman, Ward & Lee Company, H. A. Rich Company, Williams Bros. Fish Company, Cassius Hunt Company, Gloucester Fresh Fish Company, Atlantic & Pacific Fish Company, J. Adams & Co., Incorporated, B. F. Phillips Company, P. H. Prior Company, Freeman & Cobb Company, Booth Fisheries Company, Wm. Haskell Company, Shore Fish Company, Ocean Fish Corporation, William J. O'Brien, Daniel J. O'Brien, Nicholas L. Fulham, John J. Herbert, Ernest F. Rich, Edwin S. Goodspeed, Frank C. Goodspeed, Oliver C. Lombard, Edgar F. Curtis, and Alvin G. Baker.

which the acts set forth in the bill are alleged to be in violation are found in sections 1 and 2 (Comp. St. §§ 8820, 8821), and it is claimed that some of the alleged offending acts are also in violation of section 7 of the Clayton Act of October 15, 1914 (38 Stat. 731, c. 323 [Comp. St. § 8835g]).

The New England Fish Exchange is a Maine corporation, and was formed in the fall of 1908. All the wholesale fresh fish dealers then doing business in Boston, 44 in number (since reduced to 40), became members of the Exchange by the purchase of a share of its stock. At the time of the organization of the Exchange, the fish business at Boston was conducted at T Wharf and on Atlantic avenue and Commercial street, in the neighborhood of T Wharf. April 1, 1914, the business was removed to its present location at South Boston, known as the Boston Fish Pier. The Exchange was conducted at T Wharf from the time of its organization down to April 1, 1914, when it also was transferred to the Fish Pier.

The Bay State Fishing Company is a Maine corporation. It was organized in 1916, and took over the steam trawler fishing fleet of the Bay State Fishing Company of Massachusetts and 8 of the 40 dealers then members of the Exchange. These 8 dealers were Watts & Cook, Incorporated, John R. Neal Company, John Burns Company, Story-Simmons Company, Incorporated, H. A. Rich Company, B. F. Phillips Company, L. B. Goodspeed Company, and Alvin G. Baker.

The Boston Fish Pier Company is a Massachusetts corporation. It also was formed in 1916, when it took over 28 of the 40 dealers on the Exchange. It owns a control of the stock of the New England Fish Exchange, and through direct and indirect ownership, a control of the Boston Fish Market Corporation. The 28 dealers in the Boston Fish Pier Company are E. A. Rich Company, Cassius Hunt Company, Williams Bros. Fish Company, Arnold & Windsor Company, F. E. Harding Company, Hasking Fish Company, Atlantic & Pacific Fish Company, Baker, Boise & Watson Company, Freeman & Cobb Company, George M. Ingalls Company, Henry & Close Company, J. Adams & Co., Incorporated, P. H. Prior Company, Warren Fitch Company, Whitman, Ward & Lee Company, Ocean Fish Company, Star Fish Company, Coleman Son Company, Bay Fish Company, Taylor & Mayo Company, Rush Fish Company, Shore Fish Company, F. J. O'Hara & Co., Atlas Fish Company, Ernest F. Rich, doing business as A. F. Rich & Co., Lombard & Curtis, Fulham & Herbert, and the Boston Fish Company.

The Boston Fish Market Corporation is a Massachusetts corporation. It was organized by the dealers in 1910, with a view of acquiring a new location for the fish business, and holds, as lessee of the state of Massachusetts, a long-term lease of the premises at South Boston, where the Fish Pier is located and where the fish business is now conducted; the defendant dealers being sublessees.

The Commonwealth Ice & Cold Storage Company was organized in 1910 by the dealers to operate a cold storage plant, and since 1914 has occupied for this purpose certain premises set apart at the Fish Pier as sublessee of the Boston Fish Market Corporation. It is controlled

by the Boston Fish Market Corporation, which owns a majority of its common stock.

The four remaining defendants have locations on the Fish Pier as sublessees of the Boston Fish Market Corporation, where they do a wholesale fresh fish business. They are William J. and Daniel J. O'Brien, copartners under the name of R. O'Brien & Co., Booth Fisheries Company, Bunting & Emery Company, and Gloucester Fresh Fish Company; the three latter being Massachusetts corporations.

The William Haskell Company was a wholesale concern formerly doing business on the Fish Pier. It is alleged in the bill that it was acquired by the Boston Fish Pier Company, but this is not correct. It has gone into bankruptcy and out of business.

For a series of years prior to 1908, the fresh fish business at Boston was conducted at T Wharf. During this period some of the dealers had places of business upon the wharf, and others were accommodated at different points on Atlantic avenue and Commercial street. The supply of fish was brought in by fishing schooners, having been caught at fishing grounds east and northeast of the New England coast. The fleet engaged in this business consisted of 136 schooners. The fishermen connected with the schooner fleet fish from dories with hand trawls. During the latter part of conducting the business at T Wharf, fishing by steam trawlers was introduced, and the supply of fish was thus augmented.

T Wharf was held under a lease by the T Wharf Fish Market Corporation, at a rental of some $35,000 a year and taxes, and such of the dealers as had places of business upon the wharf occupied them as subtenants of the Market Corporation. The wholesale dealers on Atlantic avenue and Commercial street were permitted to make use of T Wharf for obtaining supplies of fish, and some 5 or more retailers were allowed to go there for a like purpose. The revenues of the T Wharf Fish Market Corporation consisted of the rents received from tenants, the sums collected from the other dealers for storage of hand carts, and wharfage charges and charges for scales paid by the fishermen.

Prior to 1908 the dealers and others purchased their fish from the captains, either on the cap log of the wharf or elsewhere, as they saw fit. As a rule the sales were at auction on the wharf and of an entire trip of a given kind of fish. Many abuses sprang up, detrimental alike to the fishermen and the dealers. In 1908 the dealers, with the approval of the captains of the fishing schooners, organized the New England Fish Exchange and put it into operation on T Wharf. One of the purposes of its organization was to improve the methods of conducting the business upon the wharf. The approval of the captains was indicated in a document referred to in the record as the "Captains' Agreement." Counsel for the government contend that by it the captains bound themselves to bring all their fish to T Wharf to sell upon the Exchange. But an examination of the document discloses that its fair meaning is, not that they bound themselves to bring all their fish to the wharf to sell on the Exchange, but that they were

willing to offer for competitive bidding on the Exchange such fish as they brought there, and to abide by the proposals therein made by the dealers in the nature of rules and regulations governing the transaction of business on the Exchange.

The authorized capital stock of the Exchange was 50 shares, of $100 each, and 44 dealers, who comprised substantially all the wholesale fresh fish dealers then in Boston, each purchased a share of the stock. Rules for the conduct of the business on the Exchange were adopted, which were in substantial accord with the proposals stated in the document called the "Captains' Agreement." Under these rules the business between the fishermen and the dealers was transferred from the cap log and elsewhere on the wharf to a room provided for the Exchange, where the captains were required, on the opening of the Exchange, to offer their fish for competitive bidding by the dealers. The captains were precluded from selling fish on the wharf outside of the room of the Exchange, except fish for salting; and a like rule applied to dealers in the purchasing or engaging fish at the wharf. The captains, having offered their fish on the Exchange, could withdraw it if they were not satisfied with the bids which they received, and offer it later on the Exchange or take it elsewhere. The fishermen paid the T Wharf Fish Market Corporation a wharfage charge of 30 cents per 1,000 pounds; they also paid the Exchange a charge of 1 per cent. on the selling price of their fish. In return for the latter charge the Exchange, on its part, undertook to keep a record of the transactions on the Exchange, and to pay each captain the price agreed upon with the dealer for his fish on receiving a card showing that the captain had delivered to the dealer the fish that the latter had bought. The Exchange also established a recognized cull and quality of fish, and provided means for settling disputes between the captains and the dealers and carrying their settlements into effect.

The result was that the trading in all fish brought in by vessels to the wharf, except fish for salting, had to be carried on in the room of the Exchange, and the only parties having access there were dealers who were members of the Exchange or their representatives, and persons who were not members, but to whom buyer's tickets were issued.

During the nine years of the Exchange the average annual amount received by it as fees charged the captains was $31,690, and the annual average sum received by it during this period for other fees and charges to members, buyers, and commission men was a little rising $9,000, making the average income of the Exchange over $40,000 a year. Its average expenses were a little under $20,000 a year.

In 1909, by a vote of the directors of the Exchange, it was provided that no more stock should be issued, and its by-laws provided that members desiring to dispose of their stock should first offer it for sale to the Exchange, and thereafter the stock of 4 members was purchased by the Exchange, reducing the number to 40.

Before the Exchange was formed, the dealers had made an effort to raise funds by voluntary contribution to secure a new site at which to conduct the business. This, however, failed, and in 1908, in order

to secure and develop a location for the conduct of the fish business, the Exchange adopted a rule by which those dealing on the Exchange, whether as members or by virtue of buyer's tickets, were required to pay an assessment of a given amount per pound on fish of certain classes, including ground fish, bought by them. The assessment on ground fish was a quarter of a cent a pound and on other fish classified for assessment it varied from one-eighth of a cent to a cent. The assessment on ground fish remained at a quarter of a cent a pound until October 5, 1918, nearly a year after this suit was brought, when it was abolished. This assessment was imposed, not only on the fish landed at Boston and sold by the captains on the Exchange, but on all that bought from the commission men on the Exchange which they had obtained by purchase or consignment, and which had been landed at other ports on the New England coast and shipped to them by rail or water.

As above stated, this assessment began in 1908, but not until the latter part of that year, and excluding the sums paid in 1908 and in January and February, 1918, the amount collected from January 1, 1909, to January 1, 1918, was a little more than $3,100,000; but the amount of money held by the Exchange at any one time was much less, the largest amount being $608,945.40. The reason for this was that 40 per cent. of the assessment secured from the stockholder members was paid back to them by the Exchange at the expiration of each three months. The remaining 60 per cent. assessed against them was held as an investment or trust fund, and was represented by notes given by the Exchange to the members and running for a period of five years. There were some five retail dealers having buyer's privileges on the Exchange, and the fish bought by them, of the classes subject to assessment, were assessed at the same rate as were like classes of fish when bought by the dealer members. In the case of these retail buyers 60 per cent. of the assessment was distributed to them at the expiration of the three-month periods; the remaining 40 per cent. was not returned, but was credited to the buyer's ticket account, and went into the treasury of the Exchange as a profit.

When the Exchange was formed, T Wharf was occupied under a lease expiring April 1, 1914, and it was expected that payment for the new location would be required by that date. The original by-laws, rules, and regulations were drawn with a view to the payment of the trust fund to the dealers at that time. Less than $600,000 of the assessment was used by the dealer members in the development of the property at the Fish Pier through the purchase of stock in the Boston Fish Market Corporation and of the Commonwealth Ice & Cold Storage Company. Votes were passed by the Exchange in March and June preceding and following April 1, 1914, to continue the assessment, and it was imposed and collected down to April 5, 1918, when it was abolished.

By April 1, 1914, the business conducted at T Wharf had been transferred to the Fish Pier at South Boston. It had been expected that this would take place six months earlier, but, the completion of the buildings on the Fish Pier having been delayed, this expectation was

not realized. In September, 1910, the state of Massachusetts, acting by its board of harbor and land commissioners, entered into an agreement with the Boston Fish Market Corporation to lease to it a certain parcel of the Commonwealth Flats at South Boston and to erect thereon a pier for its uses. The pier to be erected by the state was to be 1,200 feet long and 300 feet wide, and the Market Corporation was to erect thereon, prior to October 1, 1913, buildings of concrete or brick, suitable for the fish business, costing not less than $400,000. The buildings and permanent structures erected by the lessee were to become the property of the lessor at the expiration of the term of the lease or extensions thereof. The lease was to run for the term of 15 years, beginning October 1, 1913, at a yearly rental of $35,000, with the right in the lessee to extend the lease for a period of 15 years from October 1, 1928, on the same terms and conditions, except that the rental for the additional term was to be $45,000. The lessee was also to pay the "annual taxes assessed upon the premises leased, or any interest, whether of the lessor or lessee therein."

In December, 1913, the state of Massachusetts entered into a further agreement with the Boston Fish Market Corporation whereby it was provided that in case the Market Corporation, prior to the 1st day of October, 1943, had erected or caused to be erected buildings of concrete or brick, etc., on the leased premises costing not less than $1,000,000 and did not impose a wharfage charge on vessels admitted to discharge fish at the pier of more than 30 cents per 1,000 pounds of fish, or unfairly discriminate between fishing vessels or classes of fishing vessels with reference to their discharge, the lessee should have the right to extend the lease for a further period of 15 years from October 1, 1943, and for a still further period of 15 years from October 1, 1958, on the terms and conditions of the original lease, except that the rental for such additional periods should be fixed at an amount equal to 5 per cent. of the estimated value of the leased premises (exclusive of structures and improvements which had been placed by the lessee, its tenants, or licensees, thereon) as of a date 18 months prior to the commencement of each of said additional periods.

The Boston Fish Market Corporation expended or caused to be expended in the erection of permanent structures on the pier $1,300,000. The taxes assessed upon the property were $37,211.20 in 1914, and they were thereafter increased, until in 1918 they reached $52,609.92.

The Boston Fish Market Corporation in 1912, before its entry upon the construction of the buildings upon the pier at South Boston, obligated the dealers to take specific stores to be built upon the pier on a 10-year lease. An opportunity was given to all of the wholesale dealers who were members of the Exchange to take stores, and all excepting the Hub Fish Company and the Hamilton Estate did so commit themselves. A flat rent was fixed on these stores, and the dealers who were prepared to commit themselves were then given an opportunity to bid a bonus on the rental for a choice of location, which bonus was added to the rental. Having procured these commitments, the Boston Fish Market Corporation then built 45 stores on the two

sides of the pier. The buildings comprising these stores occupied all the available space on the pier, except what was required for an administration building and for the cold storage plant of the Commonwealth Ice & Cold Storage Company.

When the business was transferred in 1914 from T Wharf to the Fish Pier, all of these stores but one were taken by the wholesale fresh fish dealers, the New England Fish Company, and a concern by the name of Snow & Parker. The vacant store was subsequently let to the Prior-Hamilton Company, wholesale dealers. Other stores were erected on Northern avenue, which led past the entrance to the pier. The stores erected on the northeasterly side of the avenue backed up to the water at the head of the docks to the pier. These stores were primarily intended for the shell-fish dealers. Some stores were also erected on the opposite or southwesterly side of the avenue for trade uses ancillary to the wholesale fresh fish business. Three of the stores on the water side of the avenue have been leased since the dealers transferred their business from T Wharf; and three or more of the stores on the southwesterly side of the avenue have been let. The leases of these stores contain a restriction prohibiting the lessees from doing a wholesale fresh fish business.

In addition to the dealer members having privileges on the Exchange, there were 13 other dealers who held such privileges by virtue of buyer's tickets issued by the Exchange; and to entitle them to the buyer's tickets they had to be either tenants on the pier or obtain trading privileges from the Boston Fish Market Corporation. Five of these 13 were large retail dealers, 5 bought for salting and smoking, and the balance for general purposes. There was also a buyer's ticket issued annually to one Pickert during the mackerel season. The buyer's tickets were issued for a month and were revocable at the will of the Exchange. The trading privileges on the pier were issued to licensees for a like term, and were revocable at the will of the Fish Market Corporation. By the new rules a retailer is not entitled to be admitted to buying privileges on the Exchange unless he can qualify as a wholesale fresh fish dealer, meaning thereby one who conducts "a business not less than fifty (50) per cent. of which in money value is the selling of fresh fish to others who are retailers, and conducting it separate and apart from any retail store."

There were also 18 commission men who took from the Boston Fish Market Corporation leases of offices in the administration building on the pier. These leases were "for the purpose of conducting an office only for the prosecution on its own account of a commission business in fish (exclusive of fish livers) which [were] landed outside of the port of Boston and sold by the lessee to wholesale fresh fish dealers. The term 'commission' [was] not [to] be construed as precluding the lessee from itself buying said fish so landed for sale, providing the same [was] sold to wholesale fresh fish dealers, but the leased premises [were] under no circumstances [to] be used for the carrying or storage of fish." The commission men, by the rules of the Exchange, were required to procure admission cards to the sales room of the Exchange, and to pay therefor $50 for any one member

of a firm and $40 for each salesman, to entitle them to sell fish to members of the Exchange, and, having procured such admission cards, they were required to offer for sale each day in the salesroom of the Exchange, at 7 a. m., all fish known to be due to arrive; but where fish had been refused by buyers on account of its condition, or fish had arrived of which no previous notice had been received, they could sell to members of the Exchange at other places, but to members of the Exchange only. In the rules of the Exchange that became effective November 11, 1918, the rule as to the sale of fish by commission men was made to read as follows:

> "All fish to be sold by commission dealer members as fresh fish to members of the Exchange known to be due to arrive shall be offered for bids each day at the salesroom of the Exchange at the opening of business."

Out of the sums received by the Exchange from buyer's tickets, seller's tickets, the 40 per cent. of the assessment paid by the nonmember dealers and credited to the ticket account, and the charge to captains of 1 per cent. of the amount of their sales, it paid in dividends on each $100 share of its stock during nine years $1,800, or an average of $200 a year, and has a surplus sufficient to permit of a distribution of $2,000 to each shareholder, making in all an average annual income during this period of about $420 a share.

After the removal of the business from T Wharf to the Fish Pier, the captains were still required to pay to the Exchange 1 per cent. on the amount of their sales down to November 11, 1918, when the charge was reduced to one-half of 1 per cent. They were also required to pay the Boston Fish Market Corporation a wharfage charge of 30 cents per 1,000 pounds of fish, and an additional charge for the use of scales provided by the Market Corporation. The sum derived from these last two sources was something over $35,000 a year.

Cod, cusk, hake, haddock, and pollock, although not generally known to the consumer as ground fish, are so known to the trade. They are the most important fresh fish food in the northeastern part of the United States, and form a distinct trade class. They are not caught to any extent for consumption as fresh fish in the United States, except in Atlantic waters east and north of New England, and the trade in them as fresh fish is largely confined to the New England states, New York, New Jersey, and Pennsylvania, although to some extent the trade extends further west and south. They are the staple fresh fish food in these states. The only other fish that comes into the New England market for sale fresh in any relatively considerable quantities are halibut, salmon, and in the summer time mackerel. Ground fish are a medium priced fish as compared with the higher priced fish, such as salmon, mackerel, halibut, and blue fish, and the inferior or low-priced fish, such as whiting.

The control of the fresh ground fish trade in the United States is on the Fish Pier at Boston. It is the only market to which is brought with reasonable regularity a quantity sufficient to approach an adequate supply. There is landed at Boston annually from boats about 100,000,000 pounds of all kinds of fresh fish, of which about 83,000,000 pounds are ground fish; there are shipped into Boston annually for sale from other ports about 69,000,000 pounds of all kinds of fresh

fish of which from 30,000,000 to 39,000,000 pounds are ground fish; and substantially all of this ground fish, whether shipped in or landed at Boston from boats, goes through the Exchange on the Fish Pier. The amount landed at other places in Boston is about 1,500,000 pounds and is devoted to local consumption. The price charged for ground fish on the Fish Pier at Boston is the basis for prices charged at other markets, and to a great extent controls those prices. New York is the next largest fresh fish distributing point in the United States, and deals in about 26,000,000 pounds of fresh ground fish. For its ground fish supply, however, it is largely dependent on Boston, as it receives about 20,000,000 pounds of this class of fish from Boston. The exportation from Canada of fresh ground fish to the United States was, in 1916, a little rising 2,500,000 pounds, and in 1917 exceeded by but a little 5,000,000 pounds. What part of this, if any, is used for canning or salting, the record does not show. The amount of fresh ground fish landed at Portland, Me., annually varies from 12,000,000 to 20,000,000 pounds. About 5,000,000 pounds of this goes into canning, and of the remainder about one-half is consumed in the local trade, nearly a quarter goes to the Fulton Market in New York City, and a fifth to the Boston Fish Pier. It appears from the government reports that in 1908 there was landed in Massachusetts and Maine 84 per cent. of the cod, 99 per cent. of the haddock, 100 per cent. of the hake, and 98 per cent. of the pollock for the entire United States; the states of Washington and California supplying 7 per cent. of the cod, which was used for salting exclusively. It is estimated, and we think conservatively, that Boston controls at least 95 per cent. of the interstate trade in fresh ground fish, all of which is handled at the Fish Pier, and that from 70 to 80 per cent. of all the fresh fish handled there is sold in interstate commerce.

Early in 1916 an effort was made to organize all of the dealers at the Fish Pier into a single corporation and to conduct the business through those dealers. This effort resulted in the formation of the Boston Fish Pier Company in October, 1916. Soon after this project was started, outside promoters undertook to bring about another organization of a like character among the dealers, combining with it an independent source of supply. The Bay State Fishing Company of Massachusetts then owned a fleet of 9 trawlers bringing fish to the Fish Pier for sale. This was the only trawler fleet then in existence in these waters. It furnished from a quarter to a third of the entire supply of fish landed at Boston, and during a large part of the winter months the only dependable supply. The latter project likewise contemplated the acquisition of all the dealers on the Fish Pier in conjunction with the supply furnished by the trawler fleet, and resulted in the formation of the Bay State Fishing Company of Maine in June, 1916. It is contended on the part of the Boston Fish Pier Company that the Bay State Fishing Company was first projected and that its own organization was later entered upon as a matter of self-defense, but we are unable to find that this was the situation. It seems rather that the undertaking that resulted in the formation of the Boston Fish Pier Company was first started, and thereafter it was a race

to see which would accomplish its purpose in acquiring all the dealers. The Bay State Fishing Company acquired the trawler fleet, 8 of the dealers, 2 halibut companies, and 2 commission houses, and the Boston Fish Pier Company acquired 28 dealers and 1 commission house.

The form pursued in the acquisition of the 28 independent dealers by the Boston Fish Pier Company was as follows: Each of the concerns sold to the Fish Pier Company its business, good will, and assets, except its share of stock in the New England Fish Exchange, a share of the common stock in the New England Fish Company, a share of stock in the Boston Fish Market Corporation, and its lease of the store on the Fish Pier. The Boston Fish Pier Company took over the dealers as employés. The capital stock of each concern was reduced to 30 shares, and the shares were transferred to the Boston Fish Pier Company. These concerns, having retained their shares of stock in the New England Fish Exchange and their leases on the pier, thereafter acted in conjunction with the Boston Fish Pier Company and with each other in the conduct of the fish business, and all competition between them ceased.

The method pursued by the Bay State Fishing Company of Maine in taking over its 8 dealers was as follows: It bought outright the stock of the John R. Neal Company and the L. B. Goodspeed Company. It organized the corporation known as A. G. Baker, Incorporated, a Massachusetts corporation. It also organized the B. F. Phillips Company of Maine, Watts & Cook, Incorporated, of Maine, Story-Simmons Company, Incorporated, of Maine, John Burns Company of Maine, and the H. A. Rich Company of Maine. Alvin G. Baker then entered into an agreement with A. G. Baker, Incorporated, whereby he sold to it his merchandise, furnishings, and fixtures on the premises occupied by him at No. 1, Boston Fish Pier, the good will of the business there conducted, the lease of the premises, "the privilege which goes with or is attached to his membership in the New England Fish Exchange, and the right to operate and do business through said Exchange"; also "all dividends which may hereafter come due to him from the assessment fund, so called, of said Exchange, reserving, however, the ownership of the certificate of membership or stock in said Exchange, and all dividends which may hereafter be declared on said stock"; also the buying privileges in the New England Fish Company, and the right to use the name of A. G. Baker, Incorporated. The B. F. Phillips Company of Massachusetts made a like agreement and transfer to the B. F. Phillips Company of Maine, and each of the other Massachusetts corporations made like agreements and transfers to their respective Maine corporations. The stock of the new corporations was transferred to the Bay State Fishing Company of Maine, the individual dealers became its employés in the conduct of the fish business through the various corporations, and all competition between the 8 dealers came to an end.

In the bill it is alleged (page 22) that the Bay State Fishing Company is in itself a monopoly in restraint of trade. It is also alleged (page 23) that the Boston Fish Pier Company is likewise a monopoly in restraint of trade. It is further alleged (pages 24, 25) that

these companies "have now entered into an agreement or understanding with one another governing all dealings on said Exchange," involving the maximum prices at which fish is to be bought on the Exchange and the minimum prices at which it shall be resold in interstate commerce. In the prayer of the bill it is asked that the Boston Fish Pier Company may be declared an unlawful combination in restraint of trade and dissolved, and that the Bay State Fishing Company may also be declared an unlawful combination in restraint of trade and dissolved.

[1] In view of this, the defendants contend that unless the government establishes by its proof that these two companies have entered into an agreement or understanding with one another governing all dealings on the Exchange, and in particular those relating to fish bought on the Exchange to be resold in interstate commerce, the relief asking for the dissolution of these individual companies in the prayer of the bill should not be granted; that in the absence of the foregoing allegation, and proof establishing the combination between these companies, the bill would present distinct grounds of complaint against different defendants, which would not be permissible; that the only relief that properly can be granted is the dissolution of the combination, if any, between the Bay State Fishing Company and the Boston Fish Pier Company, and not a dissolution of either or both of these companies; and that to dissolve these companies would be to permit the joinder of three different causes of action in a single bill. They rely in support of their contention on the decision in United States v. Reading Co., 226 U. S. 324, 372, 373, 33 Sup. Ct. 90, 57 L. Ed. 243.

That case was decided in December, 1912, prior to the adoption of the new equity rules on February 1, 1913, wherein the practice in equity cases was very materially changed. In these rules (rule 26, 201 Fed. v, 118 C. C. A. v) it is provided that:

"The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."

According to this rule, if the circumstances show that the administration of justice may be promoted by joining different defendants in a single bill of complaint, although the liability asserted is not joint, it may be done; and it seems to us that, if circumstances could ever exist where the rule would be applicable, they do in this case. All the transactions complained of relate to the conduct of the fish business on the Exchange through a series of years, and are so interwoven and connected that it would put the parties to unnecessary trouble and expense if they were required to litigate three suits, instead of one, all of which would cover substantially the same ground. We think, therefore, that we may properly deal in this proceeding with the question of dissolution of these corporations, if in other respects the law and the facts justify us in so doing.

It is conceded on the part of the government that there is no evidence from which it can be found that, since the formation of the Boston Fish Pier Company and the Bay State Fishing Company, these corporations have entered into a combination for fixing the maximum prices to be paid for fish on the Exchange or the minimum prices at which it should be sold. It contends, however, that a combination exists between these companies through the Exchange. It is to be remembered in this connection that the Exchange was organized and put in operation back in 1908, long prior to the organization of these companies, and that their organizations were not and could not have been steps in furtherance of a general combination of the dealers then doing business on the pier. It may be and probably is true that, if the dealers in 1908 effected a combination through the Exchange, these companies have adopted it; but that does not make the organization of their respective companies steps leading up to that combination.

In this situation two questions are presented: (1) Whether, on the allegations of the bill and the proof produced, the Boston Fish Pier Company and the Bay State Fishing Company are each in themselves a combination in restraint of interstate trade, in violation of section 7 of the Clayton Act or the Sherman Law; and (2) whether the Exchange, inaugurated by the dealers in 1908, constitutes an unlawful combination in restraint of trade, which has, since 1916, been adopted and perpetuated by the Boston Fish Pier Company and the Bay State Fishing Company, as well as by the four remaining dealers on the pier.

[2, 3] As previously stated, this proceeding is brought to prevent the defendants from further violating the act of Congress approved July 2, 1890, known as the Sherman Act, and "acts supplementing such act." The Clayton Act of October 15, 1914, is an act supplementing the Sherman Act and other existing laws against unlawful restraints and monopolies, and is so entitled. In the bill (page 8) it is alleged that the Bay State Fishing Company "controls and causes to be operated for its own benefit, either through stock ownership or under agreements, the businesses" of its 8 members, and that the Boston Fish Pier Company "controls and causes to be operated for its own benefit, either through stock ownership or by agreements, the businesses" of its 28 defendant dealers; and while it is not specifically alleged in the bill that the consolidation of the 8 dealers in the Bay State Fishing Company and of the 28 dealers in the Boston Fish Pier Company restrains competition between the dealers in each of the respective companies, it does generally so allege, and we think that the allegations are sufficient to justify a consideration of the question whether the control acquired by these organizations over their respective dealer members was in violation of the Clayton Act. But, if this were not so, we see no reason why the plaintiff's application for leave to amend its bill as to this matter should not be granted. The subject was fully gone into at the trial by the introduction of evidence and the presentation of the views of counsel, and to allow the amendment will be in furtherance of justice and in no way affect

the substantial rights of the parties. Equity Rule 19 (33 Sup. Ct. xxiii).

That part of section 7 of the Clayton Act material to a consideration of this case reads as follows:

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

[4] The evidence discloses that the Boston Fish Pier Company, in 1916, acquired the stock of 25 of the corporations doing business in interstate commerce as independent wholesale fresh fish dealers on the Fish Pier, and the assets and business of Ernest F. Rich, doing business under the name of A. F. Rich & Co., and the partnerships of Lombard & Curtis and Fulham & Herbert, the three latter concerns being wholesale fresh fish dealers engaged in interstate trade on the pier, and that it thereafter conducted the businesses of these dealers, and all competition between them ceased. We think the acquisition of these corporations was plainly in violation of the Clayton Act, and that their combination in the Boston Fish Pier Company must be dissolved.

[5] We also are of the opinion that the acquisition by the Bay State Fishing Company of the stock in the 8 corporations in its combination is likewise in violation of the Clayton Act. The fact that 5 out of 8 of the corporations whose stock was taken over by the Bay State Fishing Company were organized under the laws of Maine, to whom the Massachusetts corporations bearing the same names conveyed their businesses and assets, does not make the situation different than it would have been, and no less a violation of the Clayton Act, had it taken over the stock of the Massachusetts corporations directly. The respective Maine and Massachusetts corporations were in substance the same, and the effect of the formation of the Maine corporations and the taking over of their stock was to defeat competition between all of the subsidiary corporations. The combination of these corporations with the Bay State Fishing Company was therefore a violation of the Clayton Act and must be dissolved.

[6] It is contended on behalf of the government that the Exchange was put into operation by the dealers in 1908 for the purpose of enabling them to control the purchase and sale of fish on T Wharf and afterwards at the Fish Pier. It is conceded that an exchange is a proper instrumentality through which to conduct the business, provided

it is governed by rules and regulations that do not impose an undue restraint upon the trade, and that the trade conditions existing between the dealers and the fishermen in 1908 were such as to call for the introduction of an instrumentality of this nature. The contention, however, is that the purpose of the dealers in the institution of the Exchange and in the establishment of the rules and regulations that were adopted was to confine the flow of fish through the pier or T Wharf to themselves and to otherwise impose undue restraint upon the trade.

In discussing the question of the Exchange, it is necessary to take into account the situation existing at T Wharf and at the Fish Pier, for they were the places where, at different times, the Exchange was located, and a limitation upon the right to be admitted to do business upon the pier or the wharf necessarily limited and confined admission to the Exchange to such as had the right to do business upon the pier or wharf. Under the rules and regulations, so far as we are informed, those having the right to do business on the pier are permitted upon like terms to obtain admission to the privileges of the Exchange, and it is evident that this should be so in order to avoid undue discrimination. If the right to do business on the pier is unlawfully restrained by the denial of its privileges to dealers other than the defendants, it would follow that their exclusion from the Exchange was also without right.

The question on this branch of the case, therefore, is whether the situation as it existed at T Wharf, and later at the Fish Pier, was such as to render the exclusion of outside dealers from the privilege of going upon the wharf or pier to obtain a supply of fish from the captains and commission men unlawful.

The T Wharf Fish Market Corporation was a combination of wholesale dealers that held the lease of T Wharf. The Boston Fish Market Corporation was also a combination of wholesale dealers that later held the lease of the Fish Pier. These organizations were formed and the locations obtained with a view of centralizing the businesses of all the wholesale fresh fish dealers, first at T Wharf, and afterwards at the pier, and thereby creating a market for the purchase and sale of fresh fish (that could not otherwise have been created) and of a character that would induce the bringing of fish to these places for sale to the exclusion of other places.

Under the T Wharf Fish Market Corporation combination some 30 wholesale dealers became tenants on T Wharf and were accorded the privilege of dealing with the captains on the wharf without further expense than the rent which they paid for their stores, and some 13 or 14 other wholesale dealers and 5 or more of the large retail dealers were permitted to purchase fish on the wharf without charge, except for the storage of hand carts. With this body of buyers centralized on the wharf, the captains of 136 fishing schooners coming into Boston were induced, through the market thus created, to bring their catches to T Wharf for sale, and the trawler fleet of the Bay State Fishing Company of Massachusetts, which was later organized, was likewise induced to bring its catches there. The commission

men also were induced to a large extent to come there to offer for sale fish which had been consigned to them and landed at ports other than Boston. Having, through these means, diverted the flow of fish from other channels to T Wharf, the wholesale dealers then, with the approval of the captains, established the Exchange and limited its privileges to themselves and such other dealers as they saw fit to grant trading privileges on the wharf.

The transfer of the business from T Wharf to the Fish Pier did not alter the situation, further than that the new location afforded opportunity for centralizing a greater number of dealers engaged in the fish business, and made it doubly sure that fish caught in New England waters would be brought to the Fish Pier for sale, rather than to T Wharf or any other place. The result of the combined action of the dealers was that 83 per cent. of all the fresh fish and 95 per cent. of all the ground fish brought to Boston was landed at the Fish Pier, which gave absolute control to these dealers of all the fish passing through the pier and a predominating control of all the fresh fish dealt in throughout the North Atlantic states, rendering it impossible for an outside dealer to build up a business in interstate trade.

We think, therefore, that the defendant dealers, by combining in the manner above outlined, with a view to centralizing and controlling the flow of fish in interstate commerce and the acquisition of that control, violated the Sherman Law, and unduly and unreasonably restrained interstate trade in fresh fish.

[7, 8] But as the Boston Fish Market Corporation and the Exchange are facilities which may be operated for the good of the trade, by amending or eliminating the rules of the Exchange that place an undue restraint on the business, and by requiring the Boston Fish Market Corporation to open up the pier upon equal and reasonable terms to such dealers as may desire the privilege of doing business there, we think that the Boston Fish Market Corporation should not be dissolved, provided the pier is thus opened up, and that the Exchange should not be dissolved, provided its rules are reformed to meet the requirements necessitated by the opening up of the pier, and are otherwise amended in the respects hereinafter pointed out as imposing undue restraints upon the trade.

Under the rules of the Exchange the fishermen coming to the pier with fish for sale are required to offer all their fish, except fish for salting, in the room provided for the Exchange, and the dealer members and others having the privileges of the Exchange are precluded from purchasing or engaging fish landed at the pier, other than fish for salting, except on the Exchange. If the pier is opened up to outside wholesale and retail dealers, and they are accorded the privileges of the Exchange upon reasonable and equal terms, we do not see that such regulations would impose an undue or an unreasonable restraint upon trade; but we think that no rule of the Exchange or of the Fish Market Corporation should be adopted or enforced which would preclude wholesale or retail dealers from the privileges of

the Exchange and the pier, so long as they conform to reasonable rules and regulations.

[9, 10] Whether the charge of 1 per cent. to the captains on the selling price of their fish operated to restrain trade and increase the price of fish is, on the evidence, doubtful. It is plain, however, that the charge was unreasonable, and this is demonstrated by the fact that, after paying all expenses of the Exchange, the average annual income on a share of stock in the Exchange was $420, three-fourths or more of which came out of the charge to the captains. The Exchange being an agency instituted for the common good and benefit of those doing business on the pier, the burden of maintaining it should be fairly apportioned among those receiving its benefits. This charge has now been reduced to one-half of 1 per cent., and should be still further reduced if it should turn out that it produces, with the other income of the Exchange, more than its expenses and a reasonable return on the money invested. But in the new rules relating to this complaint there has been inserted a provision whereby a captain is required to pay one-half of 1 per cent. figured on the highest bid made, even though he has not accepted the bid and has withdrawn his fish. This, we think, is an unreasonable restraint, and operates to compel a captain to sell his fish, whether he is satisfied with the bid or not. This provision should be stricken from the rules and its enforcement restrained.

[11] The assessment imposed by the Exchange upon the dealers and traders on the Exchange of a quarter of a cent a pound on ground fish and of an eighth of a cent to a cent a pound on other classes of fish operated directly to increase the price of fish in interstate commerce and imposed an unreasonable restraint. Although the rule imposing this assessment has been abolished since the institution of this proceeding, it was in force at the time the suit was brought, and its reinstatement should be restrained.

[12] Under the old rules commission dealers doing business on the Exchange were required to offer for sale each day in the salesroom of the Exchange, at 7 a. m., all fish known to be due to arrive which had been landed at ports other than Boston and which had been sold or consigned to them for sale. This rule, as construed and enforced by the Exchange, precluded commission men from selling their fish to wholesale dealers other than those doing business on the pier, and was an unreasonable restraint of interstate trade. Since the institution of this suit the rule has been amended as herein previously set forth, and the restraint eliminated. The reinstatement of this rule should be restrained.

[13] As the rules now stand, commission men having privileges on the Exchange may sell their fish to wholesale dealers, whether they do business on or off the pier. They are, however, precluded from selling to retailers. This rule should be amended, so as to allow commission men having privileges on the Exchange to sell to all dealers, wholesale or retail.

[14] The Exchange has at different times engaged in the purchase and sale of fish on its own account and for others, but this practice

has been done away with by article 30 of the rules effective November 11, 1918. We see no objection to article 30 as it now stands. Any infraction of it or resort to the former practice should be restrained.

[15] There has existed among the dealers a practice known as "splitting trips," whereby a given dealer would purchase a trip of fish at auction on the Exchange and then divide his purchase with other dealers. It is contended on the part of the government that in such cases the parties who were to share in the trip would agree in advance on the price to be bid, that a single bid would be made, and competition in bidding defeated, to the detriment of the captains. We think that the evidence shows that at times such agreements were made. In the new rules, however, it is provided that "a splitting of a trip or a portion of a trip between the purchaser and other members * * * shall not be agreed to or arranged until after the making of the purchase." Due enforcement of this rule will obviate the difficulty. The splitting of trips is beneficial to the smaller dealers, who often cannot handle an entire trip, and the captains prefer to sell all their fish as an entire trip, or the whole of a given variety of their fish to a single purchaser. If splitting is to be permitted, the provisions of the present rule should be strictly enforced, and any infraction of it restrained.

[16] All the rules of the Exchange limiting its privileges to wholesale fresh fish dealers, and prescribing the conditions upon which a dealer shall be regarded as a wholesale fresh fish dealer, should be abolished, and their enforcement restrained.

[17] It was strenuously insisted upon at the trial that the union of the 28 dealers in the Boston Fish Pier Company gave to that company such a predominance on the Fish Pier and control over the flow of fish there in interstate commerce that it was in itself an illegal combination in restraint of trade and offended the Sherman Act, as well as section 7 of the Clayton Act; and we think the evidence bears out the contention. Prior to the consolidation these 28 dealers had acted independently in the conduct of their businesses, and each had built up an interstate trade in fresh fish. They were tenants on the Fish Pier and members of the Exchange, through which the flow of fish passed. Each of the dealers owned a share of stock in the Exchange, and their 28 shares gave the Boston Fish Pier Company control of the Exchange. They also had substantial holdings of the common stock of the Boston Fish Market Corporation, which controlled the pier. The Exchange also had large holdings of the stock in the Boston Fish Market Corporation. This stock, together with that acquired from the dealers, gave the Boston Fish Pier Company control of the Boston Fish Market Corporation, which owned a control of the stock in the Commonwealth Ice & Cold Storage Company. This put the Fish Pier Company in a position where it could dictate what the rules of the Exchange should be and how it should be operated; also how the pier should be conducted, who should have trading privileges thereon, and who, from time to time, as existing leases expired, should become its tenants. Furthermore, it handled 58 per cent. of all the fresh fish dealt in on the pier and substantially that percent-

age of the ground fish. Its power of control became so great that, through a recent rule of the Exchange, it compelled the Bay State Fishing Company to offer its independent production (which consists of from a quarter to a third of all the fresh fish landed at the pier) for sale at auction on the Exchange or forfeit the membership of its dealers and its buyer's privilege on the Exchange. The acquisition of this power of control, due to combination and not to natural growth and development, we regard as in contravention of sections 1 and 2 of the Sherman Law.

[18] It is also contended that the combination in the Bay State Fishing Company of the 8 dealers and the independent source of supply furnished by the 9 trawlers acquired from the Bay State Fishing Company of Massachusetts was also in violation of the Sherman Law. This company has become the largest individual producer of fish on the Atlantic coast. Prior to the consolidation the 8 dealers were competitors in the purchase of fish on the Exchange and in marketing it in interstate commerce. After the consolidation it handled about 31 per cent. of all the fresh fish dealt in on the Exchange, and at certain seasons of the year practically all the ground fish. This was due to the fact that on many days through the winter months fish could be caught by the trawler fleet when it could not be by the schooners. Prior to the combination, the production of the trawler fleet was offered for competitive bidding on the Exchange to all the dealers. After its organization it was turned over to its 8 dealers, except so far as it saw fit to sell to other dealers on the Exchange. The Bay State Fishing Company had access to the Exchange through its dealer members and its buyer's privilege, which enabled it to bid at the auction sales on the Exchange. For a year or more prior to the adoption of the rule of the Exchange in 1918 requiring it, as a producer of fresh fish discharged from vessels at the Fish Pier, to offer its fish for competitive bidding on the Exchange, it had ceased to offer its fish on the Exchange, but had retained and exercised its right to bid upon other fish offered there for sale. Having its own source of supply and the right to bid upon other fish sold on the Exchange, it was in a position to bid on such fish in competition with the other dealers and thus raise the price. This gave it an undue control of the market during certain seasons of the year, and the evidence discloses that the power which it exercised was a menace to the trade, and likely to result in driving other dealers out of business or into its combination. We think, therefore, that the Bay State Fishing Company is a combination in unreasonable restraint of trade in interstate commerce, and that the combination which now exists, whereby it engages in the production and distribution of fresh fish, should be dissolved by restoring its 8 dealers to the competitive conditions under which they formerly did business on the pier and through the Exchange, and that the Bay State Fishing Company should be restrained from in any way interfering with or making use of the businesses and good will of the 8 constituent dealers in the marketing of fish.

A decree may be prepared according to the foregoing suggestions, which shall state the mode and manner in which the dissolutions and restraints above stated shall be effected; also enjoining the defendant dealers, or any of them, from in any manner combining in the conduct of their businesses, or in any way agreeing among themselves to raise or depress the price of fish to be bought or sold in interstate commerce; also enjoining the defendant dealers from enforcing any by-laws, rules, or regulations, either of the Boston Fish Market Corporation or of the Exchange, herein pointed out as imposing an undue restraint upon interstate trade; and there may be prepared and submitted for the consideration of the court such rules and regulations of the Exchange, and of the Boston Fish Market Corporation for the conduct of business on the Exchange, and the opening up of the pier to outside dealers as are not inconsistent with the conclusions reached in this opinion.

If the parties cannot agree upon the terms for opening up the pier and the Exchange, then the decree to be prepared may include a provision dissolving the Exchange and the Boston Fish Market Corporation and stating the mode and manner in which the dissolutions shall be effected.

SHAPLEY v. COHOON.

(District Court, D. Massachusetts. October 8, 1918.)

No. 1642.

1. HABEAS CORPUS ⚷54—SUFFICIENCY OF PETITION—GENERAL ALLEGATIONS.
In a petition for a writ of habeas corpus for release of petitioner from confinement as an insane person, a general allegation that the commitment is void, without the allegation of facts to support it, is insufficient.

2. STATES ⚷4—COMMITMENT OF INSANE PERSONS—POWERS.
The state alone is charged with the duty of caring for the insane within its borders, and may adopt whatever method of procedure it may desire for inquisition into their condition and the necessity for their confinement, provided the same is not in contravention of the Constitution of the United States.

3. HABEAS CORPUS ⚷45(2)—FEDERAL COURTS—DISCRETION IN EXERCISE OF JURISDICTION—PERSONS CONFINED BY STATE AUTHORITY.
To guard against unnecessary conflicts between the federal and state courts, both of which are equally bound to guard and protect rights secured by the Constitution, it is necessary that one who alleges that he has been deprived of his liberty in violation of his constitutional rights by state authorities should have exhausted all his remedies in the state courts before a federal court will exercise its jurisdiction in habeas corpus proceedings.

Habeas Corpus. Petition of Sarah Chandler Shapley against Elisha Cohoon. Writ denied.

See, also, 258 Fed. 757.

James A. Keown, of Lynn, Mass., for petitioner.
J. R. Benton, Asst. Atty. Gen., for Elisha Cohoon.
Max L. Levenson, of Boston, Mass., for defendant.

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

JOHNSON, Circuit Judge. Upon the entry of the petition in this case a rule was issued that the respondent show cause why a writ of habeas corpus should not be issued as prayed for. The respondent has filed a return, in which it is stated that the petitioner was under date of October 21, 1915, adjudged to be an insane person and duly committed to the Westborough State Hospital by a justice of the police court of Newton, in the county of Middlesex, as an insane person, two physicians having certified that the said Sarah Chandler Shapley was in their opinion insane and a proper subject for treatment and custody in the hospital for the insane as an insane person under the provisions of law; that the said Sarah Chandler Shapley was transferred from the Westborough State Hospital to the Medfield State Hospital on or about March 7, 1918. Copies of the medical certificate, commitment, and order of transfer are annexed to the return.

The petition contains many irrelevant allegations relating to the petitioner's financial affairs and the litigation in which she has been engaged in the state of Massachusetts, and in it an attempt is made to raise the federal question whether she was committed and is now deprived of her liberty in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

[1] While the petitioner states that the sole and only authority by virtue of which the respondent restrains and detains her "is a certain paper which purports to be a commitment in writing to the Westboro State Hospital for the Insane in the commonwealth of Massachusetts, but which the petitioner on information and belief alleges is wholly void and to no effect," the petition contains no allegation of any defects which would render the order of commitment void and it has been repeatedly held that a general allegation is insufficient. Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406; King v. McLean Asylum, 64 Fed. 325, 12 C. C. A. 139, 26 L. R. A. 784; Ex parte Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154.

In another part of the petition she alleges "on information and belief, on October 21, 1915, with force of arms John C. Kennedy, judge of the Newton police court, with two officers and two doctors," broke into her home in said Newton without permission and without knowledge on her part, assaulted, threatened, and indecently treated her, searched her home, and removed and carried away her papers, without even color of authority, denied her the right of consulting her friends and attorney, and ordered her to dress hurriedly and in the presence of the police officers, hurried her into an automobile and carried her to the Westborough State Hospital, and there permanently confined her as an insane person," which the petitioner alleges was in violation of articles 5, 6, and 14 of the amendments of the national Constitution. The order of commitment was signed by John C. Kennedy, judge of the Newton police court, and in it the provisions of the statutes of Massachusetts relative to the commitment of insane persons to an insane asylum appear to have been fully complied with. It states that, after a full hearing of the premises and a personal examination of the person alleged to be insane, the judge who signed the order found the

petitioner to be insane and a proper subject for treatment and custody in the state hospital at Westborough, and that he had before him the certificate, under oath, of two physicians who had made a personal examination of the petitioner and had certified her to be insane and a dangerous person to be at large, and he certifies that he had also seen and personally examined her. If the officer to whom the execution of the order of commitment was intrusted exceeded his authority, or if those who accompanied him for the purpose of assisting in the execution of the order were guilty of any unauthorized acts of violence toward the petitioner, she has her remedy. That is not a proper subject of inquiry under this petition.

There is also annexed to the petition an order of the Supreme Judicial Court of Massachusetts, dated April 6, 1917, upon the petition of the said Sarah Chandler Shapley, for a writ of habeas corpus directing "that the said Sarah Chandler Shapley be given into the custody of her sister, Marie L. Ellis, of Old Orchard, in the state of Maine, under the condition that she immediately depart from the commonwealth of Massachusetts and go with her said sister, Marie L. Ellis, to said Old Orchard, Me., and there remain in the custody of said Marie L. Ellis until the further order of the court; and it is further ordered that, should the said Sarah Chandler Shapley return to said commonwealth of Massachusetts without the permission or further order of said court, she is to be taken into custody and remanded to the custody of the superintendent of the Westboro State Hospital."

There is also annexed to the petition a copy of a petition to the Supreme Judicial Court of Massachusetts by Henry C. Atwill, Attorney General of Massachusetts, in which the previous order of the court is cited and information given that the said Sarah Chandler Shapley had returned to Massachusetts in violation of the said order, and was then residing in the city of Newton, and asking that she be ordered to appear before the court and show cause why she was not in contempt and should not be remanded to the custody of the superintendent of the Westborough State Hospital.

Upon this petition of the Attorney General the said Sarah Chandler Shapley was ordered on December 20, 1917, to appear before the justices of the Supreme Judicial Court at Boston, within and for the county of Suffolk, on Friday, the 28th day of December, 1917, at 9:30 o'clock a. m., "by serving her with an attested copy of said petition and of this order thereon, forthwith, that she may then and there show cause why she is not in contempt and she be not remanded to the custody of the superintendent of the Westborough State Hospital."

Also annexed to the petition was the final order by a justice of the Supreme Judicial Court, made on January 11, 1918, which was as follows:

"Final Order.

"This case came on to be further heard at this sitting, and thereupon, upon consideration thereof, it is ordered that the order entered April 6, 1917, be and the same is hereby revoked, that the petition for writ of habeas corpus be dismissed, and that the said Sarah Chandler Shapley be remanded to the custody of H. O. Spaulding, superintendent of the State Hospital for the Insane at Westborough, in the county of Worcester, in said commonwealth."

It thus appears that there was a hearing before a judge of the Supreme Judicial Court of Massachusetts upon her mental condition, and that he decided that it was such as to require him to remand her to the insane asylum.

The finding of the judge of the Supreme Judicial Court of Massachusetts upon the question of her insanity is conclusive, and is not subject to review. The only question presented is whether she is now deprived of her liberty without due process of law.

[2] This court has undoubted jurisdiction upon a writ of habeas corpus to discharge from the custody of state officers one restrained of his liberty in violation of the Constitution of the United States, but has discretion as to the time and mode in which this power shall be exercised. The Supreme Court of the United States in numerous decisions has defined the limits within which this discretion must be confined. The latest of these is Urquhart v. Brown, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760, in which in a footnote at page 182 of 205 U. S. (27 Sup. Ct. 459, 51 L. Ed. 760), the previous decisions are collected. While these decisions dealt with criminal prosecutions commenced in state courts, wherein the accused claimed that he was held in custody in violation of the Constitution of the United States, they apply equally to one who, it is alleged, is deprived of his liberty in violation of the Constitution by being confined within a state hospital for the insane by the administration of its laws. The state alone, as parens patriæ is charged with the duty of caring for the insane within its borders, and may adopt whatever method of procedure it may desire for inquisition into their condition and the necessity for their confinement, provided the same is not in contravention of the Constitution or laws of the United States. In Re Dowdell, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290, the Supreme Judicial Court of Massachusetts has sustained the constitutionality of its law for the commitment of insane persons, and in view of the confusion that might arise from a contrary decision by a federal court, while I think the Massachusetts statute ought to provide for notice and an opportunity to be heard before commitment of the insane is ordered, I think it would be unwise for a federal court now to advance any different view.

[3] For the welfare of the community, as well as that of the insane, and to guard against unnecessary conflicts between the federal courts and those of the state, both of which are equally bound to guard and protect rights secured by the Constitution, it is necessary that one who alleges that he has been deprived of his liberty in violation of his constitutional rights should have exhausted all his remedies in the state court before application should be made to a federal court. The exceptional cases in which a federal judge should exercise the power conferred upon him to issue a writ of habeas corpus to release one who is in custody by state authority and claims that he is deprived of liberty in violation of the Constitution are stated in Ex parte Royall, 117 U. S. 241, 251, 6 Sup. Ct. 734, 740, 29 L. Ed. 868, as follows:

"When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, or where, being a subject or

citizen of a foreign state, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations, in such and like cases of urgency, involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under state authority. So, also, when they are in the custody of a state officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses."

It is evident that the case presented by the petitioner does not fall within any of these enumerated classes. While the petitioner has presented a petition to the Supreme Judicial Court for a writ of habeas corpus, which was denied by a single justice of that court, it does not appear that upon the hearing any question of law was reserved or reported to the full court, as might have been done. King's Case, 161 Mass. 46, 36 N. E. 685. If this had been done, and the highest court of the state, competent under the state law to dispose of the matter, had finally acted, the case could have been brought to the Supreme Court of the United States upon a writ of error. Ex parte Coatz (D. C.) 242 Fed. 1003.

Although a single justice of the Supreme Judicial Court of Massachusetts has denied a writ of habeas corpus, this would not constitute res adjudicata. Bradley v. Beetle, 153 Mass. 154, 26 N. E. 429. Under chapter 504, section 78, of the Acts of 1909 of Massachusetts, it would seem as if she, or any person in her behalf, could now make application to a justice of the Supreme Judicial Court of that state, alleging that she ought not longer to be confined; and section 79 of the same chapter points out the duty of the justice, upon reasonable cause shown for hearing, to order notice of the time and place of hearing to be given, as he may determine, and further provides that the alleged insane person may be brought before the justice at the hearing upon a writ of habeas corpus if any person so requests and the justice considers it proper; also that an issue or issues may be framed and submitted to a jury by direction of the justice or on the request of any person who appears in the case.

In the opinion in Re Huse, 79 Fed. 305, 25 C. C. A. 1 (C. C. A. 9th Circuit), the reasons why the courts of the United States should not obstruct the administration of laws relating to confinement of insane persons through its own tribunals are forcibly stated, and with them I fully agree.

Petition dismissed, and writ denied.

SHAPLEY v. COHOON.

(District Court, D. Massachusetts. May 19, 1919.)

No. 1642.

Habeas Corpus ⚷45(2)—**Judgment** ⚷828(3)—**Federal Courts—Insane Persons—Commitment by State Authorities.**

The question whether a warrant or order under which a person was committed as insane is in conformity to state laws should first be presented to a state court, and the decision of that court is binding on a federal court, unless the state proceedings do not comply with the requirements of the federal Constitution.

Habeas Corpus. Petition by Sarah Chandler Shapley against Elisha H. Cohoon. On motion to dismiss petition. Motion granted.

See, also, 258 Fed. 752.

James A. Keown, of Lynn, Mass., for petitioner.

J. R. Benton and Max L. Levenson, Asst. Attys. Gen., for defendant.

MORTON, District Judge. In view of the decision of the Court of Appeals in this case (255 Fed. 689, February 11, 1919), the only question now before this court is whether the amended (or "substitute") petition is so different from that already passed upon as to require a different conclusion.

The allegations relied upon to distinguish it are, speaking generally, statements of fact specifically attacking the warrant (or order) of commitment, and averments that the Massachusetts statute and the proceedings under it contravened the federal Constitution, in that they did not provide for "due process of law."

This last question was considered and passed upon by Judge Johnson in his opinion (Mass. District Court, October 8, 1918, 258 Fed. 752), but apparently was not regarded as open upon the record by the Court of Appeals. In view of the careful opinion by Judge Johnson on this point, I need only say that it is by no means so clear that the Massachusetts statute and the proceedings alleged to have taken place under it are in violation of the petitioner's constitutional rights as to justify a federal court of first instance in so holding.

As to the alleged invalidity of the warrant: Upon this point, in addition to the petition and motion to dismiss, I have considered, by agreement of counsel, the record in the commitment proceedings which was used as an exhibit at the previous hearing, and certified copies of the orders in the habeas corpus proceeding in the state court.

The present petition states that "no less than ten petitions for writs of habeas corpus have been presented to the state courts, and on none of these has the petitioner had a fair hearing." No reason is stated why the hearings were not fair, nor why there should be "bias, prejudice, or local influence" against the petitioner, as charged. Such general allegations are disregarded. Opinion of Johnson, J., supra. In every one of said proceedings the question whether there was a valid

outstanding warrant of commitment against the petitioner was necessarily involved. Either the present allegations against the warrant have been heard and not sustained by the state courts, or they have never been made to the state courts. On the first alternative the decision of the state court as to the formal sufficiency of proceedings under its statutes is binding on the federal courts, unless the petitioner's detention is on a warrant which is plainly and absolutely void. That question, concerning as it does proceedings under the state statutes, ought to be presented to the highest state court before the jurisdiction of the federal courts is involved. See Ex parte Royall, 117 U. S. 241, 250, 251, 6 Sup. Ct. 734, 29 L. Ed. 868. If the alleged invalidity of the warrant has never been brought to the attention of the state courts, that ought to be done before resorting to the federal court. This aspect of the matter is fully covered in the opinion of Judge Johnson (pages 5 and 6, manuscript). The case at present "involves no federal question adequate to sustain the jurisdiction." White, C. J., Matters v. Ryan (April 14, 1919) 249 U. S. 375, 39 Sup. Ct. 315, 63 L. Ed. 654.

It is agreed by counsel that since this amended petition was filed the probate court in Massachusetts has adjudged the petitioner not insane. That is a matter for the consideration of the state courts. The questions here presented relate solely to the petitioner's rights under the federal Constitution.

Motion to dismiss granted.

Petition dismissed.

THOMAS v. DELTA LAND & WATER CO. et al.

(District Court, D. Nevada. Sept. 26, 1918.)

Nos. 2219, 2223, 2224, 2228, 2229, 2230, 2234.

1. REMOVAL OF CAUSES ⚷102—REMANDING CAUSE TO STATE COURT.

Where the facts upon which the right to have a case tried in the United States District Court are not clear, a motion to remand to the state court should be granted.

2. REMOVAL OF CAUSES ⚷14—PLACE OF REMOVAL—"PROPER DISTRICT."

Under Judicial Code, § 28 (Comp. St. § 1010), providing that certain cases may be removed from state courts to District Courts of the United States for the "proper district," a cause can only be removed to the federal court for the district in which the state court is situated, in view of sections 29, 51 (Comp. St. §§ 1011, 1033), no other United States District Court having jurisdiction.

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

3. REMOVAL OF CAUSES ⚷88—BOND.

The filing of the bond referred to in Judicial Code, § 29, is a condition precedent, and essential to the enjoyment of the right of removal of a cause from a state court to a United States District Court.

At Law. Actions by Richard Thomas, C. H. Castle, by Raymond E. Beardsley and another, by David Porter, by Joseph Marcelino, by Fannie M. Forbes, and by Edward C. Perrin, respectively, against the

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

Delta Land & Water Company and others. On motions by plaintiffs to remand. Motions allowed.

Evans, Evans & Folland, Walton & Walton, and Dey, Hoppaugh & Fabian, all of Salt Lake City, Utah, for plaintiffs.

Story & Steigmeyer, and Wm. Story, Jr., all of Salt Lake City, Utah, for defendant Delta Land & Water Co

FARRINGTON, District Judge. Each of the above-entitled actions was commenced in the district court of the Fifth judicial district, in and for the county of Millard, in the state of Utah, and removed to this court on petition of the defendant Delta Land & Water Company. Each of the plaintiffs is a resident and citizen of California. The Delta Land & Water Company is a Nevada corporation, and the other defendants, Prout and McPherson, are residents and citizens of Utah. In each case it is alleged that the plaintiff or plaintiffs were induced by the fraudulent representations of the defendants to purchase from the defendant company certain water rights, also to enter certain tracts of land in Millard county, Utah, and that the lands proved to be utterly worthless. The plaintiffs claim damages, actual and exemplary, in amounts varying from $11,001.59 in the Porter Case, to $70,500 in the Beardsley Case. Motion to remand is made in each suit, and, as all involve precisely the same questions, they will be considered together.

Removals were asked on the ground of diverse citizenship. The claim is made that Prout and McPherson had, and have, no interest whatever in this controversy, and that they were fraudulently joined as defendants in order to prevent removal to the federal court. Be this as it may, the question as to whether causes pending in the state court of Utah are removable to the United States District Court of Nevada for trial must be determined in any event, and, as this question is decisive, the former may be laid aside and the Delta Company will be regarded as the only defendant.

[1] Where the facts upon which the right to have a case tried in this court are not clear, a motion to remand should be granted; in fact, federal courts have almost uniformly denied the right of removal in doubtful cases. Eddy v. Chicago & N. Y. Ry. Co. (D. C.) 226 Fed. 120; Nash v. McNamara (C. C.) 145 Fed. 541; Vanderbilt v. Kerr (C. C.) 188 Fed. 537.

[2, 3] Section 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [Comp. St. § 1010]) provides that controversies over which the District Courts of the United States are given original jurisdiction, 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." No attempt is made in section 28 to define the term "proper district." The Delta Company contends that it must be construed to be the district in which the plaintiff or defendant is a resident, and, as neither the Delta Company nor the plaintiffs are residents of Utah, the controversy between them cannot be removed to the United States District Court for that state; and if there can be no removal to California, the residence of the

plaintiffs, nor to Nevada, the residence of the defendant, there can be no removal at all, notwithstanding the provision in section 28 for removal to the proper district.

Section 51 of the Judicial Code (section 1033) declares that, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." In the same section it is also provided that "no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

Plaintiffs could have instituted this suit against the Delta Company in the federal court for Nevada, but from this it does not necessarily follow that defendant has a reciprocal right of removal to Nevada. The provisions quoted from section 51 render it impossible to harass a defendant by bringing suits against him in a federal court of a distant state, simply because such distant state happens to be the residence of the plaintiff. This consideration for the defendant suggests similar safeguards for the plaintiff, and undoubtedly moved Congress, in formulating the procedure for removal of causes in section 29 (section 1011), to provide for removals only "into the District Court to be held in the district where such suit is pending."

It might be a serious hardship, if not an absolute denial of justice, to permit a defendant by removal proceedings to transfer the trial of a cause to a federal court far distant from the state in which the cause of action arose, and from the district in which the plaintiff resides, with no other ground for such removal than the fact that defendant, possibly in anticipation of such litigation, may have taken the precaution to be organized and to be brought into existence, in a state separated, as far as possible, from the locality in which it was proposed to do business. If the purpose in drafting section 28 was to confer an advantage on the defendant, the intention could have been clearly expressed in appropriate language.

Section 29 of the Judicial Code, which shows how the right of removal is to be exercised, declares that:

"Whenever any party entitled to remove any suit mentioned in the last preceding section * * * may desire to remove such suit from a state court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such state court * * * for the removal of such suit *into the District Court to be held in the district where such suit is pending*, and shall make and file therewith a bond * * * for his or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said District Court. * * * The said copy being entered * * * in said District Court * * * the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

The meaning of the term "proper court," as used in section 28, is limited, controlled, and explained, not only by sections 28 and 51, but also by section 29. Section 28 confers a right on certain persons to have a defined class of cases tried in the federal court. In the fol-

lowing section it is said that persons desirous of availing themselves of this right shall, within a fixed time, file in the state court where the suit is pending a petition for removal to the federal court for the district in which the state court is situated, together with a bond containing conditions for diligently prosecuting the cause, and payment of costs. The filing of the bond, conditioned as provided, within the time fixed, is a condition precedent, and essential to the enjoyment of the right of removal.

In preparing the petitions for removal and the bonds, defendant has ignored the provisions of section 29. This defect has not been waived. The only right of removal which defendant can claim is that conferred by the Judicial Code, and inasmuch as removal is purely a matter of grace, and the method by which defendant may avail itself thereof is provided by the statute, I am of the opinion that the method formulated in section 29 is exclusive, and that this court has no jurisdiction. This is in accord with the ruling in the following cases: Eddy v. Chicago & N. W. Ry. Co. (D. C.) 226 Fed. 120; Ostrom v. Edison (D. C.) 244 Fed. 228; St. John v. Taintor (D. C.) 220 Fed. 457; Webb v. Southern Ry. Co., 248 Fed. 618, 160 C. C. A. 518; St. John v. U. S. Fidelity & Guaranty Co. (D. C.) 213 Fed. 685; Cincinnati, H. & D. Ry. Co. v. Orr (D. C.) 215 Fed. 261; Stewart v. Cyburn Lumber Co., 111 Miss. 844, 72 South. 276.

The motion to remand is allowed, with costs to plaintiffs.

JONES v. DELTA LAND & WATER CO. et al.

(District Court, D. Nevada. November 11, 1918.)

Nos. 2220–2222, 2233, 2235, 2244.

1. REMOVAL OF CAUSES ⟹107(11)—FEES—"JUDGMENT RENDERED WITHOUT JURY."
   An order remanding a cause to a state court is a final disposition thereof in the federal court, and is a "judgment rendered without a jury," within the meaning of Rev. St. § 824 (Comp. St. § 1378), for which a docket fee of $10 may be allowed.

2. REMOVAL OF CAUSES ⟹107(11)—COSTS—CASES TRIED TOGETHER.
   Where motions to remand to the state court were made in 13 different actions, in each of which the plaintiffs were put to expense and inconvenience, plaintiff in each case, under Judicial Code, § 37 (Comp. St. § 1019), was entitled to his costs on granting of the motions, although there was but one argument, covering all the cases.

3. REMOVAL OF CAUSES ⟹107(11)—COSTS—CASES TRIED TOGETHER.
   Where there were 13 cases, in each of which plaintiffs were represented by an attorney on motions to remand the cases to the state court, a docket fee of $10 in each case, allowable under Rev. St. § 824 (Comp. St. § 1378), was neither unreasonable nor unjust.

At Law. Action by W. H. Jones, by M. K. Taylor, C. C. Taylor, and Inez Seufert, by Joseph X. Claverie, by Robert Bruce Smith, by Allen Kennedy, and by Wayne E. Smith, respectively, against the Delta

Land & Water Company, H. B. Prout, and A. M. McPherson. Orders were entered in each case to remand on motions by plaintiffs, and the defendants appeal from taxation of costs by the clerk. Decision of clerk sustained.

Evans, Evans & Folland, Dey, Hoppaugh & Fabian, and Walton & Walton, all of Salt Lake City, Utah, for plaintiffs.

Story & Steigmeyer and Wm. Story, Jr., all of Salt Lake City, Utah, for defendant Delta Land & Water Co.

FARRINGTON, District Judge. Thirteen different cases were commenced by as many different plaintiffs in the district court of the Fifth judicial district, Millard county, Utah, against the Delta Land & Water Company. All were removed to this court on the ground of diversity of citizenship. The plaintiffs were all residents and citizens of California, while the defendant is a Nevada corporation. Motions to remand were made in 7 cases, argued August 5, 1918, and allowed August 31, 1918. By stipulation of counsel, motions to remand in the remaining 6 cases were submitted without argument October 23, 1918, and in each an order to remand was entered, with costs. The matter is now before the court on appeal from the taxation by the clerk of a docket fee of $10 in each of the 6 cases.

[**1-3**] By section 824, Rev. St. U. S. (Comp. St. § 1378), a docket fee of $20 is allowed in each case when a trial is had before a jury in a civil or criminal case; but in cases at law, when judgment is rendered without a jury, the docket fee is $10. The allowance of such a fee has been approved in the following cases: Pellett v. Great Northern Ry. Co. (C. C.) 105 Fed. 194; Riser v. So. Ry. Co. (C. C.) 116 Fed. 1014; Acker v. Charleston & W. C. Ry. Co. (C. C.) 190 Fed. 288; Walsh's Adm'x v. Joplin & P. Ry. Co. (D. C.) 219 Fed. 345.

It is considered that an order remanding a cause is a final disposition thereof in a federal court, therefore in the nature of a final judgment; and hence, within the meaning of the above-quoted statute, it may be regarded as a judgment rendered without a jury. True, there has been but one argument covering all 13 cases; but there were 13 different plaintiffs, each of whom was put to expense and inconvenience, and each, under section 37 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1098 [Comp. St. § 1019]), is entitled to his costs. It is provided in that section that on remanding the cause the court shall make such order as to costs as shall be just. Here each plaintiff was represented by an attorney, who prepared and presented a motion to remand, and arranged to submit each motion to the court, and must attend to the re-entry of the cause in the state court. I am satisfied that the docket fee of $10 for such service is neither unreasonable nor unjust.

A similar question was disposed of in Goodyear D. V. Co. v. Osgood, Fed. Cas. No. 5,594. That cause was heard by the court under a stipulation embracing a large number of cases, and providing that the decree in one was to stand as the decree in all. An objection was made to a docket fee taxed in one of the cases, which was to abide the

result in the pivotal case. The court overruled the objection, and allowed the docket fee.

The decision of the clerk allowing a $10 docket fee in each case will be sustained.

UNITED STATES v. JENKS.

SAME v. JENKS et al.

(District Court, E. D. Pennsylvania. June 24, 1919.)

Nos. 91, 92.

1. INDICTMENT AND INFORMATION ⚿9—PROCEDURE.
Indictments should not be presented to the grand jury without leave of court, where there appears no real necessity for proceeding without a preliminary hearing before a magistrate or commissioner.

2. INDICTMENT AND INFORMATION ⚿86(1)—VENUE.
An indictment is demurrable which does not set out that the offense charged was committed within the jurisdiction of the court.

3. BANKS AND BANKING ⚿256(3)—EMBEZZLEMENT—INTENT.
Intent to defraud is an essential element of a violation of Rev. St. § 5209, as amended by Act Sept. 26, 1918, relating to embezzlement, etc., by officer, director, agent, or employé of any Federal Reserve Bank or member bank.

4. INDICTMENT AND INFORMATION ⚿86(2)—CONSPIRACY—VENUE.
An indictment for conspiracy is not fatally defective, where it alleges the place where the overt acts are charged to have been done, although the venue of the conspiracy is not set out.

5. CONSPIRACY ⚿33—TO DEFRAUD THE UNITED STATES.
One could not be convicted of conspiracy to defraud the United States, consisting in exercising, under a certain circular issued by the Treasury Department, the privilege of converting First Liberty Loan 4 per cent. bonds into Third Liberty Loan 4¼ per cent. bonds after the time limit set out in the circular had expired, using for that purpose bonds of the United States deposited with the Federal Reserve Bank, unless it be shown that the accused had knowledge of the terms of the circular or of the time within which the conversion privilege could be exercised.

Prosecutions by the United States against Charles N. Jenks, and against Charles N. Jenks and Elmer E. Patton. Upon motions to quash and demurrers. Demurrers sustained.

T. Henry Walnut, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

Grover C. Ladner and Wm. A. Gray, both of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. [1] While, in view of the disposition to be made of the demurrers, it is not necessary to pass upon the motions to quash, it may not be out of place to comment upon a practice, which appears to be growing, of presenting indictments to the grand jury without leave of court, where there appears to be no real necessity for proceeding without a preliminary hearing before a magistrate or commissioner. While, under the circumstances in the case of

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United States v. Kerr (D. C.) 159 Fed. 185, there appeared to be no reason for quashing an indictment which had been preceded by a hearing had in another district, in that case Judge McPherson said:

"No doubt a prosecution before these tribunals [i. e., federal courts] is ordinarily begun in much the same way as in the criminal courts of the state."

The attitude of the court for this district is in harmony with that outlined by Judge Thomson, of the Western district, in the case of United States v. Wetmore, 218 Fed. 227, where he said:

"In denying the defendants' motion to quash, we do not wish to be considered as lending our sanction generally to the practice of instituting criminal prosecutions by an investigation before a grand jury. The right of a defendant to a preliminary hearing before a magistrate or commissioner, to be informed of the nature of the charge against him, to be confronted with his accuser, and to meet the witnesses against him face to face—these are high prerogatives of the citizen, established by immemorial usage and precedent in the interest of individual freedom; and they should only be departed from in those exceptional or extraordinary cases where the public interest, always paramount, would seem to justify or demand it."

[**2, 3**] Passing to the demurrers, indictment No. 91 is clearly defective, in that it does not set out that any offense was committed within the jurisdiction of the court, nor does it charge the intent which is an essential element of section 5209, R. S., as amended by Act Sept. 26, 1918, c. 177.

The offense charged must be "with intent in any case to injure or defraud such Federal Reserve Bank, or member bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal Reserve Bank, or member bank, or the Comptroller of the Currency, or any agent or examiner appointed to examine the affairs of such Federal Reserve Bank, or member bank, or Federal Reserve Board." The intent is an essential part of the offense. Coffin v. United States, 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109; United States v. Voorhees (C. C.) 9 Fed. 143; United States v. Fish (C. C.) 24 Fed. 585; United States v. Harper (C. C.) 33 Fed. 471; United States v. Berry (D. C.) 85 Fed. 208. The demurrer to indictment No. 91 is sustained.

[**4**] In indictment No. 92, the first count charges a conspiracy to commit the offense against the United States of embezzling, abstracting, and willfully misapplying certain moneys, funds, and credits of the Federal Reserve Bank of the city of Philadelphia. While the venue of the conspiracy is not set out, the overt acts are charged to have been done at Philadelphia, so that the count is not fatally defective in this respect. There is a failure, however, to aver intent in connection with the charge of embezzlement, abstraction, and misapplication and on that ground count 1 is defective.

[**5**] In count 2 the defendants are charged with conspiracy to defraud the United States. It is charged that the fraud consisted in exercising, under a certain circular issued by the Treasury Department, the privilege of converting First Liberty Loan 4 per cent. bonds into Third Liberty Loan 4¼ per cent. bonds after the time limit set out in the circular had expired, using for that purpose bonds of the Unit-

ed States deposited with the Federal Reserve Bank. There is no averment that the defendants or either of them had knowledge of the circular, or of the time within which the conversion privilege could with the consent of the Treasury Department be exercised. Unless the prosecution at the trial should bring home knowledge to the defendants of the terms of the circular, it could not be received in evidence. It is an essential element of the fraud alleged, and without it the count is defective.

The third count is subject to the same criticism as the first.

For the reasons stated, the demurrers to both indictments are sustained.

THE ELIZABETH MAERSK.

(District Court, E. D. Louisiana, New Orleans Division. May 30, 1919.)

No. 15992.

1. SEAMEN ⚷21—WAGES—DEDUCTIONS OF FORFEITURES BY FINES—INVALID FINES.
In a libel by seamen against a steamship for wages, the controversy arising from the master imposing fines under the Danish law, which he deducted from the wages, where the fines were not imposed in conformance with sections 102, 103, of the Danish law relating to seamen, on which the master relied, the seamen not being given full opportunity to present their defense, the fines were invalid and could not be thus collected.

2. SEAMEN ⚷21—WAGES—FINES—FIXING BY DANISH CONSUL.
In a libel by a seaman for wages, where the defense was that the Danish consul had assessed a fine upon a seaman for disregard of chief officer, *held*, that the Danish law relied upon by the vessel does not give the consul a right to judge the seaman's conduct and fix the amount of the fine.

3. SEAMEN ⚷23—WAGES—ADVANCE—PAYMENT OF WAGES.
An advance payment of wages to seamen, made upon their employment for the purpose of reimbursing a boarding house keeper, is illegal under Seamen's Act Cong. March 4, 1915, § 11 (Comp. St. § 8323).

Libel by Axel Anderson and others against the steamship Elizabeth Maersk. Decree for libelants.

W. J. & H. W. Waguespack, of New Orleans, La., for libelants.
Terriberry, Rice & Young, of New Orleans, La., for claimant.

FOSTER, District Judge. This is a libel by three seamen against the Danish steamship Elizabeth Maersk, for wages.

It appears that libelants Karl E. Hjelmberg and David Anderson were shipped at Savannah, Ga., on February 3, 1919, at wages of $75 per month, for a voyage to New Orleans and further. On the day the said libelants were shipped they were each given an advance of $7.50, and on February 8th they were each paid $3 on account of their wages. While in the port of Savannah the said libelants were given permission to go ashore to see the consul for the purpose of

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

getting American passports. They were unable to secure the passports at the time and returned to the ship at about 12 o'clock in the day. Later, on the same afternoon, they again went ashore, but without permission, and remained away until 7 o'clock the next morning.

Libelant Axel Anderson was shipped at Savannah on February 8, 1919, at the same wages and for the same voyage as the other two. While at sea, on the morning of the 22d of February, he had an altercation with the chief officer regarding the ringing of the fog bell on the forecastle. The sailor admits that he objected to the ringing of the bell and told the mate "he ought to be rung between the eyes." The mate puts it a little stronger and says that in addition the sailor called him a "codfish."

For their absence without leave in Savannah the captain imposed a fine on Hjelmberg and David Anderson of one-fourth of a month's pay, or $18.75 each. For the disrespect shown the chief officer by Axel Anderson he was fined $15 by the Danish consul in New Orleans.

The vessel arrived in New Orleans on February 22d and on that day the captain discharged and paid off all the members of the crew in full, except libelants. After deducting the fines and advances and payments made in Savannah, the captain tendered them the balance of their wages admitted due, respectively, $20.75 for Hjelmberg and David Anderson and $17.50 for Axel Anderson. They offered to receive the amounts tendered on account, but payment of anything was refused, unless they signed receipts in full.

[1] It is contended by respondent that the contract with the men is governed by the Danish law, and therefore the deductions from their wages were legal. Certain articles of the Danish maritime law, sanctioned by His Majesty Christian IX, on the 1st day of April, 1892, are in evidence. The pertinent portions are as follows:

Section 74: "The seaman engaged is bound to present himself for service on board at the time fixed by the master and must not afterwards leave the ship without permission."

Section 77: "Every one of the crew shall behave himself decently, soberly and peacefully, and carefully observe the directions for the maintenance of order and discipline on board. He shall show respect towards his superior officers, receive their orders attentively and by proper and distinct answers show that they are understood."

Section 102: "Should any of the crew be guilty of any of the under mentioned breaches of duty or of discipline, penalties may be imposed by the master consisting in forfeitures of wages according to the following scale, viz.:

"(1) Not exceeding half a month: If the man behaves disrespectfully towards his superior officers or shows disobedience in the service; * * *

"(3) Not exceeding a quarter of a month: If he without permission goes on shore, if he comes back the same day; and not exceeding half a month, if he returns later."

Section 103: "Previous to exercising the authority of punishment, assigned to him under section 102, the master shall, in the presence of two of the best men on board, hold an examination over the person who has committed the fault, not, however, till twelve hours have elapsed since the misconduct has been committed, unless there be special reason for holding the examination earlier. Whatever is stated there, together with the punishment the master inflicts, should be entered in the logbook, if such is kept on board, and otherwise be recorded in writing; what is entered or written down shall

be read before the guilty and the witnesses, and its correctness be attested by the signatures of those present. Should the master not have observed these instructions, the decision with reference to the deduction in the wages is of no effect."

On the other hand, it is contended by the libelants that the Danish law has no application to the case, as the men were shipped at an American port for a voyage to another American port, and, in the alternative, that as the captain failed to comply with the provisions of section 103 of the Danish law, the fines imposed are inoperative and of no effect in any event.

[2] The master in imposing the fines did not conform to the procedure outlined in section 103 of the Danish law. He simply entered the fines in the logbook and notified libelants. He professes ignorance of all the facts upon which he imposed the fines. The only evidence he had was that of the chief officer. It was his duty under the law of his country to hold an inquiry and give the men an opportunity to state their side of the case. Had he done so, it might have resulted in his acquitting Hjelmberg and David Anderson of intention to absent themselves without leave. They had permission to go ashore in the morning, and they might well have assumed that the permission extended to the time necessary to complete the very important business they had to attend to. It might also have resulted in an apology and disclaimer of intention to be disrespectful on the part of Axel Anderson to the advantage of discipline on board the ship, or it might have resulted in the imposition of the smaller and more just fines as to all three. Furthermore, the Danish law does not seem to give the counsel the right to judge of the conduct of the men and to fix the amount of a fine. The fines imposed were wholly inoperative under Danish law. It is unnecessary, therefore, to decide whether their imposition was governed by the Seamen's Act or the Danish law.

[3] With regard to the advances made in Savannah the $3 paid the men was legal and should be deducted, but the $7.50 paid them in advance on the very day they signed was illegal. Section 11 of the act of March 4, 1915 (38 Stat. 1164, c. 153 [Comp. St. § 8323]), makes it unlawful to pay any seamen any part of his service in advance, and applies the law to foreign vessels in American ports. The seamen testify that this advance was for the purpose of reimbursing a boarding house keeper at Jacksonville, Fla., from whence they had been sent to Savannah to join the vessel. It is this very class of advances that the Seamen's Act is designed to prevent, and admitting that in this case the money was due the boarding house keeper for board and lodging actually furnished the men, the law nevertheless strikes them with nullity. There is no doubt that the Congress had ample power to apply the law to a foreign vessel in an American port. Respondent imposed an impossible condition to the tender of the balance of the wages and therefore can derive no benefit from it.

There will be a decree in favor of Karl Hjelmberg and David Anderson for $47 each, and in favor of Axel Anderson for $32.50;

libelants to receive interest at the rate of 5 per cent. per annum from judicial demand, February 27, 1919, until paid. Respondent to pay all costs.

THE JEANNETTE SKINNER.

(District Court, D. Maryland. June 16, 1919.)

1. SHIPPING ⚷3½, New, vol. 8A Key-No. Series—LIABILITY TO SEIZURE OF VESSELS REQUISITIONED BY GOVERNMENT.
   The provision of Shipping Board Act Sept. 7, 1916, § 9 (Comp. St. 1918, Append. § 8146e), making Shipping Board vessels, while employed solely as merchant vessels, subject to all laws, regulations, and liabilities governing merchant vessels, applies to vessels requisitioned under Act June 15, 1917, § 1.

2. SHIPPING ⚷3½, New, vol. 8A Key-No. Series—GOVERNMENT VESSELS—SEIZURE ON PROCESS IN REM—"EMPLOYED SOLELY AS MERCHANT VESSEL."
   A vessel requisitioned and operated by the government under authority of the Shipping Board, assigned to carry food products to the Swiss government, *held* "employed solely as a merchant vessel," within Shipping Board Act Sept. 7, 1916, § 9 (Comp. St. 1918, Append. § 8146e), and subject to process in a suit in rem, although officered and manned by naval men

In Admiralty. Suit by the Nippon Yusen Kabushiki Kaisha, owner of the Japanese steamship Ceylon Maru, against the steamship Jeannette Skinner. On objection to jurisdiction. Overruled.

Burlingham, Veeder, Masten & Fearey, of New York City, and George Weems Williams, of Baltimore, Md., for libelant.

Samuel K. Dennis, U. S. Atty, of Baltimore, Md., for respondent.

ROSE, District Judge. The American steamship Jeannette Skinner, hereinafter called the Skinner, was arrested upon process issued under a libel in rem filed against her by the owner of the Japanese steamship Ceylon Maru. By it it is sought to hold her liable for damage done by her to the Japanese vessel while the latter, on a clear day last November, lay at anchor near a French port.

The United States appeared specially and objected to the jurisdiction on three grounds:

[1] 1. That the Skinner belonged to the government, and could not be arrested without the latter's consent, and that, as she had been requisitioned under the provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917, c. 29, 40 Stat. 182, section 9 of the Shipping Board Act of September 7, 1916, c. 451, 39 Stat. 728 (Comp. St. 1918, Append. § 8146e), subjecting Shipping Board vessels in certain circumstances to all the laws, regulations, and liability governing merchant vessels, had no application to her.

The decision of the Supreme Court, handed down June 2, 1919, in The Lake Monroe, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. —, disposes of this objection adversely to the government.

[2] 2. That at the time of her arrest the Skinner was not employed solely as a merchant vessel. Shortly before the institution of these

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

proceedings, the Division of Operations of the Emergency Fleet Corporation, acting under the general authority previously given by the United States Shipping Board, assigned the Skinner to carry food products from this country to Europe for the Swiss government, which undertook to pay a stipulated freight per ton. The Division of Operations employed a concern known as the Nafra Line, Incorporated, carrying on business as ships' agents, to do those things which people in this line of business habitually do for merchant ships for which they are the agents; that is to say, it looked after the loading of the ship, made in the first instance disbursements for her port and other expenses, saw that proper bills of lading were issued for her cargo, and attended to the collection of her freight money. In short, the Skinner was employed as a merchant vessel, and the fact that her cargo was owned by a foreign government did not alter the essentially mercantile character of the service she was rendering.

It is urged, however, that, as she was commanded by officers of the United States Navy and had a naval crew, she was immune from process. That would be true if the government had stood upon its right, and it would be equally true that her mere ownership by the United States protected her from seizure if the United States so willed; but the government may waive its privileges, if it sees fit, and by the ninth section of the act of 1916 the government has waived them, if, at the time of her arrest, the Skinner was solely employed as a merchant vessel. Whether she was or was not is to be determined by the nature of the work in which she was engaged, and not by the particular department of the government to which her officers and crew belonged. As has already been pointed out, she was, at the time of her arrest, being used as a merchant vessel, and as that only. It follows that process in rem could rightly be served upon her.

3. It is urged that the only way that a ship can become responsible in rem for a tort is through the fault of some one whose relation to her is such that she is answerable for his shortcomings, and that neither the government nor its property can ordinarily be held liable for wrongs done by its servants or agents. At the time of the collision, the Skinner was not employed as a merchant vessel, and therefore the libelant cannot rely upon section 9 of the act of 1916. This objection goes, not to jurisdiction, but to liability, and its consideration should be postponed until the hearing upon the merits.

It follows that the objection to jurisdiction must be overruled.

FIDELITY TRUST CO. OF BALTIMORE, MD., v. MILES, Collector of Internal Revenue.

BALTIMORE TRUST CO. v. SAME.

(District Court, D. Maryland. June 18, 1919.)

Nos. 395, 423, 424, 425.

1. INTERNAL REVENUE ⟹9—SPECIAL TAXES—BANK CAPITAL.
That a bank also acts as a fiduciary, although no part of its capital is employed in such capacity, except as giving it standing of confidence and attracting patronage, does not exempt its capital from the special tax imposed by Act Cong. Oct. 22, 1914, § 3, par. 1.

2. INTERNAL REVENUE ⟹9—SPECIAL TAXES—BANK CAPITAL.
That a bank also engages in underwriting or promoting new enterprises, or in refinancing old enterprises, usually as a member of a syndicate or of a group, does not exempt the capital employed therein from the special tax imposed by Act Cong. Oct. 22, 1914, § 3, par. 1.

3. INTERNAL REVENUE ⟹9—SPECIAL TAXES—BANK CAPITAL.
That a bank deals on its own account in stocks and bonds or other securities does not exempt the capital employed therein from the special tax imposed by Act Cong. Oct. 22, 1914, § 3, par. 1.

At Law. Separate actions by the Fidelity Trust Company of Baltimore, Md., a body corporate, and by the Baltimore Trust Company, against Joshua W. Miles, Collector of Internal Revenue for the District of Maryland, to recover taxes paid. Tried together by agreement. Judgment for defendant in each case.

Henry W. Williams, of Baltimore, Md., for plaintiff Fidelity Trust Co.

Ritchie, Janney & Stuart, of Baltimore, Md., for plaintiff Baltimore Trust Co.

Samuel K. Dennis, U. S. Atty., of Baltimore, Md., for defendant.

ROSE, District Judge. By agreement, the above cases against the collector of internal revenue for this district were tried together. Each of the plaintiffs is a banker, and each carries on other business as well. The collector of internal revenue assessed upon each of them the special tax imposed by the first paragraph of the third section of the Act of October 22, 1914 (38 Stat. 750, c. 331), upon the total amount of its capital, surplus, and undivided profits. Each paid under protest, and, having unsuccessfully invoked the other statutory remedies, brought these suits to recover all that had been paid.

At the trial, in view of the decision of the Circuit Court of Appeals for the Second Circuit in Anderson v. Farmers' Loan & Trust Co., 241 Fed. 322, 154 C. C. A. 202, they abandoned this extreme claim and undertook to show that a part of their capital, surplus, and undivided profits was not employed in the banking business.

In addition to its banking business, each of them does three things which it says are not banking:

[1] (1) It acts as a fiduciary—that is, as a trustee, receiver, executor, or administrator. No attempt was made to show that any special portion of its assets was devoted to this part of its business, nor

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

indeed, except for the purpose of giving it such a standing as inspires confidence and attracts patronage, is any needed. An individual of character and ability, but who is without any property of his own, may efficiently discharge such duties, and often does.

Sitting as a jury, I find that neither of the plaintiffs has shown that any part of its capital, surplus, and undivided profits was not used in banking, because it was used in its fiduciary business.

[2] (2) Each of the plaintiffs engages in underwriting or promoting new enterprises, or the extension or refinancing of old, usually as a member of a syndicate or of a group. In these enterprises, each of them ordinarily makes loans to its associates, or to the company which they are launching into the world, taking as security the pledge of the borrower's interest in the adventure. Much of this is banking within the definition of the act itself, as it involves the loan or advance of money upon stocks, bonds, bills of exchange, or promissory notes.

No evidence is offered which leads me, as a trier of fact, to find that any specific portion of the capital, surplus, and undivided profits of either of the plaintiffs was not used in banking, because it was used in syndicate operations.

[3] (3) Each of the plaintiffs deals in stocks, bonds, or other securities for its own account; that is to say, it buys them when it thinks they are cheap, in order that it may subsequently sell them at a profit. Most banks, state and national, do the same thing, as a usual and useful incident to their banking business. While there is some evidence that the plaintiffs carry on such transactions on a larger scale than is usual with banks which do not regard themselves as anything else, to my mind, sitting as a jury, there is no preponderance of evidence that any determinable portion of the capital of either of them is not used in banking, because it is used in the buying and selling of securities.

It results that in all these cases the verdict must be for the defendant, whether Anderson v. Farmers' Loan & Trust Co., supra, or Real Estate Title Ins. & Trust Co. v. Lederer (D. C.) 229 Fed. 799, is followed.

The principles of law which have guided the court, sitting as a jury, are, it is believed, sufficiently stated herein, and in consequence all the prayers on each side have been rejected, either because they are covered by what is here ruled or because they are in conflict with it.

TITLE GUARANTEE & TRUST CO. v. MILES, Collector of Internal Revenue (three cases).

(District Court, D. Maryland. June 18, 1919.)

Nos. 470–472.

INTERNAL REVENUE ⚷9—SPECIAL TAXES—BANKING CAPITAL.

That a corporation engaged mainly in the business of examining and insuring real estate titles also carries on a savings bank business, which it keeps separate from its other business, such other business not affecting it, except as giving it credit and facilitating the getting of customers for its bank, does not make the total amount of capital, surplus, and undi-

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

vided profits used in the insurance business subject to the special tax imposed by Act Cong. Oct. 22, 1914, § 3, par. 1; the amount used in the banking business as such only being subject thereto.

At Law. Actions by the Title Guarantee & Trust Company against Joshua W. Miles, Collector of Internal Revenue, to recover special taxes paid under protest. Judgment for plaintiff.

Ritchie, Janney & Steuart, of Baltimore, Md., for plaintiff.
Samuel K. Dennis, U. S. Atty., of Baltimore, Md., for defendant.

ROSE, District Judge. In these cases the plaintiff seeks to recover the sum paid under protest as the special tax imposed by the first paragraph of the third section of the Act of October 22, 1914 (38 Stat. 750, c. 331), upon the total amount of its capital, surplus, and undivided profits.

Originally the plaintiff was engaged solely in the business of examining and insuring real estate titles, and in other transactions closely associated therewith. This still constitutes the bulk of its business. A number of years ago it began to carry on a savings bank business in a small way, and this has gradually grown in volume and importance. The company has kept a perfectly distinct set of books for its banking business. Whatever profit it made out of banking has remained untouched. It admits that this profit is capital employed by it in banking, and upon it the tax was properly levied.

The rest of its capital, surplus, and undivided profits is not, and has never been, used in banking, except in so far as its possession of them gave and gives it a credit which facilitates the getting of customers for its bank. In the case of Fidelity Trust Co. of Baltimore, Maryland, et al. v. Joshua W. Miles, Collector of Internal Revenue, 258 Fed. 770, contemporaneously decided, it has been held that no part of the capital which is actually used in banking escapes the tax merely because the ownership of such capital makes it easier for a banking corporation to get employment in a fiduciary capacity. The converse is also true.

It follows that in this case it is only the capital which has been actually set apart and used in the banking business which is subject to the tax.

In re SCHWAB.

(District Court, E. D. New York. June 13, 1919.)

1. BANKRUPTCY ⚿342½—REFEREE—JURISDICTION.
   Where all of the parties submitted to the jurisdiction of the referee in bankruptcy the question of the validity of a mortgage executed by the bankrupt, the mortgagee cannot assert, on motion to reverse and vacate referee's order adjudging the mortgage invalid, that the referee was without jurisdiction.

2. MORTGAGES ⚿159—PRIORITY—AGREEMENTS—VALIDITY.
   An agreement by a prior mortgagee that a subsequent mortgage, concededly a valid lien, should first be paid out of the proceeds of the mortgaged premises is legal.

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

3. BANKRUPTCY ⊂=165(1)—NOVATION ⊂=1—PREFERENCE—WHAT CONSTITUTES.
In 1913, a bankrupt and his wife executed a mortgage upon real property owned by him, and over two years later, and within four months of adjudication, the mortgagee agreed that her mortgage should be subsequent to a mortgage then given by the bankrupt which was concededly valid, *held* that, as there can be no preferential transfer without a depletion of the bankrupt's estate, the original mortgage could not be attacked, even on the theory that the agreement constituted a novation, and hence worked a preference, for in every novation there are four essential requisites, a previous valid obligation, the agreement by all of the parties to the new contract, the extinguishment of the old, and the validity of the new; and, if there was a valid novation, the new agreement was also valid, and was not open to attack.

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

In Bankruptcy. In the matter of Louis Schwab, bankrupt. On motion to reverse and vacate an order of the referee finding that a mortgage was invalid as preferential. Order reversed and vacated.

Louis Charles Wills, of Brooklyn, N. Y., for the motion.
Halbert & Quist, of Brooklyn, N. Y., opposed.

GARVIN, District Judge. This is a motion for an order reversing and vacating an order made herein by Hon. Charles A. Tipling, referee, on March 11, 1919, and filed on or about March 12 1919, in so far as the said order affects the estate of Meta Mayer, deceased, and striking from the said order the following provision contained therein, to wit:

"That the mortgage made by the bankrupt herein and his wife to Meta Mayer for $3,000 upon said parcel No. 1, which mortgage was recorded in the Queens county clerk's office on March 27, 1914, in Liber 1517 of Mortgages, p. 17, which was subject and subordinate to the $8,000 mortgage of Emily Obernier, is not a valid mortgage lien upon the said parcel No. 1, and said Meta Mayer is not entitled to receive any portion thereof out of the proceeds of the sale, the said mortgage being void and invalid in law, nor is she entitled to be credited on account of said purchase price with the amount of said mortgage, or any part thereof, and she is hereby directed to surrender the said mortgage, and she is ordered and directed to contribute and pay the amount thereof to the said trustee for the benefit of the bankrupt estate, and said trustee is subrogated to any rights which the said Meta Mayer may have or may have had under such mortgage, and said Meta Mayer is hereby ordered and directed to pay to the said trustee the balance then remaining unpaid on her purchase price, to wit, the aforesaid sum of $3,000, and the sum of $226.16, total aggregate $3,226.16"

—and for such other and further relief as may be just, with the costs of this motion.

[1] It is claimed that the referee was without jurisdiction in the premises, but this contention is without merit, inasmuch as it is now raised for the first time; all parties having submitted to the jurisdiction without question.

[2, 3] On January 30, 1913, the bankrupt and his wife made and delivered to Meta Mayer a mortgage in the sum of $3,000, covering real property owned by the bankrupt known as parcel No. 1. This mortgage remained a lien thereon until September 30, 1915, on which day the bankrupt gave another mortgage on the same parcel for $8,-

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

000 to Emily Obernier. Meta Mayer agreed to subordinate her mortgage to that given to Emily Obernier. The referee has found (decision and findings fol. 33) that the $8,000 mortgage is valid and his decision in respect thereto has not been questioned.

He considers at some length whether the Mayer mortgage was void or voidable in its inception, but I do not understand that he holds it to have been either void or voidable when given on January 13, 1913, and with this conclusion I agree.

He holds, however, that, inasmuch as the petition in bankruptcy was filed November 4, 1915, and the adjudication followed on November 18, 1915, when Meta Mayer agreed to subordinate her mortgage to the Obernier mortgage, with reasonable cause to believe the bankrupt insolvent, there was a contract of novation, and her mortgage lien was extinguished.

The question presented, therefore, is whether a mortgagee, with reasonable cause to believe a bankrupt to be insolvent, and within four months prior to the adjudication, could subordinate a valid mortgage upon the bankrupt's property to a new mortgage which the bankrupt was placing thereon, or whether such attempted subordination constituted a voidable preference.

"In every novation there are four essential requisites: (1) A previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the extinguishment of the old contract; and (4) the validity of the new one." Cyc. vol. 29, p. 1130.

It is obvious that if there was a new contract which was invalid, as the referee holds, there could be no novation, because it is essential that the new contract be valid.

The learned referee states in his decision (folio 48):

"By the terms of the subordination agreement, Meta Mayer gave up and surrendered any claim she formerly had by way of her mortgage lien on the property, prior to September 30, 1915."

It will readily be seen that, so far from surrendering any claim she had, she did no more than agree that before the property in question could be applied to the satisfaction of her mortgage, the Obernier mortgage (concededly a valid lien) would first have to be paid. Such an agreement is legal. Loucks v. Union Bank of Louisiana, 2 La. Ann. 617. If the latter had been placed upon the property as a second mortgage, there could be no possible attack upon the Mayer mortgage. There cannot be a preferential transfer without a depletion of the bankrupt's estate. Collier on Bankruptcy (11th Ed.) p. 885. It follows that the motion must be granted, and the order of the referee reversed and vacated to the extent indicated by the foregoing views. Settle order on notice.

UNITED STATES v. SELKIRK.

(District Court, S. D. Texas, at Galveston. July 14, 1919.)

1. TREATIES ⚿2—SUBJECT—MIGRATORY BIRDS.
Regulation of the taking of migratory birds which pass between the United States and Canada is a matter for treaty, power to make which is by Const. art. 2, § 2, cl. 2, granted to the United States, and by article 1, § 10, cl. 1, denied to the several states.

2. GAME ⚿4—REGULATION—GIVING EFFECT TO TREATIES.
The treaty of August 16, 1916, with Great Britain for the protection of migratory birds (39 Stat. 1702), being within power of United States to make, Act July 3, 1918 (Comp. St. 1918, § 8837a, appendix), enacted to give effect to that treaty, is also within its power.

Prosecution by the United States of William Selkirk for violation of the Migratory Bird Act of 1918. On demurrer to indictment. Demurrer overruled.

Maco & Minor Stewart, of Houston, Tex. (Albert De Lange, of Galveston, Tex., of counsel), for defendant.
D. E. Simmons, U. S. Dist. Atty., and E. P. Phelps, Asst. U. S. Dist. Atty., both of Houston, Tex.

HUTCHESON, District Judge. [1, 2] In this cause the defendant, by demurrer to an information filed by the United States attorney, seeks to have declared unconstitutional the Migratory Bird Act of July 3, 1918 (40 Stat. 755, c. 128 [U. S. Comp. St. 1918, § 8837a, appendix]), entitled "An act to give effect to the convention between the United States and Great Britain for the protection of migratory birds, concluded at Washington, August 16, 1916, and for other purposes" (the treaty referred to will be found in 39 Stat. 1702). While the demurrers present various forms of attack on the law, the gist of the contention is that, as the matter of the regulation of wild game is lodged in and a part of the sovereign power of the states and has not been delegated to the central government by the Constitution, the Congress is without power to legislate on the subject, and that the mere fact that the act is passed to give effect to a convention between the United States and Great Britain will not furnish Congress the power which without the treaty it clearly did not have, as I have no doubt that the cases in the federal and state courts holding the Migratory Bird Act of March 4, 1913 (37 Stat. 847, c. 145 [Comp. St. § 8837]), invalid, were correctly decided.

I cannot, however, assent to the view of counsel that the present act is likewise invalid.

"The constitutional provisions relating to the treaty power are: Article 2, § 2, cl. 2, which, among the powers granted to the President, provides that: 'He shall have power, by and with the * * * consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.'

"Article 1, § 10, cl. 1, provides that: 'No state shall enter into any treaty, alliance, or confederation.'

"The Tenth Amendment to the Constitution provides: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.'

The Constitution (article 6, cl. 2) provides:

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

It could not be for a moment contended that two sovereign states could not by treaty regulate the taking of migratory birds which pass from the one country to the other, and with the state of Texas still a sovereign republic, instead of a constituent part of the United States, there is no doubt that it could have concluded a treaty with Great Britain and enforced it, of the tenor and effect of that concluded by Congress.

What a state itself could do, that all the states can do through their agent, the central government, and it only remains to determine whether that government has been made the agent, or mouthpiece, of the states in the matter of treaties.

Even the most casual examination of the constitutional provisions above set out establishes: First, that the states have completely divested themselves of the power to enter into treaties; second, that without limitation or restriction they have conferred upon the President, with the consent of the Senate, the power to make treaties; and, third, that treaties made under the authority of the United States are the supreme law of the land, along with the Constitution and acts of Congress passed under the authority thereof.

While many decisions might be quoted and much learned discussion be indulged in, no more satisfactory expression of the situation of these United States and the several states composing it, in respect to treaty power exists, to my mind, than those expressions of Mr. Calhoun, while the commercial treaty with Great Britain was being discussed in the House of Representatives on January 8, 1816, when he said:

"This country within is divided into two distinct sovereignties. Exact enumeration here is necessary to prevent the most dangerous consequences. The enumeration of legislative powers in the Constitution has relation, then, not to the treaty-making power, but to the powers of the states. In our relation to the rest of the world, the case is reversed. Here the states disappear. Divided within, we present, without, the exterior of undivided sovereignty. The wisdom of the Constitution appears conspicuous. When enumeration was needed, there we find the powers enumerated and exactly defined; when not, we do not find what would be vain and pernicious to attempt. Whatever, then, concerns our foreign relations, whatever requires the consent of another nation—belongs to the treaty power—can only be regulated by it; and it is competent to regulate all such subjects, provided (and here are its true limits) such regulations are not inconsistent with the Constitution. If so, they are void. No treaty can alter the fabric of our government; nor can it do that which the Constitution has expressly forbidden to be done; nor can it do that differently which is directed to be done in a given mode, and all other modes prohibited. 4 Elliott's Debates, p. 464."

With this view of the treaty-making power of our country I unqualifiedly concur, and, so concurring, have no hesitancy in declaring that the demurrers in this case are not well founded, and that they should be and are hereby overruled.

I understand that Judge Trieber, of the Eastern District of Arkansas (United States v. Thompson, 258 Fed. 257) and Judge Van Valkenburgh of the Western District of Missouri (United States v. Samples, 258 Fed. 479) have taken the same view.

An order will be prepared and entered in accordance with the above.

SAVANNAH TIMBER CO. v. DEER ISLAND LUMBER CO. et al.

(District Court, E. D. South Carolina. March 30, 1918.)

1. INJUNCTION ⟹52—TIMBER TRESPASS—INSOLVENCY.
   Insolvent trespassers may be enjoined from cutting and destroying standing timber.
2. MORTGAGES ⟹536—FORECLOSURE—INNOCENT PURCHASER.
   A conveyance of standing timber rights, not executed in the form necessary to pass interest in real estate, never recorded, and by its terms made void upon the incorporation of another company, *held* inferior to rights secured by a purchaser for value at a sale foreclosing a mortgage given by the grantor.
3. LIS PENDENS ⟹24(2)—FORECLOSURE—RIGHTS SECURED.
   Any rights secured from a mortgagor after institution of foreclosure proceedings and filing of lis pendens are subject to the rights secured by a bona fide purchaser at the foreclosure sale.
4. VENDOR AND PURCHASER ⟹231(16)—STANDING TIMBER—CONVEYANCE.
   Standing timber is considered real estate under the South Carolina recording statute (Civ. Code 1912, § 3542), and a conveyance thereof must be recorded to bind subsequent purchasers for value.
5. VENDOR AND PURCHASER ⟹232(1)—RECORDING—NECESSITY.
   Under Civ. Code S. C. 1912, § 3543, notice of real estate sales is given only by actual record, and mere possession of the land is insufficient to charge subsequent purchasers with notice.
6. MORTGAGES ⟹497(2)—FORECLOSURE—ESTOPPEL.
   A grantee of mortgaged premises, who joined with the mortgagor in securing a postponement of the foreclosure sale, *held* estopped to contest the binding effect of the foreclosure upon the ground that it was not formally made a party defendant.
7. MORTGAGES ⟹427(4)—FORECLOSURE—PARTIES.
   One who purchases from a mortgagor, after institution of foreclosure proceedings and filing of lis pendens notice, need not be made a party defendant.

In Equity. Bill by the Savannah Timber Company against the Deer Island Lumber Company and another. Decree for plaintiff.

B. A. Hagood, of Charleston, S. C., J. G. Padgett, of Walterboro, S. C., and Arthur R. Young and Hagood, Rivers & Young, all of Charleston, S. C., for complainant.

A. C. De Pass, William N. Graydon, and De Pass & De Pass, all of Columbia, S. C., for defendants.

SMITH, District Judge. This is a proceeding in substance of an equitable nature, which was instituted in the court of common pleas for Barnwell county, on the 10th day of August, 1917, and was thereafter by the defendants removed to this court on the ground of diverse citizenship. The transcript was filed in this court on the 27th of August, 1917, the defendants have answered, the cause is at issue, and all

the testimony has been taken, and thereupon the cause came on to be heard, and counsel on both sides have been heard. The facts appear to be as follows:

On the 27th of June, 1912, the defendant Van Dorn S. Wilkins executed and delivered his purchase-money mortgage to one Jeremiah T. Finch, which mortgage was on the 3d of July, 1912, recorded in the proper office for record in the county of Colleton. By this mortgage Van Dorn S. Wilkins mortgaged all the timber measuring when cut 10 inches in diameter across the stump and over, standing or growing or lying, during the term within which the same was to be cut upon several tracts of land in Colleton county. The mortgage was to secure the sum of $49,500, evidenced by certain promissory notes, and contained a number of covenants for the protection of the mortgagee, which will be referred to as necessary. The standing timber which was so mortgaged was under the terms of the original sales of the same to be cut and removed within a period of 15 years from the 14th of April and 20th of May, A. D. 1905. Wilkins having failed in the performance of his payments, and the conditions of the mortgage being broken, on the 24th day of May, 1913, proceedings were commenced by Finch in the court of common pleas for Colleton county to foreclose the mortgage and sell the timber mortgaged. The lis pendens or notice of the pendency of the action required in cases of foreclosure by the Code of Procedure of the state of South Carolina (Code Civ. Proc. 1912, § 182) was filed in the office of the clerk of court for Colleton county on the 26th of May, 1913. Before the filing of these proceedings for foreclosure Wilkins executed an assignment of all his interest in the standing timber, dated the 8th of April, 1913, to the Forest Port Lumber Company, to be assigned thereafter to a corporation to be known as the Deer Island Lumber Company, Incorporated, or by some similar name. Such assignment being made for the sole purpose of securing to the Forest Port Lumber Company the issuance to it of preferred stock to the par value of $32,000 in the said corporation, and the delivery to it of a note for $5,000 of the said corporation to be formed, and the assignment further prescribes that upon the delivery of the stock and promissory note to the Forest Port Lumber Company the assignment should become null and void, and be of no force or effect, and in all respects be canceled and surrendered.

This assignment was not executed in the presence of witnesses in the form necessary under the law of South Carolina to pass the title to real estate, nor was it ever placed upon record. Subsequently thereto the corporation known as the Deer Island Lumber Company, Incorporated, was formed under the laws of the state of Delaware, and apparently from the testimony the stock and the note to be delivered to the Forest Port Lumber Company under the terms of the assignment of the 8th of April, 1913, were delivered to the Forest Port Lumber Company, and the assignment of the 8th of April, 1913, thereupon according to its terms became null and void and was canceled. Sundry proceedings of an interlocutory character were had in the proceedings instituted for the foreclosure from the date of its be-

ginning on May 22, 1913, until October 11, 1913. A receiver was appointed, who took actual possession of the property, and an injunction issued against the defendant cutting or removing any of the timber, etc.

On the 11th of October, 1913, the answer of the defendant Van Dorn S. Wilkins was filed, and on the same day by his consent a decree of foreclosure and of sale was made by the presiding judge of the court of common pleas for Colleton county in these foreclosure proceedings. In the meantime on the 8th of September, 1913, Van Dorn S. Wilkins had executed a deed of conveyance in proper form to carry the title to real estate and for record, to the Deer Island Lumber Company, Incorporated. This deed of conveyance, although dated the 8th day of September, 1913, was not recorded in the proper office for record in the county of Colleton until the 24th day of November, 1913, nearly three months subsequent to its date. In the meanwhile there had been sundry negotiations between Van Dorn S. Wilkins, the mortgagor, and Jeremiah T. Finch, the mortgagee, then engaged in foreclosing the mortgage, which culminated on the 11th day of October, 1913, in an agreement between Jeremiah T. Finch and Van Dorn S. Wilkins, whereby it was recited that Van Dorn S. Wilkins had therein consented to a decree of foreclosure and sale, whereby there was due under the terms of the mortgage the sum of $53,879.08, and that Jeremiah T. Finch was willing, under certain conditions specified in the agreement and not otherwise, to give the defendant Van Dorn S. Wilkins a further opportunity to endeavor to pay off the amount due under the mortgage. Therein Jeremiah T. Finch agreed to postpone the enforcement of the decree of foreclosure and to suspend the further operation of the permanent injunction and receivership granted in the cause provided Van Dorn S. Wilkins made the payments specified in the agreement, with the distinct proviso that, if the payments should not be paid when due, Jeremiah T. Finch without any further notice should be at liberty to have the permanent injunction restored and the receiver resume possession of the property, and to have the property sold as decreed in the decree of foreclosure. In other words, it was distinctly provided that, if Van Dorn S. Wilkins failed to make the payments, Finch might proceed in all respects as if no such agreement had been made. The evidence does not satisfy the court that Finch was ever made aware of the assignment from Wilkins to the Forest Port Lumber Company, dated the 8th of April, 1913, which in any event was only an assignment for the purpose of security, and became thereafter null as before stated; but it does appear that Finch was aware that Wilkins intended to assign or had assigned his interest in the property subsequent to the commencement of the foreclosure proceedings to the corporation known as the Deer Island Lumber Company, Incorporated, which was to take the property from Wilkins and endeavor to pay off the debt. It also appears that the agreement on the 11th of October, 1913, was made by Van Dorn S. Wilkins with Finch as much for the benefit of the Deer Island Lumber Company, Incorporated, as for the benefit of Wilkins.

The court is further satisfied that the Deer Island Company, Incor-

porated, through its officers, was fully aware of all the conferences between Finch and Wilkins, was fully aware of the pendency of the foreclosure proceedings, was fully aware that it received this assignment of the property from Wilkins subject to the pendency of these proceedings, and was fully aware of the contents of and assisted at the making of the agreement of the 11th of October, 1913, as made for its benefit, and participated in and accepted the same. The payments specified and required by the agreement of October 11, 1913, not having been made, upon the application of Finch, the receiver, about the 7th day of November, 1913, again took actual possession of all the property described in the proceedings, and took possession with the full knowledge of Van Dorn S. Wilkins, and thereafter, upon the application of Finch, the master proceeded to advertise the property mortgaged, to wit, the standing timber, for sale, and on the 7th day of December, 1913, sold the property at public auction to the complainant, Jeremiah T. Finch, for $20,000, which amount was credited upon the judgment due under the decree of foreclosure, and execution issued for the deficiency against Van Dorn S. Wilkins, upon which execution certain personal property was thereafter sold. In the meanwhile, and two days before this sale, a petition in involuntary bankruptcy was filed in this court against the Deer Island Lumber Company, Incorporated, and on the 15th day of January, 1916, an order was made adjudicating that corporation bankrupt as insolvent. The schedules of the bankrupt were not filed until the 6th of November, 1916, nearly two years after the filing of the petition in bankruptcy, and nearly nine months after the adjudication in bankruptcy, and on the 11th day of November, 1916, an offer of composition of 10 per cent was made on behalf of the Deer Island Lumber Company, Incorporated, which offer of compromise was thereafter accepted by order of the court in the bankruptcy case, and was paid. The deed of conveyance from the master to Jeremiah T. Finch of the standing timber sold under the foreclosure was made on the 7th of December, 1914, and recorded on the 11th of December, 1914. Thereafter Jeremiah T. Finch, in consideration of the sum of $40,000 paid by the Cooper River Corporation, on the 26th day of June, 1915, conveyed all of the standing timber sold to him under the foreclosure proceedings to the Cooper River Corporation, and the Cooper River Corporation for valuable consideration conveyed on the 7th day of June, 1916, to the Savannah Timber Company, the present plaintiff, the same property; the deed of conveyance being recorded on the 14th day of July, 1916. It will be noted, therefore, that the deeds of conveyance from the master to Finch and from Finch to the Cooper River Corporation were both made subsequent to the filing of the petition in bankruptcy against the Deer Island Lumber Company, Incorporated, and that the conveyance from the Cooper River Corporation to the Savannah Timber Company was made after the Deer Island Lumber Company had been adjudicated a bankrupt for insolvency, and before any offer of composition had been made or accepted.

[1] Van Dorn S. Wilkins, formerly the defendant in the foreclosure proceedings, and a large stockholder in and officer of the Deer

Island Lumber Company, Incorporated, during the proceedings hereinbefore referred to, is now the president of that company, and under the terms of the composition claims as such officer to be entitled to carry on the operations of the Deer Island Lumber Company, Incorporated. As such he has entered upon the lands upon which the standing timber is growing, and is proceeding to cut and destroy the same, and to interfere with the workmen of the Savannah Timber Company, and interrupt their operations. Thereupon these proceedings of an equitable nature were filed by the Savannah Timber Company in the court of common pleas for the purpose of obtaining a decree against Wilkins and the Deer Island Lumber Company, Incorporated, for damages done by this cutting, and to enjoin Wilkins and the Deer Island Lumber Company, Incorporated, from any further interference with the timber. The evidence shows that Wilkins is practically insolvent, or at least beyond the reach of an execution at law, and could not be made to pay for damages inflicted in cutting this timber; nor does it appear that the Deer Island Lumber Company, Incorporated, which is a foreign, nonresident corporation, could be made to pay either. Under these circumstances, if the title and right to possession of the property is in the complainant, the Savannah Timber Company, they would have the right to the injunction prayed.

The defendants set up the defense that the Deer Island Lumber Company, Incorporated, was not made a party to the proceedings for foreclosure, and therefore is not bound by them, and that corporation, holding the legal title under the conveyance from Van Dorn S. Wilkins and not being bound by the proceedings for foreclosure, is entitled to the possession and utilization of the property. Their position may be said to be that the effect of the proceedings in foreclosure to which the Deer Island Lumber Company, Incorporated, was not made a party was not to divest the legal title of the property, because that had already passed away from Van Dorn S. Wilkins, the only defendant, but operated simply as an equitable assignment of the mortgage held by Jeremiah T. Finch from Van Dorn S. Wilkins, and whilst that mortgage might continue to be a lien upon the property, the Deer Island Lumber Company, Incorporated, held the legal title and was entitled to the possession and utilization of the property. The position of the complainant, the Savannah Timber Company, is that it is either a bona fide purchaser for value without notice, or is the assignee or grantee of a bona fide purchaser for value without notice, and under the recording laws of the state of South Carolina and under the effect of these laws is entitled to hold the property as having the title and the right to possession against the defendants. The condition of the record, therefore, becomes all-important to ascertain, for it is the record which should control in such matters as embodying the notice which would bind a third person for value without notice.

[2-5] Assuming it to be correct, that the effect of the decree in foreclosure of a mortgage in proceedings to which the mortgagor is alone a party, and instituted after he has passed the title to a third person, is effectual only as an assignment of the mortgage, yet this would not be true where the notice given by the record, upon which a

subsequent purchaser is entitled to rely, does not disclose that the title has passed away from the original purchaser. In the present case it is claimed by the defendants that the assignment made by Van Dorn S. Wilkins to the Forest Port Lumber Company on the 8th of April, 1913, had the effect of divesting Wilkins of the title before the institution of the proceedings for foreclosure. This position is not well taken. In the first place, this assignment was not executed in the form necessary to pass the interest in real estate under the laws of South Carolina or entitle the deed to be admitted to record, and as a matter of fact was never recorded, and there is no evidence that Finch had any notice of the existence of this assignment. Furthermore, this assignment by its very terms became null and void upon the subsequent incorporation of the Deer Island Lumber Company, Incorporated, and the delivery of the stock and note whose delivery was sought to be secured to the Forest Port Lumber Company, Incorporated. At the date of the commencement of the foreclosure proceedings there was nothing on the record to notify any subsequent purchaser that Van Dorn S. Wilkins had ever parted with the title to the real estate, and the filing of the lis pendens as required by the Code of Procedure on May 26, 1913, made any after deed between any subsequent purchasers and Van Dorn S. Wilkins subject in all respects to the pendency of and the ultimate decree in those foreclosure proceedings.

It is contended by the defendants that this timber, when originally sold, became thereupon personal property, and any subsequent purchaser from Wilkins could acquire good title, whether or not the deed of assignment was recorded, because bills of sale of personal property of that kind are not required to be recorded. In the opinion of the court, under the law of South Carolina, standing timber is so far annexed to the freehold that it is considered as real estate under the terms of the recording statutes, and in order to bind subsequent purchasers the deed of conveyance must be duly recorded as required of deeds of conveyance of real estate. Otherwise, the purchaser of a piece of land without any notice from the record would be held to be bound by a prior unrecorded sale of the standing timber of which he had no notice, and which, if good, would render his purchase of the soil futile. It is to be borne in mind, too, that under the law of the state of South Carolina notice of sale of an interest in real estate can only be given by actual record, and that notice by mere possession of the land is not sufficient to charge subsequent purchasers, unless actual notice can be proved of the deed or instrument or its nature or purport (Code of Laws [Civ. Code 1912] § 3543), and no sufficient actual notice of any kind is proved in this case to Jeremiah T. Finch or any subsequent grantee of the assignment from Wilkins to the Forest Port Lumber Company dated April 8, 1913.

[6, 7] The next substantial proceeding in the foreclosure cause was the agreement of the 11th of October, 1913, and the decree of foreclosure made that day. The court finds as a conclusion of fact that this agreement and decree were made with the full knowledge, acquiescence, and acceptance of the Deer Island Lumber Company, Incor-

porated, and made for its benefit, and was procured to be made for its benefit, to give it further time to work out the payment of the mortgage, and that as against any subsequent purchasers for value it is debarred and estopped in equity from claiming in contravention of that which was done and procured to be done by it for its own benefit. That the Deer Island Lumber Company did, subsequent to the agreement of the 11th of October, 1913, appear to get into possession of the property, spend amounts of money thereon, and remove the timber in the endeavor to make the payments required by that agreement, is true. But that possession was entirely subsequent to, based upon, and in consequence of the agreement of the 11th of October, 1913, and of the decree of sale for foreclosure that day, and the Deer Island Lumber Company, Incorporated, and Wilkins are estopped from setting up any claim in contravention of or adverse opposition to that decree and agreement. When, therefore, the Cooper River Corporation for valuable consideration purchased the timber from Jeremiah T. Finch, an inspection of the record showed the mortgage from Wilkins to Finch. It also showed that no conveyance from Wilkins to any third party appeared upon the record prior to the filing of the proceeding for foreclosure, and especially of the notice of the pendency of the action on the 26th day of May, 1913. Any third purchaser for value without actual notice was entitled to disregard any conveyances on the record made by Van Dorn S. Wilkins subsequent to the 26th day of May, 1913, because by law any such conveyance must be taken subject to the right of foreclosure and sale acquired by the court upon the filing of those proceedings. The law is that in foreclosure proceedings no subsequent purchaser from the mortgagor, subsequent in date and record to the institution of the foreclosure proceedings and filing of the notice of pendency of action, need be made a party. Otherwise it would require constant amendment, or rather constant additions by proceedings of the character of supplemental bills to advise the court of changes of interest subsequent to the institution of the original proceedings for foreclosure.

According to the record, the only party necessary to be made a party on May 22, 1913, for the purpose of the foreclosure and the sale, so as to divest the title from the mortgagor, was Van Dorn S. Wilkins, and the proceedings show that he was made a party, and the subsequent sale on 7th of December, 1914, had the effect under the circumstances of this case, as concerned any subsequent purchaser for value without notice, of divesting the title of Van Dorn S. Wilkins as of the date of the filing of the notice of pendency of the foreclosure proceedings, and vesting in the purchaser as against Wilkins or any one claiming under him the legal title to the premises. Had the Deer Island Lumber Company, Incorporated, possessed any claim, it was competent for it to have prevented this inference by a subsequent purchaser by intervening in the foreclosure proceedings, of which it had full knowledge, and of the suspension of which it took advantage, as procured for its benefit, or of subsequently bringing a proceeding to redeem as against Finch before he sold, and reacquiring the legal title to the property by payment of the amount unpaid; but it did nothing

of this kind. When the Cooper River Corporation acquired the property, there were proceedings existing against the Deer Island Lumber Company, Incorporated, in bankruptcy, and at the date of the subsequent decree adjudicating that corporation bankrupt, and which related back to the day of the filing of the proceedings to have it adjudicated bankrupt, the Deer Island Lumber Company, Incorporated, so far as the record shows, not only made no claim whatsoever to the legal title to this property, as being prior and paramount to the title under the foreclosure proceedings, but in fact was a bankrupt for insolvency.

There has been no sufficient proof of any actual knowledge of the deed of conveyance from Wilkins to the Deer Island Lumber Company, Incorporated, given to the Cooper River Corporation or the Savannah Timber Company. There has been no possession shown by the Deer Island Lumber Company, Incorporated, of the property at the time of the acquisition of it by the Cooper River Corporation, or the Savannah Timber Company, and, even if actual possession of the property had been shown, that would not be sufficient under the terms of the statute of South Carolina, unless actual notice of the deed from Wilkins to the Deer Island Lumber Company, Incorporated, or its nature and purport, could be shown, and not the mere constructive notice from the record of that deed posterior to the institution of the proceedings of foreclosure and of the decree of foreclosure and sale; such posterior record not being notice to a purchaser under the foreclosure proceedings. In the opinion of the court, therefore, the complainant, the Savannah Timber Company, has as against the defendants a good title in fee to the property described in the complaint, and has a right to hold possession of and utilize the same, and it is therefore entitled to have the defendants enjoined from trespassing upon and continually damaging the property, to the destruction thereof.

It is therefore ordered, adjudged, and decreed, that, as against the defendants Van Dorn S. Wilkins and the Deer Island Lumber Company, Incorporated, the complainant, the Savanah Timber Company, and its assigns and successors, are entitled to the standing timber described in the complaint, with the exclusive right to cut, remove, and sell the same.

It is further ordered, adjudged, and decreed that the injunction heretofore granted in these proceedings by Hon. James E. Peurifoy, in the state court, be and the same is hereby continued and made permanent, and the defendants Van Dorn S. Wilkins and the Deer Island Lumber Company, Incorporated, be, and they and their agents, servants, and employés are, hereby enjoined from trespassing upon, cutting, damaging, injuring, or in any wise taking or removing any of the standing timber referred to and described in the complaint herein, and from interfering with, threatening, or removing any of the workmen of the complainant, the Savannah Timber Company, its assigns or successors.

It is further ordered that the costs of these proceedings be paid by the defendants.

DEER ISLAND LUMBER CO. et al. v. SAVANNAH TIMBER CO.

(Circuit Court of Appeals, Fourth Circuit. April 17, 1919.)

No. 1665.

MORTGAGES ⚿497(2)—FORECLOSURE—RIGHTS OF MORTGAGOR'S GRANTEE.
Where the grantee of mortgaged timber rights participated with the mortgagor in the foreclosure proceedings, and secured a postponement of the sale, it cannot avoid the binding effect of the foreclousre upon the ground that it was not made a party defendant.

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

Bill by the Savannah Timber Company against the Deer Island Lumber Company and another. Decree for complainant, and defendants appeal. Affirmed.

A. C. De Pass and William N. Graydon, both of Columbia, S. C. (De Pass & De Pass, of Columbia, S. C., on the brief), for appellants.

B. A. Hagood, of Charleston, S. C., J. G. Padgett, of Walterboro, S. C., and Arthur R. Young, of Charleston, S. C. (Hagood, Rivers & Young, of Charleston, S. C., on the brief), for appellee.

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

ROSE, District Judge. The learned judge below so fully covered the facts that a further statement of them would be superfluous. It is unnecessary to follow the zealous counsel for the appellants in the discussion of numerous questions of law. It is sufficient to point out that the decree below is right beyond dispute, if the corporate appellant was a party to the foreclosure proceedings. The experienced trial judge, who saw and heard the witnesses, finds that such appellant, with full knowledge and for its benefit, assisted at the making of an agreement by which the foreclosure sale was postponed. The record fully sustains this conclusion.

Affirmed.

CURCURU v. PENINSULAR ELECTRIC LIGHT CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1919.)

No. 3198.

1. APPEAL AND ERROR ⚿237(2)—ADMISSION OF EVIDENCE—WAIVER OF ERROR.
In an action against an electric company for death of an employé of a contractor, who in the course of his work on building being constructed came in contact with a high tension wire and was killed, error in the tentative admission of evidence that the contractor had insured the lives of his employés, including deceased, and that a claim had been filed under the Michigan Workmen's Compensation Act and suspended, was waiv-

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

ed in appellate court, where there was no motion to strike such testimony and no instruction was requested that it be disregarded.

2. Appeal and Error ⟹1053(4)—Review—Harmless Error.

In an action against an electric company for the death of an employé of a contractor, who in the course of building operations came in contact with a high tension wire and was killed, the tentative admission of testimony that contractor had insured the lives of his employés pursuant to the Michigan Workmen's Compensation Act was harmless, if erroneous, where the court charged that the fact that the contractor had insured the lives of its employés was not one on which finding could be based.

3. Electricity ⟹14(1)—High Tension Wire—Duty of Contractor.

Where an electric company constructed a high tension line, which wires carried a deadly current of electricity, the deadly nature of such agency imposes on it duties of care.

4. Trial ⟹248—Actions—Abstract Instructions.

Where an employé of a contractor, in the course of constructing buildings near a high tension electric wire, met his death when he touched the wires with his hands, *held* that, in an action against the company, a charge that the electric company was not bound to provide for absolute safety of one coming in contact with the wires, but was only bound to use reasonable care, depending on the circumstances, was not erroneous, though it gave the jury only an abstract rule.

In Error to the District Court of the United States for the Southern Division of the Eastern District of Michigan; John M. Killits and Arthur J. Tuttle, Judges.

Action by Gaetano Curcuru, administrator of the estate of Vincenzo Curcuru, deceased, against the Peninsular Electric Light Company, a Michigan corporation. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Jos. T. Schiappacasse, of Detroit, Mich., for plaintiff in error.

James V. Oxtoby, of Detroit, Mich., for defendant in error.

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

WALTER EVANS, District Judge. Vincenzo Curcuru, 25 years old, and a subject of the king of Italy, came to the United States and settled in Detroit, Mich., in 1912. At the time of his death he was employed by Jackson & Maurice Company, a firm which was constructing a two-story cement building on a lot on the northwest corner of North Grand boulevard and Hastings street in that city. While thus employed, on the 28th day of March, 1914, Curcuru was instantly killed upon coming in too close proximity to the electric wires of the defendant in error, and which wires, at least 10 years before that date, it had erected, and which it had ever since maintained and operated. The poles on which its wires were strung stood in an alley and in a line which ran near the walls of the building which Jackson & Maurice Company were constructing. On April 7, 1915, the plaintiff was duly qualified as administrator of the decedent's estate, and later instituted this action in the court below for the recovery of $25,000 for pecuniary losses and damages alleged to have resulted from the death of his intestate.

The declaration contains two counts, but it is conceded that the second count has become of no further importance. The first count stated the basis of the plaintiff's claim to recover the compensation and damages sought. It averred that the defendant's poles supporting its wires were set in the ground on the north side of the alley, the alignment of the poles running east and west and up to where it crosses Hastings street; that for over five years prior to March 28, 1914, these poles supported ten wires attached to glass insulators attached to cross-arms at or near the tops of the poles; and that for over five years previously one of the poles was located on the northwest corner of the alley referred to and Hastings street. This alley was a public highway, and had been known as such for ten years previously. One of the defendant's poles was located on the north side of the public alley, about 100 feet west of the pole on Hastings street, and all of defendant's line of poles extended about 30 or 40 feet above the ground. Prior to March 28, 1914, and on that date there was a cross-arm supported by a brace and having attached to it five glass insulators supporting the wires, and prior to that date also another cross-arm was attached to said pole in a horizontal direction about 2 feet below the first cross-arm, which was supported by a brace attached to the pole, and attached to those cross-arms were five glass insulators supporting as many wires.

It is further averred that on March 28, 1914, it became and was necessary for the employés of the Jackson & Maurice Company to work in close proximity to the described poles and wires of the defendant, which, it was averred, was well known to the defendant. Plaintiff further averred that on and long prior to the 28th of March, 1914, the defendant was supplying electrical energy to divers persons, and that said electrical energy passed through the wires on the poles referred to, and which wires were known as high tension wires, and which electrical energy was of deadly potency, and that surrounding said high tension wires there was a deadly magnetic field.

The declaration then averred (probably quite as much matters of legal conclusion as of fact) that it then and there became and was the duty of the defendant, first, not to construct or place said high tension wires over or upon the property line of the lot where the employés of said Jackson & Maurice Company had to go in the performance of their duties; second, to construct and equip said high tension wires at such a distance from the property line of said lot that it would be impossible for the employés of that firm to be injured; third, to properly and safely insulate said high tension wires, so as to render impossible discharges of electrical energy at points where the employés of that firm had to go in the discharge of their duties; fourth, to properly and safely insulate said high tension wires, so that the employés referred to, in coming in contact with or getting in the magnetic field, would not receive an electrical shock; fifth, to properly and at reasonable intervals inspect said high tension wires; sixth, to construct and maintain said high tension wires at the point where the accident occurred, so as to render it safe for the employés of the firm referred to to perform their duties; seventh, not to use high tension wires for

the transmission of its electrical energy in such a way as to render it dangerous to the employés of Jackson & Maurice Company in the discharge of their duties for that firm; and, eighth, to remove the pole located at the northwest corner of the intersection alley and Hastings street to a sufficient distance to prevent the wires on top of same from being unsafe for the employés of that firm.

Having alleged these to be the duties of the defendant, the plaintiff in his declaration further alleged that defendant had failed and neglected to perform any one of those duties, and this failure to perform those alleged duties is the negligence which is alleged to have brought about the death of the plaintiff's intestate, who, it is averred, while leveling the concrete on the top of the second story of the building, and performing the work incident to his employment, and while then exercising due care and without any fault on his part, came within the deadly magnetic field of the high tension wires of defendant, which had negligently and unlawfully been constructed and maintained over the top of said pole, and that the deceased did then and there receive an electrical shock from said wires of terrible potency, and was thereby electrocuted and killed, all on account of said electrical shock, and, having fallen to the floor of the second story of said building, was burned and lacerated in flesh, deadened in nerves, and death ensued.

Plaintiff averred that the death of said decedent was brought about by the negligent and unlawful conduct of the defendant in constructing, maintaining, and utilizing the high tension wires at a point dangerously near the place where plaintiff's intestate was compelled to go in the due performance of his duties. Plaintiff alleged that the decedent had left as heirs and next of kin his wife, 21 years of age, and his father and mother, each 65 years of age, and both of whom were dependent on decedent's intestate for support. It is claimed that the cause of action for negligence imputed to the defendant vested in the decedent's estate and in its administrator, and that the deceased contributed $25 monthly to the support of his wife and a like amount to each of his parents, and would have continued to do so during their expectancy of life. Plaintiff finally averred that by reason of these facts, and the injury thereby done, the right of action to recover therefor vested in the plaintiff's administrator, and he prays judgment for the sum of $25,000 as damages therefor.

The defendant demanded a trial of the matters set forth in the plaintiff's declaration, thereby putting in issue the truth of each and all of the averments therein made. Defendant also gave notice that it would give in evidence under the general issue, and would insist in its defense upon various matters, only two of which are necessary to be noticed, viz., first, that at the time of the injury the decedent was in the service of Jackson & Maurice Company, who were his employers, that his death resulted from a personal injury received by him on March 28, 1914, while in their service, and that the injury thus causing his death arose out of and in the course of that employment; and, second, that consequently, and upon other facts stated in the notice, the case came within the provisions of the act known as the

Michigan Workmen's Compensation Law (Pub. Acts Mich. 1912 [Ex. Sess.] No. 10), one of the purposes of which is to restrict dependents of a deceased employé who has not exercised the option given him by said act, to the remedy and to the compensation provided for therein, with the right to the employer (in the present case, Jackson & Maurice Company) if the compensation be paid under said act, to enforce, for its benefit, any liability for insurance, but that plaintiff, as the administrator of the decedent's estate, had no right to recover, inasmuch as the only person entitled to do so was the widow of the deceased, and that, if she recovered compensation from Jackson & Maurice Company, the latter or defendant could look to the insurance company named in the notice.

As these defenses were developed and relied upon at the trial, they were to the effect: (1) That since the deceased had elected to remain under the protection of the act, his administrator had no right to elect to sue the defendant, the only remedy being for the widow to claim compensation from the employer under the act, and that the only liability of defendant would be liability over to the insurance company which had indemnified the employer; and (2) that, even if the deceased's representatives had the right to proceed against either the employer or the defendant, the option had been irrevocably exercised by instituting proceedings (afterwards discontinued) under the Workmen's Compensation Act. After reserving these questions until the end of the trial, the court then held that the proceedings initiated under the Compensation Act did not constitute an irrevocable election, and that the administrator could maintain an action under the Death Act. The issues of negligence and contributory negligence were submitted to the jury. The trial resulted in a verdict for the defendant, and the case was brought here.

The plaintiff, as grounds for reversal, insists upon three assignments of error—two of them relating to the admission of testimony, and the other to one phase of the charge to the jury. We shall deal with them in that order, though the two assignments (Nos. 2 and 3) relating to this subject will be considered together.

[1, 2] Upon these assignments it is insisted that the trial court erred in admitting testimony relative to the insurance which had been taken out by the Jackson & Maurice Company upon the lives of their employés, pursuant to the Compensation Act, whereby that act had become applicable and its restrictions took effect, and in admitting testimony that a claim had been filed under the Compensation Act, and then suspended. All of this testimony, however, was offered by the defendant (and apparently in good faith) pursuant to the notice of the defenses it would make and the testimony it would offer at the trial. Objection was made by the plaintiff to the admission of this testimony, and the court said:

> "We might proceed to other testimony, and come to this question afterwards. The testimony so far may stand, subject to a motion to strike out."

No motion of that character was made by the plaintiff. In this situation it seems to the court that, the testimony having been offered during the trial pursuant to the defendant's notice, it was at least tenta-

tively admissible, though subject to be stricken out upon plaintiff's motion after the conclusion of all the testimony, and especially if it should then appear to the court that it ought not to affect the jury's verdict. No such motion having been made, it would not be fair, either to the trial court or to the defendant, to hold otherwise than that plaintiff by that failure waived his objections. Besides, we are satisfied that no prejudice could reasonably be supposed to have come to the plaintiff from the failure to exclude this testimony, especially as the charge made it clear enough to the jury that the fact that Jackson & Maurice Company had insured the lives of its employés was not one of the grounds upon which their finding could be based.

If plaintiff apprehended the possibility of prejudice in fact through the introduction of evidence showing a claim of the existence of another remedy, and the possibility that jurors would, for that reason, be less disposed to give plaintiff a verdict in the present suit, it was open to him to move to strike out the evidence, or to ask instruction that it be disregarded. But, in the absence of such motion or request for instruction, we think the court did not err in tentatively admitting the testimony, from the fact that it failed, on its own initiative, to either formally order the testimony stricken out or to expressly instruct the jury to disregard it.

[3, 4] The other assignment relates to that part of the charge to the jury wherein the learned trial judge said:

> "It was not required of the defendant here to provide for the absolute safety of any one coming in contact with this wire, nor is it incumbent upon the defendant to exercise an extraordinary degree of care. Only is it incumbent upon the defendant to exercise reasonable care with reference to those wires. What reasonable care in any given case is depends peculiarly upon the circumstances that attend the particular case. Reasonable care will vary with the change of circumstances and the fluctuation of conditions surrounding the premises. * * * And what would be reasonable care in a building in process of construction might be considered to have been extraordinary and unusual care on the part of the defendant, had there been no building there. So, in every instance, when the jury is called upon to determine whether reasonable care is being exercised or not, it must look to the circumstances that are peculiar at the exact time under examination to the conditions then in operation. Now, reasonable diligence is what was required of the defendant, and that is to be determined by the jury, by considering all the circumstances which the jury feels should have reasonably come to the defendant's knowledge."

At the outset of any discussion of the questions raised by the assignment of error based upon this part of the court's charge, it may be well clearly to recall that this is not an action by the representative of a deceased employé against his employer. There were no direct relations between defendant—a lighting company—and the plaintiff's intestate, who was in the employment of a firm which, under a contract with other outside parties, was constructing a building upon a lot near to or over a small part of which ran at least one of defendant's wires. But the presence there of the defendant's wires imposed certain very important duties upon the defendant, whose business was conducted through one of the most dangerous agencies known in nature, and plaintiff in his declaration charged defendant with neglecting those duties.

The testimony does not show that any one saw the deceased do the act which caused his death; but two, at least, of his fellow employés, who were at work near by, almost immediately afterwards saw what had occurred, and their testimony is in no way contradicted or called in question. One of them testified that when he "turned around he saw the deceased hanging on the wires," and the other testified that, "when he [the witness] turned around, he [the deceased] was hanging on the wire with both hands." Upon these uncontradicted and unqualified statements in the testimony, the inference almost inevitably must be that Curcuru's death was caused by his taking hold of a high tension wire with both hands, though whether deliberately or through some emergency is not clear. Whatever may have been the duties of the defendant in respect to those of its wires which ran near to or over a small section of the lot on which the cement building was being constructed by Jackson & Maurice Company, it could hardly be that defendant was under any duty to prevent the deceased from taking hold of its wires. It would seem to have obviously been the duty of any reasonably prudent man, even if he ventured near the wires, to abstain from putting his hands upon them when it might mean inevitable harm or even death itself.

The evidence tended to show that in November, 1913, defendant had in writing been notified by Jackson & Maurice Company that the building was soon to be erected, and its attention was therein called to the electrical situation on the lot, in view of the location of defendant's wires, and defendant was asked to make proper inspections and any necessary changes that might be required by the situation. The declaration shows that the wires were all insulated, and there is testimony tending to show that the defendant promptly attempted to meet the requirements of this notice, and supposed it had done so; but the testimony is undisputed that putting a hand on one of the defendant's insulated wires located near the building would almost inevitably bring instant death. The testimony also tended to show that plaintiff's intestate was a man of about 25 years of age, who had lived in Detroit 2 years, and that the witness who appeared to be nearest to him on the second floor of the building, where the deceased was working on March 28, 1914, did not notify him of the danger of touching the wires because the witness supposed the deceased knew it. It was no doubt assumed judicially and in every other way all through the trial that high tension electrified wires, though fully insulated (for waterproofing purposes), were and were generally known to be most dangerous and deadly when touched, and that every prudent person should avoid contact with them. This appears to be the situation the trial judge was called upon to meet in charging the jury.

The declaration having alleged and the testimony having shown that Vincenzo Curcuru was killed instantly, no cause of action therefor would have survived his death without the Michigan Death Act, which appears in the Compiled Laws of 1897 of that state as sections 10427 and 10428. This legislation provides a remedial proceeding in such conditions, and at the trial it was assumed that this law should control in this instance. No one now questions the propriety of that course. With this in mind, and stated generally, the question to be de-

termined is whether the defendant's duty to the deceased employé of another then engaged in building the house was to use "extraordinary care," or "the utmost degree of care," or "the highest degree of care" (if there be any material difference between these phrases), to prevent injury to the deceased under the facts shown, or was the obligation of the defendant such as the trial judge defined it to be in the part of his charge we have set forth? Very many authorities have been cited upon the one side and the other of this question, but while we need not state in detail our analysis of them, upon careful consideration we have concluded that the rule laid down by the court below was the correct one upon the authority of cases like Burgess v. Stowe, 134 Mich. 204, 211, 96 N. W. 29, Warren v. City Electric Ry. Co., 141 Mich. 300, 301, 104 N. W. 613, and Crowe v. Michigan, etc., R. R., 142 Mich. 692, 695, 106 N. W. 395.

We do not intend to hold that the duty to use some higher degree of care did not exist; and while we think it would have been right to give the charge which plaintiff requested, we see no reversible error in giving, instead, the definition which the court adopted. It is beyond all doubt true that the ordinarily and reasonably prudent man will use greater and greater care as the dangerous character of the situation increases; hence an instruction that reasonable care is to be judged by the circumstances of the case, and that what would be reasonable under some circumstances would be more than necessary under other conditions, or less than necessary in still another situation, is not necessarily in conflict with the idea that a high degree of care should be required here. The illustration given was to the effect that the same care which would have been reasonable and sufficient, if there had been no building in process of erection, might be insufficient where building operations like this were being carried on. Instead of giving to the jury a specific interpretation of the rule which might have been helpful, the trial judge gave the general and abstract rule. If the wires were so highly dangerous as is claimed, a jury, under this charge, must have understood that it should take into account this highly dangerous character, in fixing the degree of care required; and we are not satisfied to regard the action of the court in this respect as prejudicial error. See discussion and citations in 9 R. C. L. pp. 1199, 1200.

It results that the judgment of the court below should be, and is, affirmed.

YEE WON v. WHITE, Commissioner of Immigration. *

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3259.

1. ALIENS ⟹32(13)—CHINESE EXCLUSION—REVIEW BY COURTS.
Immigration officers have exclusive jurisdiction over Chinese exclusion cases, providing they give the applicant a fair hearing and do not abuse their discretion.

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

*Rehearing denied October 14, 1919.

2. ALIENS ⟹32(9)—CHINESE EXCLUSION—HEARING.

A Chinese exclusion hearing before immigration officers, which resulted in excluding a Chinese woman and her children upon ground that her husband had not satisfactorily established his status as a merchant, instead of a laundryman, *held* not to show abuse of discretion or denial of fair hearing.

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

Habeas corpus proceeding by Yee Won against Edward White, as Commissioner of Immigration at the Port of San Francisco. From a judgment sustaining a demurrer and denying the writ, petitioner appeals. Affirmed.

John L. McNab and Joseph P. Fallon, both of San Francisco, Cal., for appellant.

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.

MORROW, Circuit Judge. The applicants, Chin Shee, Yee Tuk Oy, and Yee Yuk Hing, wife and minor children of the appellant, Yee Won, arrived at the port of San Francisco, Cal., on the steamship Tjisondari July 16, 1917. They applied for admission to the United States as the wife and minor children, respectively, of Yee Won, who, it is alleged, was a regularly domiciled Chinese merchant and a member of the exempt class. Admission was denied by the Commissioner of Immigration on the ground that the status of Yee Won as a merchant had not been satisfactorily established. On appeal to the Secretary of Labor, the excluding decision of the Commissioner of Immigration was sustained.

Yee Won thereupon filed a petition in the District Court for a writ of habeas corpus, alleging an unfair hearing by the immigration officials and abuse of the discretion committed to them by law. The United States demurred to the petition, and upon a hearing the court dismissed the petition. The case comes here on appeal, with the record of the proceedings before the Commissioner of Immigration submitted in support of such matters as are presented by the petition for the writ of habeas corpus and the demurrer to the petition.

[1, 2] It appears from this record that Yee Won first applied for admission into the United States at the port of San Francisco in April, 1901, as the minor son of a resident merchant. Yee Won was then 20 years of age. Admission was denied, and he was deported. He returned in November of the same year, and again applied for admission as the minor son of a resident merchant, and was admitted. The father of Yee Won died in San Francisco in 1908. In the latter part of 1910 Yee Won applied to the immigration officers at the port of San Francisco for an identification of his status. He was about to depart for China, and it was his purpose to secure such an identification as would secure his admission upon his return. He made no claim

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

that he was a merchant. His claim was that he was "a capitalist and property owner." He was granted such a certificate and departed for China in January, 1911. He returned on May 29, 1914. He was then 33 years of age. He claims to have married Chin Shee in China March 2, 1911, and that a daughter Yee Tuk Oy, was born to them November 28, 1912, and a son, Yee Yuk Hing, was born to them on November 2, 1913. These three are the present applicants to enter the United States. They were all born in China, and this is their first application to enter the United States.

In support of the application of Yee Won to have his wife and minor children admitted to the United States, he testified that he was "a property owner and a capitalist," and in support of that claim exhibited to the immigration officers bank books, certificates of stock, and other documents showing that he was a person of means. He testified that he exported fruit from San Francisco to Tai Sang Fruit Company, at Sidney, New South Wales, in the years 1915, 1916, and 1917; that his firm in San Francisco was known as Tai Sang, a branch of the Australian house; that his place of business, which was also the place where he lived, was 842 Washington street, second floor, room No. 2; that his business in the years 1916 and 1917 amounted to $20,000. There is no evidence that there was any fruit goods or merchandise at this place. He testified that the packing and shipping was done elsewhere. In the list of property submitted by Yee Won is a lease dated September, 1910, for premises designated as No. 2426 Sacramento street, San Francisco, for the term of 20 years commencing the 1st day of October, 1910, at the rate of $25 per month during the first 5 years. Upon this and other testimony, the immigration inspector advised the Commissioner of Immigration that it was thought that the evidence offered was such as to justify the granting of the status of Yee Won as an exempt person—i. e., "a property holder and capitalist"—and that he had done no labor during the last year past.

While the case was thus pending upon this report before the Immigration Commissioner, an anonymous letter was received by the Commissioner, stating that Yee Won was not a merchant, but a laundryman at Sacramento and Fillmore streets. A further investigation of the case was immediately ordered. The place mentioned in the anonymous letter as Sacramento and Fillmore streets was found to be 2426 Sacramento street, which Yee Won had previously listed in his property schedule as having under lease. It was also found that this place had been a Chinese laundry for a number of years. The immigration officer proceeded to submit a photograph of Yee Won to a number of the patrons of the laundry, who identified him as the Chinese person who had driven a laundy wagon and delivered laundry from that place for a number of years. Yee Won was thereupon called for further examination, that he might be confronted by the persons who had identified his photograph as that of their laundryman. He failed to appear, and the Commissioner of Immigration thereupon decided that the exempt status of Yee Won had not been established to his satisfaction, and denied the admission of the applicant on that ground.

On appeal to the Secretary of Labor, the case was reopened to

take further testimony as to the personal identification of Yee Won by the witnesses who had previously identified him by his photograph. Three of the witnesses were reported out of town, and their statements were not obtained. The statements of two other witnesses identifying Yee Won as their laundryman were obtained, but one of them was later not positive about the identification. Yee Ging, a cousin of Yee Won, was produced as the laundryman these witnesses had identified as Yee Won. The photographs of Yee Ging and Yee Won are in the record, and the resemblance appears to be so questionable and doubtful that certainly from their features there represented one would not be likely to be mistaken for the other. The result of this supplementary inquiry was submitted to the Assistant Secretary of Labor at Washington, and upon the whole case the Secretary of Labor sustained the exclusion decision of the Commissioner of Immigration at San Francisco, and thereupon the case was brought to the District Court upon a petition of Yee Won for a writ of habeas corpus.

In the decision of the District Court upon the demurrer to the petition, the court was of the opinion that the immigration authorities had found upon evidence that would warrant the finding that Yee Won had been engaged quite recently in driving a laundry wagon. This finding the court was of the opinion deprived him of the mercantile status to which he laid claim, but the court suggested the query whether, as Yee Won was "entitled to remain, his wife and children may not be admitted as the wife and children of one rightfully in this country who is entitled to the companionship of his wife and comfort of his children." In this court counsel for the appellant refers to this decision and says:

"It will thus be seen that the sole question is whether or not a Chinese person, entitled to remain in this country by virtue of our treaty with China, although held by the immigration officials to have lost his status as a merchant, is entitled to have his wife and minor children admitted."

By the treaty between the United States and China concluded in November, 1880 (22 Stat. 826), excluding certain Chinese laborers from coming to the United States, it was provided, among other things, that—

"The limitation of suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers; other classes not being included in the limitation."

It is also provided that certain Chinese subjects, including "merchants," may "go and come of their own free will and accord." In section 2 of the act of November 3, 1893 (28 Stat. 7, c. 14 [Comp. St. § 4324]), Congress defined the terms "laborer" or "laborers" and "merchants" as follows:

"Sec. 2. The words 'laborer' or 'laborers,' wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.

"The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is

a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

In section 1 of the act of August 18, 1894, "making appropriations for sundry civil expenses for the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes" (28 Stat. 372-390, c. 301), 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."

By the act of February 14, 1903, entitled "an act to establish the Department of Commerce and Labor" (32 Stat. 825, c. 552), the Commissioner General of Immigration, the Bureau of Immigration, and the Immigration Service were transferred from the Treasury Department to the Department of Commerce and Labor, and by the act of March 4, 1913 (37 Stat. 736-737, c. 141), to the Department of Labor. Under this last statute an appeal from the decision of the immigration officers excluding an alien from admission into the United States lies to the Secretary of Labor. This was the procedure followed in this case.

In United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544, it was held that the wives and minor children of Chinese merchants domiciled in this country might enter the United States without certificates. They come in by reason of their relationship to the husband and father, and whether they accompany him or follow him a certificate is not necessary in either case. That case was a deportation case, over which the judicial department of the government has exclusive jurisdiction. The present case is an exclusion case, over which the immigration officers have exclusive jurisdiction, providing that in the administration of the law they give the applicant a fair hearing and do not abuse their discretion.

The question submitted to the immigration officers was a question of fact. Was Yee Won a merchant? This fact had to be established to their satisfaction. In the case of In re Lee Lung, 102 Fed. 132, a writ of habeas corpus was issued by the District Court upon the petition of Lee Lung, a merchant in Portland, Or., on behalf of his wife and daughter, who had recently arrived at that port. His status as a merchant was not denied, but a landing was refused his wife and daughter by the collector of customs. The writ was dismissed; the court holding that it had no jurisdiction to review the action of the collector in such proceedings. The case was taken to the Supreme Court of the United States, where the judgment of the District Court was affirmed. Lee Lung v. Patterson, 186 U. S. 168-170, 22 Sup. Ct. 795, 797 (46 L. Ed. 1108). In the Supreme Court it was said:

"The testimony of several witnesses was introduced before the District Court against the objection of the district attorney. It showed that the petitioner was a merchant of Portland, Or.; that he had gone back to China and there married Li Tom Shi according to the Chinese customs and with

the usual Chinese ceremonies, but that he had another wife with whom he lived when in China, and that Li A. Tsoi was the daughter by that wife. It was testified that a man in China could have as many wives as he had means to support."

The objection to the landing of Li Tom Shi appears to have been that the laws of the United States did not recognize plural marriages, and, while they might be so recognized in China, the said Li Tom Shi was not the valid wife of Lee Lung under our laws. The objection to the landing of Li A. Tsoi, the daughter of Lee Lung by his first wife, was that the evidence was conflicting and inconclusive, and not of the satisfactory character required. The court, referring to the decision of the District Court holding that it was without jurisdiction to review the decision of the collector of customs, said:

"It was decided in Nishimura Ekiu's Case [142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146] that Congress might intrust to an executive officer the final determination of the facts upon which an alien's right to land in the United States was made to depend, 'and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its efficiency.' This doctrine was affirmed in Lem Moon Sing v. United States, 158 U. S. 538 [15 Sup. Ct. 967, 39 L. Ed. 1082], and at the present term in Fok Yung Yo v. United States, 185 U. S. 296 [22 Sup. Ct. 686, 46 L. Ed. 917], and Lee Gon Yung v. United States, 185 U. S. 306 [22 Sup. Ct. 690, 46 L. Ed. 921]."

In conclusion, the court said:

"But jurisdiction is given to the collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony to controvert it, and we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper."

In Low Wah Suey v. Backus, 225 U. S. 460–468, 32 Sup. Ct. 734, 735 (56 L. Ed. 1165), the Supreme Court has again declared the conclusiveness of decisions of the executive officers of the government in this class of cases:

"A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final. United States v. Ju Toy, 198 U. S. 253 [25 Sup. Ct. 644, 49 L. Ed. 1040]; Chin Yow v. United States, 208 U. S. 8 [28 Sup. Ct. 201, 52 L. Ed. 369]; Tang Tun v. Edsell, 223 U. S. 673 [32 Sup. Ct. 359, 56 L. Ed. 606]."

The District Judge in the present case did not find that a fair hearing had been denied the petitioner, or that there had been any abuse of discretion on the part of the immigration officers in the proceedings, and we do not so find, after a careful inspection of the record. Chin Yow v. United States, 208 U. S. 8, 12, 28 Sup. Ct. 201, 52 L. Ed. 369.

We conclude, therefore, that there was nothing in the case for the District Court to review, and that the judgment of the court dismissing the petition was correct.

The judgment of the District Court is accordingly affirmed.

LOUIE SHARE GAN v. WHITE, Commissioner of Immigration. *

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3171.

1. ALIENS ⚿32(13)—CHINESE EXCLUSION—REVIEW BY COURT.
   Where a Chinaman was excluded after a fair hearing before the Commissioner of Immigration, and officers of that department did not abuse their discretion, the courts have no jurisdiction to review the proceedings.
2. ALIENS ⚿32(13)—CHINESE EXCLUSION—ABUSE OF DISCRETION.
   An order by Commissioner of Immigration, excluding a Chinaman on ground that his relationship to certain Chinamen in United States had not been established, is not subject to court review because partly based on difference in height between applicant and his alleged twin brother, where other discrepancies also indicated that evidence of relationship was unsatisfactory.
3. APPEAL AND ERROR ⚿181, 719(1)—RESERVING GROUNDS FOR REVIEW—NECESSITY.
   An objection not raised below, nor assigned as error on appeal, will not be considered.

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

Habeas corpus proceeding by Louie Share Gan against Edward White, as Commissioner of Immigration at the Port of San Francisco. From an order denying a writ, the petitioner appeals. Affirmed.

Marshall B. Woodworth, of San Francisco, Cal., for appellant.

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.

MORROW, Circuit Judge. The appellant, Louie Share Gan, represents himself as a native son of Louie Share Jung, a citizen of the United States; that he arrived in the United States at San Francisco, Cal., from China, during the month of May, 1917, and made application to the Commissioner of Immigration at the port of San Francisco for admission to the United States as a citizen thereof and a son of Louie Share Jung; that his application for admission was denied by the Commissioner of Immigration; that thereupon an appeal was taken to the Secretary of Labor, and the decision of the Commissioner of Immigration was sustained. Thereupon Louie Share Jung applied to the District Court for a writ of habeas corpus on behalf of Louie Share Gan, on the ground that the decision of the Commissioner of Immigration was unfair, and the Secretary of Labor and the officials acting under him were guilty of an abuse of discretion in

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

*Rehearing denied October 14, 1919.

considering certain alleged discrepancies in the testimony of the applicant and an alleged twin brother, who was admitted to the United States in December, 1916, as the son of the petitioner and a citizen of the United States. A demurrer to the petition was interposed, which was overruled. Thereupon an amended petition was filed. A return was filed by the Commissioner of Immigration. To this return the appellant filed a traverse. After hearing by the court, the writ of habeas corpus was denied.

It is contended on behalf of the appellant that the hearing before the Commissioner of Immigration was manifestly unfair and unjust to the applicant, in that his relationship to his father and alleged twin brother was made to depend specially upon his lack of resemblance to his father and his twin brother, and because of a slight difference in height from his twin brother, standing both without shoes on the same level, indicating a difference in height.

[1] If the applicant had a fair hearing before the Commissioner of Immigration, and there was no abuse of discretion on the part of the officers of that department in the proceedings, the court had no jurisdiction to review the proceedings. Low Wah Suey v. Backus, 225 U. S. 460-468, 32 Sup. Ct. 734, 56 L. Ed. 1165. Yee Won v. White, 258 Fed. 792, — C. C. A. —, just decided.

[2] The appellant contends that a judgment based on the difference in the height between the applicant and his alleged twin brother was—

"a gross abuse of discretion, and was unjust and unfair, and too notional, too fanciful, too irrational, and too uncertain to constitute any basis whatever for a ruling denying admission to the United States."

If this objection had merit, it would not avail the applicant in this case, since this is not the only ground the Commissioner of Immigration had for holding that the evidence as to the relationship between the applicant and Louie Share Jung was unsatisfactory. There are a number of discrepancies in the testimony sufficient to justify the Commissioner in declaring that the evidence was unsatisfactory.

[3] There is an addendum to appellant's brief in this court, claiming that the opinion of this court in the Case of Quan Hing Sun,[1] decided October 11, 1918, is controlling in this case. The objection to the proceedings in that case was not raised in this case in the court below and was not assigned as error in the appeal to this court. It was not mentioned until after the case had been submitted in this court. In the absence of a record presenting such an objection, it cannot be considered on appeal. Jeung Bock Hong and Jeung Bock Ning v. White, 258 Fed. 23, — C. C. A. —, just decided.

The decision of the District Court is affirmed.

[1] 254 Fed. 402, 165 C. C. A. 622.

ASSOCIATED PIPE LINE CO. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. May 19, 1919.)

No. 3251.

1. INTERNAL REVENUE ⟹9—CORPORATION EXCISE TAX—"DOING BUSINESS FOR PROFIT."

A pipe line company organized by, and doing business only for, two other pipe line corporations, *held* not merely a convenient agent of these corporations, but to be doing business for profit within Corporation Tax Law.

2. INTERNAL REVENUE ⟹7—INCOME—CORPORATION TAX LAW—INTEREST DEDUCTION.

Under Corporation Tax Law of August 5, 1909, providing that interest paid on indebtedness not exceeding paid-up capital stock may be deducted in estimating net income, moneys paid a pipe line corporation by its stockholders *held* not payment for capital stock, but advances to corporation, and corporation, having no paid-up stock, could not deduct interest on such advances in calculating net income.

3. INTERNAL REVENUE ⟹28—CORPORATION TAX LAW—ADMISSIBILITY OF EVIDENCE.

A statement made by a corporation's auditor to an internal revenue tax agent that the corporation had no paid-up capital stock is admissible in proceedings to recover taxes under Corporation Tax Law of August 5, 1909.

In Error to the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Action by the United States against the Associated Pipe Line Company. Judgment for the United States, and defendant brings error. Affirmed.

Action by the United States against the Associated Pipe Line Company, a California corporation, to recover $1,423.56 for excise taxes for 1909, assessed under subsection 1 of section 38 of the Act of Congress of August 5, 1909, the Corporation Tax Law, 36 Stat. 111, 112, c. 6. The United States recovered judgment. Among other things the act provides: "That every corporation * * * organized for profit and having a capital stock represented by shares * * * and engaged in business * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above $5,000 received by it from all sources during such year. * * * Such net income shall be ascertained by deducting from the gross amount of the income of such corporation * * * received within the year from all sources, * * * (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation * * * outstanding at the close of the year." The defendant below denied that it is a corporation organized for profit, and alleged that it never has and never could earn any profits; that it never had any net income and has no income; that its income never exceeded its expenses of maintenance and operation; that its income was derived solely from stockholders; and that the stockholders have always severally paid all excise and income taxes assessed against them respectively by the United States.

The facts found by the District Court and as agreed upon are, in substance, as follows: The Associated Oil Company was incorporated in 1901, and the Kern Trading & Oil Company was incorporated in 1903. The Associated Oil Company has always been a purchaser, producer, and seller of crude petroleum and its products, and the Kern Company has been an agent of the Southern Pacific Company, a railroad carrier, for the purpose of developing, handling, and furnishing to the Southern Pacific Company fuel oil for its locomo-

*Rehearing denied October 14, 1919.

tive engines engaged in interstate and intrastate commerce. In 1907, these companies made an agreement containing the following matters: The Kern Company was then the owner of and operating a pipe line, together with pumping stations, tanks, and appurtenances, between Volcan and Delano, in California, about 31 miles; the pipe line being laid on the right of way of the Southern Pacific Company. The Associated Company and the Kern Company proposed to extend this pipe line from Delano to Port Costa along the right of way of the Southern Pacific Company between Delano and Goshen, and Fresno and Port Costa, and on the right of way of the Central Pacific Railway Company between Goshen and Fresno; the said line from Volcan to Delano and from Delano to Port Costa to be owned by a corporation in which the Associated Company and the Kern Company should be equally interested. It was agreed that a California corporation should be created to own, lease, and operate pipe lines, but not as a common carrier, for the transportation and movement of oil, etc., to be named Associated Pipe Line Company, with a capital of $7,000,000, or of 70,000 shares of $100 each. Directors were to be selected by each of the parties to the agreement. A president and superintendent were to be agreed upon. The Associated Pipe Line Company was to have vested in it, by purchase from the Kern Company at actual cost, the ownership of the pipe line, stations, tanks, and appurtenances between Volcan and Delano. The pipe line company was to construct and own the extension of the pipe line from Delano to Port Costa, together with stations and appurtenances, and might construct and own additional pipe lines that the parties desired jointly to build and operate.

It was agreed that the cost of the pipe lines, tanks, and appurtenances between Delano and Port Costa and all expenses of construction should be advanced by the Kern Company. The Associated Oil Company agreed that it would pay the Kern Company one-half of the entire total cost to it of the pipe lines, tanks, and appurtenances between Volcan and Port Costa within three years from the date of the agreement, and that on one-half of all the sums paid by the Kern Company, comprising such total cost, the Associated Oil Company would agree to pay interest. One-half of the entire capital stock of the Associated Pipe Line Company was to be issued to the Kern Company, and one-half to the Associated Oil Company. Expenses for repairing, operating, and maintaining were to be divided monthly between the Associated and Kern Companies in proportion to the amount of oil moved for either party to tidewater or intermediate points. Betterments and improvements, together with taxes and assessments upon the property of the Associated Pipe Line Company, were to be apportioned between the Associated Oil Company and the Kern Company. The pipe lines were to be exclusively used for the movement of oil belonging to the Associated and Kern Companies. They were so used, and the Associated Pipe Line Company has never been engaged in any business other than that of transporting oil through such pipe lines for the two above-named companies.

The Associated Pipe Line Company, plaintiff in error here, was incorporated in 1907, pursuant to the agreement just referred to, and the stock subscribed as follows: Calvin, 34,980 shares; W. F. Herrin, 10 shares; George L. King, 10 shares; W. S. Porter, 34,990; Buck, 10 shares. On August 27, 1907, the capital stock was issued to the nominees of Associated Oil Company and Kern Trading & Oil Company as subscribed for. In February, 1910, 34,980 out of the 34,990 shares issued to Porter were transferred to the Associated Oil Company, and on July 17, 1913, 34,970 of the 34,980 shares issued to Calvin were transferred to the Kern Company, while 20 shares remained with Calvin and Porter and their successors, as directors, and 30 shares remained in Herrin, King, and Buck, as directors, and the Kern Company and the Associated Company were the owners of the entire capital stock in equal proportions, except 50 shares held by the five directors; each director holding 10 shares. The purposes of the incorporation of the Associated Pipe Line Company were: "The acquisition, construction, owning, maintenance and operation, but not as a common carrier, of pipe line for transportation of oil within the state of California, together with necessary pumping stations therefor."

Pursuant to the agreement of April, 1907, the pipe lines, tanks, and appurtenances between Volcan and Delano were conveyed to Associated Pipe Line Company after the organization thereof, and that company constructed an extension of the pipe line from Delano to Port Costa, together with stations and appurtenances, and also an additional pipe line from Maricopa to Port Costa. The Kern Company advanced the costs of construction between Delano and Port Costa and half the cost of the additional line from Maricopa to Port Costa, and the Associated Oil Company advanced the other half of the cost of the last-mentioned line.

Up to December 31, 1909, the Kern Company had advanced $4,978,401 for cost of the pipe line between Volcan and Delano and for cost of construction of extension lines from Delano to Port Costa; and on December 31, 1909, one-half of the sum so advanced by the Kern Company was owing to it by the Associated Oil Company, together with interest in the sum of $149,352. For convenience the account of such advances and interest was carried on the books of the Associated Pipe Line Company. The necessary expenses of maintenance and operation for 1909, inclusive of the sum of $149,352, was $674,232.23, which sum, together with $99,542.58 depreciation charged on the books of the Associated Pipe Line Company for 1909, made a total of $773,774.81, which was charged by the Associated Pipe Line Company against the Kern Company and the Associated Oil Company for 1909, and was reported by the Associated Pipe Line Company to the United States as its gross income for 1909. The return made for that year also showed: "Total amount of paid-up capital stock at close of year, not adjusted." It showed no net income for 1909 and no tax payable by the Associated Pipe Line Company for 1909 under the act of August 5, 1909. The Commissioner of Internal Revenue disallowed the interest charge of $149,352, and, after deducting $5,000 allowed by the provision of the act of Congress, assessed the Associated Pipe Line Company a special excise tax of 1 per cent. on the balance of $144,352, amounting to $1,443.52, which the Associated Pipe Line Company paid under protest. Claim for refund was made in 1912 and was allowed on August 13, 1912, but in December, 1915, the commissioner concluded that he had erred in the refund for the reason that the Associated Pipe Line Company had no paid-up capital stock in 1909 on which to base a legal right for the deduction of interest, and after correction of the figures he demanded payment of $1,423.56. The Associated Pipe Line Company has never declared or paid any dividends on its stock, and the finding is that none of the capital stock of the Associated Pipe Line Company was paid until December 31, 1911.

Edmund Tauszky, of San Francisco, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., and Frank M. Silva, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The main points urged by plaintiff in error are: That the Associated Pipe Line Company is not a corporation organized for profit; that it is not carrying on or doing business within the meaning of the Corporation Tax Law; that the plaintiff in error had no net income during the year 1909 and was entitled to deduct from its gross income interest paid by it.

[1] We cannot uphold the argument that the agreement between the companies had the effect of making the Associated Pipe Line Company merely "the agent of Associated Oil Company and Kern Trading & Oil Company * * * as a convenient instrument for the construction, maintenance, and operation of pipe lines for the joint use of its owners," neither of which requires them for their entire length for the transportation of oil from oil fields. Corporate organi-

zation was to acquire, own, maintain, and operate pipe lines to transport oil within California, and the activities of the corporation harmonized with the avowed purposes of its creation. It had a large business of transporting oil through pipe lines; it paid the Kern Company for a line that had been constructed from Volcan to Delano; it constructed and operated a pipe line from Delano to Port Costa, the payment for which work was advanced by the Kern Company as the moneys were required. The advances, amounting to nearly $5,000,000, were credited to the Kern Company as cash on the books of the Associated Pipe Line Company, although not against its stock subscription. Subsequently an entry was made as of December 31, 1911, transferring the advances on the books of the company to the capital stock account.

The plaintiff in error also constructed another pipe line from Maricopa to Port Costa, commenced in October, 1908, and operated the line in the early part of 1910. That advances made in connection with the construction of these pipe lines were made in equal proportion by the Kern and the Associated Oil Companies is not of special moment, beyond the fact that on advances made by the two companies the interest charge, over which this controversy has arisen, accrued. It seems that each company was allowed interest from the date it made its advances up to the time of the adjustment of the respective advances. It is explained that when the return of annual net income for 1909, showing $149,352 interest on open accounts, was made, this was interest accruing on the amount advanced by the Kern Company for the line which was then in operation, while for the advances which had been made by the Associated Oil Company no interest was allowed in 1909 and none charged until the line was in operation. However the pipe line company carried, on its books, accounts for the Associated Oil Company and the Kern Company in which they were credited with their cash advances as they were made from time to time, and no entry was made in the books with regard to payment for the capital stock of $7,000,000 until December 31, 1911, at which date both lines had been constructed.

The secretary and auditor of the Associated Pipe Line Company testified that the motive for making the interest charge of $149,352 was to equalize the investment in the pipe line, the two companies being entitled to 50 per cent. usage each, and he described the Associated Pipe Line Company books as only "a clearing account," and the entry as "a mere matter of adjustment between the two owning companies to equalize the use of the capital investment," and said that the present practice was for the companies to make adjustments between themselves, and that, if the Associated Oil Company had used the pipe line 55 per cent. and the Southern Pacific 45 per cent., then the Associated Oil Company paid to that company its percentage on the 5 per cent. that it had used its line.

The return made by the Associated Pipe Line Company was as by a corporation organized for profit, and the return showed that it had accumulated money. It is hard to conceive that the formation of the corporation was had with a view other than the realization of profit.

It may be that the stockholders in the Associated Pipe Line Company took the profit away from the corporation, but it is clear that the way in which the money was made was by a corporate organization; and the corporation, having achieved the object of its creation, became subject to the imposition of the tax with respect to doing business. In Von Baumbach v. Sargent Land Co., 242 U. S. 503, 37 Sup. Ct. 201, 61 L. Ed. 460, a corporation was created "to unite in one ownership the undivided fractional interests of its various stockholders in lands," and to "own such property, and, for the convenience of its stockholders, to receive, and distribute to them," the proceeds of the disposition of such property at such times and in such amounts and in such a manner as determined by the board of directors. The Supreme Court found no difficulty in concluding that such a corporation was organized for profit and did not come within the exceptional character of charitable or eleemosynary corporations, and the court after examining the earlier corporation tax cases, held that the corporation was carrying on business and said:

> "The fair test to be derived from a consideration of all of them [the cases] is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain, and such activities as are essential to those purposes."

The court emphasized the view that the Corporation Tax Law requires no particular amount of business in order to bring a company within its terms. The activities considered brought the corporation there in question within that line of the decisions which have held that such corporations were doing business in a corporate capacity within the meaning of the law. McCoach v. Mine Hill R. R. Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842, illustrates the distinction. There a railroad corporation turned over its entire property under a lease to another company, and even ceased to exercise its power of eminent domain. It was held not to be engaged in business. The Associated Pipe Line Company appears to have been active, and to be maintaining its organization for the purposes for which it was created; it has expended and received money, has borrowed money, has constructed pipe lines, has allowed itself to be charged interest, has had dealings with its stock and stockholders concerning moneys received, and in 1909 was actually transporting oil and performing its corporate functions.

[2] We now inquire into net income during 1909. The company returned the total amount of paid-up capital stock outstanding at the close of year 1909 as "not adjusted," and the total amount of bonded or other indebtedness as "not adjusted," and the gross income as $773,774.81. It deducted the total amount of ordinary and necessary expenses, including interest charge, $674,232.23, and depreciation, $99,542.58; total deductions, $773,774.81; "net income nil." According to the findings, none of the capital stock of the corporation was paid until December 31, 1911. If we accept this finding as true, clearly the plaintiff in error in 1909 had no paid-up capital stock and was therefore

not in a position to include the interest charge in arriving at what its net income was.

It is argued that, although the moneys were not entered in the capital stock account on the pipe line company books until December, 1911, the fact was there was no net income by way of interest on advances because such advances were not made by plaintiff in error and the interest was not earned by or payable to the pipe line company, and that the pipe line company was merely the conduit through which the Associated Oil Company paid the Kern Company the interest on the advances by the Kern Company. We gather the contention to be that the fact was that when the pipe line company was created the Kern Company transferred to it the then-existing pipe line from Volcan to Delano, and agreed to advance the cost of constructing the extension from Delano to Port Costa, and that this was the consideration for the issuance of the stock of the pipe line company to the Associated and the Kern Companies; that construction was commenced in 1907 and the line operated in 1908; that up to December 31, 1909, the advances for cost of the line from Volcan to Delano, and of the extension from Delano to Port Costa, amounted to about $5,000,000 upon which interest for 1909 was $149,352; and that stock of the par value of this amount had therefore been paid for up to December 31, 1909.

But this reasoning seems to lead to the conclusion that the advances that were made were in payment of capital stock, and, if such is the correct view, there was a sale of stock and no indebtedness.

The plainer view seems to be that there was an indebtedness on account of advances, but that there was no paid-up capital stock at the time of the return, and therefore that, as a matter of law, no interest could be deducted.

[3] An income tax agent in the Internal Revenue Department testified, over the objection of the plaintiff in error, that in 1915, when he investigated the books of the pipe line company, he had a conversation with the auditor of the plaintiff in error, and that the auditor then stated to him that the capital stock of the corporation had not been paid up to December 31, 1909, when the tax in question was assessed, and that the matter had not been adjusted. The objection was based upon the ground that any statement by the auditor, unless authorized by the corporation through its board of directors, would not be binding upon the company.

We think that the ruling of the court was correct. Lane v. Boston & Albany R. R., 112 Mass. 463; Lynchburg Tel. Co. v. Booker, 103 Va. 594, 50 S. E. 148.

The judgment is affirmed.

SAN PEDRO, L. A. & S. L. R. CO. v. BROWN.

(Circuit Court of Appeals, Ninth Circuit. May 19, 1919.)

No. 3172.

1. MASTER AND SERVANT ⚷289(35)—INJURY—DUTY OF CAR INSPECTOR.
Considering evidence of practice followed by inspectors, *held*, it could not be said, as matter of law, that it was incumbent on an inspector, working under a train and injured by the moving thereof, to make sure that his fellow inspector actually placed thereon the signal to indicate that it was being inspected.

2. MASTER AND SERVANT ⚷243(3)—INJURY—CONTRIBUTORY NEGLIGENCE—RULES AND CUSTOM.
While it is the duty of an employé to observe rules promulgated by the employer, yet, there being evidence of a custom with respect to the interpretation of a rule which does not clearly cover the particular situation which confronts the employé, the employé is not always negligent in following the custom.

3. NEGLIGENCE ⚷101—EMPLOYERS' LIABILITY ACT—COMPARATIVE NEGLIGENCE.
By express provision of federal Employers' Liability Act (Comp. St. §§ 8657–8665), contributory negligence of employé of interstate carrier merely mitigates damages, and does not bar recovery.

4. MASTER AND SERVANT ⚷180(4)—EMPLOYERS' LIABILITY ACT—NEGLIGENCE OF FELLOW SERVANT.
Federal Employers' Liability Act (Comp. St. §§ 8657–8665), making interstate carrier liable for injury to employé resulting from negligence of an officer, agent, or employé, renders it liable for negligence of fellow servant in prosecution of its business.

5. MASTER AND SERVANT ⚷180(5)—EMPLOYERS' LIABILITY ACT—NEGLIGENCE OF FELLOW SERVANT.
Though under rules of interstate carrier it is the duty of inspectors to put signal on train to indicate it is being inspected, one of two inspectors working together, by relying on the other to place such signal, does not make him his agent; with the result of absolving the carrier from liability under federal Employers' Liability Act (Comp. St. §§ 8657–8665) for his injury through negligent failure of the other to place the signal, but such negligence is attributable to the carrier; section 5 of the act declaring void, pro tanto, any contract or rule the purpose or intent of which is to enable the carrier to exempt itself from liability under the act.

6. MASTER AND SERVANT ⚷204(3)—EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK.
A car inspector of an interstate carrier, who trusts to another inspector working with him to put on a train a signal indicating that it is being inspected, and goes on with his work unaware of the other's failure to do so, does not, under the federal Employers' Liability Act (Comp. St. §§ 8657–8665), assume the risk of such negligence of the other.

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

Action by Robert L. Brown against the San Pedro, Los Angeles & Salt Lake Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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

The San Pedro, Los Angeles & Salt Lake Railroad Company brought writ of error to review a judgment of the District Court in favor of Brown, defendant in error, upon a verdict for damages for personal injuries. The railroad company denied negligence and pleaded contributory negligence. The action was brought under the federal Employers' Liability Act April 22, 1908 (35 Stat. 65, c. 149 [Comp. St. §§ 8657-8665]), which provides, in substance, that every common carrier by railroad, while engaged in interstate commerce, is liable in damages to any person suffering injury while he is employed by such carrier in such commerce, whether such injury results in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, and the fact that an employé may have been guilty of contributory negligence merely mitigates the damages and does not bar a recovery.

The evidence as produced by plaintiff below was as follows: Brown was an experienced car inspector employed by the railroad company at Otis, now Yermo, Cal. The inspectors worked in pairs; Brown's "partner" being one Ables, also an experienced inspector. On November 17, 1914, in daylight, they were about to inspect a train of 15 or more cars which was standing upon a main track west of the depot. The inspectors went toward the head of the engine, and separated near the head of the engine, Ables going on the south or engineer's side, and Brown on the north or fireman's side, of the engine. Ables had the blue flag in his hand. When the men separated, they were about 50 feet from the front of the engine, and Ables said, "I will put the flag there, and we will hold them there until we are through." Brown testified that it was not customary to put the flag right in the cab of the engine, but to place it on the running board, where the engineer could see it; that when he went around the engine on the north side he could not see the engineer or the fireman; that he passed two cars, and observed that on the third car, a "Salt Lake box car," the air was set, but the piston travel was too short; that he went to the west end of the car to adjust the brake, and crawled under the west end of the car behind the rear trucks, was facing forward, on the fireman's side, and pulled the release rod to release the brakes. The lever had a track spike in it, instead of a key bolt, and moved with difficulty, so he took his hammer from his pocket to strike, and was in the act of crawling up closer when he noticed the wheels starting. He made a "lunge," seized a grab-iron under the rear of the car, and managed to get out by the time the train came to a stop, but was injured. Brown said that he relied upon his partner to put the blue flag on the engine; that the custom was for one inspector to go on one side and one on the other, although they were supposed generally to go together.

There was evidence as to the custom of the railroad company with respect to inspection of air and of cars, and that when a train was brought into the yard the car inspectors place a blue flag on the end, and one inspector would go down each side of the train and inspect for brake shoes and brake "riggins." There was no evidence of a practice of putting a flag signal at each end of the train.

The testimony of Brown and Ables varies in some respects, particularly as to the conversation they had just before they separated; but Ables admitted that he was going toward the engine and had the flag in his hand. There was evidence that it was neither customary nor necessary that each inspector should personally see the flag on the engine before going beneath the car.

Certain rules of the company were introduced in evidence. One, No. 517, under the heading "Car Inspectors," reads: "When making repairs under cars standing on main track or side track, they must protect themselves by placing a blue signal on the drawhead or the platform or step of the car at each end of the train to prevent the cars from being coupled to or moved while they are making repairs." Rule 26, under which Brown said they were working, provides: "A blue flag by day and a blue light by night displayed at one or both ends of an engine, car, or train, indicates that workmen are under or about it. When thus protected, it must not be coupled to or moved. Workmen will display the signal, and the same workmen alone are authorized to move them. Other cars must not be placed on the same tracks, so as to intercept the signal, without first notifying the workmen." Another rule, No. 842, pro-

vides, in substance, that if the brakes on the last car are properly set, inspectors or trainmen will signal to release the brakes, and the inspector will examine each car and see that the brake releases, and if any brakes will not release, or have leaks or broken rods, they must be cut out by closing the stop cock in branch pipe.

Fred E. Petit, Jr., A. S. Halsted, E. E. Bennett, and Dana T. Smith, all of Los Angeles, Cal., for plaintiff in error.

T. W. Duckworth, of San Bernardino, Cal., and J. H. Ryckman, of Los Angeles, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Judge (after stating the facts as above). [1-3] It is evident that the inspection was being made for defective brake equipment rather than an air test, and, considering the evidence of the practice followed by the inspectors at Yermo, we cannot say that, as a matter of law, it was incumbent upon the inspector who was working under the train to make sure that the other inspector actually placed the signal.

Certainly it is the right of an employer carrier to issue rules for the safety, guidance, and protection of its employés, and it is the duty of the employés to observe such rules. But, if there is evidence of a custom with respect to the interpretation of a rule which does not clearly cover the particular situation which confronts the employé, the employé is not always negligent in following the custom, and if in the observance of the usual practice he is injured through the negligence of his fellow employé, under the statute cited he may have a cause of action for injuries received. But, if we assume that Brown was negligent in not personally seeing that the flag was placed, surely his negligence was not the sole cause of the accident, for notwithstanding Brown's negligence, if Ables, his fellow inspector, had not negligently failed to place the flag, the accident would not have happened.

[4, 5] It is urged that no duty rested upon the railroad company to place a blue flag on any part of the train under which Brown was working, but that the duty to place such a flag was enjoined upon Brown, the inspector, that he could not delegate or confide the performance of such duty to Ables, and that, if failure to place the flag was the proximate cause of the injury, Brown could not recover.

In this connection we have carefully considered the argument of plaintiff in error that it could not have been the intent of Congress, as expressed in the act, to permit of recovery where an injury to an employé has resulted in any way from the negligence of a fellow servant. That may be so, and Reeve v. Northern Pacific Railway, 82 Wash. 268, 144 Pac. 63, L. R. A. 1915C, 37, sustains the argument. But that argument does not answer the question in the present case. The injury sued upon in the Reeve Case was received by the employé, who was a laborer about cars, by being pushed out of the car by another employé, who was scuffling with a third fellow employé, and brushed against the man who was thrown out. It was held that the injury was not caused by the negligence of a fellow employé, committed while he was prosecuting the business of the employer. Here, however, Brown

was giving his undivided attention to his duty, the adjustment of a brake on a car, in order to put the brake in proper condition for the journey about to begin, and Ables had the flag and was also engaged in the business of the employer.

It is not open to argument that under the act cited the old defense of the fellow servant rule is gone, and we find no reasonable ground upon which to rest a conclusion that an interstate railroad employer can, by a rule made for the safety of the employés, destroy a cause of action in favor of an employé for injury received while performing a duty and directly caused by the negligence of a fellow employé.

The express declaration of the statute (section 5) that "any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability" created by the act, shall, to that extent, be void, gives aid in the proper interpretation of the act and is inconsistent with the theory advanced by plaintiff in error that Brown made Ables his agent to place the flag and that Ables' negligence is to be imputed to Brown, although Ables was a fellow car inspector. The two were fellow servants, and the act of the one in relying upon the other did not make a relationship of principal and agent whereby the employer can be absolved.

Considering the context of the statute, it is unimportant whether the negligence of the fellow servant, Ables, is called the negligence of the master or is called imputed negligence, for the liability of the carrier arises to any person suffering injury resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, and no "contract" or "rule" made for the purpose of attempting to establish a relationship between the employé and the carrier, to enable the carrier to exempt itself from the liability created by the act, can be sustained as effective in relieving the carrier.

[6] It is also argued that Brown must be held to have assumed the risk of the injury he sustained as a result of his reliance on his coemployé and the failure of his coemployé to place the flag and so protect him. The point is based upon a portion of the charge of the lower court to the effect that Brown did not assume the risks that were attendant upon the negligence of a fellow servant.

Clearly, under the act, the defense of assumption of risk is open to the carrier, except in actions brought under section 4, which provides that, in an action for damages for injury to an employé, "such employé shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé." Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. But Brown was not injured by reason of any defect in the machinery, or by reason of any danger normally or necessarily incident to the occupation of inspecting cars. The accident would not have happened at all, but for the negligence of a fellow servant; and as to employers, while engaged in interstate commerce, the servant so engaged does not agree, as between himself and the carrier, to assume the risk of the neg-

ligence of his fellow servant. Watson v. St. Louis R. Co. (C. C.) 169 Fed. 950. In Boldt v. Penn. Ry., 245 U. S. 441, 38 Sup. Ct. 139, 62 L. Ed. 385, the court affirmed the action of the trial court in refusing to charge that "the risk the employé now assumes, since the passage of the federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of defendant's officers, agents, or employés." The opinion expressed was that the requested charge was erroneous, because the action there brought was not one within the provisions of section 4 of the act. But as far as we are advised it has never been held that in an action brought under the statute, where an employé trusts to another to do an act necessary for his safety, and he himself is not aware of the failure of such employé to do the act, and actually goes on with his work, relying upon the performance of the act by his fellow servant, and by reason of the negligence of the employé relied upon injury follows, the risk of such negligence on the part of the fellow servant is assumed by the injured man.

In Illinois Central Railroad Co. v. Skaggs, 240 U. S. 66, 36 Sup. Ct. 249, 60 L. Ed. 528, upon a writ of error to review a judgment recovered under the federal Employers' Liability Act, it was argued that the railroad company could not be negligent to an employé whose failure of duty and neglect produced the dangerous condition. The court took it for granted that under the statute recovery by an employé for the consequences of actions exclusively his own could not be had. In qualifying the assumption, the court said in effect that where the injury to the employé does not result in whole or in part from the negligence of any of the agents or employés of the employing carrier, or by reason of any defect or insufficiency, due to its negligence, in its property or equipment, action would not lie. "But," continued the court, "on the other hand, it cannot be said that there can be no recovery simply because the injured employé participated in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and, if the injury to one employé resulted in whole or in part from the negligence of any of its other employés, it is liable under the express terms of the act; that is, the statute abolished the fellow-servant rule. If the injury was due to the neglect of a coemployé in the performance of his duty, that neglect must be attributed to the employer; and, if the injured employé was himself guilty of negligence contributing to the injury, the statute expressly provides that it shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé." This decision we believe to be applicable to the facts in the case before us. Brown, pursuing the usual practice at Yermo, may have participated in the act of failing to put up the flag; but Ables' failure was, in large part, the direct cause of the damage. Brown relied upon Ables, and in reliance upon him went on to perform his duty. By the express terms of the statute the negligence of Ables may be attributed to the carrier.

We find no error in the record, and affirm the judgment.

Affirmed.

BUESSEL v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 178.

1. CRIMINAL LAW ⚷1134(7)—REVIEW—APPELLATE PROCEDURE—USE OF WRONG REMEDY.
   Act Sept. 6, 1916, § 4 (Comp. St. § 1649a), providing that no reviewing court shall dismiss an appeal solely because a writ of error should have been sued out, but that "when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed," does not authorize an appellate court, where a criminal case has been brought up by appeal, to exercise the same comprehensive powers of review which it is entitled to exercise when an appeal is rightfully taken, and review both the law and facts.
2. CRIMINAL LAW ⚷1090(1)—APPELLATE PROCEEDINGS—BILLS OF EXCEPTIONS.
   A statute which authorizes a writ of error to be sued out thereby allows a bill of exceptions to be signed and used in connection therewith, for it is only through such bill that the rulings of the judge made at the trial become a part of the record to be reviewed.
3. CRIMINAL LAW ⚷1090(19)—APPELLATE PROCEEDINGS—RECORD.
   Where there has been an actual trial, the parties are not at liberty to substitute a written stipulation or agreed statement of facts as to what occurred at the trial in lieu of the bill of exceptions required.
4. CRIMINAL LAW ⚷1090(8, 14)—APPELLATE PROCEEDINGS—RECORD.
   The general rule has been that in actions at law evidence introduced or offered and rejected at the trial, and rulings thereon, can be brought before the appellate court only by bill of exceptions, and unless a statute otherwise provided such bill has been necessary to bring into the record for review the instructions and requests to charge; and such rules apply to criminal as well as to civil cases.
5. CRIMINAL LAW ⚷1091(10)—APPELLATE PROCEEDINGS—REVIEW.
   The rule has been elementary, and applicable in criminal proceedings as well as in civil, that a ruling of the trial court upon the admission of evidence will not be reviewed in the appellate court, unless the bill of exceptions shows that an exception was taken thereto.
6. COURTS ⚷356—FEDERAL COURTS—CONFORMITY STATUTE.
   The Conformity Statute (Comp. St. § 1537) has no application to bills of exceptions, or to the mode of reviewing a decision once made in a federal district court.
7. CRIMINAL LAW ⚷1090(2)—APPELLATE PROCEEDINGS—RECORD.
   Judicial Code, § 269, as amended by Act Feb. 26, 1919, requiring appellate courts to "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," does not dispense with the necessity of a bill of exceptions to bring into the record matters which would not otherwise be a part thereof; but the record to which the act refers is that which is legally the record.
8. CRIMINAL LAW ⚷1090(5)—APPELLATE PROCEEDINGS—RECORD.
   A demurrer to an indictment is a part of the record proper, and is not dependent on a bill of exceptions.
9. CRIMINAL LAW ⚷984—SENTENCE ON DIFFERENT COUNTS.
   Unless a court, imposing sentence under each of several counts in an indictment, otherwise directs, the sentences under all run concurrently, and the fact that one count is defective does not entitle defendant to release from imprisonment.

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

10. INDICTMENT AND INFORMATION ⇨203—VERDICT ON GOOD AND BAD COUNTS.
Where an indictment contains good and bad counts, a general verdict of guilty will be referred to the good counts, if sustained by the evidence, and the judgment will be affirmed.

11. COURTS ⇨356—APPEALS IN EQUITY—RECORD OF EVIDENCE.
Under equity rule 75b (198 Fed. xl, 115 C. C. A. xl), until the statement of the evidence in an equity case has been approved by the trial court or judge, it is not a part of the record for purposes of appeal.

12. CRIMINAL LAW ⇨1090(1)—"BILL OF EXCEPTIONS"—DEFINITION.
"A bill of exceptions" is a formal statement in writing of the exceptions duly taken at the trial to the decisions and instructions of the judge, with as much of the testimony as is necessary to enable the court to say whether error at law was committed in respect to the particular decisions or instructions as to which the exceptions were taken.

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

Ward, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Connecticut.

Criminal prosecution by the United States against Theodore Buessel. Judgment of conviction, and defendant brings error. Affirmed.

Joseph P. Tuttle, of Hartford, Conn., for plaintiff in error.

John F. Crosby, U. S. Atty., and George H. Cohen, Sp. Asst. U. S. Atty., both of Hartford, Conn.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. This is an indictment under Espionage Act June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 219, as amended by Act May 16, 1918, c. 75, § 1, 40 Stat. 553 (Comp. St. 1918, § 10212c). The indictment upon which the defendant was originally placed on trial contained a number of counts, but all except the third, fourth, and seventh were withdrawn from the consideration of the jury.

The third count alleges that the defendant, when the United States was at war, uttered disloyal and abusive language about the form of government, and did by word support and favor the cause of Germany, and by word oppose the cause of the United States therein. It alleges in particular the following language:

"That the present war in which the United States is engaged is nothing but a Wall Street affair; that Germany is the most wonderful country in the world, and it could never be crushed by any other nations; that the war would last four or five years more, as the Germans were a marvelous people and the other nations could never cope with them; that Germany could easily crush the Allies, because the Germans worked under one general, Hindenburg, and the Allies were deficient in maneuvers, and the United States would have to fight the battle alone; that it was unreasonable and unjust for the United States to have gone into the present war; that in Germany, public affairs like the army and navy were run by men, but in this country they were run by women, Mrs. Wilson, for example; that the material written in the newspapers is ridiculous, that the Kaiser is not pictured as he truly is, that he is a wonderfully clever man, good and just, well versed in all the arts, and that he would be a wonderful man, even if he were not the Kaiser; that he was very indignant when asked to subscribe to the Red Cross, that he did not believe in it, and that those collecting for it received a commission; that

Japan and Mexico would soon be in this war against this country; that the schools in this country were failures."

The fourth count alleges that the defendant uttered—

"disloyal, scurrilous and abusive language about the military and naval forces of the United States, and language intended to bring the military and naval forces of the United States into contempt, scorn, contumely, and disrepute, and in particular, the following language, to wit: That the army of the United States is not loyal, and that almost any of our soldiers could be bought for a very small sum; but that the army of the Kaiser was absolutely loyal, and that the men over there would give their lives if necessary in response to the Kaiser's wish, but that no dependence could be placed on the American soldier."

The seventh count alleges that the defendant uttered—

"disloyal and abusive language about the flag of the United States, and language intended to bring the flag of the United States into contempt, scorn, contumely, and disrepute, and in particular, the following language, to wit (speaking to a person wearing a flag pin and referring to the flag pin): 'Remove that thing from your coat. I do not like it.'"

That portion of the Espionage Act which is involved in this case reads as follows:

"Whoever, when the United States is at war, shall willfully utter, print, write or publish any disloyal, profane, scurrilous or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, * * * or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the army or navy of the United States into contempt, scorn, contumely or disrepute, or shall willfully utter, print, write or publish any language intended to incite, provoke or encourage resistance to the United States or to promote the cause of its enemies, * * * and whoever shall by word or act support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the United States therein, shall be punished," etc.

It is assigned for error that a demurrer to the third count of the indictment was overruled. There are assignments of error in reference to the admission of evidence, sometimes with no exception taken thereto. There are assignments of error for refusals to charge as requested, although in each instance no exception was taken. There are assignments of error as to the charge itself, one of them covering nearly a whole page of the printed transcript; but no exceptions were taken at the time to any portion of the charge as delivered. And in examining what purports to be the transcript of record we find it contains no bill of exceptions and no certificate of any kind from the judge as to the correctness of anything contained in the transcript relating to the proceeding at the trial.

[1] This being a criminal case and tried in a common-law court, the method by which to review it is by writ of error. It has, however, been brought into this court on appeal; the defendant in his petition for appeal praying that "a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated," be sent to this court. What purports to be a transcript of the record is here; whether it is duly authenticated and can be considered is a

question which the court must decide. A writ of error is of common-law origin, and it was used to review simply alleged errors of law, committed in a common-law action. In such actions there were no errors of facts to be reviewed, as the juries were sole judges of the facts. An appeal, on the other hand, is a process of civil-law origin, and was employed to review errors of fact and of law committed by courts of equity or admiralty and maritime jurisdiction, in which the judges passed on the facts as well as the law. The distinction between the common-law jurisdiction and the equity jurisdiction is maintained in the courts of the United States, and until Congress passed Act Sept. 6, 1916, c. 448, § 4, 39 Stat. 727, if an appeal was taken in a common-law action or a writ of error in an equity suit the appellate court could not have considered it. But the act referred to, which can be found in the margin,[1] provides that an appeal shall not be dismissed solely because a writ of error should have been sued out. U. S. Compiled St. (1916) Ann. vol. 3, § 1649a, p. 3275.

Whatever the exact meaning of the above act may be, it certainly does not mean that the appellate court shall have the right, where a criminal case is brought up on an appeal, to exercise the same comprehensive powers of review which it is entitled to exercise where an appeal is rightfully taken. To hold that such was the intention would be to make the act unconstitutional, as it would make the court the final judge of the facts as well as of the law in a class of cases where there is a constitutional right to a trial by jury, whose verdict is decisive as to the facts. A possible construction may be that we are simply to regard the appeal as though a writ of error had been sued for and granted, and that we should in all other respects proceed accordingly, so that the record should be required to be certified to the court in the same manner that would be required if a writ of error, instead of an appeal, had been sued out. Another possible construction may be that the statute is not to be so narrowly construed, but, being remedial in its nature, is to be understood as meaning that if an appeal has been taken, and the record has come up, not as it would be required to come up on a writ of error, but as it would come up on an appeal, the appellate court is then to proceed in the same manner as though the case was before the court on a writ of error and a record certified as required in common-law actions. We do not decide which of these two constructions is to be given to the act. In the view we take of this case it is unimportant which construction is correct. We should reach the same conclusion under either, so far as the questions here involved are concerned; for, whether the record be regarded as a record at law or a record in chancery, it is so defective in either case that this court cannot consider it, even under the act of 1916, whatever construction be given to the act.

We shall consider the case now upon the theory that under the

[1] "No court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

act the record should come into this court in the manner it would have been required to come under a writ of error; and, as we shall see, a writ of error implies a bill of exceptions, where certain erroneous rulings are to be reviewed, and the record is here, as already stated, without a bill of exceptions.

[12] We shall first consider the necessity of a bill of exceptions, and the effect of its omission. A bill of exceptions is a formal statement in writing of the exceptions duly taken at the trial to the decisions and instructions of the judge, with so much of the testimony as is necessary to enable the court to say whether error of law was committed in respect to the particular decisions or instructions to which the exceptions were taken.

Prior to the statute of Westminster (13 Edw. I, c. 31), the only errors reviewable at common law on a writ of error were those disclosed on the face of the record; and according to the English common law the "record" consisted of the pleadings, process, verdict, and judgment. But by the statute mentioned, enacted in 1385, provision was made for a bill of exceptions by which erroneous rulings might be brought before the appellate tribunal. The provisions of that statute may be found in the margin.[2]

In 3 Wharton's Criminal Procedure (10th Ed.) § 1705, that writer declares that, so far as concerns criminal cases at common law, it has always been held in this country that bills of exceptions do not lie. He adds that in England a bill of exceptions has never been allowed at common law in cases of felony and treason. And in section 1712 he states that in most jurisdictions bills of exceptions in criminal prosecutions are now allowed by statutes of comparatively recent adoption. As the case under consideration is not civil, but criminal, how is it, then, that a bill of exceptions is necessary to raise the questions counsel ask the court to review?

The Judiciary Act of 1793 limited the appellate jurisdiction of the Supreme Court to civil cases, and until 1879 no revisory jurisdiction over the District Courts in criminal cases was given to the Circuit Courts. But the act of 1879 (Act March 3, 1879, c. 176, 20 Stat. 354), gave authority to sue out a writ of error to revise a criminal trial in the District Courts in cases where the sentence imposed was imprisonment or fine exceeding $300 in amount. And the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087, 1133), now in force, in section 128 confers on the Circuit Courts of Appeals appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts

[2] "When one that is unpleaded before any of the Justices doth allege an Exception, praying that the Justices will allow it, which if they will not allow, if he that alleged the Exception do write the same Exception, and require that the Justices will put to their Seals for a Witness the Justices shall so do; and if one will not, another of the Company shall. (2) And if the King, upon Complaint made of the Justices, cause the Record to come before him, and the same Exception be not found in the Roll, and the Plaintiff shew the Exception written, with the Seal of a Justice put to, the Justice shall be commanded that he appear at a certain Day, whether to confess or deny his Seal. (3) And if the Justice cannot deny his Seal, they shall proceed to Judgment according to the same Exception, as it ought to be alleged or disallowed." Statutes at Large, vol. I, p. 99.

in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court unless otherwise provided by law. In granting that authority to the Circuit Courts of Appeals, the Code makes no distinction between decisions in civil and in criminal cases. U. S. Comp. St. (1916) Ann. vol. 2, § 1120, p. 1389. And as a judgment in an action at law was reviewable only on writ of error, it was by means of that writ that a judgment of conviction in a criminal case was to be reviewed in this court. That writ commands the trial judge to send the record and proceedings to this court, in order that it may be inspected, to find whether any error of law has been committed, and, if it has, that this court may cause further to be done therein to correct that error. Then the statute requires that there shall be returned with the writ of error, at the day and place therein mentioned, "an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party." U. S. Compiled Statutes (1916) vol. 3, § 1653, p. 3280. But when Congress authorized the proceedings in a criminal case to be reviewed upon a writ of error, it thereby sanctioned the use of a bill of exceptions; for the writ of error brings up the "record," and the bill of exceptions is the method by which the proceedings at the trial, which otherwise would not be in the record, are made a part of it and so reviewed.

[2] A statute which authorizes a writ of error to be sued out thereby allows a bill of exceptions to be signed and used in connection therewith, for it is only through it that the erroneous rulings of the judge made at the trial upon points of law become a part of the record to be reviewed. While no act of Congress in express terms authorized the judges to sign bills of exceptions in civil or criminal cases, Congress recognized the use of such bills by providing how they are to be authenticated by the judges. U. S. Comp. St. (1916) Ann. § 1590, p. 3168. And in 1914, in providing for a review of a conviction in cases of criminal contempt, it expressly authorized the evidence in such cases to be preserved by bill of exceptions, and authorized a review of the judgment "upon writ of error in all respects as now provided." U. S. Comp. St. (1916) Ann. vol. 2, § 1245c. We know of no other express reference to a bill of exceptions in the acts of Congress.

The clerk of the court below has certified that the transcript is "a correct and complete transcript of the record." But matters which are no part of the record proper were only made a part thereof by the judge, and the inclusion of such matters into the record by the clerk of the court and his certification of the record did not authenticate them or authorize their review by the appellate tribunal. Galvey v. Baker, 5 Cl. & F. 157; Steffy v. People, 130 Ill. 98, 22 N. E. 861; Lewis v. Godman, 129 Ind. 359, 27 N. E. 563; Thompson v. Lyon, 14 Cal. 39; Whitfield v. Westbrook, 40 Miss. 311. In Lessor of Fisher v. Cockerell, 5 Pet. 248, 254, 8 L. Ed. 114 (1831), Chief Justice Marshall, speaking of the rule common to all courts exercising appellate jurisdiction, according to the course of the common law, said:

"The appellate court cannot know what evidence was given to the jury, unless it be spread on the record in proper legal manner. The unauthorized cer-

tificate of the clerk that any document was read, or any evidence given, to the jury, cannot make that document or that evidence a part of the record, so as to bring it to the cognizance of this court."

The transcript contains what the parties call a "Stipulation re Contents of Record," in which it is stipulated that in connection with the "appeal" to this court the record shall contain certain counts of the indictment, the demurrer to the third count, the testimony of the witnesses, certain exhibits and motions, the requests to charge, and the assignments of errors. It is to be observed of this stipulation that the parties have simply stipulated that the record shall contain certain matter, as, for example, "the testimony of the following witnesses." It is not even a stipulation that the testimony and rulings which appear in the transcript are correct. But, irrespective of the character of the particular stipulation, it must be said that a stipulation does not make the matter so stipulated a part of the record. It cannot be regarded as "an agreed statement of facts."

The Supreme Court has said that a writ of error may bring up "an agreed statement of facts," without a bill of exceptions. But that is where the parties after issue joined agree upon the facts and submit the statement to the trial court in the form of a special case for its judgment without proceeding to trial. Where this was done, it was the rule in England that there could be no writ of error, as an agreed case never was a part of the record, so that there was nothing upon the record upon which an appellate tribunal could act. Mr. Justice Blackstone in his Commentaries (volume 3, p. 378), in speaking of this, said:

"Nothing appears upon the record, but the general verdict; whereby the parties are precluded from the benefit of a writ of error."

This matter was referred to at some length in United States v. Eliason, 16 Pet. 291, 299, 300, 10 L. Ed. 968, and the court declared that in the United States a writ of error could be brought upon an agreed case, it being authorized by the long-established practice of this country. But clearly the stipulation of counsel which is contained in the record of this case bears no resemblance to "an agreed statement of facts," within the doctrine stated in United States v. Eliason, supra.

[3] And where there has been an actual trial the general rule seems to have been that the parties were not at liberty to substitute a written stipulation or agreed statement of facts as to what occurred at the trial in lieu of the bill of exceptions required. Wessels v. Beeman, 66 Mich. 343, 33 N. W. 510; Pearce v. Clements, 73 Ala. 257; State v. Weiskittle, 61 Md. 48; Richardson v. State, 28 Fla. 350, 9 South. 704; Herbison v. Taylor, 29 Neb. 217, 45 N. W. 626. In Houlehan v. Rassler, 73 Wis. 559, 41 N. W. 720, it was held that papers may form a bill of exceptions by stipulation of attorneys when ordered by the court to be made part of the record.

In Inglee v. Coolidge, 2 Wheat. 363, 4 L. Ed. 261, decided 100 years ago, there was no bill of exceptions, but the transcript contained the trial judge's report of the evidence. Mr. Webster argued that it

could not be considered any part of the record, and that the matter objected to should have been put on the record by a bill of exceptions, and, that not having been done, the writ should be dismissed. That course was pursued, and Mr. Justice Story stated that all the Justices were unanimously of the opinion that the report of the judge could not be considered as a part of the record.

In Suydam v. Williamson, 20 How. 427, 437, 15 L. Ed. 978 (1857), the transcript contained what purported to be all the evidence introduced at the trial, that given on behalf of the defendant and that given on behalf of the plaintiffs, and certain offers of proof on the part of the plaintiffs which were objected to by the defendant and excluded by the court. This mass of evidence filled 60 pages of the transcript. It was in the form of a report by the judge who tried the case. It was signed by him and under his seal. But the court declined to consider it, because it was not a bill of exceptions. And the court declared:

"And we also say that this court cannot so far depart from the settled practice and regular course of proceeding as to give an effect to the paper which neither its contents nor terms would warrant."

There are other cases decided by the same court to the same effect and cited in the opinion.

[4] The general rule has been that in actions at law evidence introduced, or offered and rejected, at the trial, and rulings thereon, can be brought before the appellate court only by a bill of exceptions. In Porto Rico v. Emmanuel, 235 U. S. 251, 255, 35 Sup. Ct. 33, 35 (59 L. Ed. 215), the court declared that:

"In the absence of a bill of exceptions, questions respecting the admissibility of evidence are of course excluded from our consideration, and the review is confined to what appears upon the face of the pleadings and the findings. Rosaly v. Graham, 227 U. S. 584, 590 [33 Sup. Ct. 333, 57 L. Ed. 655], and cases cited."

And see England v. Gebhardt, 112 U. S. 502, 505, 5 Sup. Ct. 287, 28 L. Ed. 811; Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608; Berly v. Taylor, 5 Hill (N. Y.) 579; Litsey v. Moffett, 29 Kan. 507; Lee v. Mound Station, 118 Ill. 304, 8 N. E. 759; Waddell v. Cunningham, 27 Fla. 477, 8 South. 643; Joiner v. Van Alstyne, 20 Neb. 578, 30 N. W. 944.

Unless a statute otherwise provided, a bill of exceptions has been the sole mode by which instructions and requests to charge could be brought into the appellate court for review. In Stanton v. Embry, 93 U. S. 548, 555, 23 L. Ed. 983, the court said that unless the exceptions to the rulings of the court in the progress of the trial, or to the instructions given to the jury are signed by the judge, or sealed with his seal, it is not a bill of exceptions within the meaning of the statute authorizing such proceeding, nor does it become a part of the record. The seal of the judge is no longer required, but his signature or that of another judge of the court is all that is required in accordance with the statute. U. S. Compiled Statutes (1916) Ann. vol. 3, § 1590. In Storm v. United States, 94 U. S. 76, 24 L. Ed. 42, the court declared that the instructions given by the court to the jury are no part of the record, unless made so by a proper bill of excep-

tions. And see Struthers v. Drexel, 122 U. S. 487, 491, 7 Sup. Ct. 1293, 30 L. Ed. 1216; Anderson v. Fitzgerald, 4 H. L. Cas. 484; Wagar v. Peak, 22 Mich. 368; Toledo v. Preston, 50 Ohio St. 361, 34 N. E. 353; Collins v. Breen, 75 Wis. 606, 44 N. W. 769; Forest v. Crenshaw, 81 Ky. 51.

[5] The rule has been elementary, and applicable in criminal proceedings as well as in civil, that a ruling of the trial court upon the admissibility of evidence will not be reviewed in the appellate court, unless the bill of exceptions shows that an exception was taken after the objection was overruled. Commonwealth v. Foster, 182 Mass. 276, 65 N. E. 391; People v. Murphy, 135 N. Y. 450, 32 N. E. 138; Bond v. State, 103 Ala. 90, 15 South. 893; Hunt v. State, 116 Ga. 615, 42 S. E. 1004; Moeck v. People, 100 Ill. 242, 39 Am. Rep. 38; State v. Lynn, 169 Mo. 664, 70 S. W. 127; Commonwealth v. McGowan, 189 Pa. 641, 42 Atl. 365, 69 Am. St. Rep. 836; People v. Miller, 122 Cal. 84, 54 Pac. 523; Kearney v. State, 46 Md. 422; State v. Powers, 72 Vt. 168, 47 Atl. 830; Post v. Hartford St. Railway, 72 Conn. 362, 44 Atl. 547. In Michigan Insurance Bank v. Eldred, 143 U. S. 293, 298, 12 Sup. Ct. 450, 36 L. Ed. 162, Mr. Justice Gray stated the rule and declared that by the uniform course of decision no exceptions to rulings could be considered, unless they were taken at the trial and were also embodied in a formal bill of exceptions. And in United States v. United States Fidelity Co., 236 U. S. 512, 529, 35 Sup. Ct. 298, 59 L. Ed. 696, the court pointed out that the essential function of an exception was to direct the mind of the trial judge to the precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling, if convinced of error, so that mistrials due to inadvertent errors may be obviated. The court held, therefore, that an exception furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court.

[6] And the courts of the United States have applied the rule, even if the courts of the state within which they were sitting did not; for it is well settled that the rules and practice which prevail in the state courts do not apply to proceedings in the federal court. The act of Congress (section 1537, vol. 3, U. S. Compiled Statutes 1916 Ann.), directing that the practice, pleadings, and forms and modes of proceeding in the District Courts should conform to the practice, pleadings, and forms and modes of proceeding in the courts of the state has no application to bills of exceptions, or to the mode of reviewing a decision once made in the District Court. Chateaugay Iron Co.,Petitioner, 128 U. S. 544, 553, 9 Sup. Ct. 150, 32 L. Ed. 508; N. Y. & N. E. R. Co. v. Hyde, 56 Fed. 188, 5 C. C. A. 461.

In most jurisdictions it is the rule that the appellate court does not review, even in a criminal case, an erroneous instruction or an erroneous refusal to charge, unless the same was excepted to at the trial. People v. Burt, 170 N. Y. 560, 62 N. E. 1099; Knoll v. State, 55 Wis. 249, 12 N. W. 369, 42 Am. Rep. 704; Steffy v. People, 130 Ill. 98, 22 N. E. 861; Bush v. State, 47 Neb. 642, 66 N. W. 638; Barnes v. State, 113 Ga. 189, 38 S. E. 396; State v. Williams, 115 Iowa, 97, 88 N. W.

194; State v. Vinso, 171 Mo. 576, 71 S. W. 1034. The rule has been applied in the federal as well as in the state courts. Myers v. Pittsburgh Coal Co., 233 U. S. 184, 195, 34 Sup. Ct. 559, 58 L. Ed. 906; Humes v. United States, 170 U. S. 210, 212, 18 Sup. Ct. 602, 42 L. Ed. 1011; St. Clair v. United States, 154 U. S. 134, 153, 14 Sup. Ct. 1002, 38 L. Ed. 936; Tucker v. United States, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112.

Motions made during the progress of a cause and the rulings of the court granting or denying them could be brought before the appellate court only by a bill of exceptions. Wiggins v. Witherington, 96 Ala. 535, 11 South. 539; White v. Douglas, 51 Kan. 402, 32 Pac. 1092; Fleming v. Bainbridge, 84 Ga. 622, 10 S. E. 1098; Richardson v. Eureka, 92 Cal. 64, 28 Pac. 102; Burns v. People, 126 Ill. 284, 18 N. E. 550.

From what has been said it is evident that, unless the established rules of law have been changed by recent legislation, this court is not at liberty to review the evidence, to see whether any testimony has been erroneously admitted, or whether there were errors in the charge as actually given, or whether any requests to charge were improperly refused. In Struthers v. Drexel, supra, the Supreme Court declared that the matters not spread upon the record in legal manner are not in the record for any purpose; and it is also evident that, if the testimony and the charge and the requests to charge had been put into the record by a bill of exceptions, the court would still be powerless to review any ordinary errors therein for want of exceptions duly taken.

[7] But we find that Congress by an act approved on February 26, 1919 (40 Stat. 1181, c. 48), has amended section 269 of the Judicial Code by providing 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 becomes necessary therefore to consider to what extent this act has modified the principles above laid down. We are to examine "the entire record before the court." Now, we have seen that under the decisions of the Supreme Court the testimony and the charge and refusals of requests to charge are not in the record before the court, although they may be found in the transcript, unless they have been put into the record by a bill of exceptions. We are not prepared to say that it was the intention of the Congress, by the act recently passed, to make bills of exceptions no longer necessary, and that hereafter we are to hold that any matter found in the transcript is to be regarded as in the record, even though the trial judge has not examined and certified to its correctness by putting his signature to a bill of exceptions. We do not think that such could have been the intention. The "record" to which the act refers is that which is legally the record, and in examining that we are to disregard "technical errors, defects or exceptions which do not affect the substantial rights of the parties." But matters which could not have been regarded as in the record prior

to the passage of the act are not to be held to be in the record since the passage of the act. We are still unable to review the evidence, the charge, and the refusals to charge.

[8] The indictment, however, is properly in this court, as it is a part of the record, and needs no bill of exceptions to make it such. And no bill of exceptions is necessary to make the demurrer to the third count a part of the record proper. State v. Strong, 6 Iowa, 72; State v. Day, 52 Ind. 483; Ex parte Knight, 61 Ala. 482; 3 Encyc. Pleading & Practice, p. 407, note. We therefore set forth in the beginning of this opinion the counts upon which the defendant was tried, and the part of the Espionage Act for the violation of which the indictment was found. It seems to be conceded that the statute is constitutional, and indeed its constitutionality has been established by the Supreme Court. See Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566; and Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561. These cases were decided by that court on the day this case was argued, and they have not yet been officially reported; and the indictment is to be considered in the light of what the court declared in the Schenck Case. It there said:

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. * * * The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. * * * 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. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."

[9] Now, whether, in view of the above statement, the third count should be held good or bad, is under the circumstances not material to the disposition we must make of this case; for the fourth and seventh counts are good and sufficient and no demurrer was interposed as to them. The verdict of the jury is, like the indictment, a part of the record, and is not dependent on a bill of exceptions; and it appears that the jury found the defendant guilty upon all three counts. The judgment is in like manner a part of the record, but it has not been included in the transcript. As it does not affirmatively appear that the court, in imposing sentence, directed that the sentences were to run successively we need not assume that such a direction was given; and, if it was not given, the invalidity of the third count, if it be invalid, would not justify a reversal, for unless the court imposing sentence under each of several counts, does not direct that imprisonment under one count is not to run concurrently with imprisonment under the others, the punishments under all the counts are executed simultaneously, and the fact that one of the

counts is defective does not entitle the defendant to a release from imprisonment. Reg. v. King (1897) 18 Cox C. C. 447; In re Breton, 93 Me. 39, 44 Atl. 125, 74 Am. St. Rep. 335; In re Jackson, 3 MacArthur (D. C.) 24.

[10] We may point out, although the question is not directly involved in this case, that it is the law of the federal courts, as it is of state courts as well, that where an indictment contains good and bad counts, and a general verdict is returned, the verdict will be referred to the good counts, if sustained by the evidence, and the judgment of the court will be affirmed. Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; State v. Stebbins, 29 Conn. 463, 79 Am. Dec. 223; Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460; Mead v. State, 53 N. J. Law, 601, 23 Atl. 264; Commonwealth v. Howe, 13 Gray (Mass.) 26.

[11] We come now to consider whether a different conclusion would be reached if the act of 1916 should be construed as authorizing the appellate court to review the record in a criminal case which is brought here on appeal where the record comes up as it would come up in appeals in equity cases. A bill of exceptions, so necessary in common-law actions coming up on a writ of error, was unknown to equity. Chief Justice Taney said, in Ex parte Story, 12 Pet. 339, 9 L. Ed. 1108: "A bill of exceptions is altogether unknown in chancery practice." And in Johnson v. Harmon, 94 U. S. 371, 24 L. Ed. 271, Mr. Justice Bradley said: "A bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken, can only be used on a motion for a new trial made to said court." Watts v. Starke, 101 U. S. 247, 250, 25 L. Ed. 826.

The Supreme Court has the power to regulate the practice in suits in equity in the federal courts. This it has done by the equity rules promulgated on November 4, 1912.[3] The matter of the record on appeal is regulated by rule 75. And the record which we find in the transcript does not conform to the regulations there prescribed. It is provided in paragraph "b" of the rule referred to:

"That the evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decisions of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness."

None of the testimony in the record has been reduced to narrative form, but all of it appears in the exact words of the witnesses, and there is nothing to show that the court or judge directed that any portion of it should be in the exact words of the witnesses. The rule also provides that:

"If the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal."

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[3] 226 U. S. 629, 33 Sup. Ct. xix; 198 Fed. xix, 115 C. C. A. xix.

It is evident that it was not intended that the testimony should become a part of the record without the approval of the judge, and until it has been approved by him it is not a part of the record for the purposes of the appeal. And as the testimony in the transcript in this case is not there in conformity to rule 75 we cannot consider it.

Rule 77 authorizes questions presented by an appeal to be presented upon an agreed statement, when it can be done without an examination of all the pleadings and evidence. But this can only be done "with the approval of the District Court or the judge thereof." There is nothing of that sort in this record.

Rule 75 deals only with the testimony. It does not expressly refer to rulings made by the judge during the trial, either on motions or as to the admission of evidence, or refusals to charge or as to the charge as actually given. Prior to rule 75 testimony in an equity case had to be made in some way a part of the record. It did not become a part of the record simply because it had been given or received in the court below, even though it found its way into the transcript. That appears in Blease v. Garlington, 92 U. S. 1-7, 23 L. Ed. 521, where Chief Justice Waite, writing for the court, stated that it would not say that since the Revised Statutes the courts under the operation of the rule might not in their discretion in an equity suit permit the examination of witnesses orally in open court, adding that, if such practice is adopted in any case, the testimony presented in that form must be taken down, or its substance stated in writing, "and made a part of the record, or it will be entirely disregarded here on appeal." But there is nothing in the opinion which indicates how the testimony was to be made a part of the record.

The matter was considered at length in Southern Building & Loan Association v. Carey (C. C.) 117 Fed. 325 (1902). The court found it a perplexing subject. "How is that testimony to be taken," asks Judge Hammond, "and transmitted to the appellate court? Strange to say, I do not find that question answered by the cases or the books on practice or the rules, any more than the one we have in hand,[4] and the necessity for a rule governing the practice is apparent." Present rule 75 no doubt was intended to provide an answer to the question above asked.

In Street's Federal Equity Practice, vol. 2, § 1629, which was published prior to the adoption of the present rules, that writer says, in speaking of the testimony taken in open court, that "such testimony should be expressly incorporated in the record by an order of the court and sent up on appeal, in order that the action of the court in accepting or rejecting the testimony may be reviewed." It "should be certified by the court as a part of the record." Then in section 1630 he says that though, strictly speaking, the bill of exceptions in an equity case is unknown, he declares that an order of the court directing that the evidence should be made a part of the record, and directing it to be sent up on appeal, will have the effect of a bill of exceptions.

[4] The reference was to old equity rule 67 (149 U. S. 793, 13 Sup. Ct. iii), the last paragraph.

In Whitehouse's Equity Practice, vol. 1, § 514, the writer states that in preparing an equity case for an appellate court, after the evidence has been reduced to typewritten form, it "is approved by the chancellor or presiding justice, and the whole record thus made up from the pleadings and evidence is then certified by the clerk to be correct, and each printed copy by him as a true copy, and the record is transmitted to the clerk of the appellate court." He is not speaking specifically of the practice in the federal courts, but in the courts of the United States generally—state and federal. And we may add that we know of no way of getting into the record on an appeal the requests to charge a jury and the instructions to the jury, when those requests and instructions have not been certified by the judge.

From what has been said it sufficiently appears that, whatever construction is to be placed on the act of 1916, the record in this case is not sufficient to enable us to pass upon the admissibility of evidence, or the alleged errors in the instructions as given, or in the failure to instruct as requested.

We may add that, whatever may or may not have been the practice in this circuit prior to 1912 in the matter of preparing the record in an appeal, the subject is governed by rules 75, 76, and 77, as framed by the Supreme Court, and that there is no power in this court to exempt a particular case from their operation. The rules, having been promulgated under the authority of an act of Congress, have the authority of statutory regulation. Winter v. Ludlow, 104 Fed. Cas. No. 17,891.

In conclusion it may be said that under rule 8 of the Rules of the Supreme Court, promulgated by the court on December 22, 1911,[5] a bill of exceptions certified by the judge is no longer required, and that matters may get into the record by stipulation of counsel or the clerk's certificate. This seems to us an utterly erroneous view. That it is unsound conclusively appears from the decisions of the court made since the rules were promulgated. In People of Porto Rico v. Emmanuel, supra, decided in 1914, three years after the rules were promulgated, the court, as we have before pointed out, declared that in the absence of a bill of exceptions questions of the admissibility of evidence are excluded, and the review is confined to what appears upon the face of the pleadings and the findings. And in Cerecedo v. United States, 239 U. S. 1, 3, 36 Sup. Ct. 3, 4 (60 L. Ed. 113), decided on October 25, 1915, the court said:

"There is no bill of exceptions in the record, and nothing which enables us to lawfully ascertain the existence of the constitutional questions relied upon."

And after saying that because of the absence of the bill of exceptions there was nothing before the court it added:

"Even indulging, for the sake of the argument only, in the assumption of the correctness of the proposition urged that an extraordinary discretion might exist in some extreme case to supply the entire absence of a bill of exceptions, we see no ground whatever for the premise that this is a case of that character."

[5] 222 U. S. 669, 32 Sup. Ct. vi.

In view of these decisions it is idle to say that on a writ of error a bill of exceptions can be dispensed with since rule 8 was promulgated; and if it cannot be dispensed with it is as true now as it ever was that matters of evidence and requests to charge and the instructions do not get into the "record" without a bill of exceptions where there is a writ of error, and neither the act of 1916 nor the act of 1919 dispenses with the necessity of getting matters to be reviewed into the "record" by the action of the judge.

We may, however, say in passing that on the argument in this court great stress was laid on the admission in evidence of certain cards found in the defendant's room which had on their backs, in what was alleged to be defendant's handwriting, statements which disclosed a hostile or unfriendly feeling for the United States. The writing on one was:

"Wilson is the meanest coward that ever ran around on two legs. God's curse upon American—German-Americans, too."

That on the other was:

"Germany did not break her pledges. You have not won yet. One German is as good as 299 Americans. Americans have not got any blood; they are milk and water creatures."

While for reasons already stated we do not feel called upon to notice any alleged errors in the admission of evidence, we may concede that the reasons given for admitting the cards were erroneous. They could not properly be received, either on the question of credibility or for the purpose of showing that defendant made the statements the indictment charged him with having made. But in our opinion it is equally plain that the cards were admissible for the purpose of showing intent, or motive, which has been called the mother of intent; and, being admissible it is of no consequence that some other reason not tenable was assigned for the admission of the testimony at the time.

This court has recently had occasion to speak plainly concerning the record which has been presented here in two criminal cases brought up on writs of error. In one of them, Linn v. United States, 251 Fed. 476, 163 C. C. A. 470, there was no true bill of exceptions, although there was something which purported to be a bill and was settled and allowed by the District Judge as such. In the other, Fraina v. United States, 255 Fed. 28, — C. C. A. —, there was a transcript of the stenographer's minutes which the parties called a bill of exceptions, and this court condemned. And in the present case, which is wrongly brought here upon an appeal, we neither have a bill of exceptions nor anything else which we can legally notice, unless it be the sufficiency of one of the counts of the indictment. We feel obliged to call attention to this matter again, so that in subsequent cases in this court the rights of parties may not be prejudiced or lost by the failure to get before the court a record which at least raises the questions which it is desired to have decided.

Judgment affirmed.

WARD, Circuit Judge (dissenting). The construction of the Act of September 6, 1916, § 4 (Comp. St. § 1649a), is so important that I feel obliged to express an opinion about it. These provisions are as follows:

Act of 1916. "Sec. 4. No court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

This act is obviously remedial and entitled on familiar principles to a liberal construction. It may be construed as meaning merely that an appeal as a formal paper should be treated as if it were in the form of a writ of error, and that a writ of error as a formal paper should be treated as if it were in the form of an appeal; the wrong process in either case having been used. If so, the appellate court, where an appeal has been taken in an action at law, cannot consider exceptions taken at the trial, although the testimony and exceptions are brought before it in a manner proper for an appeal, because they are not brought up by a bill of exceptions and therefore would not be technically before the court in an action at law.

I am not clear whether the opinion of the court goes so far, and am assuming it to hold that the testimony and exceptions in this case were not before it, because the record had not been approved by the judge as required by Supreme Court equity rule 75(b). Before that rule was adopted it had never been the practice in equity to submit records to the trial judge for approval. This appears from the last rules of the Supreme Court promulgated at October term, 1911. 222 U. S. 669, 32 Sup. Ct. vi. Rule 8 (1) provides:

"1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

"In order to enable the clerk to perform such duty and for the purpose of reducing the size of transcripts of record in cases brought to this court by appeal or writ of error, by eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant or plaintiff in error or his attorney to file with the clerk of the lower court, together with proof or acknowledgment of service of a copy on the appellee or defendant in error, or his counsel, a præcipe which shall indicate the portions of the record to be incorporated into the transcript of the record on such appeal or writ of error. Should the appellee or defendant in error, or his counsel, desire additional portions of the record incorporated into the transcript of the record to be filed in this court, he shall file with the clerk of the lower court his præcipe also, within ten days thereafter (unless the time shall be enlarged by a judge of the lower court or by a justice of this court), indicating such additional portions of the record desired by him.

"The clerk of the lower court shall transmit to this court as the transcript of the record in the case only the portions of the record below designated by both parties as above provided.

"The parties or their counsel, however, may agree by written stipulation to be filed with the clerk of the lower court the portions of the record which shall constitute the transcript of record on appeal or writ of error, and the clerk in such case shall transmit only the papers designated in such stipulation.

"If this court shall find that portions of the record unnecessary to a proper

presentation of the case have been incorporated into the transcript by either party, the court may order that the whole or any part of the clerk's fee for supervising the printing and of the cost of printing the record be paid by the offending party."

It will be seen that there is no suggestion whatever of any approval of the record by the trial judge. On the contrary, it is to be made up by stipulation of the parties.

At October term, 1912 (226 U. S. 629, 33 Sup. Ct. xix; 198 Fed. xix, 115 C. C. A. xix), the new equity rules were promulgated. Rule 75 reads:

"In case of appeal:

"(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a præcipe which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his præcipe also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

"(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his præcipe under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

"(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph b of this rule and shall be covered by the directions which the court or judge may give on the subject."

Subdivisions (a) and (c), taken together, show that there need be no reference to the judge if the parties agree upon the general contents of the record. Subdivision (b), I think, comes into operation only if the parties cannot agree upon the manner in which the evidence has been condensed and the testimony reduced to narrative form. The purpose of both rules was to shorten the records and save expense in printing. The fact that the Supreme Court did not amend section 1 of rule 8 after new equity rule 75 had been adopted, and expressed no intention of changing the former practice in rule 75, convinces me that no change was intended. Thus both rules may be construed con-

sistently with each other. The practice in the Southern district of New York has been in accordance with this view. The attorneys in equity causes almost without exception agree in writing upon the contents of the record without submitting it to the judge for approval. If the court is right in saying that the testimony and exceptions are not brought before it without such approval, it follows that for years we have been deciding equity causes upon the law and facts, so far as they depend upon the testimony contained in the record, without there being any testimony legally before us. Needless to say that the subject is one for grave reflection.

The attorney's intention to raise the exception in the present case is clear, because he has laid the testimony and the exception before the court in a record containing the written stipulation of the attorneys which the clerk certifies the parties have agreed to be correct and complete. The record is good within the equity rules.

Likewise it may be noted in favor of the practice that in admiralty causes it has never been the practice to submit the record for allowance. Supreme Court rule in admiralty LII(3), 29 Sup. Ct. xlv, expressly provides that the clerk of the District Court shall omit from the record any pleading, testimony or exhibits the parties by written stipulation of their proctors agree to omit and our rule in admiralty IV (3), 29 Sup. Ct. xxxix, contains a similar provision.

The act of 1916 proceeds further to require us to "take the action which would be appropriate if the proper appellate procedure had been followed." I read this to mean that a party shall not suffer for any procedural mistake of his attorney, and that we shall treat the record on appeal, so far as questions of law are concerned, as if he had been aware that a bill of exceptions was necessary to preserve the exceptions taken at the trial and had sued out a writ of error accompanied by the usual bill of exceptions.

I fully recognize that a writ of error sued out in an action at law does not bring exceptions taken in the course of the trial before the court, unless it is accompanied by a bill of exceptions signed by the trial judge. I also admit that neither Supreme Court rule 8 nor the act of 1916 makes any change in the law in this respect. The act of 1916 covers, not cases of regular, but of erroneous, procedure, and the precise question we are to determine is whether, when an appeal has been duly perfected in an action at law, exceptions taken at the trial and appearing in the record are to be disregarded, because no bill of exceptions has been signed by the judge, as required in an action at law.

UNITED MINE WORKERS OF AMERICA et al. v. CORONADO COAL CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5154.

1. APPEAL AND ERROR ⟹1097(1)—REVIEW—SUBSEQUENT APPEALS—FORMER DECISION AS LAW OF CASE.
A question of law decided by an appellate court becomes the law of the case, and will not be reconsidered on a subsequent review.

2. COURTS ⟹343—JOINDER OF CAUSES OF ACTION—CONFORMITY STATUTE.
Where a state statute, as construed by its highest court, permits the joinder of plaintiffs or causes of action in an action at law, in the absence of federal legislation, such joinder may be made in a federal court in the state, under Conformity Act (Rev. St. § 914 [Comp. St. § 1537]).

3. ACTION ⟹50(3)—JOINDER OF CAUSES OF ACTION—ARKANSAS STATUTE.
Under the Arkansas Code of Practice, as construed by its Supreme Court, causes of action of different plaintiffs, arising out of the same torts, committed by the same persons, at the same time, and in pursuance of the same alleged conspiracy, may be joined in a single action.

4. APPEAL AND ERROR ⟹177—ESTOPPEL TO ALLEGE ERROR—FAILURE TO CLAIM RIGHTS AT TRIAL.
Where a number of causes of action against the same defendants are joined in an action, if defendants are thereby given additional rights, as a greater number of challenges to jurors, such a right must be claimed at the trial, to entitle them to insist upon it in the appellate court.

5. EVIDENCE ⟹368(1)—DOCUMENTARY EVIDENCE—COMPELLING PRODUCTION BY ADVERSE PARTY.
District Court has authority to require parties who are officers of an organization, as such officers, to produce books and records of the organization.

6. EVIDENCE ⟹373(2)—DOCUMENTARY EVIDENCE—AUTHENTICATION OF DOCUMENTS.
Records of a labor organization, containing printed reports of conferences between representatives of the organization and of employers, stenographically taken, and the correctness of which was testified to by officers of the organization and conferees, *held* sufficiently authenticated to be admissible in evidence.

7. CONSPIRACY ⟹19—ACTION FOR CONSPIRACY—EVIDENCE.
In an action by receivers of coal-mining companies against a miners' organization, its subsidiaries, and members to recover damages for destruction of property, alleged to have been pursuant to a conspiracy, records of the organization, containing reports of conferences with operators employing only union miners, in which the organization pledged itself to do all in its power to protect such operators from competition by nonunion mines, *held* relevant.

8. CONSPIRACY ⟹19—ACTION FOR CONSPIRACY—EVIDENCE.
In an action for conspiracy, the law permits great latitude in the introduction of evidence tending to establish the conspiracy, and connecting those advising, encouraging, aiding, abetting, and ratifying the overt acts committed for the purpose of carrying into effect the objects of the conspiracy.

9. ASSOCIATIONS ⟹19—CORPORATIONS ⟹423—TORTS BY MEMBERS—LIABILITY—ENCOURAGEMENT OR RATIFICATION.
Corporations or associations are liable for the torts of their members or employés, if encouraged in the commission of them, or if ratified thereafter.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Rehearing denied November 15, 1919.

10. CONSPIRACY ⚿19—ACTION FOR CONSPIRACY—EVIDENCE.
In a civil action for conspiracy to destroy property, indictments of some of defendants for destruction of the property and pleas of guilty are admissible against them as admissions, and against their codefendants shown to have approved and ratified their unlawful acts.

11. CONSPIRACY ⚿13—CIVIL LIABILITY—PERSONS LIABLE.
If unlawful acts were in pursuance of a conspiracy, and were committed before the conspiracy had been abandoned, or its object accomplished, all persons who were members of the conspiracy, or made themselves parties thereto at any time before it had been abandoned, or its object completed, are responsible.

12. CONSPIRACY ⚿19—ACTION FOR CONSPIRACY—EVIDENCE.
Correspondence between an arms company and officers of a labor organization, showing a purchase by the latter of arms and ammunition and their shipment to local unions, by whose striking members they were used in a battle resulting in the destruction of plaintiff's mines, was admissible against the organization, in an action against it and its members for conspiracy.

13. CONSPIRACY ⚿19—ACTION FOR CONSPIRACY—DAMAGES.
In an action for conspiracy to destroy plaintiff's mines, as a result of which and the unlawful acts of defendants pursuant thereto their leases were forfeited, evidence of the value of such leases was admissible on the question of damages.

14. DAMAGES ⚿20—TORTS—NATURAL AND PROXIMATE CONSEQUENCES.
All damages which are the natural and proximate results of a tort are recoverable.

15. CONSPIRACY ⚿21—ACTION FOR CONSPIRACY—SUFFICIENCY OF EVIDENCE—JURY QUESTION.
Evidence *held* sufficient to warrant submission to the jury of the question of conspiracy between the organization, United Mine Workers of America, and its subsidiary district and local unions and their members, to destroy plaintiffs' mine property, and to support a verdict finding such conspiracy, and that the destruction of the property was the result thereof.

16. APPEAL AND ERROR ⚿263(1)—REVIEW—INSTRUCTIONS.
An appellate court can review only that part of a charge to which exception was taken at the trial.

17. TRIAL ⚿193(1)—INSTRUCTIONS—OPINION OF JUDGE AS TO FACTS.
In the federal courts, the judge, in charging the jury, may, whenever he thinks it necessary to assist them in arriving at a just verdict, express his opinion upon the facts, where he also states that his opinion is not binding upon them, and that they are the exclusive judges of the facts.

18. APPEAL AND ERROR ⚿1070(1)—HARMLESS ERROR—VERDICT.
Where there were a number of plaintiffs in an action of tort, claiming damages in a gross sum, it is not prejudicial error that the jury returned a general verdict for plaintiffs, without apportioning the damages between them.

19. DAMAGES ⚿69—ACTIONS OF TORT—INTEREST.
In actions of tort the allowance of interest is discretionary with the jury, and the court may not allow interest where the jury has failed to do so.

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Arkansas; James D. Elliott, Judge.

Action by the Coronado Coal Company and others against the United Mine Workers of America and others. Judgment for plaintiffs,

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

and defendants bring error. Affirmed, conditional on remittitur by plaintiffs.

See, also, 235 Fed. 1, 148 C. C. A. 495.

This was an action by two receivers of nine corporations appointed by the court below in one proceeding in equity, in which these nine corporations were defendants. The basis of the action is to recover damages for the destruction of the property of these corporations in the possession of the receivers, they being engaged in mining, selling, and shipping coal from Sebastian county, Ark., 75 per cent. of which shipments were made to customers outside of the state of Arkansas, in the course of interstate trade and commerce. The complaint charges that the destruction of the property was by some of the defendants, and was committed in pursuance of a conspiracy and combination formed by all the defendants, in restraint of trade and commerce, among the several states, in violation of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. §§ 8820–8823, 8827–8830), the Sherman Anti-Trust Act, and amendments.

Among the defendants named are the United Mine Workers of America, District Union No. 21, and 28 local unions of the district union; the other defendants being officers of the head and district unions and members of the local unions. None of the unions are incorporated, but they are all voluntary associations of mine workers throughout the United States. The headquarters of the national organization of the defendant United Mine Workers of America are located in Indianapolis, in the state of Indiana. It is charged that the members of said association are subdivided into about 30 districts, and numerous local unions in each district. Each district union has jurisdiction of the local unions within its district, and the United Mine Workers over all. Other allegations as to the unions are set out in the opinion of this court in Dowd v. United Mine Workers of America, 235 Fed. 1, 2, 148 C. C. A. 495, when this case was before this court before, and it is therefore unnecessary to restate them. The present receivers are the successors of Dowd, who was the plaintiff when this action was instituted. There were three amended complaints filed, and later amendments to certain paragraphs of the last amended complaint.

After the demurrers to the third amended complaint, motion to quash service of process, and a motion to strike parts of the third amended complaint had been overruled, defendants filed their answers. They denied that the plaintiffs were engaged in interstate trade and commerce, and in effect denied all the material allegations of the complaint. Then they alleged that the United Mine Workers of America is a labor union composed of more than 400,000 working men in the United States, Canada, and Mexico, engaged in the digging of coal, organized in an unincorporated society; that it has no legal entity apart from its membership, is not engaged in business for profit, but has for its objects shorter working hours for its members, reasonable compensation for services rendered, and the betterment of general working conditions for its members, as shown by its constitution, a copy of which was filed; that no member or members, officer or officers, is authorized to act for, or in behalf of, or to represent, it beyond the scope, provisions, and terms of such constitution, and if any members of the organization committed the torts complained of, their acts were beyond the scope, provisions, and terms of the constitution, and therefore not binding upon the union.

There was a trial to a jury, and a verdict for the plaintiffs, on which judgment was entered for treble the amount of the verdict. Four days after the rendition of the verdict by the jury plaintiffs filed a motion to amend the judgment, by adding interest from the date of the destruction of the property to the date of entering the judgment, although the verdict made no allowance of interest. This motion was, by the court, several months later, sustained, and the judgment amended by adding treble the interest at the rate of 6 per cent.

Alton B. Parker, of New York City (Covington & Grant, of Ft. Smith, Ark., and Henry Warrum, of Indianapolis, Ind., on the brief), for plaintiffs in error.

Henry S. Drinker, Jr., of Philadelphia, Pa., and James B. McDonough, of Ft. Smith, Ark. (Roger B. Hull, of New York City, on the brief), for defendants in error.

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

TRIEBER, District Judge (after stating the facts as above). The record is very voluminous, covering over 3,400 printed pages. There are 184 assignments of error, but counsel in their briefs and oral arguments only insisted upon those hereinafter mentioned, and we will therefore confine this opinion to those assignments and in the order presented by counsel.

[1] 1. The defendants insist that it was error to hold the unions which were made defendants as entities, against which an action could be instituted, process had, and judgment recovered; they being unincorporated labor unions.

This question was determined by this court on the former hearing, sub nomine Dowd v. United Mine Workers of America, 235 Fed. 1, 148 C. C. A. 495, and it was there held that under the Sherman Anti-Trust Act these unincorporated unions may be sued by one injured in his business or property by reason of anything done which is forbidden by the Sherman Act. That decision is the law of the case, and cannot now be again reviewed. In re Sanford Fork & Tool Co., 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; National Bank of Commerce v. United States, 224 Fed. 679, 140 C. C. A. 219; Continental, etc., Bank v. North Platte Valley Irrigation District, 237 Fed. 188, 150 C. C. A. 334; Griggs v. Nadeau, 250 Fed. 781, 163 C. C. A. 113.

[2, 3] 2. It is next claimed that there was a misjoinder of plaintiffs and of their causes of action, and that the demurrer to the complaint on that ground should have been sustained.

In order to understand the issues involved in this motion, it is proper to state that the complaint alleges that the nine corporations, for which the plaintiffs as receivers sued, were under the control of the same persons, who owned all the shares of stock of all nine corporations and all were operated as one, eight of them being subsidiaries of the Bache-Denman Coal Company; that by reason of these facts, the destruction by the defendants of the property of said corporations, they sustained the losses jointly; that by reason of the unlawful acts of the defendants the plaintiffs were prevented from operating any of the mines, they being in close proximity in the Prairie Creek valley, in Sebastian county, Ark. It is further alleged that the receivers were appointed by the District Court by a single decree, in one action.

That under the Code of Practice of the state of Arkansas, in which state the wrongs were committed and this cause tried, it was proper to join all the plaintiffs' causes of action, all of them arising out of the same torts, committed by the same persons, at the same time, and in pursuance of the same alleged conspiracy, has been determined by the Supreme Court of the state ever since the enactment of Act May

11, 1905 (Laws Ark. 1905, p. 798). St. Louis, I. M. & S. Ry. Co. v. Broomfield, 83 Ark. 288, 104 S. W. 133; Southern Anthracite Coal Co. v. Bowen, 93 Ark. 140, 124 S. W. 1048; Hargis v. Lawrence, 136 Ark. 323, 204 S. W. 755. Under the Conformity Act of Congress (section 914, Rev. Stat. [Comp. St. § 1537]) the state practice controls proceedings at law in the national courts held in the state, in the absence of an act of Congress. Glenn v. Sumner, 132 U. S. 152, 156, 10 Sup. Ct. 41, 33 L. Ed. 301; Sawin v. Kenny, 93 U. S. 289, 23 L. Ed. 926; O'Connell v. Reed, 56 Fed. 531, 536, 5 C. C. A. 586; Rush v. Newman, 58 Fed. 158, 161, 7 C. C. A. 136.

In Kansas City Southern Ry. Co. v. Leslie, 238 U. S. 599, 603, 35 Sup. Ct. 844, 59 L. Ed. 1478, an action arising under the national Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657-8665]), the plaintiff joined two distinct and separate actions caused by the same act of negligence, one to recover damages for the benefit of the estate of the deceased, and the other for the pecuniary loss of the next of kin. There was a verdict in favor of the plaintiff for a lump sum on both causes of action, without any apportionment to the different beneficiaries. This was made one of the assignments of error. Notwithstanding that in Gulf, Colorado, etc., Ry. v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785, it had been held that "Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return"—the judgment entered on the verdict of the jury without apportionment was upheld, the court holding:

"As the challenged verdict seems in harmony with local practice and has been approved by the court below [referring to the Supreme Court of Arkansas], the judgment thereon is not open to attack here upon the ground specified."

[4] But it is contended that there is an act of Congress regulating the consolidation of causes (section 921, Rev. Stat. [Comp. St. § 1547]), and that in Mutual Life Insurance Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706, this has been construed adversely to the ruling of the court below. We do not so construe the opinion of the court. What the court decided was that—

"Where the English consolidation rule has not been adopted, the American courts, state and federal, have exercised the authority of ordering several actions by one plaintiff against different defendants to be tried together, whenever the defense is the same and unnecessary delay and expense will be thereby avoided."

The court then proceeded:

"But although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remain distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defense, whether by way of challenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately."

In the instant case there was no consolidation of actions, but assuming, without deciding, that the same rule applies to actions orig-

inally brought by several plaintiffs, or against several defendants, which could properly be consolidated under that section, objection can only be made if the parties are deprived of a right material to their defense, "whether by way of challenge of juror or of objection to evidence to which it would have been entitled if the causes had been tried separately." Of course, such rights can only be claimed at the trial of the cause, and not by demurrer to the complaint. There is no claim that the defendants were deprived of either of these rights at the trial. To entitle the defendants to insist in the appellate court that they were entitled to more than three peremptory challenges of jurors, that right must be claimed at the trial, and also that the parties complaining had exhausted their right of peremptory challenges. It was so held in Connecticut Mutual Life Insurance Co. v. Hillmon, 188 U. S. 208, 212, 23 Sup. Ct. 294, 47 L. Ed. 446, when the case, reported in 145 U. S. 285, 12 Sup Ct. 909, 36 L. Ed. 706, was for the second time before the Supreme Court. The record here shows that the defendants only challenged one juror peremptorily. It fails to show that they had made any claim to more than three challenges. How, then, can it be claimed that the court erred, when it was never called on to rule on the question, when the jury was selected, and the defendants were not prejudiced by having exhausted the three challenges?

[5] 3. It is claimed that the court erred in requiring the defendants to produce certain books, writings, and documents.

If the petitions for the books and documents had failed to specify what books and documents were wanted, or did not make a sufficient showing of their materiality, so that the object was merely an attempt to obtain information, it would have been error to grant the petitions. United States v. Terminal Railway Association (C. C.) 154 Fed. 268, 272, and authorities cited. But each of the petitions set out and described the documents wanted, and the reasons for their materiality. All except the first petition were against the defendants as officers of the organization, to produce books and documents in their possession as such officials, which it was alleged were records of their organization. The first petition included them as officers and individuals, but this petition was denied. Section 262, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162), which is a re-enactment of section 716, Rev. Stat. (Comp. St. § 1239), authorizes such an order. It was so held in American Lithographic Co. v. Werckmeister, 221 U. S. 603, 609, 31 Sup. Ct. 676, 55 L. Ed. 873. As the orders to produce them were limited to the parties as officials of the United Mine Workers of America, and not as individuals, the claim that the orders were in violation of the Fourth and Fifth Amendments to the Constitution must also fail. Hale v. Henkel, 201 U. S. 43, 69, 26 Sup. Ct. 370, 50 L. Ed. 652; Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558; Wheeler v. United States, 226 U. S. 478, 33 Sup. Ct. 158, 57 L. Ed. 309.

[6] 4. Did the court err in allowing the defendants in error to read in evidence extracts from the printed records of the joint conference proceedings, conferences between a large number of coal mine

operators, employing only union labor, and the officials of the United Mine Workers of America?

To determine this assignment of error it is necessary to refer to the allegations of the complaint. The complaint, except for some amendments, which are not of sufficient materiality to this issue to require that they be set forth, will be found in a note to the former opinion of this court in 235 Fed. 9, 148 C. C. A. 495.

The last amendment to paragraph 21 gives the names of 231 operators, who had entered into an agreement with the United Mine Workers of America to employ only union miners and conform to the rules of the unions. These were furnished by the plaintiffs in pursuance of an order of the court, made on motion of the defendants. That motion, among other requests, asked that plaintiffs "state the names of the persons acting or assuming to act for the operators, referred to in said paragraph and amendments thereto." The main objection to the introduction in evidence of these records was "that no proper foundation for their introduction had been laid." The testimony shows that the proceedings of these conferences were taken down stenographically, copies furnished to the United Mine Workers of America, and by it caused to be printed and kept in its archives under the control of its secretary. Before they were introduced in evidence, Mr. Green, the secretary of the United Mine Workers' organization, testified that the printed reports were "verbatim reports of the arguments, discussions, and propositions of what took place at these conferences, and that the association caused them to be printed, and the printed volumes produced were the ones that came back from the printer." A number of representatives of the operators, and several high officials of the United Mine Workers of America, also testified orally to what took place at these meetings, and all agreed with Mr. Green, the secretary, that these printed records were correct transcripts of the proceedings of the conferences. As the testimony of the officials of the miners' organization, as well as of the operators, who attended these conferences, verified the correctness of the printed records introduced, how can it be claimed that there was no foundation for the admission in evidence of these records? St. Louis & San Francisco R. R. v. Duke, 192 Fed. 306, 309, 112 C. C. A. 564; Portland Gold Mining Co. v. Flaherty, 111 Fed. 312, 49 C. C. A. 361; Wilhite v. Houston, 200 Fed. 390, 393, 118 C. C. A. 542. The objection to their introduction for want of a proper foundation is without merit.

[7] 5. Were they irrelevant?

The records establish that these conferences between the United Mine Workers and coal operators, who employed only union labor, were held for the purpose of protecting these operators against competition from nonunion or independent operators, who were able to produce coal cheaper, owing to the fact that they had the 10-hour workday, while in the mines operated by union labor the 8-hour workday was in force; that the independent operators were not subject to the strict regulations prescribed by the Mine Workers' union, nor did they pay as high wages to the miners. To protect these op-

erators, the records show, the United Mine Workers obligated themselves "to afford all possible protection to the trade and to the other parties hereto against any unfair competition, resulting from the failure to maintain scale rates." In order to accomplish this the organization pledged itself to attempt to "unionize" all coal mines, and thus, as stated by Mr. Lewis, its vice president—

"wipe out competition between us as miners—first, viewing it from our side of the question; next, for the purpose of wiping out competition as between the operators in these four states. When we have succeeded in that, and we have perfected an organization on both sides of the question, then, if I understand the real purpose of this movement, it is that we will jointly declare war on every man outside of this competitive field who will do anything in any way endangering the peace that exists between us. What is necessary to do this? Organize our forces in the competing fields, so far as the United Mine Workers are concerned. Go into these outside competing fields and tell your competitors that they have to join this movement, whether they like it or not, and give stability to the coal business of the United States."

In the 1902 joint conference, Mr. Robbins, speaking for the operators, complained of defendants, saying:

"Four years ago, in the city of Chicago, we agreed to be the advance guard on the question of an 8-hour day, with the distinct and absolute promise that unless our competitors were brought up to the same conditions that we would be put back where we were. And what is the result? None of our competitors have been brought up. In no place that we compete, that I know of, has the 8-hour day been established. We are competing constantly with operators that still have a 10-hour day. Their cost is proportionately less."

When the miners' convention met that year, the following resolution was adopted in order to carry out the pledges made to the operators:

Resolution 33: "Whereas, the miners of Virginia and Kentucky in the past have been a detriment to the organization in other states by their not being organized: therefore be it resolved, that our national organization shall use its power in all forms to bring these miners into the organization."

In the convention of the Mine Workers in 1904 the following resolution, introduced by a representative of a local union from district 21 (Arkansas, Oklahoma, and Texas) was adopted:

"Resolved, that in strict compliance with our obligations and teaching, we accord a hearty approval to our national board on its action in regard to district No. 15 strike, now on, in Colorado, and whatever action taken by the national that in their judgment is necessary to the successful ending, in the elevation of the craft in district No. 15, meets our entire approval, for which we pledge our unqualified support, as our knowledge of the field of Southern Colorado, in the event of an unsuccessful issue of the trouble now pending, would work almost unsurmountable and incalculable damage to district No. 21, as it would be an unjust competitor in the same commercial field, and could with very little effort undersell and supersede us in the Oklahoma and Southwestern Kansas markets."

Without setting out in full all the agreements between the miners and the union operators, and the resolutions of the miners at their conventions, for the purpose of carrying out these agreements, it clearly appears from these records that the United Mine Workers were pledged and determined to unionize all coal mines in the nonunion districts, for the purpose of protecting the operators in the district in which the mines had been unionized, in competitive mar-

kets in other states, and in order to appease these operators, who complained at every joint conference that they were unable to comply with their agreements with the organization and compete with the independent operators, unless they are unionized. The objection is without merit.

[8] 6. The objection to the introduction of the United Mine Workers' Journal is equally untenable. The secretary of the organization, testified that—

"It is the official publication of the organization, published by authority and under the supervision of the International Executive Board of the United Mine Workers of America; that its editor is appointed by the president of the International Union."

Therefore the editorials, which were published in almost every issue of the Journal, must be deemed the acts of the organization. They were clearly admissible. As the action is one for conspiracy, the law permits great latitude in the introduction of evidence tending to establish the conspiracy and connecting those advising, encouraging, aiding, abetting, and ratifying the overt acts committed for the purpose of carrying into effect the objects of the conspiracy.

The main issue in this cause, so far as the national organization and its officers were concerned, was whether the torts committed by some of the defendants were in pursuance of an unlawful conspiracy to compel the plaintiffs and other coal mine operators to unionize their mines, and were authorized, encouraged, advised, and, if not authorized, ratified by the national organization and its officers, after they had been committed. The court did not err in admitting these journals in evidence. Clune v. United States, 159 U. S. 590, 593, 16 Sup. Ct. 125, 40 L. Ed. 269; Hitchman Coal Co. v. Mitchell, 245 U. S. 229, 249, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; Louie v. United States, 218 Fed. 36, 41, 134 C. C. A. A. 58.

[9] That corporations, and this association must be treated as such in this action, are liable for the torts of their members or employés, when encouraged in the commission of them, or if ratified thereafter, is well settled. Philadelphia, etc., R. R. v. Quigley, 62 U. S. (21 How.) 202, 16 L. Ed. 73; Denver, etc., Ry. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146; Stewart v. Wright, 147 Fed. 321, 327, 77 C. C. A. 499. Nor does the doctrine of ultra vires apply. National Bank v. Graham, 100 U. S. 699, 25 L. Ed. 750; Chesapeake & Ohio Ry. v. Howard, 178 U. S. 153, 160, 20 Sup. Ct. 880, 44 L. Ed. 1015.

[10] 7. The admission in evidence of the indictment and pleas of guilty of some of the defendants, members of the local unions, for the destruction of this property, was clearly proper against those defendants, as admissions made by them, and if their unlawful acts were applauded and approved by their codefendants, after having encouraged them in their unlawful acts, such approval is a ratification of these unlawful acts, and makes them liable. Loewe v. Lawler, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; Allis Chalmers Co. v. Reliable Lodge (C. C.) 111 Fed. 267; Kroger Grocery & B. Co. v. Retail Clerks' I. & P. Ass'n (D. C.) 250 Fed. 890, 897; Alaska Steamship Co. v. International, etc., Association (D. C.) 236 Fed. 964.

[11] Whether the acts of those defendants amounted to a ratification was a question to be determined by the jury from the evidence, under proper instructions. If the unlawful acts were in pursuance of a conspiracy, and were committed before the unlawful conspiracy had been abandoned, or the object of the conspiracy completed, all persons who were members of the conspiracy or made themselves parties thereto at any time before the conspiracy had been abandoned, or its object completed, are responsible. Thomas v. United States, 156 Fed. 897, 910, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; Smith v. United States, 157 Fed. 721, 728, 85 C. C. A. 353; United States v. Babcock, 3 Dill. 581, 585, Fed. Cas. No. 14487; Goldfield Consolidated Mines Co. v. Goldfield Miners Union (C. C.) 159 Fed. 524. In Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 243, 38 Sup. Ct. 65, 70 (62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461), Mr. Justice Pitney, speaking for the court in relation to the acts of the head organization, its resolutions, contributions of money to the striking union men, the encouragement and approval of the destruction of property, said:

"The plain effect of this action was to approve a policy which, as applied to the concrete case, meant that, in order to relieve the union miners of Ohio, Indiana, and Illinois from the competition of the cheaper product of the non-union mines of West Virginia, the West Virginia mines should be 'organized' by means of strikes local to West Virginia, the strike benefits to be paid by assessments upon the union miners in the other states mentioned, while they remained at work."

8. What has been said heretofore as to the admissibility of the records of the joint conferences applies also to the records of the meetings of the Executive Board of the United Mine Workers of America.

[12] 9. The correspondence between the officials of the Remington Arms Company, showing the purchase of arms and ammunition and payment therefor, by the officers of the United Mine Workers of America, their shipment to Hartford, Ark., to the officers of the district and local unions, their distribution by them to the striking members, shortly before the battle which resulted finally in the destruction of plaintiffs' mines, and their use by them, was admissible as tending to show that the organization aided and encouraged the commission of the torts. But in no event could the admission be prejudicial to the defendants, for there was ample testimony showing that those who committed these wrongs were members of the union, armed with guns and ammunition, which were freely used on the occasions alleged in the complaint.

[13, 14] 10. Evidence of the value of the leases held by plaintiffs, and which, by reason of the unlawful acts of the defendants, are shown to have been forfeited, was clearly a part of the damage sustained, and admissible for the purpose of enabling the jury to determine the losses and damages of the plaintiffs. Section 7 of the Sherman Act (Comp. St. § 8829) provides for threefold damages sustained by reasons of violations of the provisions of that act. A lease may be as valuable as any other species of property, and they are sold and transferred for valuable considerations in the same manner as any other

species of property. It is almost an everyday occurrence that oil, coal, and other mining leases are sold for large sums of money. The court in its charge to the jury submitted that question fairly, and no exceptions were taken to that part of the charge. All damages which are the natural and proximate results of a tort are recoverable. United States v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; Howard v. Manufacturing Co., 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147; Farmers' Loan & Trust Co. v. Eaton, 114 Fed. 14, 17, 51 C. C. A. 640; City of Ironton v. Harrison Construction Co., 212 Fed. 353, 129 C. C. A. 29.

[15] 11. Did the court err in refusing to direct a verdict for the defendant, the United Mine Workers of America?

It is contended that the evidence fails to establish a conspiracy in violation of the Sherman Act, which is the gist of the action, and therefore it is claimed there can be no recovery in this action. A great deal of the testimony, relating to the organization of the Mine Workers, their acts to accomplish the object of absolute control of all coal mines, is almost identical with that set out in the opinion of the District Judge in Hitchman Coal & Coke Co. v. Mitchell, 202 Fed. 512, to which reference is made, in order to shorten this opinion.

The evidence, to our minds, as it was in the opinion of the learned trial judge and the jury, established the conspiracy practically beyond question. It is much stronger than that in the Hitchman Coal & Coke Co. Case. To review it fully, covering as it does over 3,000 pages of the printed record, would only tend to prolong this opinion, and serve no useful purpose. The law requires that, in order to entitle defendants to such a direction, the court must give the evidence the strongest probative effect, and view it in the light most favorable to the plaintiffs, and, if there is any substantial evidence to sustain the allegations in the complaint, a peremptory instruction must be refused. This is too well settled to require the citation of authorities. A careful reading of the evidence satisfies that it fully sustains the conclusions of the learned trial judge on these motions. There was substantial evidence to warrant a finding of the following facts:

That there was concerted action on the part of the union miners of district No. 21, with the union miners of the entire national organization and the heads of that organization, tending to demonstrate the idea and motive entertained by the entire organization, and all the members of it, that it was necessary, in order to protect the union workers in the fields already unionized, to unionize the nonunion fields, as well as to hold all those which were already unionized.

To attain the objects of the United Mine Workers, to control the mining of coal in the United States, it was deemed to be necessary that they may be in a position to enforce their demands absolutely, secure the unionization of all fields, prevent the production of nonunion mined coal, and destroy the competition of nonunion-mined coal in the markets of the country with union-mined coal.

That the national organization is composed of all of the individual members of the local unions, and by its constitution it is divided into branches, district and local, all subordinate to the national organiza-

tion. The construction and enforcement of the constitution is placed in the officers of the national organization; the district and local organizations are directly subject to the direction and control of the International Executive Board.

That while the constitution gives to the district organization the power and authority to authorize strikes under certain conditions, it does not delegate exclusive authority to these district officers. They may order a local strike, but in view of other provisions in the constitution and in the light of the record of the doings of the Executive Board of the national organization, in exercising absolute control over the different districts, this provision seems to be only permissive, and was never intended to take the absolute control from the International Executive Board. The national board, after the local strike was ordered, had the right to supervise and absolutely control the same, and had the right to discipline to the extent of absolutely taking the charter away from the offending members in the event the orders of such national board were not complied with.

Article XII, section 2, of the constitution of the national organization, provides:

"Before final action is taken by the district upon questions that * * * may require a strike, * * * the president and secretary of the aggrieved district shall jointly prepare, sign, and forward to the national president a statement setting forth the grievance complained of, the action contemplated by the district, together with the reasons therefor, and await the decision of the national president and be governed thereby."

The national organization has, undoubtedly, under the constitution, supreme authority. The judgment, discretion, wisdom, and power of the entire organization are vested in the national organization; every member of a local union is a member of the national organization and a contributor to its funds.

That prior to April 6, 1914, when mob violence was first resorted to against plaintiffs' mines, communications were had, by telegrams, between officers of the district and members of the local organizations, that employés of the plaintiffs were on that day and until the final destruction of the property, beaten into insensibility, and that it was all done in the name, at least, of the United Mine Workers of America.

There was evidence that the national officers and officers of the district organization knew what was being done from April 6, 1914, to the day of the destruction of the plaintiffs' property on July 17, 1914, and that no effort was made to stop these unlawful acts of violence by the national organization.

It is established beyond question that the property of the plaintiffs was burned and their mines destroyed in the course of the strike, for the purpose of carrying out the aims, objects, and purposes of the national organization, and its objects were thereby attained to the extent of the elimination of the nonunion mines of these plaintiffs by the destruction of their property, and thereby kept nonunion coal, produced and intended to be produced from these mines, out of interstate commerce. There was not a word of criticism by the United Mine Workers of America—no suggestion of discipline; on the oth-

er hand, strike benefits were paid, pensions allowed, court costs assumed, and every act committed by these members of the district and local organizations approved by the entire organization.

As to the motion of the other defendants for a directed verdict, there was also substantial evidence tending to establish that on Saturday, April 4th, when plaintiffs' mines were opened as "nonunion" or "open shop" mines, a number of the union miners congregated at the mines, some of them attempting to get inside the inclosure. On the next day, Sunday, some minor disturbances occurred, throwing of rocks toward the houses where the nonunion employés lived, and calling them opprobrious names. A few days before the opening of the mines, with nonunion employés, Mr. Reed, a member of the union, approached Mr. Argo, a bookkeeper of the plaintiffs', and asked him if the company was going to run an open shop. He then stated "that if they did they would not last longer than Pat stayed in the army." On that Sunday a meeting of the union miners was held at Hartford, and storekeepers there were told to close their stores the next day and go to Prairie Creek for the demonstration to be held there to prevent the opening of the mines with nonunion labor.

On Monday, April 6th, large crowds of union miners and sympathizers met in front of the union hall of the Prairie Creek local union, about a quarter of a mile from the office of the Prairie Creek mine No. 4, where speeches were made by some of the miners, and a committee appointed, which called on the mine superintendent and asked that the company abandon its attempt to run it as nonunion, one of the committee telling him, "if they didn't want a repetition of Colorado." Meanwhile the crowd, which had accompanied the committee, had broken over the ropes of the inclosure and assaulted two of the guards so seriously that they had to be taken to the hospital at Ft. Smith.

To prevent further trouble the mine was closed, and thereupon the miners hoisted an American flag, and alongside of it a banner bearing the words: "This is a union man's country." The nonunion miners were afraid to come out of the mine. Some of the union men then went in, pulled the fires, and assaulted and injured a number of the men. A physician, a sympathizer with the union miners, was with the strikers, but refused to treat the serious wounds inflicted on one of the nonunion men. On the next day the bookkeeper was visited at his home and warned that unless he and his wife left they would be killed. Two weeks later he was assaulted and beaten by the financial secretary of the local union.

A temporary injunction against the strikers was obtained, but in spite of that the employés of the plaintiffs were threatened and at various times assaulted. In May the temporary injunction was made permanent by the court. In that month the convention of district No. 21 was held at Ft. Smith, which was attended by the district officers, and also the defendant John P. White, president of the United Mine Workers of America. A few days later Dan Wilcox, president of the local union, at Adamson, Okl., told J. A. Murry that the miners of Oklahoma "were going to come down to Prairie Creek and clean those scabs out." The latter part of June the secretary-treasurer

of district 21 purchased rifles from the Remington Arms Company, and from dealers at Hartford and Ft. Smith, 27 high-powered auto-loading rifles, 28 old Springfield rifles, and several thousand cartridges for the same, which were paid for by checks of the union. These arms and ammunition were shipped to members of the local union. Some of them afterwards pleaded guilty to that charge and were sentenced to imprisonment. Two nonunion miners, Baskins and Sylsberry, were murdered, while in the custody of a constable. Mr. Stewart, president of district No. 21, told a deputy marshal, in talking about the injunction:

"Damn the injunction! The national government is against us, but the people are with us, and we are going to win."

Some of those working in the mines were told by members of the union, a few days before July 17th, that they had better stay out, as there was going to be trouble. Others of the employés were also warned to the same effect. Residents of Frogtown, about half a mile from the Prairie Creek mines, where many of the union miners lived, were warned by them to leave the village on July 17th, as there would be trouble, and a large number of them left. On that day meetings of the miners were held at Hartford and at Bolen Pond. The union miners, employed in the union mines in the vicinity, did not report for work on that day. About midnight of the night of the 16th, all the lights at the mine went out, and about 4 o'clock a. m. a number of men fired shots into the company's property. At 7 o'clock a. m. they surrounded the mining camp, took possession of No. 3 tipple, and blew it up with dynamite. There was a regular battle then fought between the company's employés and the union men. They then set fire to several houses, burned some loaded cars, and destroyed the property, as alleged in the complaint. In October another attempt was made to open the mines under the protection of the court, and they were again attacked and the workmen driven off.

The learned counsel for defendants neither in their voluminous brief (326 printed pages) nor in their oral argument questioned these statements of facts, nor did they seriously attack the sufficiency of the evidence, but they insist that they do not establish that the plaintiffs were engaged in interstate commerce, and therefore these acts were not in violation of the Sherman Act. The leading case relied on is United States v. Knight, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, but this case, if not expressly overruled, has been much weakened by the later decisions of the Supreme Court, and it was so held by this court when the case was here before. 235 Fed. 1, 8, 148 C. C. A. 495. As this court, when this case was here before, held that the alleged wrongs and torts of the defendants charged in the complaint, and which at the trial were established by substantial evidence, constituted an interference with interstate commerce, and violated the Sherman Act, that opinion is the law of the case, and cannot again be re-examined.

12. It is also contended that, while the constitution of the union authorizes strikes, it does not authorize unlawful acts, such as the destruction of property, and that strikes are not unlawful. The trial

court did not hold that strikes were unlawful, but, on the contrary, held, "The right of the union miners to strike cannot be questioned," but added, "as long as no violence was used."

There were only two exceptions taken to the charge of the court. These were:

(1) "The defendants separately except to the instruction which submits to the jury the question that the United Mine Workers of America, in its entire membership, can be held responsible for the conduct of a local strike when violence is used without showing that the entire membership participated in the wrongful acts, and without full knowledge of the same ratified such wrongful conduct before the institution of this suit."

(2) "And the defendants severally except to that part of the court's charge which submits to the jury the question that the controversy between the miners and the plaintiffs in question was under the control of the International Association and its officers, and that they were charged with the duty of preventing violence and with the responsibility of any violence that occurred or any wrongful acts that were committed."

The first exception was not, and could not well be, insisted on. It is unnecessary that each and every member of an organization engaged in an unlawful conspiracy must participate in the wrongful acts committed by some of the conspirators. The act of one, in carrying out the objects of the conspiracy, is the act of all the conspirators.

The second exception has no basis whatever to rest on, as nothing in the charge of the court was to that effect.

13. The next contention is that the court erred in refusing to give the special requests for instructions asked in behalf of the defendants.

Counsel in their brief include under one head a number of assignments, 150 to 176, inclusive. They are instructions which requested directed verdicts in favor of each of the defendants. We have hereinbefore held that the court did not err in refusing to direct a verdict for any of the defendants. It is therefore unnecessary to repeat what has been said.

[16] 14. Assignment No. 177 relates to the court's additional charge, when the jury returned for further instructions and the charge given by the court when the jury was recalled, after having failed to agree on a verdict for two days.

As to the first additional charge, when the jury came into court for additional instructions, it is sufficient to state that no exception was taken to any part of that additional charge.

When the jury was recalled by the court on the second day, the court expressed its opinion as to the evidence, and said, in effect, that in its opinion the plaintiffs had made out a case entitling them to a verdict, but added:

"Now, that is the judgment of this court, and if it were my duty to decide it, I would decide it here. Now, you are not bound by my opinion. I have a right to give you my judgment; however, you are the sole and exclusive judges of the facts, and it is for you to determine these issues of fact independent of my judgment, and this court believes you ought to determine it, and under your oaths as jurors and agree upon a verdict."

The only exception taken by defendants to that charge was:

"Mr. Grant: May I take an exception to that part of the charge with reference to the great conspiracy, and also that part which is to the effect that the organization put that in force?

"The Court: Yes, sir; in the opinion of the court you are entitled to your exception.

"Mr. Grant: I just desire to get an exception.

"The Court: The exception is allowed."

Counsel now, not only ask that that part of the charge which was excepted to be reviewed, but ask us to review the entire supplemental charge, because they say: First, that it amounted "to a peremptory instruction to return a verdict against the defendants," and, second, that "the opinion regarding the facts of the case, which the court formed and expressed to the jury, was an erroneous one."

As to the first contention, the Supreme Court, in Allis v. United States, 155 U. S. 117, 122, 15 Sup. Ct. 36, 38 (39 L. Ed. 91), said:

"There is no intimation in the exception that the defendant at the time thought that the court was trying to coerce the jury, or suggested that its language might have such an influence upon them. Evidently the claim of coercion is an afterthought, from subsequent study of the record. But it is settled that no such afterthought justifies a reviewing court in reversing a judgment."

This was in a criminal case, in which the defendant had been convicted of an infamous crime.

In Robinson & Co. v. Belt, 187 U. S. 41, 50, 23 Sup. Ct. 16, 19 (47 L. Ed. 65), it was held:

"While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record."

The same rule has been followed by this court in many cases. Lesser Cotton Co. v. St. L., I. M. & S. Ry., 114 Fed. 133, 52 C. C. A. 95; Beiseker v. Moore, 174 Fed. 368, 373, 98 C. C. A. 272; Maynard v. Reynolds, 251 Fed. 784, 786, 164 C. C. A. 18.

[17] But even if there had been an exception sufficient to present that issue in this court, the charge did not pass beyond the limits of the rule of the national courts relative to the statement to the jury of the court's opinion upon the deductions from the evidence relative to the facts in issue. In Vicksburg & Meridian R. R. v. Putnam, 118 U. S. 545, 553, 7 Sup. Ct. 1, 2 (30 L. Ed. 257), that rule is thus stated:

"In the courts of the United States, as in those of England, from which our practice is derived, the judge, in submitting the case to the jury, may at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, and call their attention to the parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error."

Other cases to the same effect are United States v. Reading R. R., 123 U. S. 113, 114, 8 Sup. Ct. 77, 31 L. Ed. 138; Doyle v. Union

Pacific Ry., 147 U. S. 413, 430, 13 Sup. Ct. 333, 37 L. Ed. 223; Simmons v. United States, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968; Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873; Freese v. Kemplay, 118 Fed. 428, 430, 55 C. C. A. 258; Smith v. St. Louis, I. M. & S. R. R., 214 Fed. 737, 742, 131 C. C. A. 43; Griggs v. Nadeau, 250 Fed. 781, 163 C. C. A. 113.

The court in its general charge said:

"In trials of this character, like all civil actions, the exclusive province of the jury is to pass upon the facts, and determine the issues of fact that are presented by the pleadings."

In the supplemental charge, of which the defendants now complain, the court told the jury:

"Now, you are not bound by my opinion. I have a right to give you my judgment; however, you are the sole and exclusive judges of the facts, and it is for you to determine these issues of fact independent of my judgment."

In our opinion this charge clearly and forcibly submitted every material fact which had arisen during the trial, and neither peremptorily nor otherwise coerced or directed a verdict in favor of either party. Suslak v. United States, 213 Fed. 913, 919, 130 C. C. A. 391.

Turning to the only question covered by the exceptions, to wit, the opinion which the court expressed to the jury in the supplemental charge, with reference to the great conspiracy, and also that part which is to the effect that the organization put that in force, is also untenable. First, there was no error in the court's charge upon the subject, because he merely expressed his opinion on the evidence, the facts and the effect of the evidence, and he told the jury that his opinion was not binding upon them; so it necessarily follows that, even if it was a mistaken opinion, it was not error, under the rule of practice in the national courts, to express his opinion of the evidence. As stated hereinbefore, there is a vast volume of substantial evidence tending to sustain his views.

[18] 13. Assignments 178 and 179 are to the effect that the court erred in accepting the verdict in the form returned by the jury, to wit:

"We, the jury find the issues in favor of the plaintiffs and against the defendants, and assess plaintiffs' actual damages at $200,000.00"

—and not requiring the jury to find the separate damages sustained by the several plaintiffs. The exception taken to the verdict was:

"Mr. Grant: I would like to except to the form of the verdict, for the reason that, as we understand it, the verdict of the jury should apportion the damages."

The exception does not specify whether counsel wanted the damages apportioned among the plaintiffs or the defendants. If it was intended to have the apportionment between the defendants, it was clearly without merit. Washington Gaslight Co. v. Lansden, 172 U. S. 534, 552, 19 Sup. Ct. 296, 303 (43 L. Ed. 543), where it was held that—

"Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, without examining

the question of the different degrees of culpability. And if but one is sued, he is liable for all the damages inflicted by the most culpable."

If it was intended to have the apportionment of the damages awarded to the plaintiffs, the request should have been made to that effect, in order that the court may have its attention called thereto. But, assuming that the exception was intended to have the apportionment of the damages to each of the corporations represented by the receivers, without requesting it in plain language, the exception cannot be sustained. There is no complaint that the verdict is excessive; therefore, it may well be asked, how are the defendants prejudiced? As stated in Kansas City Southern Ry. v. Leslie, 112 Ark. 305, 332, 167 S. W. 83, 93 (Ann. Cas. 1915B, 834):

"Appellant, at the time the verdict was rendered, made no objection to its form. He did not ask that the jury be required to return separate amounts for pain, and suffering, and for loss of contributions. The widow and child, under the law, were entitled to the entire amount. They were the only persons having a pecuniary interest in the amount of damages recovered, and it could not prejudice appellant because these damages were returned in a lump sum. Appellant will be protected in the payment of the judgment as rendered, since all of the parties who had an interest in the same are represented in the suit."

This was approved by the Supreme Court. 238 U. S. loc. cit. 604, 35 Sup. Ct. 844, 59 L. Ed. 1478. It may be that the rule would have been different if there had been separate actions by each of the corporations, claiming different amounts, and these actions had been consolidated. But there was only one action for one gross sum.

[19] 14. Assignments 183 and 184 attack the action of the court in adding to the damages assessed by the jury interest from the date the property was destroyed to the day of judgment, and trebling that interest.

The motion of plaintiffs for interest was filed 4 days after the verdict had been returned and judgment entered thereon, and the order of the court correcting the judgment, which had been entered on the verdict of the jury, was made 11 months after the entry of the judgment. This, in our opinion, was error. The allowance of interest in actions of tort is discretionary with the jury. In Eddy v. La Fayette, 49 Fed. 807, 1 C. C. A. 441, this court held that an instruction on the measure of damages, in an action for a tort by a railway in negligently setting fire to property, to award interest, was error. The Supreme Court, in affirming the judgment (163 U. S. 456, 467, 16 Sup. Ct. 1082, 1086, 41 L. Ed. 225), said:

"Undoubtedly the rule, in cases of tort, is to leave the question of interest as damages to the discretion of the jury."

Other cases in point are Lincoln v. Claflin, 74 U. S. (7 Wall.) 132, 139, 19 L. Ed. 106; The Scotland, 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153; De La Rama v. De La Rama, 241 U. S. 154, 159, 36 Sup. Ct. 518, 60 L. Ed. 932, Ann. Cas. 1917C, 411; District of Columbia v. Robinson, 180 U. S. 92, 107, 21 Sup. Ct. 283, 45 L. Ed. 440; Arnold v. Horrigan, 238 Fed. 39, 47, 151 C. C. A. 115. And this is the settled rule established by the Supreme Court of the state of

Arkansas, where the tort was committed and the action tried. Watkins v. Wassell, 20 Ark. 420; Crow v. State, 23 Ark. 684, 694. In no event can the court add interest to the verdict of the jury, when the jury had failed to allow interest, whether the action is ex contractu or ex delicto. Hallum v. Dickinson, 47 Ark. 120, 126, 14 S. W. 477: Ark. & La. Ry. v. Stroude, 82 Ark. 117, 127, 100 S. W. 760; McDonough v. Williams, 86 Ark. 600, 608, 112 S. W. 164; Minot v. Boston, 201 Mass. 10, 86 N. E. 783, 25 L. R. A. (N. S.) 311; Dyer v. Combs, 65 Mo. App. 148. Nor is there anything in the Sherman Act which changes this rule.

Thomsen v. Cayser, 243 U. S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322, relied on by defendants, is not in point. In that case the jury, by its verdict, allowed interest, but failed to compute it. The verdict of the jury was "for the plaintiff in the sum of fifty-six hundred dollars, with interest." Interest having been awarded by the jury, the computation was merely ministerial. Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402, was an action in equity, and the chancellor in his discretion allowed interest, as the jury may have done in this case, but refused to do so. None of the authorities cited by counsel sustains the contention that in an action for a tort the court may allow interest, when the jury had failed to do so. In equity and admiralty, the court, in assessing the damages, acts as a jury, and therefore such cases are not in point.

As the amount allowed for interest is fixed, this error may be corrected without remanding the case for a new trial, by permitting the defendants in error to enter a remittitur for that sum. As this is the only error in this cause, defendants in error will be permitted to file a remittitur in the court below, within 40 days from the filing of this opinion, for the interest allowed, and upon filing a certified copy of such remittitur with the clerk of this court the same will be affirmed; otherwise, it will be reversed, with instructions to grant a new trial.

HOOK, Circuit Judge (dissenting). After the jury had deliberated without result for about two days, the trial court of its own motion recalled and charged them in a way that soon produced the verdict. Parts of this charge will be presently set forth. Having in mind the constitutional relations between court and jury, and their practical relations as well, I cannot escape the conviction that the language employed by the court was so forcible that it virtually coerced the verdict. That should never occur where the state of the evidence requires its submission to a jury, however unequal in weight the court may regard it. The power of a court to comment upon the evidence and to assist a jury in performing their duties is one of the most valuable features of the practice in the courts of the United States, and its exercise almost always makes for right and justice. But, however strongly a court may feel in a case that should properly go to the jury, the power to comment and assist them is not a power to direct a verdict, and the distinction should always be observed. Words often take compelling force from the authority of him who utters them; and when he may, but should not, command, he must be most careful with advice. The Supreme Court has said:

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." Starr v. United States, 153 U. S. 614, 626, 14 Sup. Ct. 919, 923 (38 L. Ed. 841).

And upon the same subject this court said:

"But his comments upon the facts should be judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment." Rudd v. United States, 97 C. C. A. 462, 173 Fed. 912.

It should be borne in mind that the trial court did not regard the case at bar as one for a directed verdict against the defendants, nor do my Brothers hold differently in the foregoing opinion. It was a case for the jury, and if in effect the verdict was directed by the court, error was necessarily committed.

In the foregoing opinion the exceptions to the charge are held insufficient to raise this question. The exceptions might have been more specific, but I think the intention of counsel was sufficiently evident, and that the trial court understood it. But whether this is so or not is not now decisive of our duty. A recent amendment of section 269 of the Judicial Code, approved February 26, 1919 (40 Stat. 1181, c. 48), provides:

"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."

The matter under discussion was of vital importance and is well within the above provision. It was not an inadvertence or casual ruling in the progress of the trial, to which specific objection or exception was necessary to inform the court and give it opportunity for correction, but it was a deliberate action, going to the very root of the judgment now under review. In view of the above I will now set forth parts of the charge, the italics being mine:

"*I want to say to you that the court has no thought at all of discharging you. You were sworn upon your oaths to do your duty as jurors. In the opinion of the court there is no reason on earth why reasonable men,* with a due regard for right, and each having due respect and consideration for the other's opinion, *should not arrive at a conclusion in this case.* What would be a fortune to either of you, or [to me], has already been spent and *a failure to render justice in this* and other [cases] *is what brings the courts into contempt.* * * * *And you are advised that this court is of the opinion* that the facts in this case justify you in *the conclusion overwhelmingly* that it was the policy, and therefore the agreement, for years of this national organization to prevent mining of nonunion coal for the unlawful purposes named in this complaint that it might not come into competition with union-mined coal; *that there is no question in this court's mind but that* that strike was ordered down there for that purpose to prevent the mining of nonunion coal in these plaintiffs' mines; that the strike was called by those who were the instrumentality of the greater organization, the general organization, the defendants, and their act was its act, and that they put into motion the force that destroyed this property. * * * *Why, this court has not a thought that* there would ever have been any trouble there if it had not been for the prevention of the mining of nonunion coal. *Now, that is the judgment of this court,*

and if it were my duty to decide it I would decide it here. * * * If there is any question about the law on the responsibility for this, responsibility of the greater organization, that is for the higher court to say; but you cannot reach it until you have done your duty—*you are the stumbling block in the way and this whole time is wasted.* Now, after I have said what I have, I am going to say that *I have no thought of discharging you; you must return a verdict in this case.*"

Of course, the court said it was for the jury to determine the facts, and that they were not bound by its opinion, etc.; but are not such expressions wholly futile in the compelling force of the above? There are occasions in which the statement of a principle of law is but an academic formula. Can it reasonably be said, after such a charge, that the jury felt free to exercise their own independent judgment? The question whether the well-established province of a jury is invaded is to be judged by the natural effect of the charge upon the minds of the jurors. How did they feel about it? Did they feel free to exercise their functions independently, or were they constrained by the intrusion of the personality and power of the judge, and the fear of his displeasure, ridicule, or contempt? In this case they were reminded of their oaths; they were told that they would not be discharged, but had to return a verdict; that there was no reason on earth why they should not agree; that failure to render justice would bring the court into contempt; that there was no question in the mind of the court about the evidence; that it was overwhelmingly one way, meaning against the defendants; and that they were a stumbling block in the way of the final determination of the legal responsibility for the acts charged. It is regrettable that this incident occurred, for up until that time the case was most admirably and carefully tried.

In my opinion the judgment should be reversed.

CHIN FONG v. WHITE, Immigration Com'r.*

(Circuit Court of Appeals, Ninth Circuit. June 2, 1919.)

No. 3180.

ALIENS ⟹27—CHINESE—EXCLUSION—RE-ENTRY AS MERCHANTS.

A Chinese person, claiming right to re-enter the United States under Act Nov. 3, 1893, § 2 (Comp. St. § 4324), as having been a merchant in the United States for a year before his departure therefrom, may not thereunder, and under rule 15, subd. 11, of the Department of Labor, as to admission of Chinese claiming such right of re-entry, be denied admission by the Commissioner of Immigration on the ground that his original entry was unlawful; but this is a matter for determination in a deportation proceeding before a different tribunal.

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

Habeas corpus proceeding by Chin Fong against Edward White, Commissioner of Immigration at the Port of San Francisco, to se-

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

*Certiorari granted 250 U. S. —, 40 Sup. Ct. 14, 64 L. Ed. —.

cure the discharge of petitioner, held by the Commission of Immigration for deportation as a Chinese person not entitled to re-enter the United States under the provisions of the Exclusion Act. From the order discharging the writ, and remanding petitioner for deportation, petitioner appeals. Reversed, with direction.

See, also, Chin Fong v. Backus, 241 U. S. 1, 36 Sup. Ct. 490, 60 L. Ed. 859; Ex parte Chin Fong, 213 Fed. 288.

George A. McGowan, of San Francisco, Cal., for appellant.

Annette Abbott Adams, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. The appellant, Chin Fong, is a Chinese person who arrived at the port of San Francisco on December 23, 1913, from China on the steamship Persia. He had previously departed from the port of San Francisco for China on November 12, 1912, on the steamship Nile. He claimed the right to re-enter the United States as a returning Chinese merchant. The provisions of the treaty between the United States and China, concluded November 17, 1880 (22 Stat. 826), excluded laborers, but provided that certain subjects of China, including merchants, might "go and come of their own free will and accord." Chin Fong claimed the right of re-entry under the provisions of Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 7, 8 (Comp. St. § 4324), which provides:

"Sec. 2. * * * The term 'merchant' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.

"Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

Pursuant to law the Department of Labor has prescribed certain rules governing the admission of Chinese; among others a rule of procedure for those claiming the right to re-enter the United States as merchants previously domiciled in the United States as such. Subdivision 11 of rule 15 of such rules provides as follows:

"(11) *Proof of Mercantile Status.*—Chinese applying for preinvestigation under the terms of this rule, or for admission without having taken advantage of the rule, on the ground of having been domiciled in the United States as merchants, shall be required to establish to a reasonable certainty that they are actually owners of the business claimed or members of the firm owning such business, with proofs of the amounts actually paid for their respective interests and the times at which such payments were made. In no case should the claim of mercantile status be allowed unless inspection of

the alleged mercantile establishment shows a bona fide capital and stock, the latter commensurate with the former and with the number of partners claimed."

In the appellant's statement made to the officers of Immigration upon his arrival at the port of San Francisco in December, 1913, he claimed to be a member of the business house of Kwong Mow Lan & Co., at No. 8 Pell street, in New York City. The papers were accordingly forwarded to the Commissioner of Immigration in New York City for an investigation of that claim. Inspector Sisson, in charge of the Immigration service in the New York office, reported the appellant's status as a merchant in New York City as follows:

"Referring to your letter of the 2d instant, No. 13137½, I return herewith papers in the case of Chin Fong ex S. S. Persia, December 23, 1913, applying for admission at your port as a merchant and member of the firm of Kwong Mow Lan & Co., No. 8 Pell St., New York City:

"In connection with this case would state that our records show that this applicant filed an application for a return certificate as a merchant and member of the above firm in this office on December 9, 1911, and that the said application was given unfavorable consideration by the Commissioner of Immigration at Seattle, Washington, under date of January 18, 1912, and I have requested the Seattle office to forward to you the original record. In view of the fact, however, that while this application was denied in January, 1912, he did not depart from the United States until November 23, 1912, a further investigation has been made covering this period, and attached to the record will be found in triplicate the sworn statement of Chin Fong, the manager of the firm, together with those of the statutory witnesses, Messrs. Israel Brand and John L. Delmonte, both of whom are business men, and so far as this office knows reputable.

"From the examination of this applicant conducted at your port it is noted that he claims to have been first admitted to the United States in K. S. 32 (1906) at Niagara Falls as a section 6 Canton merchant, and further that his certificate was lost at the time the firm of Yung Wah Tong was moving in the fifth or sixth month of S. T. 1 (1909) from No. 32 Mott St. to 33 Pell St. Niagara Falls was not a port of entry for Chinese in K. S. 32 (1906) and consequently he could not have been admitted through that port. Further the firm of Quong Yuen Shing & Co. has occupied the premises at No. 32 Mott St. for many years last past, as is also the case with the firm of Chong Lung & Co. at 33 Pell St.

"By reference to the statement of this applicant made before this office on January 3, 1912, which will form a part of the record to be forwarded to you by the Seattle office, it will be noted that Chin Fong testified he was first admitted to the United States in K. S. 22, 11th month (Dec., 1896—January, 1897), at Niagara Falls, upon a merchant paper which had been forwarded to him by the firm of Young Wah Hong & Co., No. 33 Mott St., and that he continued in business with said firm for a period of about six years, which would be until 1902 or 1903, when the firm went out of existence.

"Kwong Mow Lan & Co. are engaged in manufacturing cigars at No. 8 Pell St., where they also dispose of them at retail as well as wholesale, and it is believed to be a bona fide establishment."

Upon this report, and other testimony taken by the Immigration officers in San Francisco, the Commissioner of Immigration at that port made the following finding and decree:

"*Finding and Decree.*—The applicant applied for preinvestigation of his alleged status as a merchant (form 431) in December, 1911, but his application was denied by the Seattle office, and an appeal from that decision dismissed by the Bureau for the reason that it was satisfactorily shown at that time that the applicant had fraudulently secured his original admission to the

United States; it having been claimed by him that he entered this country at or near Niagara Falls, New York, in 1897, on 'merchant's papers' sent to him in China by the Young Wah Hong Company at New York. It was first claimed by the applicant in the present case that he was admitted at Niagara Falls in 1906, but when confronted with his previous testimony he denied the last-mentioned statement, and reiterated the year first mentioned as the date of his original entry, and stated that he was then admitted as a section 6 Canton merchant on papers secured by him in that city.

"Niagara Falls was not a port of entry for Chinese in 1906, *and the applicant has not satisfactorily accounted for the present whereabouts of the papers on which he claims to have been admitted, so that it must be concluded that his domicile in this country was unlawful;* and as the Bureau has sustained the action of the Seattle office in refusing his application for form 431, the applicant is denied admission and advised of his right of appeal."

An appeal from this decision was taken to the Secretary of Labor, who approved the decision of the Commissioner of Immigration. The finding of the Acting Secretary of Labor was as follows:

"Washington, March 6, 1914.

"In re Case of Chin Fong.

"I am satisfied that the action recommended by the Bureau is the correct one in this case. The original entry of this man was obtained by fraud. He cannot predicate any right whatever upon the basis of fraud. The fact that he has been permitted to remain in this country constitutes no waiver of the right to deport him, and the fact that the government has not heretofore affirmatively exercised the authority to deport him, while it amounts to tentative permission to remain here, does not preclude or estop the government from exercising its authority to deport or deny admission at any time. A different question would be presented were the facts such that it did not appear that the alien's original entry was fraudulent. No business he might engage in nor length of residence here can cure the fraud perpetrated by him in gaining admission in the first instance.

"This case appears to be quite fairly within the Mack Fock decision, which, in my opinion, is correct. The recommendation that admission be denied is approved.

"JBD/G. J. B. Dinsmore, Acting Secretary."

The appellant thereupon applied to the District Court for a writ of habeas corpus, which was denied. Ex parte Chin Fong, 213 Fed. 288. An appeal was then taken to the Supreme Court of the United States, upon the theory that the construction of the treaty of November 17, 1880, was involved. The appeal was dismissed, on the ground that Chin Fong was seeking to re-enter the United States under section 2 of the Act of November 3, 1893, and not under the treaty of 1880, and that—

"Where the right of a person of Chinese descent to enter this country depends, * * * upon the statutes regulating Chinese immigration, and not upon the construction of provisions of treaties relating thereto, a direct appeal would not lie to the court under section 238 of the Judicial Code [Comp. St. § 1215] from a judgment dismissing a petition for habeas corpus." Chin Fong v. Backus, 241 U. S. 1, 36 Sup. Ct. 490, 60 L. Ed. 859.

By permission of the District Court, the appellant was then permitted to again file a petition for a writ of habeas corpus, basing his claim for relief upon his alleged rights vested in him by the statute, and not upon rights previously supposed to flow from the treaty with China.

The appellant contends that he has met every requirement of the statute providing the terms and conditions upon which he, as a Chinese merchant, as described in section 2 of the act of November 3, 1893 (28 Stat. 7), domiciled in the United States, is entitled to reenter the United States; that is to say, he has established by the testimony of two credible witnesses, other than Chinese, that he was a merchant and a member of the firm of Kwong Mow Lan & Co., No. 8 Pell street, in New York City; that such location was his fixed place of business for at least one year before his departure from the United States in November, 1912, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of said business as a merchant; that he is being excluded for reasons not mentioned in the statute, or in any rule or regulation of the Department of Labor; that such exclusion is against the law, and is therefore an abuse of discretion on the part of the Commissioner of Immigration.

The evidence in the record fully supports the appellant's claim of a mercantile status in the United States prior to his departure therefrom in 1912. The report of Inspector Sisson is that—

"Kwong Mow Lan & Co. are engaged in manufacturing cigars at No. 8 Pell street, where they also dispose of them at retail as well as wholesale, and it is believed to be a bona fide establishment."

Referring to the findings and decree of the Commissioner of Immigration at San Francisco, excluding the appellant, we find that the reason for such exclusion is, not that he was not a merchant, but that—

"The applicant has not satisfactorily accounted for the present whereabouts of the papers on which he claims to have been admitted, so that it must be concluded that his domicile in this country was unlawful."

The papers here referred to by the Commissioner are the papers upon which the applicant claims to have been admitted into the United States in 1896–1897, or 1906, and concerning which there was some mistake as to whether it was 1896–1897, or 1906. There is no finding and decree by the Commissioner as to whether the applicant was a merchant in New York City for at least one year before his departure for China in 1912, and there is no intimation or suggestion that he was not such a merchant. The Acting Secretary of Labor, in approving the decision of the Commissioner of Immigration, did so upon the ground that "the original entry of this man was obtained by fraud"; but this was not the question submitted to the Commissioner of Immigration or to the Secretary of Labor for decision. The question was not whether the applicant was legally admitted in 1896–1897, or 1906. The question was whether he had been a merchant in the United States at least one year before his departure from the United States in 1912 (Chin Fong v. Backus, 241 U. S. 1, 5, 36 Sup. Ct. 490, 60 L. Ed. 859), and upon that question the evidence was all one way, establishing beyond controversy all the facts required by the statute and the rule of the Department of Labor to the effect that he was such a merchant at No. 8 Pell street, New York; that it had been his fixed place of business for at least

one year before his departure from the United States; that the business in which his firm was engaged was that of manufacturing cigars; that the cigars were disposed of at retail as well as wholesale, and the establishment was bona fide; and the witnesses by which these facts were proven, other than Chinese, were business men, and so far as known to the inspector were reputable men. This question so presented to the Commissioner of Immigration was not decided, either by the Commissioner or the Acting Secretary of Labor; but they undertook to decide another question, namely, that the applicant had fraudulently secured admission into the United States either in 1896–1897, or 1906, as a merchant defined in the treaty of 1880.

The Supreme Court in this case (Chin Fong v. Backus, supra), referring to the definition of a "merchant" as described in the treaty, points out that "it was the definition of the status acquired in China, not acquired in the United States, and, having been acquired in China, gave access to the United States, and after access freedom of movement as citizens of the most favored nations," and because the case as there (and here) presented did not involve the status of Chin Fong as a merchant under the treaty, but did involve his status solely under the act of November 3, 1893 (28 Stat. 7), the court held that it had no jurisdiction of the appeal.

The case of Ex parte Mack Fock, 207 Fed. 696, referred to by the Acting Secretary of Labor as an authority supporting his decision, is not in point. In that case the application was that of a Chinese person who claimed to be a returning native-born American of Chinese descent. In support of that claim he presented a paper purporting to be a certificate issued by Felix W. McGettrick, United States Commissioner at St. Albans, in the district of Vermont, on the 12th of June, 1906, certifying that it had been adjudged by him that said Mack Fock had a lawful right to be and remain in the United States by reason of his being a citizen thereof. The question submitted to the Commissioner at Seattle was whether or not Mack Fock was a native-born American. Upon examination the Commissioner found that he was not, and that he was in fact born in China. The Commissioner thereupon ordered his exclusion upon the precise issue presented by the applicant for admission. It may be contended that in the present case the Commissioner of Immigration did in effect determine the question at issue when he concluded that appellant's original entry into the United States was unlawful, and for that reason he was never lawfully domiciled in this country, and that this conclusion is sufficient to overcome the specific finding that he was a merchant domiciled in this country for at least one year prior to his departure therefrom in 1912, and under that finding entitled to return under the act of November 3, 1893. But whether Chin Fong's original entry into the United States under the treaty was or was not lawful was a different question, not presented in this case (Chin Fong v. Backus, supra), and one to be determined in a deportation proceeding before a different tribunal. See Act May 6, 1882, c. 126, § 12, 22 Stat. 58, 61, as amended by Act July 5, 1884, c. 220, 23

Stat. 115, 117 (Comp. St. § 4299); Act Sept. 13, 1888, c. 1015, § 13, 25 Stat. 476, 479 (Comp. St. § 4313); Act March 3, 1901, c. 845, § 3, 31 Stat. 1093 (Comp. St. § 4334).

Our conclusion is that the appellant has been denied admission for a reason other than that connected with his status as a merchant under the act of November 3, 1893, and for that reason the order of exclusion is void.

The judgment of the District Court is reversed, with direction to discharge the appellant from custody.

RUTHERFORD et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 239.

CRIMINAL LAW ⚷657—TRIAL.

In a prosecution against the leaders of a religious society, who it was charged had violated the Espionage Act, where the government called members of the society and they proved unwilling witnesses, *held*, that the acts of the trial court in committing such witnesses for contempt, on the theory that they were falsifying when they refused to answer questions, but stated that they did not remember, etc., was under the circumstances so prejudicial to defendants that a new trial should be granted.

Manton, Circuit Judge, dissenting.

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

Joseph F. Rutherford and others were convicted of violating Espionage Act June 15, 1917, tit. 1, §§ 3, 4, and they bring error. Reversed and remanded.

Sparks, Fuller & Stricker, of Brooklyn, N. Y., for plaintiffs in error.

James D. Bell, U. S. Atty., and Charles J. Buchner, Sp. Asst. U. S. Atty., both of Brooklyn, N. Y., and I. R. Oeland, Sp. Asst. Atty. Gen., of New York City.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment of conviction of the defendants, eight in number, indicted for violation of sections 3 and 4, title 1, of the Espionage Act of June 15, 1917 (40 Stat. 219, c. 30 [Comp. St. 1918, §§ 10212c, 10212d]). Seven of the defendants were sentenced to terms of 20 years and the eighth to a term of 10 years in the federal penitentiary at Atlanta, Ga. The defendants are members of religious organizations known as the International Bible Students' Association, the People's Pulpit Association, and the Watch Tower Bible & Tract Society, all representing a form of religious doctrine preached from 1870 down to the time of his death in 1916, by a person known as Pastor Russell. One of these doctrines is an absolute prohibition of the killing of human beings, and so of taking any part at all in war. The trial continued from June 5

to June 20, 1918. We think there was sufficient evidence upon which to submit the case to the jury, and that none of the errors assigned is ground for reversal, except in respect to the matters now to be considered.

The government called three witnesses, all members of the International Bible Students' Association, Mrs. Mabel Campbell, Mrs. Agnes Hudgings, and William F. Hudgings. They were not willing witnesses, and the court properly allowed the government great latitude in examining them. Mrs. Campbell refused to swear that the carbon copy of a letter submitted to her had been written by her from the dictation of the defendant Van Amburgh. At the conclusion of the examination in chief the court said:

"The court suggests that if the defendants desire to cross-examine this witness that you recall her later. This witness is not discharged, but will remain in attendance. We will take some other witness for the present."

This was, as he subsequently said, to give her an opportunity of taking advice as to her testimony before being recalled for cross-examination. She never was so recalled.

Mrs. Hudgings was called with reference to a letter with a rubber stamp signature, J. F. Rutherford, one of the defendants:

"Q. I hand you Exhibit 11 and ask you if you identify that rubber stamp there as similar to the one that Mr. Rutherford used? A. No, I wouldn't identify that stamp.

"Q. Is there anything peculiar about that? A. I don't understand you.

"Q. Anything peculiar about that rubber stamp there? A. It is the same as all rubber stamps, as far as I know.

"Q. What did he have on the rubber stamp that you knew that he used? A. 'J. F. Rutherford.'

"Q. Was it the same as that (indicating)? A. I think so.

"Q. Looks like that? A. Some.

"Q. You have seen him use it frequently? A. Yes, sir.

"Q. How often? A. Couldn't say.

"Q. Do you see any difference between that and the one that you had seen him use? A. I have not paid such particular attention to it that I would specify.

"Q. I ask you, could you see any difference between that and the one you have seen him use? A. I couldn't answer that question.

"The Court: The court is inclined to think you can, and you must answer it. The question is if you can see any difference, and you must answer that question.

"The Witness: Your honor, I might say—

"The Court: I might say to you, Mrs. Hudgings, that we must have full, true, direct answers to all these questions that are asked you which the court decides are proper. Your answers thus far have seemed to be evasive.

"Mr. Fuller: I except to these remarks of the court on behalf of each of the defendants.

"Mr. Sparks: I ask that the witness be permitted to make the statement that was called out by the court in view of the characterization of the court's question to her. I ask that she be permitted to make her statement for the record.

"The Court: She may make any statement she desires to.

"The Witness: I was about to say that I gave an oath that I would tell the truth and the whole truth as nearly as I was able to, and that I would not identify the stamp for the reason that I could not; that I did not know the stamp plainly enough so I could identify it, and therefore do not wish to give false testimony.

"The Court: This second witness seems to be taking an attitude that the court can't permit to continue. Now, the court has great power as to compelling a witness to answer, and answer directly, and has much power in case a witness is evasive in answering. This is rather extraordinary, and in the case of the other witness I had her withdraw, thinking that likely counsel for the defense would advise her, or some one else. Now, the question here is not for you to identify this stamp; the question was if it looked like the one you saw this person use. Ask the witness whether she was the one that used the stamp in stamping letters.

"Mr. Sparks: I take exception to the court's remarks and the general character of it as tending to make the witness say something which she has already stated she could not do. I take also exception to that part of the court's remarks in which he says that he suggested that the previous witness might be withdrawn in order that counsel for the defense or some one else might advise her, not knowing what counsel could advise her to do in view of her testimony, and in view of the position of counsel for the defendants, that the witness could not possibly answer the questions that were propounded to her by the court and counsel.

"The Court: The court is very much inclined to believe that the former witness could answer the questions, and that the answers that she was giving were not true answers, and, while I would not deal with her hastily, I became convinced, if that was the case, I should deal with the witness for contempt of court, and perhaps in other directions, because that would be the plain duty of the court under such circumstances.

"Mr. Sparks: We take exception to those last remarks of the court, and in view of them we ask for the court to declare a mistrial and the withdrawal of a juror.

"The Court: The motion will be denied, and an exception will be noted on behalf of the defendants."

After some further testimony the court said:

"We will take a recess here for a few moments, and I ask the witness to examine that letter very carefully with respect to the paragraph and punctuation. the position of the typewriter worked on the paper, the width of the margins on each side, and the place where the typewriting work commences at the top and the place where there is space left at the bottom, where you start your second page there, and take what time you need, and then the court will argue, upon coming in here, whether you wrote that letter or not. Now, take it to the light in a side room by yourself; the court will furnish that, and take what time you want. We will take a little recess while you are doing that. (Short recess.)"

After recess:

"The Court: Gentlemen of the jury, the court was of the opinion that this witness wrote the letter that it had asked her to examine; that is, wrote it all on the typewriter. On going out counsel on both sides advised me that she did not write the letter, and the court was not justified in asking her to examine it in that view of the situation. So, gentlemen, please draw no unfavorable inference by reason of this error the court made. Counsel was merely inquiring as to the stamp, and I assumed she was the stenographer that wrote the whole letter, so it was the court's error.

"By Mr. Oeland: Q. After you have examined the stamp, what is your best judgment as to whether or not that is one of the stamps used by Mr. Rutherford?

"Mr. Sparks: I object to the form of the question; I object to best judgment. A conviction of the defendants cannot be based upon the witness' best judgment as to any particular fact—

"Q. What do you say, after careful examination, whether this was one of the stamps that were used? A. In all good conscience I could not say if that was one of the stamps that we used.

"Q. Would you say it was not? A. I would not.

"By the Court: Q. What do you most think about it?
"Mr. Sparks: I object to it, as to form. (Objection overruled. Exception.)
"The Witness: I could not answer the question.
"Q. What are you most inclined to think about it? A. I cannot draw any conclusion conscientiously."

The government sought in the case of the witness William F. Hudgings to prove by him the signatures of the defendants Van Amburgh and MacMillan. He was asked:

"Direct examination by Mr. Oeland:
"Q. Do you know the signature of Mr. Van Amburgh? A. I have seen it many times.
"Q. Do you know the signature of MacMillan? A. I have seen it also.
"The Court: Have you seen him write?
"The Witness: I won't say I have seen him write.
"The Court: What is your best recollection as to whether you have seen him write?
"The Witness: I think I have never seen him write.
"The Court: Well, write anything—the signature or not?
"The Witness: I have not watched that.
"The Court: I did not ask you whether you ever saw them write; I want an answer yes or no.
"The Witness: I said 'No.'
"Q. Have you seen letters that they have signed and handed out? A. I have seen checks they have signed themselves, but not letters.
"Q. You have seen checks they signed? A. Yes, sir.
"Q. Is that right? A. Yes, sir.
"The Court: You have been there how many years?
"The Witness: About nine years.
"The Court: Continuously?
"The Witness: Yes, sir.
"The Court: And both these gentlemen have been there in that place of business nine years?
"The Witness: Almost continuously; yes, sir.
"The Court: And you tell us that you have never seen either of them write with a pen or pencil; never seen them in the act of writing?
"The Witness: No, sir; I never stood over their shoulder.
"The Court: I did not ask you where you stood. I asked, during that nine years, you tell us whether, upon your oath, that you never say either of these gentlemen in the act of writing. That is what the court asks you, sir.
"The Witness: I do not remember that I ever saw either of these gentlemen in the act of writing.
"The Court: What is your best recollection whether you ever did or not?
"The Witness: That is my best recollection.
"The Court: Tell us how your workshops, or your different places where you do your work, are located; how often are you in one another's presence?
"The Witness: I am very little in Mr. Van Amburgh's presence. His office is separated by a partition. I am more frequently in Mr. MacMillan's presence, but not to see him do any writing.
"The Court: And when you were in his presence, is he at his desk doing his work?
"The Witness: Part of the time.
"The Court: And during that entire nine years you never happened to see him in the act of writing?
"The Witness: Not that I can now recall. That is my best recollection.
"Q. I hand you Exhibit 31 for identification and ask you if at any time—I will ask you if that is a fac simile, a mimeograph copy of the signatures of MacMillan and Van Amburgh? A. It looks very much like it. * * *
"Q. Looking at the mimeograph signature there, what is your best opinion as to whether or not that is MacMillan's signature? A. It looks very much like Mr. MacMillan's signature.

"Q. What is your best opinion? A. That would be my best opinion, but I might be mistaken.

"Mr. Sparks: I ask the court, in view of the fact that we have sat silent here under this examination of this witness, that it is no part of counsel's duty to suggest to any witness under examination, under the latitude that your honor allowed the government to cross-examine, to suggest or make any objections under the circumstances, and that his failure to recollect shall in no wise be taken as against—that they shall assume no hostile attitude as against the defendants for that reason.

"The Court: The requested instruction is denied.

"Mr. Sparks: Exception.

"The Court: I do not propose to stop and instruct this jury every two minutes, and at the request of the court I think that counsel for the government should ask this witness more about the opportunities and probabilities of his seeing this person write. It is a very extraordinary situation here. Very extraordinary testimony. It is very improbable. * * *

"The Court: Now, Mr. Witness, you do not mean that you have seen him write his signature? Have you ever seen him in the act of writing with a pen, pencil, or whatever the writing may be, or the signing of his name or writing anything else, writing in a book on any kind of book or paper or other material? Now, the question is whether you have ever seen him in the act of writing, not how much or how little, but whether you have ever seen him in the act of writing. That is the question this court wants you to answer.

"The Witness: I cannot answer 'Yes,' unless I knew it was a correct answer. Therefore I cannot answer 'Yes' to that question.

"The Court: Did you know him before you went there to work?

"The Witness: No, sir.

"The Court: So your acquaintance extends for a period of nine years?

"The Witness: Yes, sir.

"The Court: Did you go away on trips with him?

"The Witness: No, sir; not with him.

"The Court: Or in his company?

"The Witness: No, sir; that has probably occurred during the nine years.

"The Court: Been at hotels together?

"The Witness: During conventions I think that has occurred.

"The Court: Why do you say 'think'; don't you remember about that?

"The Witness: I do not recall that I have ever put up at hotels with Mr. Van Amburgh, but I would not say that I have not, because we have many conventions. * * *

"Q. Where was his desk with reference to your desk? A. It was in the same office, not a great distance apart.

"The Court: The same room?

"The Witness: Yes, sir.

"The Court: Your desk is in the same room his desk is in?

"The Witness: It is a very large room, about 20 or 30 desks.

"The Court: It is not so large but that you could see across it?

"The Witness: No, sir.

"Q. How far was your desk away from MacMillan's? A. About 10 feet, I think.

"Q. Anything intervening between you and MacMillan? A. No, sir.

"Q. You could see him sitting at his desk? A. My desk for the greater part has been with my back to Mr. MacMillan's desk, but recently it has been turned so it is alongside; that is, my side is toward Mr. MacMillan's desk, a little in front.

"Q. How far away from him? A. About 10 feet.

"Q. And you have been there within 10 feet of him for a year and a half? A. I guess it is about that long.

"Q. And you have never seen him writing with his pen?

"The Court (interposed): Or pencil?

"The Witness: I cannot say that I can recall that I have ever seen him in the act of writing. I would not say I have not, but I would not say that I have.

"The Court (addressing the clerk): Have you any forms here committing a witness for contempt? Well, you direct the clerk to get up the commitment papers. This witness is going to be committed for contempt of court. The court is thoroughly satisfied, Mr. Witness, that you are testifying falsely when you say that you cannot recall of ever seeing Mr. MacMillan write, and this has happened several times during this trial with other witnesses, especially with your wife. I believe—is that right, Mr. Judge Oeland?

"Mr. Oeland: Yes; she was one of the witnesses.

"The Court: And it becomes the plain duty of the court to commit you to jail, sir, for contempt, and, before doing so, I think it is the duty of the court to explain to you that the answer, 'I do not remember of ever having seen him write,' is just as false, is just as much a contempt of court, if you have seen him write, as it would be for you to say that you had never seen him write, without using the expression, 'I do not remember.' Now, we will adjourn here for a few moments. The court desires you to have every opportunity to correct your answers if you so desire to do so, and the court suggests that it would be very proper for you to talk with a lawyer about the situation. Counsel for the defense or counsel for the government or any one else you may desire to, but I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this court, and I am very sure it has, to deal with you in the manner proposed, I am going to do it. Now, a good many times a lay witness comes into court with the notion that, if they say they do not remember, that is a complete answer. I desire to inform you that that is not a complete answer, when the fact is that you do remember, or the fact is that you could not fail to remember. Now, we will take a recess for about 10 minutes.

"The Witness: Would it be proper for me to make a statement?

"The Court: You may make a statement, but it would be more prudent, I think, after you confer with some one, because you evidently have a wrong notion of this situation. Now, it is the duty of the court to be indulgent with you, and considerate with you, and give you every opportunity to do right. I would not like to have you, or any one else, think for a moment that that course will not be taken up. You see the situation is a very remarkable one, Mr. Witness, in having a desk in the same room with a man for so long, and transacting so much business with him, and being present when so much business has been transacted by him. The answer that you do not remember of ever seeing him write would be, in the opinion of the court, impossible, and when I say 'impossible,' that is a strong word; but the situation is so remarkable that I feel very sure that I am justified in that. Now, you are the third witness who has taken this course. Is it the fourth witness, Mr. District Attorney?

"Mr. Oeland: This is the third witness, your honor, and the Italian witness.

"The Court: Well, the Italian witness is not very well to be classed with him, I think.

"Mr. Oeland: No; I should not stick to it.

"The Court: And the court has sat here several days listening to this, and it becomes the plain duty of the court to commit you for contempt and deal with you otherwise, if necessary.

"Mr. Sparks: Before the recess I would like to make an objection.

"The Court: Yes; but this is dealing with the witness.

"Mr. Sparks: I understand, but I have the right at any stage of the case to make a motion such as I am going to make.

"The Court: Well, we will hear you.

"Mr. Sparks: In view of the fact that this has occurred at least three times during the trial of this case, and the court has expressed its opinion as to the truthfulness of the witnesses, the witness in each case claiming that they or she were doing the best they could to answer the questions put to them, in view of the fact that they could not state and answer the question from their own knowledge, and in view of the fact that the court has without any doubt indicated to the jury this witness was telling an untruth, and in each case telling them that unless they modify their testimony after an adjournment, I feel that these various occurrences have resulted in great

prejudice to the defendants, and cannot help but affect the jury in their deliberations upon this case, when it finally goes to them, especially in view of the fact that these three witnesses are members of the same organization, that that will have its effect unconsciously, and there is nothing that the court can say to them, in view of these various occasions, which will eradicate this impression from their minds. I also object upon the ground that these witnesses have been called by the government itself, and the government is in no better position to impeach their own witnesses than any plaintiff or party in any civil suit, and this impeaching of the witness by the government is contrary to all the known rules of procedure on the question of impeachment, and we respectfully ask, in view of all the facts, to withdraw a juror.

"The Court: To what?

"Mr. Sparks: To withdraw a juror.

"The Court: Well, the motion is denied.

"Mr. Sparks: I take an exception.

"The Court: And in denying the motion the court desires to say that this is not an extraordinary procedure in the least. Nothing has been done to violate the rules as to impeachment of witnesses. The court has a right to express its opinion in the circumstances of the present situation. If the court fails to do so, it would not do its duty. The court has even a right to express its opinion as to the way the verdict should go in a case in this court. I never exercised that right, and if the course suggested by counsel for the defendants was the proper course to pursue, then in any trial the government could be defeated, or in civil suit a plaintiff or defendant might be defeated in his case or in his defense, because a witness comes in and says 'I do not remember,' would be unable to proceed and complete the trial of any case. That would be giving a witness or witnesses the power to stop all proceedings in court. And as is said in this motion, gentlemen, as to prejudicing you against the defendants, there is no evidence in the case that any of these defendants are responsible for this witness' testimony. There is no evidence in the case to justify you in drawing the inference that any of these defendants are responsible for the attitude taken by the witness, so you should not draw any inference against the defendants. The young man on the stand is a witness called by the government. Whatever their relations may be, as appears by the testimony, would not warrant the court or the jury in charging this up, so to speak, to the defendants, or any of them; so you should be very careful not to let the conduct and the testimony of the witness in the respect indicated work any harm against any of the defendants. Now, before we take our recess, Judge Oeland, I wish you would ask him how long they have had their desks in the same room. I understood him to say one time more than a year and a half.

"Mr. Oeland: That is the way I understood him.

"The Court: I understood him another time to say a year and a half.

"Mr. Sparks: Nothing in the court's remark in reference to my motion can be deemed by me to have cured the situation which I assume to exist.

"The Court: Not in the least. The motion is denied, and what the court said is in explanation of the ruling it made in denying the motion.

"By Mr. Oeland: Q. How long have you been within 10 feet—your desk being within 10 feet of Mr. MacMillan? A. About a year and a half.

"The Court: How long has your desk been in the same room with Mr. MacMillan?

"The Witness: About a year and a half.

"The Court: Before this year and a half, did you occupy different rooms or workshops?

"The Witness: He was not there; he had no desk.

"The Court: What kind of a desk do you work at, whether roll top or flat top?

"The Witness: Roll top.

"The Court: And what kind of a desk does Mr. MacMillan work at, whether roll top or flat top.

"The Witness: Roll top when he is there.

"The Court. I did not ask you when he was there. Are there any other desks in this room?

"The Witness: Yes, sir; about 30.
"The Court: About 30 desks?
"The Witness: Yes, sir. * * *
"The Court: Well, you have been away attending these meetings and conventions; have you dined with him?
"The Witness: On some occasions.
"The Court: In a dining car?
"The Witness: No; I do not think we have been in a dining car together.
"The Court: In hotels?
"The Witness: I think we have been in a hotel together, but not in the same room.
"The Court: Never dined with him in a hotel on the European plan, in a restaurant where you make out—or a railway dining car where you make out—a schedule of the things to be served. Did you see him write?
"The Witness: I think not.
"The Court: Does he carry a little pocket memorandum book?
"The Witness: I could not say.
"The Court: Did you ever see him write in that?
"The Witness: I do not know that he carries one.
"The Court: You cannot tell about that?
"The Witness: No, sir.
"The Court: Tell the court whether you care to take any further time on this matter, do you?
"The Witness: My time is your time.
"The Court: I suggest that you might confer with counsel.
"The Witness: No, sir; my answers will be exactly as they have been.
"The Court: Very well. You are adjudged to be in contempt of this court and you are ordered to be committed to jail forthwith. Mr. Clark, you prepare the commitments. You are in the custody of the marshal from now on. And you may call the next witness."

Subsequently the court said:

"The Court: Well, gentlemen of the jury, I should say the action of the court in this regard should not be considered by you. You should draw no inference against these defendants, because there is no evidence in the case warranting it at the present time, and you will give attention, Mr. Reporter, to transcribing this testimony, in order that it may be used this afternoon. We will stop here for about 10 minutes in order that we may obtain another reporter.
"Mr. Sparks: Will your honor have an exception noted for all of these defendants?
"The Court: Certainly. All of these defendants, so far as they are entitled to an exception to this proceeding against the witness, and not against the defendant."

June 11, 1918, the witness was committed for contempt, and remained in prison until April 14, 1919, when he was discharged by the United States Supreme Court upon a writ of habeas corpus on the ground that his testimony, even if false, did not obstruct the court in the performance of its judicial duties. In re Hudgings, April 14, 1919. Mr. Justice White said:

"Testing the power to make the commitment which is under consideration in this case by the principles thus stated, we are of opinion that the commitment was void for excess of power—a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone, without reference to any circumstance or condition giving to it an obstructive effect. Indeed, when the provision of the commitment directing that the punishment should continue to be enforced until the contempt—that is, the perjury—was purged, the impression necessarily arises that it was assumed that the power existed to hold the witness in confinement under the punish-

ment until he consented to give a character of testimony which in the opinion of the court would not be perjured.

"In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected, we are of opinion that the case is an exception to the general rules of procedure to which we have at the outset referred, and therefore that our duty exacts that we finally dispose of the questions in the proceeding for habeas corpus which is before us. It is therefore ordered that the petitioner be discharged."

We think that the attitude of the court in regard to the testimony of these three witnesses and the action it took in the presence of the jury in the case of the witness William F. Hudgings was most prejudicial to the defendants. It was very likely to intimidate witnesses subsequently called, to prejudice the jurors against the defendants, and to make them think that the court was satisfied of the defendants' guilt. What a judge may say to the contrary on such an occasion will not necessarily prevent such consequences. It is not enough to justify a conviction that the defendant be guilty. He has a right to be tried in accordance with the rules of law. The defendants in this case did not have the temperate and impartial trial to which they were entitled, and for that reason the judgment is reversed.

MANTON, Circuit Judge. I dissent. As stated in the prevailing opinion, the plaintiffs in error (hereinafter called the defendants) were officers or employés of the Watch Tower Bible & Tract Society, the People's Pulpit Association, and the International Bible Students' Association, corporations under which, it is alleged, they were engaged in following a religious belief. While our country was at war, and before the armistice was signed, the defendants were tried and convicted on an indictment containing the four following counts:

First Count. A conspiracy to cause insubordination, etc., in the military and naval forces of the United States.

Second Count. A conspiracy to obstruct the recruiting and enlistment service of the United States.

Third Count. An attempt to cause insubordination, etc., in the military and naval forces of the United States.

Fourth Count. Obstructing the recruiting and enlistment service of the United States, etc.

The offenses charged were committed between June 16, 1917, and May 6, 1918. The corporations, acting through their officers and employés, who were indicted, between June 30, 1917, and March, 1918, caused to be published 850,000 copies of a book called "The Finished Mystery." These copies were distributed in large numbers in the army camps of the United States, and many hundreds of thousands of copies were distributed throughout the United States and Canada. The book purported to be an interpretation of the Book of Revelations and the Book of Ezekiel. The book has taken the shape of a small bible or prayer book. The first half is devoted to many quotations, with interpretations, from the Scriptures. Then, in about the center of the book,

are found writings, placed there in a very insinuative manner, of which the following extracts are a type:

"Standing opposite to those Satan has placed three great untruths, human immorality, the Antichrist and a certain delusion which is best described by the word Patriotism, but which is in reality murder, the spirit of the very Devil. * * * Under the guise of Patriotism the civil governments of earth demand of peace-loving men the sacrifice of themselves and their loved ones and the butchery of their fellows, and hail it as a duty demanded by the laws of heaven." Page 247.

"If you say that this war is a last resort in a situation which every other method, patiently tried, has failed to meet, I must answer that this is not true—that other ways and means of action, tried by experience and justified by success, have been laid before the administration and willfully rejected.

"'In its ultimate causes, this war is the natural product of our unchristian civilization.' * * * There is not a question raised, an issue involved, a cause at stake, which is worth the life of one blue-jacket on the sea or one khaki-coat in the trenches." Page 251.

At about this stage, the fertile mind of the reader would be very much interested, if sanctimonious at all. At this stage, he is supplied this food of poison for his patriotism and loyalty to his country. Under the mockery of religion or religious teaching, I can conceive of no worse thrust at America and at America's needs, at the time of the publication of this book, than that which was published in this book by the defendants. We in America all accord to men of all religious faiths the right to an honest and faithful belief in their creed and the practice of it accordingly, but that the defendants' efforts were intentional and for the desired purpose is apparent from a mere recital of some of the happenings during this period.

The defendant Rutherford wrote on July 17, 1917, referring to The Finished Mystery:

"It seemed good to the Lord to have the seventh volume prepared. * * * When the time came for publishing this work we were in the midst of much opposition, and knowing that to consult the opposers would hinder the publishing of the volume, I took counsel with Brothers Van Amburgh, MacMillan, Martin, and Hudgings of the office force."

The book was paid for out of the funds of the corporation with which the defendants were associated and which they managed. The effect of the book upon the drafted men is exemplified by some of these circumstances. As instances:

One Dutchess, formerly a National Guardsman, sold a copy of the book to one Sisson of Binghamton, N. Y. The latter claimed exemption later before the local board as a conscientious objector and was aided in this by the defendant Van Amburgh.

One Insberg was drafted and sent to Camp Devens in October, 1917. After purchasing the book, he refused to perform any military duty. He later bought a dozen volumes of the book and put them in the library of the Young Men's Christian Association at Camp Devens. Later he deserted.

One De Cecca was drafted, sent to Camp Devens, took a copy of the book with him, and then refused to work in camp.

One Niciti was drafted, sent to Camp Devens, got 30 copies of the

book, distributed them in camp. After he put on his uniform, he took it off and refused to do any work in camp.

One Anderson was drafted and sent to Camp Upton. After reading the book, he deserted, came to the Tabernacle (defendants' establishment), and while there an army officer was looking for him. He saw the officer; used the fire escape as a means of escaping from the building.

The record is replete with evidence indicating the defendants' active advising men subject to the draft to claim their exemption and to refuse to perform any duty in camp if they were drafted.

A pamphlet was later published, called the Bible Students' Monthly, and this by the Watch Tower Bible & Tract Society. An article therein was as follows:

"Young man, the lowest aim of your life is to be a good soldier. A good soldier never tries to distinguish right from wrong. * * * A good soldier is a blind, heartless, soulless, murderous machine. He is not a man; he is not even a brute, for brutes only kill in self-defense. * * * No man can fall lower than a soldier. It is a depth beneath which we cannot go."

Ten thousand copies of this monthly containing this quotation were reprinted in October, 1917, and paid for by defendants in the name of the Watch Tower Bible & Tract Society.

The guilt of the defendants is plain, and I do not understand that the majority of the court are of the opinion that the facts did not warrant this conclusion of the jury.

But this judgment is to be reversed because of the alleged adverse attitude of the court in regard to the testimony of three witnesses, Mrs. Mabel Campbell, Mrs. Agnes Hudgings, and William F. Hudgings, and the action taken by the court in the presence of the jury in the case of the witness Hudgings in committing him for contempt of court, saying it was so prejudicial to the defendants that it could not be cured by the many words of caution expressed by the trial judge.

In order to establish its case, the government found it necessary to call as witnesses employés and others who were attached to and associated with the defendant corporations. Mrs. Mabel Campbell was a stenographer for the defendants. She had written letters, carbon copies of which were taken from the defendants by a search warrant. She identified initials on the letters, and was placed on the witness stand to identify the letters. She refused to identify the letters. The court was apparently of the opinion that she was not telling the truth, and from the recital of what took place, as this record discloses, the court was undoubtedly correct in this conclusion.

Agnes Hudgings, also a stenographer, wrote certain letters to which she attached initials which she used in her course of business conduct in writing such letters; letters indicating the initials of the person who dictated the letter. She was the wife of one of the officers of the association. She refused to identify the letters, and the court, having reached the conclusion that she was not telling the truth, did not hesitate to tell her that she was evading and fencing, and not frank and truthful. Whatever was said by the court in his questions was at once

followed by directing the jury not to permit it to prejudice any one; that it should not reflect against the defendants or the government, for nothing appeared, he said, indicating that the defendants or the defendants' counsel were responsible for the attitude taken by the witnesses, the two stenographers.

Hudgings was called as a witness to identify the handwriting of one of the defendants, MacMillan. He was in close association in the same office, sitting within 10 feet of the desk occupied by MacMillan for two years, and declared that he could not identify the handwriting of either MacMillan or Van Amburgh.

At this stage of the trial, the conduct of the witnesses who were called, and who were associated with the defendants, became so palpable that the court properly told the witness he was not telling the truth. He ordered him committed for contempt of court. At once the court instructed the jury:

"There is no evidence in the case to justify you in drawing the inference that any of the defendants are responsible for the attitude taken by the witness, so that you should not draw any inference against the defendants."

The right to commit for contempt of court, or to summarily cause the arrest of a witness for perjury, is well recognized and approved by our courts. Of course, there must be facts justifying the contempt proceedings. This rule was recently laid down in Re Hudgings, 249 U. S. 378, 39 Sup. Ct. 337, 63 L. Ed. 656, decided April 14, 1919, by the Supreme Court of the United States. In this recent decision of the Supreme Court, the power to commit for contempt, when the circumstances warranted it, was recognized; but it was held that in the particular instance of Hudgings the circumstances did not warrant his commitment.

Throughout the trial, the court constantly protected the defendants' rights by frequent caution, and in many instances he asked the jury not to be prejudiced because of occurrences which took place during the course of the trial, which the court felt might in some way prejudice the defendants. And again, in the charge to the jury, the court left with the jury the statement that he had no opinion as to the facts, and that the facts were for the jury solely, and that no unfavorable inferences should be drawn by reason of any statement made by the court, nor should they be influenced by anything that occurred during the course of the trial. The rule has long been established that the trial judge of the District Court has wide latitude in the conduct of a trial; he may even comment upon the weight of evidence; so, too, he may comment upon the conduct of the witnesses and of counsel. Simmons v. United States, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; Vicksburgh, etc., Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 118, 30 L. Ed. 299; Lovejoy v. United States, 128 U. S. 171, 9 Sup. Ct. 57, 32 L. Ed. 389; Breese v. United States, 106 Fed. 680, 45 C. C. A. 535; Smith v. United States, 157 Fed. 721, 85 C. C. A. 353.

Indeed, it is my opinion that the learned District Judge was most patient and considerate of the defendants' rights. His consideration of defendants' counsel, who in their zeal to protect their clients' interest

many times overstepped the bounds of due respect to the dignity of the court, was magnanimous and kindly.

I see no error warranting a reversal of this conviction in the conduct of the trial judge, and in my opinion the judgment should be affirmed.

HICKSON v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1919.)

No. 1709.

1. WAR ⚷4—ESPIONAGE ACT—INDICTMENT FOR VIOLATION.
   In an indictment for violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), by willfully making false reports or statements with intent to interfere with the operation or success of the military or naval operations of the United States, when the United States was at war, it is unnecessary to aver that such statements were made in the presence or hearing of persons in the military or naval service, or subject to military or naval duty.
2. WAR ⚷4—ESPIONAGE ACT—VIOLATION.
   Evidence *held* to sustain a verdict finding defendant guilty of violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c) by making false statements with intent to interfere with the military or naval operations of the United States when at war.
3. CONSTITUTIONAL LAW ⚷90—WAR ⚷4—ESPIONAGE ACT—FREEDOM OF SPEECH.
   The Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), is not unconstitutional in making criminal in time of war statements or utterances which in time of peace might be within the constitutional rights of a citizen.
4. CRIMINAL LAW ⚷1218—EXECUTION OF SENTENCE—FEDERAL COURTS.
   Unless a defendant convicted of crime is sentenced to imprisonment for a period longer than one year, or to hard labor, a federal court is without authority to order the sentence executed in a state penitentiary.
5. CRIMINAL LAW ⚷1188 — UNAUTHORIZED SENTENCE — CORRECTION BY APPELLATE COURT.
   Where a federal court has exceeded its authority in the sentence imposed on a convicted defendant, the error may be corrected by the appellate court by remanding the cause for appropriate sentence.

In Error to the District Court of the United States for the Western District of South Carolina, at Rock Hill; Charles A. Woods, Judge.

Criminal prosecution by the United States against F. C. Hickson. Judgment of conviction, and defendant brings error. Reversed with directions.

Cornelius Otts, of Spartanburg, S. C. (J. K. Henry, of Chester, S. C., on the brief), for plaintiff in error.

C. G. Wyche, Asst. U. S. Atty., of Greenville (J. William Thurmond, U. S. Atty., of Edgefield, S. C., on the brief), for the United States.

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

PRITCHARD, Circuit Judge. This was a criminal action instituted in the District Court of the United States for the Western District of South Carolina.

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

The defendant was tried on an indictment containing seven counts, in which he was charged with willfully, unlawfully, and feloniously making and conveying certain false reports and statements while the United States was at war with the Imperial German government, with intent to interfere with the operations and success of the military and naval forces of the United States, and to promote the success of the enemies of the United States.

On motion of counsel, the court directed a verdict of not guilty on the second, fourth, and fifth counts of the indictment and submitted to the jury the first, third, sixth and seventh counts, and counsel for defendant, took an exception to the refusal of the Court to direct a verdict of not guilty as to all the counts of the indictment. The jury returned a verdict of not guilty on the third and seventh counts, and returned a verdict of guilty on the first and sixth counts of the indictment.

The statute under which plaintiff was convicted is what is known as the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 219 (Comp. St. 1918, § 10212c) and is in the following language:

"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 or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

[1] The first four assignments of error relate to the demurrer to the indictment and the motion to direct a verdict. It was contended that the indictment did not allege and that the proof did not show that the remarks made or the newspaper article were delivered to any member of the military or naval forces or those subject to draft. The defendant's contention is that the indictment should have alleged that the language used was directed to or used in the presence of enlisted men of the army or navy of the United States or those within the draft age. We think this question was disposed of adversely to the contention of defendant's counsel by this court in the case of H. E. Kirchner v. United States, 255 Fed. 301, — C. C. A. —. The court in that case, in passing upon this question, among other things, said:

"The remaining objections to the indictment are founded on the theory that the false statement must be made to, or at least within the hearing of, persons who are, or who are liable to become, members of the military or naval forces. We find no warrant for this contention in the statute. The success of the military and naval forces is aided or hampered in large measure by the spirits of the civilian population. Shipbuilders, munition makers, coal miners, lumber producers, buyers and sellers of Liberty Bonds and War Saving Stamps, women and girls making Red Cross supplies, merely begin the list of civilians whose patriotic ardor is almost as essential to the success of our military and naval forces as is the spirit of the men composing these forces. Excepting only those who are too unintelligent to understand, there is no class of our population on whom some false statements may not have a pernicious effect in the direction of restraining patriotic endeavor. In

drawing the indictment it was unnecessary for the pleader to negative the fact that the statements alleged against the defendant were made only in the hearing of those too unintelligent to understand them. The return of the indictment necessarily imported that the defendant's statements were made to some person who understood them, and repeated them before the grand jury. It follows that, unless the false statement be made only to children of very tender years or to imbeciles, the intent to interfere with the operation or success of the military or naval forces may exist.

"The crime denounced is not that of interfering with the success of our forces. If the false statement is willfully made with the intent denounced, the offense is complete; and if the effect of the statement may reasonably be to chill the ardor or restrain the efforts of any of those who hear the statement, the prescribed intent may exist. The statute does not discriminate between an intent to directly interfere * * * with the operation or success of the military forces. And hence we have no reason for making such distinction."

In support of its contention the court cited a number of other decisions reported in the bulletins entitled "Interpretation of War Statutes."

The fifth assignment is to the effect:

[2] (a) That there was no proof of any false statement in the alleged newspaper article set out in the sixth count, or

(b) That any word or utterance of defendant was made with intent to create mutiny, disloyalty, or insubordination in the military or naval forces of the United States, and it is urged that the court below erred in not directing a verdict in favor of the defendant.

On these grounds the court below in refusing the motion for a new trial said:

"I could not resist the conclusion, however, that it was fair to submit it to the jury, that I was obliged to submit it to the jury, whether when the defendant said: 'When the flag of my country is never sacred except when used as the red flag in the bull-pen to tease the beast to fight,' that that meant certainly by the strongest insinuation and inference, that that meant that the flag of his country had been used to tease the people into patriotism and into the spirit of fighting, that it had been falsely presented to them, that the issue had been so falsely represented that the flag was used to tease them into the fighting spirit. That was a legitimate inference the jury might draw, and I could not see my way clear to withdraw that from the jury."

As to this assignment we are of opinion that it was a question for the jury to decide as to whether the following statement was true.

"It was wrong for this country to be drawn into the war, and that Woodrow Wilson was the man that did it; that it was a money-making propaganda, and the steel men, and the big men, and the big office holders were the ones that were getting the benefit of it, and that he bet Woodrow Wilson was getting his drag, and that he should be assassinated; that it was wrong for one man to say what the whole country should do."

This was an unwarranted and reckless statement, and one that should never be indulged in by a citizen of this government.

The jury having passed upon this question, we are not inclined to interfere with the verdict.

By the sixth assignment is insisted that the evidence did not warrant a verdict of "Guilty." This was also a question of fact as to the intent of the defendant at the time he made the remark, concerning which witnesses testified. The court's charge bearing on this point was

fair and impartial, leaving, as it did, the question of intent to be determined by the jury. The jury having found the facts in pursuance of the instructions given we think the assignment is without merit.

The seventh assignment relates to the refusal of the court below to grant a new trial on the ground that the jury was unduly influenced in that one juror was biased and incapable of rendering a true verdict.

The learned judge, who heard this case, in referring to this phase of the question, said:

"All that I think that the remark in question meant was that this was a case in which soldiers were particularly interested. They were particularly interested in finding a true verdict, that those who had done anything to interfere with the military operations of the government should be punished for it. It did not imply that those soldiers were interested in having a false or prejudiced verdict. It would have been better perhaps for him not to have said anything about it, and as it turned out it would have been better for Mr. Thurmond had he not made any interrogation. I cannot think there was any impropriety in the course he pursued. If the juror had been accused of anything that was improper I should have had him summoned here, but I do not think there was anything improper in his conduct."

We think that the above-statement of the court is a full and complete answer to the contention of the defendant as respects this point.

[3] The eighth, ninth, and eleventh assignments of error are based on the ground that the Espionage Act as interpreted by the court below is unconstitutional. This question was decided by the Supreme Court of the United States in the case of Schenck v. United States 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470 (decided March 3, 1919, and reported in the advanced sheets). In that case the court held that the law was constitutional. Justice Holmes in speaking for the court, among other things, said:

"But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in Patterson v. Colorado, 205 U. S. 454, 462, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. Aikens v. Wisconsin, 195 U. S. 194, 205, 206, 25 Sup. Ct. 3, 49 L. Ed. 154. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Buck Stove & Range Co., 221 U. S. 418, 439, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. The question in every case is whether the words used are used in such circumstances as 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. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in section 4 * * * punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking or circulating a paper), its tendency and the

intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. Goldman v. United States, 245 U. S. 474, 477, 38 Sup. Ct. 166, 62 L. Ed. 410. Indeed that case might be said to dispose of the present contention if the precedent covers all media concludendi. But as the right to free speech was not referred to specially, we have thought fit to add a few words."

This point was also decided March 10, 1919, in Jacob Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 240, 63 L. Ed. 561, Advanced Sheets. Mr. Justice Holmes, in speaking for the court, said:

"With regard to that argument we think it necessary to add what has been said in Schenck v. United States, only that the First Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language. Robertson v. Baldwin, 165 U. S. 275, 281, 17 Sup. Ct. 326, 41 L. Ed. 715. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."

The tenth assignment of error is to the effect that the jury was inconsistent in finding the defendant not guilty as charged in the third and seventh counts, and at the same time finding him guilty in the first and sixth counts. This question was not presented to the court below. Indeed, it appears to be an afterthought of counsel. These crimes are separate and distinct, and the findings of the jury as to one cannot be said to be inconsistent with its findings as to the others.

A careful examination of the record shows that the jury was amply warranted in finding as it did. The charge of the learned judge who heard the case was fair and impartial. Therefore we are impelled to the conclusion that there is no error as respects the rulings of the court below.

[4] In conclusion, there is one matter not mentioned in the assignments of error, to which we will refer briefly. It appears that the defendant was sentenced to the penitentiary for a term of six months. We think this was unauthorized. This question was passed upon in the case of In re Bonner, Petitioner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149. The court in discussing this phase of the question, said:

"Section 5356 of the Revised Statutes of the United States [Comp. St. § 10460], under which the defendant was indicted and convicted, prescribes as a punishment for the offenses designated fine or imprisonment—the fine not to exceed $1,000 and the imprisonment not more than one year, or by both such fine and imprisonment. Such imprisonment cannot be enforced in a state penitentiary. Its limitation, being to one year, must be enforced elsewhere. Section 5541 of the Revised Statutes [section 10527] provides that: 'In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the Legislature of the state for that purpose.' And section 5542 [section 10528] provides for a similar imprisonment in a state jail or penitentiary where the person has been convicted of any offense against the United States and sentenced to imprisonment and confinement at hard labor. It follows that the court had no jurisdiction to order an imprisonment, when the place is not specified in the law, to be executed in a penitentiary when the imprisonment is not ordered for a period longer than one year or at hard labor. The statute is equivalent to a direct denial of any authority on the part of the court to direct that imprisonment

be executed in a penitentiary in any cases other than those specified. Whatever discretion, therefore, the court may possess, in prescribing the extent of imprisonment as a punishment for the offense committed, it cannot, in specifying the place of imprisonment, name one of these institutions. This has been expressly adjudged in Re Mills, 135 U. S. 263, 270 [10 Sup. Ct. 762, 34 L. Ed. 107], which, in one part of it, presents features in all respects similar to those of the present case."

[5] In the case of Mitchell v. United States, 196 Fed. 874, 116 C. C. A. 436, the Circuit Court of Appeals for the Ninth Circuit, in referring to the question as to whether one under circumstances like the case at bar is entitled to a final discharge, said:

"But the error in the judgment does not entitle the plaintiff in error to his discharge, as it might if the question were presented on a writ of habeas corpus. The case having come to this court on writ of error, this court, while reversing the judgment of the court below, may remand the cause to that court, with directions to enter the appropriate judgment. Murphy v. Massachusetts, 177 U. S. 155, 20 Sup. Ct. 639, 44 L. Ed. 711; Haynes v. United States, 101 Fed. 817, 42 C. C. A. 34; Whitworth v. United States, 114 Fed. 302, 52 C. C. A. 214."

As we have stated, the other assignments of error as to the rulings of the court below are without merit. However, from what we have stated as to this point, it necessarily follows that the judgment of the court below should be reversed and the cause remanded, with directions to enter such judgment on the verdict of the jury as the justice of the case requires and the acts of Congress authorize.

UNITED STATES v. SAFE INVESTMENT GOLD MINING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 19, 1919.)

No. 5010.

1. PUBLIC LANDS ⚷120—SUIT FOR CANCELLATION OF PATENT—FRAUD.
   While the United States has the same remedy in equity for cancellation of a patent for fraud that an individual would have in case of his own deed, it has the burden of proof, and is subject to the same rule that the evidence must be clear and convincing.
2. MINES AND MINERALS ⚷45—CANCELLATION OF PATENT—PROOF OF FRAUD.
   Evidence in a suit for cancellation of a mineral patent for fraud *held* insufficient to overcome the presumption in favor of the validity of the patent, or to show that representations made in the application for patent were willfully and knowingly false, or that they were relied on by the government officers.
3. MINES AND MINERALS ⚷17(1)—MINING CLAIMS.
   The words "discovery of the vein or lode," as used in Rev. St. § 2320 (Comp. St. § 4615), in prescribing the prerequisites of a valid mineral location, owing to the varying conditions to which the expression must be applied, has no rigidly fixed meaning.
4. PUBLIC LANDS ⚷120—SUIT FOR CANCELLATION OF PATENT—ISSUES.
   Where a suit by the government for cancellation of a patent is based upon fraud, plaintiff will be confined as a general rule strictly to that issue.

Carland, Circuit Judge, dissenting.

⚷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 District of South Dakota; James D. Elliott, Judge.

Suit by the United States against the Safe Investment Gold Mining Company and Frank Steiskal, trustee. Decree for defendants, and complainant appeals. Affirmed.

George E. Trowbridge, Asst. Sol., Department of Agriculture, of Denver, Colo., and E. W. Fiske, Asst. U. S. Atty., of Sioux Falls, S. D., for the United States.

J. M. Hodgson, of Casper, Wyo., for appellees.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

BOOTH, District Judge. This is a suit to cancel, for fraud, a patent issued by the United States August 20, 1908, covering 61 lode-mining claims, containing about 1,118 acres, embraced in mineral survey No. 1894, situated in Lawrence county, S. D. The fraud alleged is false representations knowingly made to the officers of the United States General Land Office at the time of the application for the patent. Voluminous testimony was taken before a special examiner appointed by the court. Upon the trial the bill was dismissed upon the merits for want of equity.

The evidence discloses that the Safe Investment Gold Mining Company, hereinafter called the Mining Company, was a corporation organized under the laws of South Dakota. It became the owner of the Pyrites lode-mining claim, mineral survey No. 591, in the county of Lawrence, S. D. Adjoining this Pyrites lode lies the land making up mineral survey No. 1894, involved in this suit. Of the claims going to make up this survey, 8 were located by Ole Christopher, 13 by I. A. Webb, 4 by C. M. Woodbridge, 6 by John Peterson and A. A. Moodie, 20 by J. F. Sawyer and S. Cresswell, and 10 by the Mining Company itself. Apart from the claims located by the company, all but 6 of the others had been located prior to the organization of the company. Webb and Woodbridge were connected with the company from its organization; the other locators had no connection therewith.

Having acquired ownership of the claims, and having caused an official survey to be made of the property, and the same having been designated by the Surveyor General of South Dakota as mineral survey 1894, the company, on November 23, 1905, authorized Webb, one of its directors, as attorney in fact, to make application for a patent, and to take the necessary steps in connection therewith. The application for patent was filed June 29, 1906. The land being within the limits of the Black Hills National Forest, the Forest Supervisor ordered an examination and report. This report was made July 27, 1906, and approved August 2, 1906. On September 4, 1906, a protest against the application for the patent was filed by the Forest Supervisor, but was withdrawn September 26th. On November 30, 1907, the receiver's final receipt was issued. August 20, 1908, the patent issued.

April 28, 1911, the bill of complaint was filed herein. The bill alleged a conspiracy on the part of the officers of the Mining Company

to defraud the United States. The evidence in the record as to a conspiracy is not, in our judgment, sufficient to justify a discussion as to this element of the case. The fraud claimed is alleged to have been committed by the officers of the defendant Mining Company. It centers around I. A. Webb, one of the directors. No fraud is alleged on the part of the officers or employés of the government. The alleged fraud consists of false representations claimed to have been knowingly made in connection with the application for the patent, and relates specifically to two matters—the discovery, required by section 2320, R. S. (Comp. St. § 4615), and the amount expended for labor or improvements required by section 2325, R. S. (Comp. St. § 4622), and amendments thereto.

[1] The rules of law applicable to such cases are well settled.

"The United States has the same remedy in a court of equity to set aside or annul a patent for land, on the ground of fraud in procuring its issue, which an individual would have in regard to his own deed procured under similar circumstances." United States v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110; McCaskill Co. v. U. S., 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590; Milner v. United States, 228 Fed. 431, 143 C. C. A. 13.

But the burden of proof rests upon the government, even though the establishment of a negative be required; and the evidence must be clear and convincing. In the case of United States v. Stinson, 197 U. S. 200, 25 Sup. Ct. 426, 49 L. Ed. 724, the court said:

"While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established:

"First. The respect due to a patent, the presumption that all the preceding steps required by law have been observed before its issue, the immense importance and necessity of the stability of titles depending upon these official instruments, demands that suits to set aside or annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof. Maxwell Land Grant Case, 121 U. S. 325 [7 Sup. Ct. 1015, 30 L. Ed. 949]; Colorado Coal Co. v. U. S., 123 U. S. 307 [8 Sup. Ct. 131, 31 L. Ed. 182]; U. S. v. San Jacinto Tin Co., 125 U. S. 273 [8 Sup. Ct. 850, 31 L. Ed. 747]; U. S. v. Des Moines, etc., Co., 142 U. S. 510 [12 Sup. Ct. 308, 35 L. Ed. 1099]; U. S. v. Budd, 144 U. S. 154 [12 Sup. Ct. 575, 36 L. Ed. 384]; U. S. v. American Bell Tel. Co., 167 U. S. 224 [17 Sup. Ct. 809, 42 L. Ed. 144].

"Second. The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.' Maxwell Land Grant Case, supra [121 U. S.] 381 [7 Sup. Ct. 1015, 30 L. Ed. 949]; United States v. Iron Silver Mining Co., 128 U. S. 673, 677 [9 Sup. Ct. 195, 32 L. Ed. 571]; United States v. Des Moines, etc., Co., supra [142 U. S.] 541 [12 Sup. Ct. 308, 35 L. Ed. 1099].

"Third. It is a good defense to an action to set aside a patent that the title has passed to a bona fide purchaser, for value, without notice; and, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the government, but also will protect the rights and interests of innocent parties. U. S. v. Burlington & Missouri River R. R. Co., 98 U. S. 334, 342 [25 L. Ed. 198]; Colorado Coal Co. v. U. S., supra [123 U. S.] 313 [8 Sup. Ct. 131, 31 L. Ed. 182]."

To the same effect: Diamond Coal Co. v. United States, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936; Washington Securities Co. v. United States, 234 U. S. 76, 34 Sup. Ct. 725, 58 L. Ed. 1220; Burke v. So. Pac. R. R., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527; Wright-Blodgett Co. v. United States, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637; United States v. Beaman, 242 Fed. 876, 155 C. C. A. 464; United States v. Porter Fuel Co., 247 Fed. 769, 159 C. C. A. 627.

[2] The statements made by Webb in the application for patent which are now challenged for fraud are as follows:

"That in virtue of a compliance with the mining rules, regulations, and customs, by the said Safe Investment Gold Mining Company, applicant for patent herein, has become the owner of, and is in the actual, quiet, and undisturbed possession of the Oregon No. 26 and other lodes, M. S. No. 1894, as herein described, linear feet of the vein, lode, or deposit, bearing gold, together with surface ground 600 feet in width, for the convenient working thereof, as allowed by local rules and customs of miners."

And:

"Deponent further states that the facts relative to its right of possession to said mining claim, vein, lode, or deposit and surface ground so surveyed and platted are substantially as follows, to wit: Discovery, location, and purchase, which more fully appear by reference to the copy of the original record of location and the abstract of title hereto attached and made a part of this affidavit; the value of the labor done and improvements made upon said Oregon et al. lodes, M. S. No. 1894, claim, by it and its grantors, being equal to the sum of five hundred dollars upon and for the benefit of each claim embraced in this survey; and said improvements consist of shafts, drifts, tunnels, and crosscuts."

It is contended by plaintiff that, inasmuch as the land in question was within the limits of a national forest, patent therefor could issue only upon proof of a discovery of mineral in such quantity and of such value as to show the land to be more valuable on account thereof than for national forest purposes. And it is claimed that defendant Mining Company in its application for patent, by the statements above set out, falsely and fraudulently represented that it had made on each of the claims a discovery of mineral of sufficient value to show that the lands were more valuable for mineral than for national forest purposes.

It is further contended by plaintiff that the application for patent, by the statements above set out, falsely and fraudulently represented that a well-defined vein or lode carrying mineral of value had been discovered on the claims in question, whereas in truth no such vein or lode had been discovered. The bill of complaint alleges:

"The plaintiff's said officials believed and relied upon said false and fraudulent representations and were deceived thereby, and were at all times prior to the issuance of said patent in ignorance of the aforesaid fraudulent character of said mineral entries, application, and proofs, and of the character of the said lands, and because of said belief, reliance, deception, and ignorance, and not otherwise, caused the said application to be allowed and the said receiver's receipt, register's certificate, and patent to be issued in the manner and form as herein alleged."

The evidence bearing upon Webb's representation as to discovery was substantially as follows: The land in question was in the min-

eral belt of the Black Hills, and was not dissimilar in character to the formation at the Homestake Mine. The general mineral character of the country was recognized. Gold had been found on the adjoining Pyrites claim in considerable quantities. Twenty-five of the claims included in mineral survey 1894 had been located in the period from 1898 to 1902, and had been acquired by the Mining Company between October, 1904, and March, 1905. The location certificates covering these claims had been filed as required by the statutes of South Dakota, and no question had been raised as to the validity of the locations. Presumptions were in their favor. Discovery holes were dug upon the other claims, in accordance with the statutory requirements. Witnesses for the plaintiff who had worked in digging these holes testified that, while rock in place was found upon these latter claims, there was no true fissure or vein carrying minerals of value; that no free gold was obtained by panning; that assays of samples taken from the discovery holes showed traces of gold. Webb, who was called as witness for plaintiff, testified that his information, from the men who had delved into the ground upon these claims, was that the claims contained ore bodies; that he knew they contained ore bodies; that "there were veins all through there." Witnesses for the plaintiff, who later examined the claims, testified that they found no true mineral-bearing veins or lodes which would pay to mine. Witnesses for the defendant testified that such mineral-bearing veins and lodes did exist, and in some instances contained ore of commercial value; that veins could be traced extending from the Pyrites lode to the Oregon claims. In some instances free gold was obtained by panning estimated to run as high as $3 per ton. Assays made at the instance of the plaintiff showed only traces of gold from samples taken from the various claims; assays made at the instance of the defendant showed gold in quantities, from a trace to $2.80 per ton. Practical miners testified on behalf of the defendant that they found upon the claims such veins as would justify a reasonably prudent miner and prospector in expending time and labor and money in their development; and mining engineers testified on behalf of the defendant that, from an examination of the ground by them, it was their opinion that a reasonably prudent man would be justified in expending time, money, and labor in exploiting and developing and prospecting the property. Mining engineers testifying for the plaintiff reached the opposite conclusion.

[3] Much argument has been devoted by counsel and many authorities cited with a view to determining the meaning which should be given to the words "discovery of the vein or lode" as used in section 2320, R. S.; the purpose being to establish the test by which to determine whether Webb was guilty of knowingly making false representations when he based his application for patent upon "discovery." We do not think an extended discussion of the authorities cited is necessary. They clearly indicate that the expression "discovery of the vein or lode" has no rigidly fixed meaning; and this, of necessity, owing to widely varying conditions to which the expression must be applied.

In Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113, the court, in speaking of the requisites of a valid location, said:

"There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence."

In King v. Mining Co., 152 U. S. 222, 227, 14 Sup. Ct. 510, 511 (38 L. Ed. 419), the court, in speaking of section 2320, R. S., said it was—

"In effect, a declaration that locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits shall not be permitted. A location can only rest upon an actual discovery of the vein or lode."

In Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770, the court said:

"When the controversy is between two mineral claimants the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. * * * But even in such a case * * * there must be such a discovery of minerals as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining."

Lindley on Mines, § 336, cites approvingly the definition of Judge Hawley contained in Book v. Justice Mining Co. (C. C.) 58 Fed. 106, 120:

"When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

It is unnecessary to decide what the exact necessary requirements for the issuance of the patent would have been as to discovery of minerals, if a contest had been instituted. The questions here are whether the representations actually made by the defendant were willfully and knowingly false, and whether those representations were relied upon by the plaintiff. A careful consideration of the whole evidence leads to the conclusion that plaintiff has failed to establish the allegations of the bill in respect to those matters. In view of plaintiff's contentions, set forth above, as to the meaning to be placed upon the statements in the application, it was incumbent upon plaintiff to prove that the statements made by Webb in the application were capable of but one meaning, viz. the meaning now placed upon them by plaintiff, or at least that this meaning was in fact intended by Webb, and that the statements were also understood with the same meaning by the officials of the General Land Office. Conceding, without deciding, that both of the above-stated requirements, contended for by plaintiff, as to mineral value of the land were necessary prerequisites to the issuance of a patent, and that such requirements had

not been met, still the fraud alleged lacks proof. First, there is no evidence that the officials of the Land Office believed that such requirements were necessary, or that the language of the application was intended to make such representations. The register of the United States Land Office where the application for patent was made, who at the time of the application was receiver of the United States Land Office, testifying on behalf of the plaintiff, said:

"The Land Office arrives at the fact that the land is mineral land when the application is made from the mineral survey and the record of the application for patent. The Surveyor General of South Dakota certified it was mineral land before the Land Office passed upon this application for patent. He files this plat, and this plat is filed in connection with this application, certified by the Surveyor General on May 12, 1906."

And further said:

"I would say it is my opinion from the examination made of these papers for application for patent by the mineral clerk, by Mr. Bennett as register, and myself, that all the requirements of the United States statutes had been met by the applicant for this patent."

Mr. Bennett was not called as a witness.

Secondly, there is an affirmative showing by plaintiff that Webb, at the time of the application for a patent, did not believe that the requirements now contended for by plaintiff existed under the law and practice. If Webb did not believe that such requirements existed, then, clearly, plaintiff, by putting such a construction on the language of the application as would make Webb represent as actually existing a condition of affairs which he did not believe necessary to exist, and then by showing that such requirements had not in fact been fulfilled, has not furnished the required clear and convincing proof of the alleged willful fraud.

As to the alleged fraud touching the improvements, the evidence shows that the expenditures were made upon the Pyrites lode and mineral survey 1894 in accordance with the group theory; if this theory was applicable, there can be no doubt that the required amount was expended.

Upon the question whether the expenditures for improvements upon the Pyrites lode could be properly said to be for the benefit of mineral survey 1894, the evidence is conflicting; but the presumptive force of the certificate of the Surveyor General of South Dakota has not been destroyed, and this certificate, covering the matter as it does, must be taken as conclusive. United States v. Iron Silver Mining Co., 128 U. S. 673, 685, 9 Sup. Ct. 195, 32 L. Ed. 571; United States v. King, 83 Fed. 188, 27 C. C. A. 509.

It is the claim of the plaintiff that the alleged fraudulent scheme was devised and carried out with a view to securing the land within mineral survey No. 1894 for the sake of getting the timber thereon, which, it is alleged, was worth, standing $27,000. As tending to establish fraud, plaintiff calls attention to testimony that the presence of timber upon the land had been remarked upon by Webb and others connected with the Mining Company prior to the application for patent, and that Webb had instructed the man who dug the discovery

holes to locate all the ground he could get in there, and also put in the timber, and to Webb's testimony that one purpose of locating these claims was to keep others from getting the ground next to the Pyrites lode. But such facts do not of themselves establish fraud. As was said in United States v. Iron Silver Mining Co., 128 U. S. 673, 684, 9 Sup. Ct. 195, 199 (32 L. Ed. 571), in reference to similar facts:

"A prudent miner, acting wisely in taking up a claim, whether for a placer mine or for a lode or vein, would not overlook such circumstances, and they may in fact control his action in making the location."

Furthermore, this timber was largely on the claims which had been located by parties not connected with the Mining Company and which had been afterwards purchased by it. Still further, the evidence shows that the expenditure of more than the amount stated as the value of the timber had been made upon or for the benefit of mineral survey 1894 prior to the application for the patent, and that subsequent to the application several times that amount was spent upon the Pyrites lode and mineral survey 1894 as a group. In the light of such evidence, the probability of the existence of the alleged fraudulent scheme for the purpose of obtaining the timber is reduced to a minimum. Certainly the evidence does not meet the required standard.

[4] It is finally claimed by the plaintiff that, though the evidence fails to establish fraud, yet it establishes a mistake on the part of the Interior Department in issuing the patent, and that for this reason the patent should be canceled. It is sufficient to say, as to this contention, that no such issue is presented by the bill of complaint, and that, when a suit of this character is based upon fraud, the plaintiff will be confined, as a general rule, strictly to that issue. Eyre v. Potter, 15 How. 42, 55, 14 L. Ed. 592; French v. Shoemaker, 14 Wall. 314, 335, 20 L. Ed. 852; Wall v. Parrot Silver & Copper Co., 244 U. S. 407, 37 Sup. Ct. 609, 61 L. Ed. 1229; Reed v. Munn, 148 Fed. 737, 80 C. C. A. 215.

As these conclusions dispose of the case, it is not thought necessary to determine other questions arising upon the record and discussed by counsel in their briefs.

Judgment affirmed.

CARLAND, Circuit Judge (dissenting). A consideration of the evidence in this case has satisfied me that the patent for M. S. 1894 should be canceled as against the Investment Company for fraud. The defendant Steiskal, who was the trustee for the bondholders under the mortgage executed by the Investment Company, now holds the title to the land in controversy as trustee. This appears, not only from the evidence, but by the terms of the deed on foreclosure. The complaint of the plaintiff being on file when the foreclosure proceedings were had, no additional rights accrued to the bondholders than those they possessed under the mortgage. The trustee as such cannot be an innocent purchaser of the land.

It appears in a general way that about $75,000 in bonds were issued by the Investment Company under the mortgage, but it does not appear

by whom they are held, or the circumstances under which they were acquired. There is no allegation in the complaint that there are any innocent bondholders; the allegation in this behalf being confined to the trustee. We cannot, for want of allegation and proof, determine whether there are any innocent bondholders. The decree below should be reversed, and a decree entered canceling the patent to M. S. 1894 as against the Investment Company, but preserving the title of Steiskal as trustee in behalf of those bondholders who shall come in and by proper pleading and proof show themselves to be innocent bondholders for value under the mortgage. If no such bondholders shall come in, then the title of Steiskal as trustee shall be also canceled. If innocent bondholders do come in, sufficient land should be sold to satisfy their claims; all matters necessary to carry out our judgment being left to the trial court.

NATIONAL BRAKE & ELECTRIC CO. v. CHRISTENSEN et al.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2163.

1. EQUITY ⟹422—FINAL DECREE.
   A decree may be final both as to the merits and to the time relation; but, where a chancellor denies a petition for a rehearing, it may be the final judicial action in the case despite an earlier decree on the merits which otherwise was final, the final order bringing forward to the time thereof the original decree on the merits.

2. COURTS ⟹405(12)—FEDERAL COURTS—FINAL DECREE—"FINAL ORDER."
   The federal procedure is wholly statutory, and, when the statute limited appeals to final decrees, the meaning of "final" becomes a matter of statutory construction, and it is within the province of the court to declare that a "final order" is one that ends the litigation in the trial court, and that the legislative intent was against piecemeal appeals.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Order.]

3. PATENTS ⟹323, 327—CONCLUSIVENESS—FINALITY OF DECREE.
   Where an alleged infringer was permanently enjoined and an accounting was directed before a master in chancery for past infringement, and on appeal decree was affirmed, the decree, though interlocutory in form, was in its essence a final decree, so that after affirmance and before accounting was had the infringer cannot by petition set up in the Circuit Court of Appeals as res judicata a judgment of another Circuit Court of Appeals in an action brought by the same complainants in another circuit holding the patent invalid.

Application for Order Directing Dismissal of Bill Brought in the District Court of the United States for the Eastern District of Wisconsin.

Application by the National Brake & Electric Company for an order directing dismissal of a bill brought in the United States District Court by Niels A. Christensen and another against petitioner for patent infringement. Application denied.

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

John S. Miller, Edward O. Brown, and Charles A. Brown, all of Chicago, Ill., and Thomas B. Kerr, of New York City, for petitioner.

Joseph B. Cotton, of New York City, Louis Quarles, of Milwaukee, Wis., and Wm. R. Rummler, of Chicago, Ill., for respondents.

Before BAKER, MACK, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Respondents sued petitioner in the District Court for the Eastern District of Wisconsin for alleged infringement of patent No. 635,280, issued October 17, 1899, to N. A. Christensen, for a combined pump and motor. On issues joined as to the ultimate rights of the parties, the District Court heard and considered all the evidence each side had to offer respecting the ownership, validity, and infringement of the patent, and thereupon adjudged and decreed that respondents were the owners of a valid patent which was being infringed by structures made, used, and sold by petitioner, that petitioner and its agents be enjoined during the life of the patent from making, using, or selling any combined pump and motor embodying the Christensen improvements, and that an accounting before a named master in chancery be had for past infringements. On appeal to this court that decree was affirmed in 1915. 229 Fed. 564, 144 C. C. A. 24. Ever since our mandate was issued, the cause has been pending in the District Court in Wisconsin on the accounting.

Sometime after the decisions in this circuit, respondents began a suit on the same patent against the Westinghouse Traction Brake Company in the District Court for the Western District of Pennsylvania. That litigation resulted in a decree, entered in 1917, pursuant to the mandate of the Circuit Court of Appeals for the Third Circuit (243 Fed. 901, 156 C. C. A. 413), holding the patent invalid and dismissing the bill for want of equity.

Thereupon petitioner went into the District Court in Wisconsin, and, on representations that it was entitled to the benefit of the Pennsylvania decree as a privy, asked that the Wisconsin decree be vacated and petitioner be granted leave to amend its answer on the merits by setting up the Pennsylvania decree as res adjudicata. That petition was denied.

And now petitioner comes before us in an original proceeding, asking that we recall our mandate, vacate our decree, find that the Pennsylvania decree is res adjudicata in this case, and thereupon direct the vacation of the Wisconsin decree and the dismissal of the bill on the merits.

On the records of the two cases, which are submitted as constituting all the evidence that bears on this motion, respondents dispute petitioner's contentions as to the identity of subject-matter and parties in the two decrees. But at the threshold lies the question of the nature and effect of the Wisconsin decree, affirmed by this court, and we have stated the case only in that aspect.

[1] A decree may be looked at from the point of view of time, and also from that of essence. The former discloses procedural law, mainly statutory appellate procedure; the latter concerns the right of a party who, for instance, on issues joined respecting title to property and exclusive possession or use, has submitted all his proofs

and arguments, afterwards to require the court to ignore its deliberate decree on title and right of possession and to hear again the evidence and arguments on those issues because a supplemental or dependent issue has been reserved for future judicial determination.

If a decree writes "finis" to the litigation, it certainly merits the term "final" in time relation. But even in the time relation of procedure, the last judicial action is not always the matter that is reviewed on appeal. If a chancellor entertains a petition for a rehearing (motion for a new trial), his denial of the petition may be the final judicial action in the case, but his decree on the merits as deduced from the evidence and the law is the matter that is reviewed. The effect of the final order in time is to bring forward to the same time the order on the merits. Brockett v. Brockett, 2 How. 238, 11 L. Ed. 251; Aspen Mining Co. v. Billings, 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986; Kingman v. Western Mfg. Co., 170 U. S. 675, 18 Sup. Ct. 786, 42 L. Ed. 1192; Chicago G. W. Rld. Co. v. Basham (March 3, 1919), 249 U. S. 164, 39 Sup. Ct. 213, 63 L. Ed. 534.

[2] Federal appellate procedure is wholly statutory. When the statute limited appeals to "final" decrees, the meaning of "final" was a matter of statutory construction. It was within the province of the court to declare that a "final" order was only the one that ends the litigation in the trial court and that the legislative intent was against "piecemeal" appeals. Barnard v. Gibson, 7 How. 650, 12 L. Ed. 857; Craighead v. Wilson, 18 How. 199, 15 L. Ed. 332; Beebe v. Russell, 19 How. 283, 15 L. Ed. 668; Humiston v. Stainthorp, 2 Wall. 106, 17 L. Ed. 905; Green v. Fisk, 103 U. S. 518, 26 L. Ed. 485; Keystone Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. 32, 33 L. Ed. 275; McGourkey v. Toledo Ry. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079; Ex parte National Enameling Co., 201 U. S. 156, 26 Sup. Ct. 404, 50 L. Ed. 707; Heike v. United States, 217 U. S. 423, 30 Sup. Ct. 539, 54 L. Ed. 821; Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629. In many of these cases the point was stressed that the intermediate order or decree sought to be presented for review, regardless of its essence, was not final for the purposes of appeal within the meaning of the statute. In the Heike Case the court observed:

> "It is true that in a certain sense an order concerning a controlling question of law made in a case is, as to that question, final. Many interlocutory * * * orders effectually dispose of some matters in controversy, but that is not the test of finality for the purposes of appeal or writ of error."

If an order that is interlocutory in time effectually disposes of certain issues under the law and the evidence, the effect of the last order that disposes of the remaining issues is the same as the effect of the order denying a motion for a rehearing—it brings forward to the latter date for the purposes of appeal the intermediate order on the merits, unless there is a special statutory provision for an intermediate appeal from the intermediate order in question.

[3] Even in cases of procedural law, where the only question was when the time for taking an appeal was ripe, the manifest inconveniences and hardships from long postponement of a review of a decree,

intermediate in time, but based on a full submission and consideration of the law and the evidence respecting the foundational issues of title and use, led to exceptions in the application of the time rule. In Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404, an assignee in bankruptcy filed a bill to cancel sundry deeds of the bankrupt, to establish the assignee's title and right of possession, and to obtain an accounting of the rents and profits received by the defendants. On a full hearing of the issues of title and right of possession, and of the fact that defendants had been in unlawful possession, the trial court decreed that the complainant was the owner and was entitled at once to exclude the defendants from the property, that the defendants' receipts of rents and profits were unlawful, that the amount thereof be determined in an accounting before a master, and that so much of the bill as related to the accounting be retained for further decree. Plainly the parties were kept in court for determination of an issue within the pleadings. Plainly the decree on title and right of possession was not the "final" decree in time relation. Plainly, in its essence, that decree was final as to the issues then adjudged, for they "could not have been afterwards reconsidered or modified except upon a petition for a rehearing"; and the only question was whether an appeal should then be allowed or only after all issues had been finally disposed of in the trial court. In view of the fact that the assignee in bankruptcy might distribute the proceeds of the sale of the property among the creditors before the accounting issue for rents and profits was finally disposed of, the appeal was permitted to stand. In aid of the "no piecemeal appeals" rule, Mr. Chief Justice Taney condemned the splitting of cases and the rendition of two or more final decrees on the merits and pointed out to the trial courts that after a full hearing of the foundational rights of the parties only an opinion should be given and no executable orders entered until the master's account of profits or damages was in, so that all matters in dispute might be embodied in "one final decree." (But the reasons that underlay that attitude have lost their importance by changes in appellate proceduure introduced in the act creating the Circuit Courts of Appeals.) Thomson v. Dean, 7 Wall. 342, 19 L. Ed. 94, was a similar case. There also the decree on review finally adjudged title and right of possession, and reserved the matter of accounting for a future decree.

While Forgay v. Conrad and Thomson v. Dean are exceptional cases in the application of the Federal appeals statute then in force, they are not exceptional when substantive law is the test. Indeed, throughout the world of English-derived jurisprudence, there is unanimity that a decree which, on issues joined, and on submission by the parties and consideration by the court of all the evidence the parties can or choose to adduce and all the law the parties and the court deem applicable, adjudges that the complainant is the owner and entitled to the exclusive possession of property and that the defendant has unlawfully invaded the complainant's rights, and orders the defendant to surrender or keep away from the property forever, is a final decree on those issues, even though the issue concerning profits or damages from the defendant's trespasses has been reserved for future judicial action.

Decrees of this character have been held to be final in essence, regardless of time relation, in cases of partition, partnership, foreclosure, redemption, cancellation, rescission, injunction, condemnation, and many others.[1] English courts have never been tied by a statute limiting appeals to those that write "finis" to the litigation. In an English chancery cause there may be successive appeals. Consequently the essential nature of the decree or order has furnished the test.[2] And in its simplest form the test is whether the parties have intended to submit and have submitted an issue of title or right upon all their admissible contentions of fact and law and the court has intended to decide and has decided that issue and has put its decision into an immediately executable decree which in terms puts an end to that controversy, with no reservation of right to the parties or to the court for further or renewed

[1] Partition cases: Allison v. Drake, 145 Ill. 500, 32 N. E. 537; Ames v. Ames, 148 Ill. 321, 36 N. E. 110; Williams v. Wells, 62 Iowa, 740, 16 N. W. 513; Damouth v. Klock, 28 Mich. 163; McRoberts v. Lockwood, 49 Ohio St. 374, 34 N. E. 734; Lochrane v. Loan & Security Co., 122 Ga. 433, 50 S. E. 372; Cedar Co. v. Peoples Bank, 111 Fed. 446, 49 C. C. A. 422 (4th C. C. A.); Richmond v. Richmond, 62 W. Va. 206, 57 S. E. 736.

Partnership Cases: Decatur Land Co. v. Cook (Ala.) 27 South. 559; Sammis v. Poole, 89 Ill. App. 118, affirmed in 188 Ill. 396, 58 N. E. 934; Hastie v. Aiken, 67 Ala. 313; Hake v. Coach, 105 Mich. 425, 63 N. W. 306.

Foreclosure and redemption cases: Myers v. Manny, 63 Ill. 211; Gentry v. Lawley, 142 Ala. 333, 37 South. 829; Marquam v. Ross, 47 Or. 374, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1; Mills v. Hoag, 7 Paige (N. Y.) 18, 31 Am. Dec. 271; Zimmerman v. Pugh (Ala.) 39 South. 989.

Cancellation or reformation of deed cases: McMurray v. Day, 70 Iowa, 671, 28 N. W. 476; Lohman v. Cox, 9 N. M. 503, 56 Pac. 286; Stahl v. Stahl, 220 Ill. 188, 77 N. E. 67; Jones v. Wilson, 54 Ala. 50; Johnson v. Northern Trust Co., 265 Ill. 263, 106 N. E. 814.

Perpetual injunction cases: Merch & Manuf'rs National Bank v. Kent, 43 Mich. 292, 5 N. W. 627; Sacramento Irr. Co. v. Lee, 15 N. M. 567, 113 Pac. 834; Improvement Co. v. Lund, 15 N. M. 696, 113 Pac. 840; Chicago Life Ins. Co. v. Auditor, 100 Ill. 478; Earl v. Jacobs, 177 Mich. 163, 142 N. W. 1079.

Condemnation cases: Petition of Philadelphia, M. & S. St. Ry. Co., 203 Pa. 354, 53 Atl. 191; Tennessee Cent. Ry. Co. v. Campbell, 109 Tenn. 640, 75 S. W. 1012.

Miscellaneous cases: Walker v. Crawford, 70 Ala. 567; People v. Bank, 133 Cal. 107, 65 Pac. 124; Wynn v. Bank, 168 Ala. 469, 53 South. 228; Robert v. Rousseau, 28 R. I. 335, 67 Atl. 330; Klein v. Independent Brewing Ass'n, 231 Ill. 594, 83 N. E. 434; Townsend v. Petersen, 12 Colo. 491, 21 Pac. 619; Fry v. Rush, 63 Kan. 429, 65 Pac. 701; Perrin v. Leper, 72 Mich. 454, 40 N. W. 859; Ayer v. Termatt, 8 Minn. 96 (Gil. 71); De Grasse v. Gossard Co., 236 Ill. 73, 86 N. E. 176; Arnold v. Sinclair, 11 Mont. 556, 29 Pac. 340, 28 Am. St. Rep. 489; Rawley v. Burris (Tenn. Ch.) 47 S. W. 176; France v. Bell, 52 Neb. 57, 71 N. W. 984; Marean v. Stanley, 34 Colo. 91, 81 Pac. 759; Neher v. Crawford, 10 N. M. 725, 65 Pac. 156; Canal Co. v. State of Louisiana, 233 U. S. 362, 34 Sup. Ct. 627, 58 L. Ed. 1001.

[2] British and colonial cases: In re Stockton Iron Furnace Co., 10 L. R. Ch. D. 335; Vidi v. Smith, 3 El. & Bl. 968; Fenner v. Wilson, 62 L. J. Ch. 984; North British Bank v. Collins, 1 MacQueen (Scotch Appeal Cases) 369; Shaw v. St. Louis, 8 Supreme Court of Canada, 385; Baptist v. Baptist, 21 Supreme Court of Canada, 425; Ahmed Musaji Saleji v. Hashim Ebrahim Saleji, Indian Law Reports, 29 Calcutta, 758; Bhup Indur Bahadur Singh v. Bajai Bahadur Singh, Indian Law Reports, 23 Allahabad, 156; Boloram Dey v. Ram Chundra Dey, Indian Law Reports, 23 Calcutta, 279; Carles v. Hertz' Trustee, 1904 Transvaal Supreme Court, 584.

presentation and consideration. Such a decree, after the term, can be opened only on petition for rehearing, bill of review, or appeal.

From the point of view of time any order is interlocutory that "speaks between" the beginning and the end of the litigation. But from the point of view of essence only those orders are interlocutory which abstain from determining the merits of any foundational issue of title or right and do no more than control temporarily the possession or use of property or the actions of the parties in order that the decree or decrees on the merits when rendered may be effectively executed.

Injunction cases (and there can be in reason no difference between the equitable protection of patent rights and other rights) furnish a particularly clear example of the essential distinction. An owner of property is harassed by repeated and continuing trespasses. He may bring a common-law action for damages on account of the trespasses. But that is not an adequate remedy against a persistent trespasser. So the owner invokes the equitable remedy of injunction devised by the old-time chancellors. In his bill he sets forth his title and right to exclusive possession and the defendant's repeated and continuing trespasses as indicative of the defendant's intent to trespass in the future, and thereupon prays, always for a permanent injunction, and sometimes for a temporary. If on affidavits and other informal and inconclusive evidence the chancellor orders the defendant to refrain until he can determine the equities on a full and formal submission and deliberate consideration of all the evidence and law, the order is not only interlocutory in time but also in essence. But when the parties have submitted everything they have respecting title and right to exclusive possession and the defendant's minatory attitude, and thereupon the chancellor enters a permanent injunction, immediately executable, the order is final in essence on the issues submitted and determined, but may be either final or interlocutory in time relation. It is final in time, if the owner asks no damages for past trespasses, or, having asked waives them. In McGourkey v. Toledo & Ohio Ry. Co., 146 U. S. 536, 546, 13 Sup. Ct. 170, 172 (36 L. Ed. 1079), it was said that a decree fixing the rights and liabilities of the parties and ordering an accounting before a master is final in time relation, that is, for the purposes of appeal, "if such accounting be not asked for in the bill." It is interlocutory in time if the owner sets up and demands his damages for past trespasses and the chancellor reserves that matter for future judicial action. But how comes the chancellor to act at all upon the matter of damages? Injunction, which is the sole basis of the equitable jurisdiction over the bill, is prospective—it regulates the conduct of the defendant for the future. Damages concern only the past. For them a common-law action was proper and adequate. But the chancellor, having rightly taken cognizance of an equitable subject-matter, rightly concludes, in order that there may be a speedy determination of both the equitable and the legal causes of action concerning the same property, not to remit the parties to the common law court, but to entertain the common-law cause of action as an appendage of the equitable cause. When the chancellor has found the complainant's title and right to ex-

clusive possession and from evidence of the defendant's repeated and continuing trespasses has found the defendant's threat as to the future, his entry of a permanent injunction exhausts every equitable issue in the bill. But the same evidence that discloses the defendant's threat as to the future usually proves the existence of damages for past trespasses. All that remains in such a case is to ascertain one element, the amount, in order to make the common-law cause of action complete. And it is more convenient that this should be done in the court that already has jurisdiction of the parties and has established from the evidence the foundation of the common-law cause of action. So the decree of a permanent injunction, determining as it does all the equities of the bill, is final as to the equities, irrespective of whether an accounting of damages for past trespasses is or is not reserved for future action.

With respect to time relation the distinction between a temporary and a perpetual injunction may be ignored without injury to the parties. If a decree that holds or creates a status until a full hearing can be had is challenged, the appeal must be taken within thirty days. Such a decree is interlocutory both in time and in essence. If a decree dismisses an injunctional bill for want of equity, a period of six months is allowed for appeal. Such a decree is final both in time and in essence. If a decree establishes a perpetual injunction and orders an accounting, no injury is done if, as a matter of procedural law, it be held that an appeal must be taken within thirty days. Such a decree, though final in essence, is interlocutory in time, and stressing time in procedure, it may be better that the decree be classified as interlocutory for the purposes of appeal. But although appeals from decrees of temporary injunction and from decrees of perpetual injunction with accounting reserved are thus brought within the same section of the appellate practice statute, no bar to recognizing the difference in essence between temporary and perpetual injunctions is thereby formed. On appeal from a decree of temporary injunction, the only question is whether the trial court abused its discretion in holding or creating a status. If a decree of perpetual injunction with accounting reserved must be held to be interlocutory in essence because it is held to be interlocutory in time, then the only question on appeal would be the chancellor's abuse of discretion. This very contention was presented in Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810, and was rejected.

If a decree of perpetual injunction with accounting reserved is merely interlocutory in essence, then the defendant as a matter of right can insist that the chancellor hear again the same evidence and newly discovered evidence and decide anew the equities of the bill. If such a decree is affirmed on appeal, its character, if interlocutory in essence, is not thereby changed, and the defendant could still insist on having his day in the trial court on the merits. In reply to such an insistence in In re Potts, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994, the court said:

"The decision and decree of this court did not amount, indeed, technically speaking, to a final judgment, because the matter of accounting remained to be disposed of. * * * But they constituted an adjudication by this court of

all questions, whether of law or of fact, involved in the conclusion that the letters patent of the plaintiff were valid and had been infringed. * * * The questions of novelty and infringement were before this court, and disposed of by its decree, and must therefore be deemed to have been finally settled, and could not afterwards be reconsidered by the circuit court."

And the defendant, of course, could not have the Supreme Court reconsider its final decree on validity and infringement except by petition for rehearing. Inasmuch as the act creating the Circuit Courts of Appeals (Act March 3, 1891, c. 517, 26 Stat. 826) requires those courts to hear and determine patent cases in the way theretofore done by the Supreme Court, we had assumed that our books were closed on the questions of the validity and infringement of the Christensen patent ever since 1915.

Lovell-McConnell Co. v. Auto Supply Co., 235 U. S. 383, 35 Sup. Ct. 132, 59 L. Ed. 282, involved a matter of taxable costs in a Circuit Court of Appeals. The fees in question were not taxable if the decree appealed from was a "final decree." It was held that a decree finding a patent valid and infringed, awarding a permanent injunction, and directing an accounting of damages and profits was a final decree for the purpose of determining the rights of the parties concerning costs. If a decree that is held to be interlocutory for the purpose of appeal is held to be final respecting a right to costs, how much more important it is that such a decree be held to be final respecting the right to hold a permanent injunction based on findings of validity and infringement after a full submission and consideration of all the evidence and the law bearing on those issues.

In Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629, the statute governing the issuance of writs of certiorari by the Supreme Court to Circuit Courts of Appeals was interpreted and applied. It was held that a refusal to grant the writ on application to review a decree of perpetual injunction with accounting reserved was not equivalent to an affirmance of that decree by the Supreme Court; and that, a writ of certiorari having been granted after the Circuit Court of Appeals had passed on the accounting, the whole case was before the Supreme Court for review. This procedural decision is not deemed by us to oppose a holding that a decree of perpetual injunction with accounting reserved is a final decree on the equities unless vacated on appeal or writ of certiorari.

Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 37 Sup. Ct. 506, 61 L. Ed. 1148, is relied on by petitioner as demonstrating that the decree here in question is merely interlocutory in essence. In that case a bill for infringement was dismissed for want of equity by a District Court in Ohio, and that decree had been affirmed by the Circuit Court of Appeals for the Sixth Circuit (213 Fed. 789, 130 C. C. A. 447) Contemporaneously a bill by the same complainant against different defendants was pending in a District Court in Illinois, and that bill was dismissed for want of equity (193 Fed. 418). When the appeal from that decree came before this court, the defendants-appellees moved that the decree of the District Court be affirmed on the ground that they were in privity with the defendant in the Ohio

case (222 Fed. 261, 138 C. C. A. 23). The Supreme Court held that the issue of the defendants-appellees' having been privies to the decree of the District Court in Ohio was pleadable and the question of fact triable in this appellate court. The decrees of the two District Courts and the decree of the Circuit Court of Appeals for the Sixth Circuit were all final decrees both in time and in essence. No question arose or could arise whether a decree of perpetual injunction, immediately executable, though interlocutory in time by reason of a reserved accounting, is or is not final in essence on the issues of title and right of exclusive use. Our understanding of the Hart case is that the first adjudication on the equities of a bill is binding on the parties and their privies. In what ways that first adjudication may be availed of are matters of procedure. We do not understand that the intention of the parties in submitting their full proofs and the character of such submission, and the intention of the court in giving deliberate consideration to all the evidence and law the parties can present and the character of the result of such consideration, are dependent upon the subsequent condition that the court shall always deny and never grant the equitable relief prayed for in the bill.

We are unable to find, as a matter of substantive law, that a perpetual injunction has only a temporary purpose and force.

The petition is denied.

MOREY LINOTYPING CO. OF CHICAGO, ILL., v. CHICAGO LINO-TABLER CO. OF CHICAGO, ILL.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2660.

APPEAL AND ERROR ⚷339(4)—INTERLOCUTORY DECREE—TIME FOR APPEAL.

While a decree in a suit for patent infringement, solely enjoining the infringement and ordering an accounting, is a final decree in essence as to the equities of the bill, yet, as a matter of procedure, it is an interlocutory decree within the time for perfecting an appeal, and so, where an appeal was not perfected within 30 days, it must be dismissed.

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

Suit by the Chicago Lino-Tabler Company of Chicago, Ill., against the Morey Linotyping Company of Chicago, Ill. From a decree for complainant, defendant appeals. Appeal dismissed.

A. L. Jackson, for appellant.

Charles A. Brown, of Chicago, Ill., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Appellee sued appellant on account of alleged infringement of a patent and prayed for a permanent injunction and an order of accounting. On issues joined respecting the validity of the patent and the fact of infringement, the District Court heard all that the parties had to offer and found that the patent was

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

valid and infringed, entered a permanent injunction, immediately executable, and ordered an accounting of damages and profits to be had before a master in chancery.

Forty-one days later appellant filed in the District Court its petition for an appeal, which was at once allowed. And now appellee moves that the appeal be dismissed for want of jurisdiction on the ground that the appeal should have been taken within thirty days from the entry of the decree.

We have no doubt that the decree of permanent injunction, with accounting reserved, is a final decree in essence as to the equities of the bill. See National Brake & Electric Co. v. Christensen, 258 Fed. 880, — C. C. A. —, herewith decided. But, as therein pointed out, a plain distinction exists between substantive and procedural law. And under the authorities referred to in that case the decree is interlocutory in time, and time relation is determinative of the procedure.

The appeal is dismissed.

PLUNKETT et al. v. LEVENGSTON.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2463.

1. Trial ⚷211—Instructions—Inferences—Failure of Party to Testify.
In a civil action the jury may properly be instructed that it is justified in drawing inferences against defendants because of their failure to testify, and especially where facts in issue are peculiarly within their knowledge.

2. Release ⚷59—Instructions—Effect of Covenant Not to Sue.
An instruction as to the validity and effect of a covenant not to sue, executed by plaintiff to certain defendants, *held* erroneous.

3. Pleading ⚷409(1)—Defects in Plea—Waiver.
Whether a covenant not to sue, running to two of the three tort-feasors, can be pleaded as a defense by the two in an action against the three, not determined, because plaintiff sought a determination in this one action of all issues.

4. Fraud ⚷3—Fraudulent Representations—Grounds of Liability.
Liability for damages in an action for fraud is not created solely by the presence of a fraudulent intent, but there must have been false representations made with intent to deceive, and they must have been material, made to induce action, and relied upon and acted upon to the injury of the party claiming damages.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by Harry M. Levengston against James Plunkett and William Young Conn Humes. Judgment for plaintiff, and defendants bring error. Reversed.

Defendant in error, herein called "plaintiff," was persuaded by plaintiffs in error, herein called "defendants," to purchase a collection of books called a "historical library," for the sum of $65,000. This action is brought to recover damages by reason of fraud alleged to have been practiced by defendants in making the sale.

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

Plunkett, one of the defendants, met plaintiff in New York state and persuaded him to go to New Orleans where the library was located, the same having been collected by a librarian named Beer. Upon arriving at New Orleans, plaintiff met Humes, who, it was represented, held an option to purchase the books and therefore controlled the sale. Although traveling many miles to personally examine the collection, plaintiff never saw the library: but upon representations made, now in this action asserted to be false and which induced him to buy, plaintiff purchased the library for $65,000.

Plunkett represented that he was to receive 5 per cent. commission for making the sale, but proposed to apply this commission upon the purchase price, provided plaintiff gave him the right to resell the library and share equally in the profits of the resale. The agreed price less the 5 per cent. was thereupon paid by plaintiff and the books were sent to New York.

There is evidence tending to show that the entire library was not worth more than a thousand dollars, and it also appeared that only about $15,000 of the purchase price went to Mr. Beer; the balance being divided among the defendants.

After the sale was made, Plunkett represented that he had prospective buyers from one of whom only a definite offer was submitted. This buyer, it was claimed, would give $150,000 for the library, but payment was to be made by unsecured notes. As a part of the deal, plaintiff was to pay Plunkett a commission of $50,000 cash. Inquiry as to the responsibility of the party who was to execute the $150,000 notes materialized an unnamed woman whose exact residence was unknown.

When the books reached New York City, steps were taken to catalogue them. During this period, while plaintiff was still ignorant of the nature or value of his collection, Humes advised him that a fraud had been committed and proposed to disclose certain information upon condition that plaintiff would agree not to sue Humes or Tomlinson. Thereupon plaintiff executed to Humes and Tomlinson the desired agreement. All defendants rely upon this agreement as a bar to plaintiff's recovery. It reads as follows:

"It is hereby agreed that no action shall be begun against William Y. C. Humes and Herbert O. Tomlinson, or either of them, by reason of any matters existing at this date by the undersigned.

"Given for a good consideration.

"Saratoga Springs, N. Y., January 21, 1911. H. M. Levengston.

"Witness: W. T. Butler."

The jury rendered a verdict in plaintiff's favor for $73,423.12, which sum included interest from the date of the transaction to the day of the rendition of the verdict. Thereafter, upon order of the court, this sum was reduced to $65,000 and judgment entered therefor against defendants. Tomlinson has not attacked the judgment in this court, having sought immunity through a discharge in bankruptcy. Defendants assign error:

(a) In not directing a verdict for defendants.
(b) In receiving evidence against objection.
(c) In instructions to the jury.

Donald De Wolfe and Vincent G. Gallagher, both of Chicago, Ill., for plaintiffs in error.

Clifford L. Beare, for defendant in error.

Before EVANS, Circuit Judge, and GEIGER, District Judge.

EVANS, Circuit Judge (after stating the facts as above). We are convinced that the evidence is sufficient to support the verdict rendered in favor of the plaintiff. It will serve no useful purpose to restate in detail all of the evidence upon which we base this conclusion.

Defendants' claim that the representations set forth in the declaration were not actionable—that at least some of them were mere expressions of opinion, while others were promises or statements of proph-

ecy as to future transactions—must also be rejected. While some of these statements, standing alone, were subject to this criticism, there were many actionable representations made. They were made at various times and at different places and by different defendants. It is impossible to set them forth fully. They should be read together. So construed, we are convinced that actionable misrepresentations appear.

[1] *Instructions.*—Complaint is made because the court, among other things, charged the jury as follows:

"You may also take into consideration the fact that it was agreed by the parties here that at least fourteen cases of these books were shipped from the Chicago warerooms of Tomlinson & Co. to New Orleans at or about the time when the transaction took place, and you also had a right to take into consideration the fact that Tomlinson has not seen fit to take the stand in this case. All of those facts may be considered by you. The same is true with the defendants Plunkett and Humes. Those charges were made, and they probably knew as well as anybody in the world actually what took place, and they had a perfect right to take the stand in their own behalf, and give you their version of the transaction, and I say you may take into consideration the fact in reaching your verdict that they did not so testify, although as you know that at different times during the trial appeared here. * * *"

In giving this charge no error was committed. This was a civil action. The jury was justified in drawing inferences against defendants because of their failure to testify. Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463; Union Bank v. Stone, 50 Me. 595, 79 Am. Dec. 631; Brown v. Schock, 77 Pa. 471; Bastrop State Bank v. Levy, 106 La. 586, 31 South. 164.

More than this, one of the issues of fact arose over defendants' claim that a librarian of standing had collected these books. On the other hand, it was claimed by plaintiff that a large portion of the library was shipped from Chicago to New Orleans shortly before the prospective purchaser arrived; that these books were sent by Tomlinson & Co. to New Orleans; that they were no part of the library collected by Mr. Beer. The real facts were peculiarly within the knowledge of defendants, particularly Tomlinson, and under such circumstances the failure of a party to testify raises an inference against him. Mantonya v. Reilly, 184 Ill. 183, 56 N. E. 425. We conclude, however, that, in the absence of any special circumstances such as here disclosed, the instruction was proper. Wigmore on Evid. § 289.

The agreement heretofore quoted was pleaded as a bar by all defendants. To this plea, plaintiff filed a replication of non est factum. Upon the trial the execution and delivery of the agreement was clearly established, and to avoid its effect plaintiff introduced evidence tending to show that its execution was secured by fraud, also that it was a conditional release, and further that there was a total failure of consideration for its execution. Against objection the court received this evidence on the assumption that the pleadings were "as broad as the proof." Formal amended pleadings were later filed.

[2] The judge charged the jury in reference to the agreement as follows:

"Now as to the so-called covenant not to sue, you have heard evidence given by Levengston, you have heard Mr. De Lay, you have heard Mr. Butler,

and there have been certain letters read to you which refer to it. Now, if you find from the evidence in this case that Levengston sent that paper or release to Tomlinson and Humes on the basis of a promise on the part of Humes that he would furnish certain evidence of the fraud committed on Levengston, and that he would send an affidavit which would enable Levengston to institute his suit in New York City, and if you find further from the evidence that Humes did not fulfill his part of the agreement; if he made his promise and failed to keep it—then the covenant, so-called covenant, not to sue is no bar to the action in this case.

"But you have all the facts before you. You have all the facts that anybody has. You heard all the evidence. It must be fresh in your mind because it was the last evidence given, and you are to make up your minds from that evidence whether Humes did what he promised to do when he got the covenant not to sue from Levengston. If he did fulfill his promise, if Levengston got what he expected to get and what he was promised, then there is a complete bar as to Tomlinson and Humes. If, on the other hand, this document was procured by false promises, if it was procured by promises that were not fulfilled, then it is no bar to an action on the part of Levengston."

Defendants challenged the correctness of this charge and preserved their rights by exceptions.

This charge was clearly erroneous. There was no total failure of consideration for executing the agreement. In fact, the jury could have well found that a part of the consideration passed to the plaintiff before the agreement was executed.

Nor can we accept as correct the statement that—

"If he did fulfill his promise, if Levengson got what he expected to get and what he was promised, then there is a complete bar as to Tomlinson and Humes. If, on the other hand, this document was procured by false pretenses, if it was procured by promises that were not fulfilled, then it is no bar to an action on the part of Levengston."

If the agreement was obtained through fraud, and we think the evidence presents a jury question on this issue, it was not a bar to plaintiff's recovery. But such issue of fraud was not fully nor correctly presented to the jury by these instructions.

[**3**] Whether defendant could, against plaintiff's objection, have pleaded a covenant not to sue, running to two of the three or more joint tort-feasors in an action against all wrongdoers, we need not determine. See Duck v. Mayeu, 2 L. R. Q. B. D. 1892, 511; Mason v. Jouett, 2 Dana (Ky.) 107; C. & A. Ry. v. Averill, 224 Ill. 516, 79 N. E. 654; McDonald v. Goddard Grocery Co., 184 Mo. App. 432, 171 S. W. 650, 58 L. R. A. 293 (note); 34 Cyc. 1090; 23 Ruling Case Law, 405, note 13. While we are convinced that this agreement is a covenant not to sue (City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271), and not a release, the record before us is not such as would justify us in disposing of the case upon a question of pleading.

The plaintiff sought a determination of the issues raised by the covenant by him executed and invited the court to dispose of all of the issues presented by the pleadings and is not now in this court in a position to avail himself of a rule of pleading which at best is somewhat out of harmony with a practice which demands disposition in one action of all issues capable of being fairly triable in one suit. Neither in the District Court nor in this court did plaintiff raise any

objection to the disposition of all the issues arising out of the execution and delivery of this covenant.

[4] Another assignment of error respecting instructions, we think, is well taken.

At the completion of the charge counsel for defendant called the court's attention to an alleged failure to enlighten the jury respecting "future promises." To this, the court replied:

"Well, I am of the opinion, as I stated on the motion for a directed verdict, that, if the jury finds in this case that there was a deliberate planned fraud, then it is immaterial what means were used to induce Levengston to give up his money; whether it was a promise in the future, whether it was an expression of opinion, whether it was saying the boxes were open, look at the books. It doesn't make the slightest difference what the conspirators did to bring about the desired result, if they intended to commit a fraud, and if they unlawfully intended to induce the plaintiff to part with the money."

To this charge defendant excepted.

This instruction was clearly erroneous. Liability for damages in a fraud action is not created solely by the presence of a fraudulent intent. There must, of course, have been false representations made with intent to deceive, and such representations must have been material, made to induce action, relied upon, and acted upon to the injury of the party claiming damages.

While it is true the judge had previously defined the elements necessary to make out a case of fraud accurately, this later incorrect statement of the law could not but mislead the jury to defendants' prejudice.

The judgment is reversed.

NIAGARA TRANSIT CO. v. NORTHWESTERN FUEL CO.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1919.)

No. 2612.

WHARVES ⚿20(1)—COLLAPSE OF COAL UNLOADING BRIDGE—ACT OF GOD.

The collapse during a storm of a steel unloading bridge on respondent's coal dock weighing 1,200 tons, new and of approved and modern construction, by which libelant's vessel was injured, *held* not due to negligence which rendered respondent liable, but to the entirely unusual violence of the storm which could not reasonably have been anticipated.

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

Suit by the Niagara Transit Company against the Northwestern Fuel Company. Decree for respondent, and libelant appeals. Affirmed.

Fred W. Ely and John B. Richards, both of Buffalo, N. Y., for appellant.

L. K. Luse, of Superior, Wis., for appellee.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge. The action was in admiralty for damages to appellant's boat William A. Rogers through the collapsing

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of appellee's coal unloading bridge at its Superior, Wis., dock where the boat was moored for unloading. The bridge was a steel structure, having a trussed span of over 500 feet, weighing about 1,200 tons, its lower chords 80 feet from the surface, and the truss about 40 feet high. It was supported on huge steel legs, one set (called the shear legs) near the water end of the dock, and another (called the pier legs) at the opposite end; the span extending normally at about right angles to the water line. The legs rested firmly on massive compound trucks, each having twelve flanged wheels which ran on heavy rails laid on the dock parallel to the water line, the rails for each set of trucks being about 2 feet apart. Electrically driven devices operated the six driving wheels of each truck whereby the bridge could be moved either way along the rails so that boats might be unloaded at any point along this thousand or more feet of dock front served by this bridge, and the coal deposited anywhere upon the dock under the bridge.

At the shear end of the span there was a raisable arm or apron nearly 80 feet long, which, when in position for unloading boats, was extended forward on the plane of the lower chords of the span making of it a continuation of the bridge, held in position over the boat by heavy cables from the upper part of the span. This apron or extension was so attached to the lower part of the span that when desired it could be raised by the cables, and when at its full height it stood about ten degrees forward from a position rectangular to the floor of the span, and held in place by the cables. Along the underside of the span and of the extended apron there was a trolley arrangement whereby a small suspended trolley house could be moved underneath and along the entire span and apron of the structure. From it, suspended by heavy cables, was the bucket or "clam" for unloading the boats. This was in two parts, weighing empty 14 tons, and of 10 tons capacity.

The boat to be unloaded was made fast to the dock and the trolley and clam were then run out on the apron over an open hatch of the boat. The open clam was lowered into the hatch and being raised gathered and held its capacity of coal, and was run back on the bridge and dumped at the place desired. As the various hatches were emptied, others were reached by moving the bridge or the boat or both. To load, dump, and return the bucket required about a minute.

A single operator in the trolley house controlled the movement of the bridge along the rails as well as the movements of the bucket, and the raising and lowering of the apron when this was required. Hand and foot levers operated the necessary electrical machinery. For the very essential function of holding the bridge at any desired place on the rails there were brakes and rail clamps. The brakes engaged the driving wheels, and were set automatically when the driving power was off the wheels, and after the brakes were set the automatic descent of a very heavy weight caused strong heavy clamps to engage the rails. Thus each time the operator threw off the power that moved the bridge along the rails, the holding mechanism became automatically effective.

In addition to these automatic holding devices, appellee had procured and had placed for convenient access on the trucks certain devices for additional security in case of emergency, consisting of chock blocks with bolts, designed to be firmly bolted to the tracks so that when in place they would rest upon the rails and against the forward wheels; the blocks being curved to engage the wheels almost to the point of their contact with the rails.

In building the structure provision was made for some skew movement whereby the shear legs might move some distance, about 70 feet, either way from rectangular position, without endangering the bridge.

On the day in question, while the boat was being unloaded, a storm of great violence came on, forcing the shear end of the bridge to move along the rails so far as to collapse it, and the extension or apron, which with the clam, was over the boat, fell upon it, causing the damage for which the recovery is sought.

Appellee contends that the storm which caused the movement and the collapse of the bridge was one of unprecendented violence, and that for the damage occasioned by this "act of God," unmixed with any negligence on its part, it cannot be held liable. Appellant maintains that the violence of the storm was not unprecedented at this place; also, that appellee did not exercise proper care to secure the structure to the rails, and that it was not properly secured, and that this fact, coupled with the negligent operation of the bridge and bucket in the face of the impending storm, was the proximate cause of the collapse.

The evidence was voluminous, orally given before the district court, which found for appellee, acquitting it of any negligence in the construction and operation of the bridge, finding that the injury complained of was caused wholly by "an act of God," through this storm which it found to have been unprecedented in its violence.

The questions are purely of fact, and the evidence consists wholly of the transcript of that which was adduced in the district court. That appellee exercised all due care in the selection and erection of the bridge is very evident. The structure was new, having been in use only about six months. It was built on the then most approved plan by constructors presumably of the highest skill, and the evidence affords no ground for any charge of negligence in this regard.

As to the appliances for holding the bridge to the rails the evidence in our judgment warrants the conclusion of their sufficiency for all contingencies which might in reason have been anticipated. That the brakes were set and the clamps were in proper engagement is sufficiently shown by evidence of the physical condition of the parts after the occurrence. But in addition to these, with warning of an approaching windstorm the chock blocks were bolted to their intended places on the rails. But all these together were not sufficient to stop the movement of the shear end of the bridge.

The fact of the movement against the combined holding power of these appliances, far from sustaining the contention of negligence through alleged failure to afford sufficient anchorage, in our opinion

gives but added proof of the extreme violence of the storm, which is after all the factor most determinative of this controversy. There was evidence of the records kept at the nearest weather bureau at Duluth of a number of previous storms whose recorded velocity in mileage was greater than the same records showed this one to be. But the office of this bureau is about four miles from the scene of the accident, and from the velocity of the wind as there recorded it does not follow but that it may have been much greater at this place. Indeed, the physical manifestations appearing from the evidence render it altogether probable that such was the fact. In the more immediate vicinity of this accident freight cars were blown over, buildings unroofed and moved, and large boards were carried through the air and upwards at such velocity as to drive them through the overhanging roof of an adjacent building with such force that they remained there; and other bridge structures in the vicinity were also blown down. Half a dozen witnesses, familiar with the location, testified that this was the most violent storm they had ever experienced at this place. From the oral evidence on this subject, which the District Court heard, not only are we unable to say that the court erred in concluding that this was a storm of unexampled violence, but from its perusal we are quite satisfied that had we heard it our conclusion would have been the same.

It is urged that, even conceding the storm to have been unprecedented in violence, there was negligence in operating the bridge practically up to the time it began to move, and in failing to have run the clam back under the bridge structure and raised the apron so it would not have been over the boat. It is true that the storm was a long time in breaking and reaching its full fury, and that the wind blew quite strongly for a considerable time before the accident. Appellee's superintendent had given orders to clamp down the bridge and hold it. The order did not say that it should not be operated. It was moved to a full hatch and then clamped down, as stated; but the work of unloading continued until very shortly before the accident. The evidence warrants the conclusion that just prior to the accident there was a very sudden and violent increase in the velocity of the storm, caused probably by the meeting there of two distinct storm centers, and that it was the sudden cyclonic action of the storm that caused the bridge to move as it did. In our judgment the operation of the bridge just before the accident was not such an unreasonable thing to be done as to amount to negligence on the part of appellee.

If the apron or extension had been raised it is more than possible that the bridge in falling would not have struck the boat, since it seems the main damage to the boat was done by the falling upon it of this apron which extended above it. The raising of the apron was not a trivial operation. The evidence varied as to the time required to raise it—from three to twelve minutes—and it could not be said that this structure, if in standing position about 80 feet upward from the bottom of the span, would not, in case of collapse, have fallen forward and upon the vessel, with even more damaging effect from the height to which it might have been raised. When the bridge collapsed

there is no certainty that the apron would have fallen backward; indeed, it is very possible that it might have fallen in the direction toward which when raised to its full height it was normally inclined, viz., toward the boat. The apron when raised high above the span might through the action of the wind have had tendency to impart a twist to the span wholly apart from the skew action through movement of the trucks, and negligence might perhaps with equal show of reason have been attributed to the raising of the apron under such circumstances. The probable effect of the raising or lowering of the apron is entirely too speculative to predicate actionable negligence on what in fact was done.

In our judgment the evidence warranted the conclusion expressed by the District Court that the storm was "entirely unusual in its violence, and could not reasonably have been anticipated, and was the sole cause of the injury." For the consequences of such "act of God," unmixed with negligence, appellee was properly held to be not answerable.

The decree of the District Court is affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. BLUM.*

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3239.

INSURANCE ⚷446—LIFE POLICY—"SUICIDE, SANE OR INSANE."

An exception from liability for death by "suicide, sane or insane," in a life policy includes self-destruction irrespective of the assured's mental condition at the time of the act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suicide, Sane or Insane.]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Estelle M. Blum against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant brings error. Reversed.

This is an action by Mrs. Blum, widow and beneficiary named in a life insurance policy issued by the United States Fidelity & Guaranty Company, plaintiff in error herein. The complaint alleged that Samuel Blum, the insured, died at Seattle through external, violent, and accidental means; that proofs of death were duly furnished, but that the insurance company denied liability. The policy of insurance provided for loss of life against "the loss or disability resulting from bodily injuries effected directly and independently of all other cause through external, violent and accidental means (excluding suicide, sane or insane, or any attempt thereat)." The insurance company pleaded that the death of Blum was effected through suicide, or an attempt thereat, and not otherwise. After verdict in favor of Mrs. Blum, judgment was entered against the insurance company, and writ of error thereafter brought the cause to this court.

The substance of the evidence was that Mr. Blum was a prosperous business man, and happy in his domestic affairs; that on January 1, 1917, certain of his property in Alaska was burned, and that the news of the fire

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

*Rehearing denied October 14, 1919.

greatly depressed him for a time; that he did not sleep well, and was greatly worried about his business, and said he could not get the Alaska fire out of his mind; but that his condition of mind improved somewhat before January 12th, the day on which he died; that on that morning he and his wife went to a ship to see a friend sailing for Alaska; that later Mr. Blum went to his office, transacted some business there, and went to his home for lunch; that after lunch he took a nap and returned to his office; that he went to a barber shop, where he again seemed nervous and restless, and returned to his office about half past 4; that he walked up and down, and apparently was under mental strain and discouraged; that about 5 o'clock he complained to his associate that he could not collect his thoughts; that he stepped into his private office, leaving the door connecting with his outer office partly open; that his absence was noticed, and that immediately thereafter his body was found on the sidewalk two stories below. There was some testimony that a few days before his death he had had a fainting spell, and that he complained of feeling ill, and that when a feeling of faintness was coming upon him he would try to get fresh air. There was clear proof that he complained of lack of sleep, inability to collect his thoughts, and was more or less melancholy shortly before his death.

There is no positive evidence as to how he got out of the window, which was over 3 feet high from the floor, and had a sill 42 inches wide, and the lower sash being raised left an opening 2 feet 4½ inches wide and 2 feet 9½ inches high. But the contention of the plaintiff below was that he fell out involuntarily while trying to get air, and that his death was wholly involuntary and purely accidental, while the insurance company contended that he jumped out voluntarily, sane or insane, and that his death was suicide. As the case was properly for the jury, we need not dwell upon the evidence.

Peters & Powell, of Seattle, Wash., for plaintiff in error.

Preston, Thorgrimson & Turner and Lyons & Orton, all of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The principal assignments of error are directed to the instructions of the court. The insurance company requested the following instruction:

"It appears from the undisputed evidence in this case that on the 12th day of January, 1917, some time in the neighborhood of 5 o'clock in the afternoon, Samuel Blum was in his office in the Pacific Block in the city of Seattle; that this office had an opening to the city street through a window or series of windows fronting thereon; that Blum was last seen alive in this room; that almost immediately thereafter his body was found lifeless on the sidewalk pavement, which he must have reached through this window opening of his office. The question, after all, for you to determine, then, is as to whether Blum came out of this window intentionally or unintentionally. If you are satisfied by a greater weight of evidence that it is more probable that he came out or through the window intentionally than that he did it by accident or unintentionally, then the burden of proof placed upon the defendant by the presumption of law existing against suicide will have been supported by the defendants, and your verdict should be for the defendant."

The court gave the instruction, but added the following:

"I don't think that that instruction could possibly mislead you, but to avoid any chance that it may, I wish to qualify it somewhat. It is stated therein that the question is as to whether he came out of the window intentionally or unintentionally. Now suicide is the intentional taking of one's life. Therefore, to constitute suicide on the part of Blum in jumping or throwing himself from that window, the following elements would be necessary: That is, that he voluntarily came through the window; that he knew when he did voluntarily come through the window that it would probably result in his death;

and that he did jump or throw himself from the window with the idea of ending his life and killing himself."

Counsel for the insurance company excepted to that part of the qualifying charge which stated in effect that one alleged to have committed suicide must know at the time that his act would probably result in death or in fatality.

The position of the insurance company is that by the qualification the jury were instructed that if they found that Mr. Blum was insane, and that he went through the window without a conscious intent of self-destruction, they could not find that he committed suicide.

A study of the opinions of the courts upon the subject of provisos and clauses similar to the one under consideration tells us that after the decision of the Supreme Court in 1872 in Insurance Co. v. Terry, 15 Wall. 580, 21 L. Ed. 236, wherein it was held that a proviso in a contract of life insurance against death by suicide did not include a self-killing which was not intentional, and that, when the deceased did not realize the physical nature and consequences of his act, and took his own life, being impelled by an irresistible, insane impulse, it was not his act, and no more than an accident, changes in the language of contracts of insurance were frequently made with a view of excluding a certain manner of death from the risk assumed by the insurers. The changed forms often provide that the insuring company does not assume the risk of self-destruction, sane or insane. In Bigelow v. Berkshire Insurance Co., 93 U. S. 284, 23 L. Ed. 918, the policy contained a condition of avoidance if the insured should die by suicide, sane or insane. The court said:

"The words of this stipulation 'shall die by suicide (sane or insane),' must receive a reasonable construction. If they be taken in a strictly literal sense, their meaning might admit of discussion; but it is obvious that they were not so used. 'Shall die by his own hand, sane or insane,' is doubtless a more accurate mode of expression; but it does not more clearly declare the intention of the parties. Besides, the authorities uniformly treat the terms 'suicide' and 'dying by one's own hand,' in policies of life insurance, as synonymous, and the popular understanding accords with this interpretation. * * * Life insurance companies indiscriminately use either phrase, as conveying the same idea. If the words 'shall commit suicide' standing alone in a policy import self-murder, so do the words 'shall die by his own hand.' Either mode of expression, when accompanied by the qualifying words, must receive the same construction. * * * Nothing can be clearer than that the words 'sane or insane' were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity. These words have a precise, definite, and well-understood meaning. No one could be misled by them; nor could an expansion of this language more clearly express the intention of the parties. * * * It is unnecessary to discuss the various phases of insanity, in order to determine whether a set of circumstances might not possibly arise which would defeat the condition. * * * For the purposes of this suit it is enough to say that the policy was rendered void if the insured was conscious of the physical nature of his act, and intended by it to cause his death, although, at the time, he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing. * * * To say that the company will not be liable if the insured shall die by 'suicide, felonious or otherwise,' is the same as declaring its nonliability if he shall die by 'suicide, sane or insane.'"

In Clarke v. Equitable Assurance Society, 118 Fed. 374, 55 C. C. A. 200, the policy provided that—

"Self-destruction, sane or insane, within one year from the date of the issuance of the policies, is a risk not assumed by the society in this contract."

The Court of Appeals carefully reviewed the decisions, and concluded that the insurer was not liable. The reasoning was that the proviso had no words which limited its operation to intentional suicide, but that the insurer contracted that it would not assume the risk of self-destruction, sane or insane. To a contention that self-destruction would avoid the policy if the insured lacked intelligence to know that his act was wrong, but that the policy would not be avoided if he did not understand the physical nature of his act, the court said:

"To sustain such contention would require us to believe that the deceased shot himself through the head because he did not know that it would kill him. Instead of giving to the words of the proviso the plain meaning for which they were manifestly intended—that the insurer intended to guard itself from liability if the insured came to his death from any physical movement of his own, whether sane or insane—we would lose ourselves in consideration of the different phases of insanity, be compelled to split it into degrees, and to hold that, if he was so entirely insane as not to understand the physical consequences of his act, the proviso would be avoided, while a lesser degree of insanity would make the company liable."

In the more recent case of Moore v. Northwestern Mutual Life Insurance Co., 192 Mass. 468, 78 N. E. 488, 7 Ann. Cas. 656, the Supreme Court of Massachusetts referred to Bigelow v. Berkshire Life Insurance Co., supra, and pointed out that in the pleadings in that action a replication, alleging that the insured, when he inflicted the pistol wound upon his person by his own hand, was of unsound mind and wholly unconscious of his act, was held to be bad as against a demurrer, and quoted approvingly from De Gogorza v. Knickerbocker Life Ins. Co., 65 N. Y. 232. In that case the trial judge charged that if the act causing the death of the assured was an involuntary act of one incapable of exercising his will, then the company would be liable, but the Court of Appeals in New York held that such an instruction was erroneous, and that the words, "sane or insane," incorporated in the policy meant just what those words commonly import, "and that is, if death ensues from any physical movement of the hand or body of the assured proceeding from a partial or total eclipse of the mind, the insurer may go free." As specially pertinent to the case before us, the Court of Appeals said:

"We are not altogether unmindful of the force of the proposition that a man does not die by his own hand who has not sufficient mind to will his own death, and it is not, perhaps, entirely easy to see in what precise words in our language the idea may be accurately and artistically expressed that a totally insane man may take his own life. But the question seems to involve more—the refinement of language—than the application of practical sense. and we are of the opinion that, in the common judgment of mankind, it will be considered that when a totally insane man blows his brains out with a pistol that he will be said to have died by his own hand within the meaning of a policy such as we have now under consideration."

In the support of the approval of these views the Supreme Court of Massachusetts cites Travelers' Insurance Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; Clarke v. Equitable Assurance Society, supra, and other cases. The conclusion of the court was that on reason and authority the words "sane or insane" cover every case of suicide, and that where self-destruction was clearly shown, it made no difference what the state of mind of the person committing the suicide was. In Billings v. Accident Co. of North America, 64 Vt. 78, 24 Atl. 654, 17 L. R. A. 89, 33 Am. St. Rep. 913, the policy provided that there would be no liability if death resulted from suicide, sane or insane, and the court held that this clause included self-destruction irrespective of the assured's mental condition at the time of the act, and that the court, in an action on the policy, would not attempt to measure the degrees of insanity. Adkins v. Columbia Life Ins., 70 Mo. 27, 35 Am. Rep. 410.

These opinions appear to us as logical and fair interpretations of the plain words used in the contract of insurance. If the insured fell out of the window by accident or in a faint, and was killed by the fall, of course there could be a recovery. But if he, of his own physical motion, went through the window and so destroyed himself, then under the contract the insurer can avoid liability, and it would matter not what the mental condition of the insured was. The effect of the qualification to the instruction quoted was a direction that, although death may have resulted from the physical act of going through the window, suicide could not be found unless deceased intended to kill himself, and knew that his act would probably result in death. And this we hold was a material error.

We cannot sustain the contention of the insured that the statutory definition of suicide as the "intentional taking of one's own life," found in the Criminal Code of the state of Washington (section 2385, vol. 1, Rem. & Bal. Ann. Codes) is controlling. That provision has to do with offenses against the public, but is not decisive in cases of private rights.

The judgment is reversed, and the cause is remanded, with directions to grant a new trial.

Reversed and remanded.

PENN MUT. LIFE INS. CO. v. BLUM. *

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3241.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Estelle M. Blum against the Penn Mutual Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hartman & Hartman, of Seattle, Wash., for plaintiff in error.

Preston, Thorgrimson & Turner and Lyons & Orton, all of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

*Rehearing denied October 14, 1919.

HUNT, Circuit Judge. This cause was tried jointly with United States Fidelity & Guaranty Co. v. Blum, 258 Fed. 897, and by stipulation the facts of that case are to be considered herein. Inasmuch as the questions of law are also the same as in the other case, upon the authority of the decision therein, the judgment is reversed, with directions to grant a new trial.

THE ADRIATIC.

(Circuit Court of Appeals, Third Circuit. June 7, 1919.)

No. 2463.

1. ADMIRALTY ⚷72—INTERNATIONAL LAW ⚷10—COMITY.

On principles of international comity, a United States court is bound to accept a suggestion of the British ambassador that the British government requisitioned a certain British ship at a certain time.

2. INTERNATIONAL LAW ⚷10—BRITISH SHIP—COMITY.

A United States court, in a libel against a British ship, on suggestion by the British ambassador, appearing as amicus curiæ, that the ship has been duly requisitioned by the British government, is not at liberty to consider the question of the validity of the requisition, or to consider a claim by libelant, alleging breach of a charter party, that the British government did not have power to requisition the vessel, because the vessel at the time was on the high seas.

3. ADMIRALTY ⚷39—COMITY—DISMISSAL WITHOUT PREJUDICE.

Where a United States court, hearing a libel of a British ship based on an alleged breach of a charter party, cannot consider the questions involved by reason of the British ambassador having suggested that the vessel was duly requisitioned by the British government, it will dismiss the proceedings without prejudice to the right of the libelant to institute another action in some court which is in a position to pass upon the question of the validity of the suggested requisition.

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

Libel in rem by H. Baars & Co. and the Export Terminal & Shipping Company against the British steamship Adriatic, and in personam against the owners, W. H. Cockerline & Co., to recover damages. From a decree in favor of the respondents (253 Fed. 489), the libelants appeal. Affirmed.

Howard T. Kingsbury and Frederic R. Coudert, both of New York City, for British Embassy.

Willard M. Harris, of Philadelphia, Pa., and John C. Avery, of Pensacola, Fla., for appellants.

John M. Woolsey, of New York City, Howard H. Yocum, of Philadelphia, Pa., and Harry D. Thirkield, of New York City, for appellees.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

HAIGHT, Circuit Judge. H. Baars & Co., a corporation of Delaware, filed in the court below a libel in rem against the British steamship Adriatic, and a libel in personam against the owners, W. H. Cockerline & Co., a British concern, to recover damages which it

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claimed to have sustained by reason of an alleged breach of a charter party that had been entered into, on September 28, 1916, between the owners of the steamship and the Export Terminal & Shipping Company, and which had been assigned by the latter to the libelants prior to the alleged breach. The original charterer subsequently, by petition of intervention, became a colibelant in the suits. The charter was for a single voyage from an American port to a European port, and was to become effective upon the arrival of the vessel at the port of Philadelphia, Pa., where orders were to be given at once by the charterers. On November 8, 1915, while the vessel was on the high seas, the Transport Division of the British Admiralty notified the owners in England, by telegram, which was confirmed by letter sent to them the following day, that the ship had been requisitioned for government service. Instructions, to be given to the master when the vessel should reach Philadelphia, were also cabled to the British consul general at Philadelphia. Although the owners endeavored to have the requisition canceled and the vessel released, they were unsuccessful. She reached Philadelphia on November 28, 1915, and on the next day the master was notified by the British consul general that she had been requisitioned, and he was given certain instructions as to her further movements, which, with the concurrence of the owners, he obeyed, and which made it impossible for the vessel to fulfill the charter. The vessel remained continuously in the government service from that time until she was lost at sea about a year later.

Before the case came on for trial, but long after the vessel had been released from arrest under bond given by the owners, a suggestion was filed by counsel for the British Embassy, appearing as amici curiæ, to the effect, among other things, that the steamship, which was of British registry and belonged to subjects of Great Britain, had been "duly requisitioned by the British Admiralty, which is an integral part of the government of the United Kingdom of Great Britain and Ireland," and that the requisition was "a governmental action by the government of Great Britain, and should not be inquired into by" the court in which the cause was pending. Considerable testimony was taken by the respondents as to the legality of the requisition and as to the effect of a refusal by the master of the vessel or the owners to obey the instructions of the Admiralty and of the British consul general at Philadelphia, and as to what the British government could have done to compel obedience to them. No testimony was offered by the libelants on any of these points.

[1] The learned judge of the court below, feeling that under the circumstances he should decline to adjudicate "any claim of right advanced by the libelants" which grew out of the requisitioning of the vessel by the British government, dismissed the libels. Thereupon the libelants appealed. In addition to the before-mentioned suggestion filed in the court below, there has been filed in this court, under the hand of the British ambassador and the seal of the British Embassy, a certificate wherein are set forth the same facts as were set forth in the suggestion, and an express avowal again made that the requisition of the steamship was "a governmental act by the government of Great

Britain and Ireland." On principles of international comity, we feel bound to accept the suggestion and avowal of the British ambassador as conclusively establishing both the fact of the requisition and its governmental character. Such has been the practice, as to similar facts, of the English courts (The Parlement Belge, L. R. 5 P. D. 197; The Constitution, L. R. 4 P. D. 39), and quite generally of the courts of this country. See The Marpo (D. C. S. D. N. Y.) 252 Fed. 627; Agency of Can. Car & F. Co. v. American Can Co. (D. C. S. D. N. Y.) 253 Fed. 152; The Roserie (D. C. N. J.) 254 Fed. 154, where the suggestions were made directly by counsel for an embassy, and The Exchange, 7 Cranch, 116, 3 L. Ed. 287, where it was made through the attorney for the United States.

It must be considered as established, therefore, that the vessel was actually requisitioned by the British government, acting through the Admiralty, before the time arrived for her to perform the charter. The charter party contained the following clause, viz.: "If vessel be requisitioned by the British Admiralty, this charter is to be null and void." As the vessel was requisitioned by the British Admiralty, that provision of the charter party would seem to relieve absolutely the owners from any liability growing out of her failure to perform the charter. The libelants contend, however, that it does not have that effect, because, as it is claimed, the British Admiralty had no power, under the English law, to requisition the vessel when the attempt to do so was made, because she was then upon the high seas and not within the British Isles or the waters adjacent thereto. Of course, that contention, if correct, to have any effect, must necessarily be predicated upon the assumption that the provision in question of the charter party referred only to such requisitions of the British Admiralty as should be strictly legal and in accordance with the laws of Great Britain, as distinguished from requisitions which might in fact be made by the Admiralty, but which were beyond its legal power and authority to make.

[2] Assuming, for purposes of argument only, that such is a proper construction of the charter party, it is apparent that, if the vessel was legally requisitioned, no liability attached to the respondents by reason of the failure of the vessel to thereafter perform the charter, because, upon such a requisition, the charter party, by its express terms, became null and void. But, in accordance with the rule that "the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory," it is not within the province of a court of this country to attempt to determine whether the requisition of the vessel was valid or invalid under the laws of Great Britain; it must be here accepted as legal, or, as it is sometimes expressed, such a question is not justiciable. Ricaud v. American Metal Co., 246 U. S. 304, 309, 38 Sup. Ct. 312, 62 L. Ed. 733; Underhill v. Hernandez, 168 U. S. 250, 253, 18 Sup. Ct. 83, 42 L. Ed. 456; American Banana Co. v. United Fruit Co., 213 U. S. 347, 357, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047; Oetjen v. Central Leather Co., 245 U. S. 297, 303, 38 Sup. Ct. 309, 62 L. Ed. 726; The Invincible, 2 Call. 29, Fed. Cas. No. 7,054; Hewitt

v. Speyer, 250 Fed. 367, 162 C. C. A. 437 (C. C. A. 2d Cir.); Earn Line S. S. Co. v. Sutherland S. S. Co. (D. C. S. D. N. Y.) 254 Fed. 126. Hence it follows that, even if the charter party be construed as libelants must have it construed to raise the question of the validity of the requisition, no cause of action accrued to them from the failure of the vessel to perform the charter, so far as the courts of this country are at liberty to determine. This conclusion has rendered it unnecessary for us to consider or decide any of the other questions which have been raised.

[3] The decree will accordingly be affirmed, with costs. However, in order that there may be no possible misunderstanding in the future as to the effect of the decree, we deem it proper to expressly state, what we think is necessarily to be inferred from the action of the court below, that the libels are dismissed without prejudice to the right of the libelants to institute another action in any court which is in a position to pass upon the question which, as above stated, we have not felt at liberty to inquire into.

SETTON v. EBERLE-ALBRECHT FLOUR CO.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1919. Rehearing Denied July 22, 1919.)

No. 5213.

1. SALES ⟹418(2)—BREACH OF CONTRACT TO DELIVER—MEASURE OF DAMAGES —"PLACE OF DELIVERY."

When contracts for the sale of chattels are broken by vendor failing to deliver, the measure of damages is the difference between the contract price and the market price of the article at the time when and the place where it should have been delivered, with interest; the place of delivery meaning the place where title passes.

2. SALES ⟹418(12)—BREACH OF CONTRACT—MEASURE OF DAMAGES—RESALE CONTRACTS.

If a buyer of chattels has, in advance, made a contract for resale, and discloses such fact to his vendor, who undertakes to furnish the commodity and deliver it at a specified time and place, so that the buyer may fulfill his resale contract, but the vendor fails to do so, he will be liable on the basis of the profits the vendee would have realized on his contract of resale.

3. SALES ⟹418(12)—BREACH OF CONTRACT TO DELIVER—MEASURE OF DAMAGES —"C. I. F."

Where a flour merchant in Alexandria, Egypt, brought an action for breach of a contract to buy of a corporation in St. Louis, Mo., "2,000 bags 'White Owl' at 23/6 per 280 lbs. c. i. f. Alexandria, all August shipment," but failed to allege special damages, or facts showing an exception to the general rule of damages, the measure of damages was the difference between the contract price and the market price at St. Louis, and not the difference between the contract price and the market price in Alexandria; the contract not being one technically for resale, and the letters "c. i. f." merely meaning "cost, insurance, and freight."

Carland, Circuit Judge, dissenting.

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

Action by Jacques Setton, doing business as Jacques Setton & Co., against the Eberle-Albrecht Flour Company, for breach of contract. Judgment for defendant on a directed verdict, and plaintiff brings error. Affirmed.

Frank H. Sullivan, of St. Louis, Mo. (Clement A. Lawler, of Kansas City, Mo., and George F. Haid, of St. Louis, Mo., on the brief), for plaintiff in error.

Rhodes E. Cave, of St. Louis, Mo. (A. G. Eberle and George H. Williams, both of St. Louis, Mo., on the brief), for defendant in error.

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

AMIDON, District Judge. The plaintiff, Setton, a flour merchant of Alexandria, Egypt, brought this action against the defendant, the Eberle-Albrecht Flour Company, of St. Louis, Mo., for a breach of the following contract, dated July 11, 1914:

"We offer to buy of you 2,000 bags 'White Owl' at 23/6 per 280 lbs. c. i. f. Alexandria, all August shipment."

This offer was accepted by cable. The contract was wholly by correspondence and cable. The defendant failed to deliver the flour, as performance became difficult by the breaking out of the World War early in August. Probably the principal cause of the breach was obstruction to shipping facilities. It may also be that enhancement of price was a factor. It is not claimed that either of these causes was legal justification for the breach. In the trial court the case turned wholly on the proper measure of damages; plaintiff insisting that they should be based on the difference between the contract price and the market price at Alexandria, and the defendant on the difference between the contract price and the market price at St. Louis. The trial court held with defendant, and excluded evidence as to prices in Egypt, and, as plaintiff offered no evidence of market price at St. Louis, it directed a verdict in favor of defendant at the conclusion of plaintiff's case, and entered judgment accordingly. Plaintiff brings error to review that judgment.

Some time was spent in the trial court explaining the letters c. i. f. They mean "cost, insurance, and freight." Their significance was explained by Lord Justice Blackburn, in Ireland v. Livingston, L. R. 5 H. L. 395, 406, in language quoted in Williston on Sales, page 408, and in the fourth edition of Benjamin on Sales, section 891. The Lord Justice concludes his statement as follows:

"In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way."

The duty which this feature of the contract imposed upon the seller has no bearing upon the question now under review.

[1] The general rule as to damages is stated by Sedgwick, at section 734, as follows:

"When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time * * * when and the place where it should have been delivered, with interest."

The same rule is expressed in slightly different language, and a multitude of cases cited, in the fourth edition of Sutherland on Damages, at section 651.

The words "place of delivery" in the rule, mean the place where title passes. If the goods are to be shipped by carrier, this will be the place at which they are delivered to the carrier. If there is no local market at that place, the words have been enlarged to include places in the same vicinity where there is a market; allowances being made for freight. The rule as stated by Sedgwick has been adopted by the federal courts (Grand Tower Co. v. Phillips, 23 Wall. 471, 23 L. Ed. 71; Globe Refining Co. v. Landa Cotton Co., 190 U S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171; Salmon v. Helena Box Co., 147 Fed. 408, 412, 413, 77 C. C. A. 586), and by all state courts entitled to speak with authority on such a subject (Cahen v. Platt, 69 N. Y. 348, 25 Am. Rep. 203; Rahm v. Deig, 121 Ind. 283, 23 N. E. 141). An examination of these authorities will show that using the market price at the place of ultimate receipt by the consignee in measuring damages has resulted in a reversal in all ordinary mercantile transactions.

[2] To the general rule there is an exception, which is accurately expressed in Sutherland on Damages, section 662, page 2343, as follows:

"If the buyer has, in advance, made a contract for resale, and discloses that fact to his vendor, who undertakes to furnish the commodity and deliver it at a specified time and place, arranged with reference to enabling the buyer to fulfill his contract for resale, and the vendor fails to deliver the property, he will be liable for damages on the basis of the profits the vendee would realize upon his contract for such resale."

This exception is well illustrated and explained in Rahm v. Deig, 121 Ind. 283, 23 N. E. 141; Howard Supply Co. v. Wells, 176 Fed. 512, 100 C. C. A. 70; West Drug Co. v. Byrd, 92 Fed. 290, 293, 34 C. C. A. 351; Southern Flour & Grain Co. v. McGeehan, 144 Wis. 130, 128 N. W. 879.

Mere knowledge that goods are purchased for resale in the ordinary course of business will not take the transaction out of the general rule and place it under the exception. If that were not so, the exception would swallow up the general rule completely, for it is always known that, when goods are bought from a manufacturer by a broker or wholesaler, or by a retailer from a jobber, the buyer purchases for resale. To bring a case within the exception, the buyer must have an existing contract for resale at the time of the purchase, and must buy for the purpose of enabling himself to perform his obligations on the resale, and these features must be clearly explained to the seller, and he must enter into his contract for the purpose of enabling the buyer to perform his obligations under the contract of resale. The same result will follow if the buyer is acting as the agent of the seller,

as in Cook Mfg. Co. v. Randall, 62 Iowa, 244, 17 N. W. 510, and McCormick Harvesting Co. v. Jensen, 29 Neb. 102, 45 N. W. 160.

It will be found, upon a careful examination of authorities entitled to be considered, that in order to take a case out of the general rule there must be present some special feature, such as those to which we have adverted. Such special features must be sufficient to take the case out of the special title of Sales and place it under the general law of Contracts. Then the rule of Hadley v. Baxendale, 9 Exch. 341, as qualified by later decisions, may control. Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171. Mere knowledge that goods are purchased for resale is not sufficient to produce that result. One reason for this is that the market price at the place where the goods are to be resold carries the transaction one stage nearer the ultimate consumer than the original sale, and always shows a higher market value than that which controlled between the original buyer and seller. It would be manifestly unjust to measure the damages by a market value thus enhanced. This feature is well explained by Judge Adams, speaking for this court, in Salmon v. Helena Box Co., 147 Fed. 408, 412, 413, 77 C. C. A. 586.

[3] It is likewise true that all courts regard the damages, when they are measured by the exception, as special damages, and the facts showing that the exception ought to apply must be pleaded in the complaint. No such allegations are contained in the complaint in this case, and a reading of the correspondence between the parties convinces us that the facts would not justify such claim.

The ruling of the trial court was therefore right, and its judgment is affirmed.

CARLAND, Circuit Judge, dissents.

GOLDSTEIN v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. May 26, 1919.)

No. 3289.

1. ARMY AND NAVY ⚷40—INTERFERENCE WTH ARMED FORCES OF UNITED STATES—OFFENSES.

The exhibition of a picture during the existence of the war with Germany, calculated to sow discord between the people of the United States and the British Empire by arousing feelings of indignation by portraying scenes in which British soldiers were depicted during the Revolutionary War as murdering noncombatant Americans, is a violation of Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), making it an offense for any person when the United States is at war to willfully cause or attempt to cause insubordination, mutiny, or refusal of duty in the armed forces of the United States, for the depicting of such scenes might cause insubordination, etc., of armed forces operating in connection with the British.

2. ARMY AND NAVY ⚷40—INTERFERENCE WITH ARMED FORCES OF UNITED STATES—OFFENSES.

An indictment, charging that defendant, by the exhibition of a moving picture calculated to cause feelings of indignation against England, vio-

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*Rehearing denied October 14, 1919.

lated Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), making it an offense for any person to cause, or attempt to cause, insubordination, mutiny, or refusal of duty in the armed forces of the United States, *held* sufficient, in view of the fact that millions of men were being drafted, though it did not aver that soldiers witnessed the exhibition of the picture; it being alleged that the picture was publicly exhibited.

3. ARMY AND NAVY ⟹40—ESPIONAGE ACT—INDICTMENT—SUFFICIENCY.

An indictment *held* to charge a violation of the Espionage Act, in that it alleged that defendant in aid of the German government had control of and was using a motion picture calculated to arouse feelings of enmity between the people of the United States and the British Empire, for the purpose of violating Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), making it an offense for any person to cause or attempt to cause any insubordination or refusal of duty in the armed forces of the United States.

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

Robert Goldstein was convicted, under Act June 15, 1917, of knowingly, willfully, and unlawfully attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States during war, and he brings error. Affirmed.

The plaintiff in error was convicted on two counts of an indictment, the first of which charged as follows: "That throughout the period of time from the 6th day of April, in the year of our Lord one thousand nine hundred and seventeen, to the day of the finding and presentation of this indictment, the United States has been at war with the Imperial German government, and that during said period of time one Robert Goldstein, whose full and true name other than as herein stated is to the grand jurors unknown, hereinafter called defendant, in the city of Los Angeles, state of California, and within the Southern Division of the Southern District of California and within the jurisdiction of this honorable court, did, on the 28th day of November, in the year of our Lord one thousand nine hundred and seventeen, knowingly, willfully and unlawfully attempt to cause insubordination, disloyalty, mutiny, and refusal of duty, in the military and naval forces of the United States in the manner following, that is to say:

"That at the time and place aforesaid, the said Robert Goldstein did present to the public at Clune's Auditorium Theater, a certain motion picture play, entitled and known as 'The Spirit of '76,' which said motion picture play was designed and intended to arouse antagonism, hatred, and enmity between the American people, and particularly the American military and naval forces, against the people of Great Britain, and particularly against the military and naval forces of Great Britain at a time when, as the defendant then and there well knew, the government of Great Britain with its military and naval forces was an ally of the United States in the prosecution of the war as aforesaid against the Imperial German government; that among the scenes so presented in said motion picture play, 'The Spirit of '76,' there was, at the time and place aforesaid, presented to the public in said picture the scene of a soldier of Great Britain whirling an American infant around on the point of his bayonet, and the scene of British soldiers in the act of shooting and bayoneting helpless and defenseless American women and children and dragging American women and children by their hair and capturing and carrying away young American girls, and many other scenes of like character, all of which were designed and intended and were being used for the purpose of causing insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States."

There was a demurrer to each count of the indictment for its failure to state an offense against the laws of the United States, and a motion to quash which specifically pointed out the absence of allegation showing the proximity

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of military or naval forces of the United States, or that they could be affected thereby. The demurrer and the motion were overruled.

Crittenden Thornton, of San Francisco, Cal., for plaintiff in error.
Robert O'Connor, U. S. Atty., and W. F. Palmer, Sp. Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The demurrer and the motion to quash raised the question whether or not either count of the indictment alleged an offense against the United States.

[1] We will first consider the count which charges an attempt to cause insubordination and disloyalty or refusal of duty. The statute, Act of June 15, 1917, is clear and simple in its language. Whoever, when the United States is at war, shall willfully cause, or attempt to cause, insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, shall be punished as provided. The question of the truth or falseness of the thing done by the person who, when the state of war exists, attempts to cause disloyalty or any of the other conditions enumerated, is not the essence of the inquiry. Enacted as the statute was while the country was at war, the evident, underlying purpose of its language was to prevent any willful attempt to engender feelings of lack of fidelity to the United States among the military or naval forces or any attempt made with evil mind to cause any disobedience to lawful authority in the military or naval forces; and the statute should always be read in the light of the purpose of its enactment.

It is clear that an attempt to create disloyalty may be by showing a picture to the public, as well as by uttering speech or publishing a writing. The picture might be a truthful representation of an historical fact, and yet the nature of it, the circumstances surrounding the exhibition thereof, the time, the occasions when the public exhibitions are had, may well tend to show whether the picture would naturally, in the light of great events, be calculated to foment disloyalty or insubordination among the naval or military forces. In time of peace, a picture purporting to show incidents of a war fought more than a hundred years before, and exhibiting soldiers of a foreign country bayoneting helpless American women and children, might arouse but ordinary interest. But, if it has come about that a war is being fought by the United States and in the war the cause of the United States is allied with that of the foreign country whose soldiers are pictured as murdering American women and children, and if, at the time the United States is enforcing draft laws and raising a large army and navy to fight the common enemy of the two allied countries, it seems but reasonable to say that the exhibition of such a picture is calculated to arouse antagonisms and to raise hatred in the minds of some who see it against the ally of the United States, and as a probable effect to put obstruction in the way of the necessary co-operation between the allied countries against the enemy, and to undermine an undivided sentiment for the United States and to encourage disloyalty and refusal of duty or insubordination among the military and naval forces. Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470.

[2] Nor, in an attempt of the character indicated, is it necessary that the picture exhibited should actually be seen by soldiers and sailors already enlisted. Millions of men within the provisions of the conscription act and subject to call were in the military and naval forces throughout the country and were part of the public. The exhibition to the public at a public place, if given with the evil intent described, is sufficient. In Coldwell v. United States, 256 Fed. 805, — C. C. A. —, the Court of Appeals for the First Circuit considered an objection to an indictment wherein it did not appear that the persons whom the defendant was alleged to have addressed were in the military or naval forces of the United States. The court said:

"The act makes it an offense to willfully 'attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States,' or to 'willfully obstruct the recruiting or enlistment service of the United States,' and its language is broad enough to include statements calculated to produce these results, when made in the presence of persons who are not in the military or naval forces of the United States, provided they are willfully made and with the intent set out in the act."

[3] The second count also charges a violation of the Espionage Act, in that it specifically alleges that the defendant, in the aid of the German Government, had control of and was willfully using the film as a means to violate section 3 of title 1 of the Act of June 15, 1917, c. 30, 40 Stat. 219 (Comp. St. 1918, § 10212c), the Espionage Act, in the manner as fully described in the first count of the indictment. The first count is referred to and drawn into the body of the second count by reference to the motion picture play "The Spirit of '76," and it is charged that it was designed and intended for use and was used as the means of violating section 3 of title 1, Act of June 15, 1917, c. 30, and title 11, § 22 (Comp. St. 1918, §§ 10212c, 10212i). When considered with the first count incorporated within it, we think the second count is sufficient.

We believe that the issues under the counts were properly for the jury, and, as the evidence upon which the verdict was predicated is not in the record, we must accept the verdict as sustained by the evidence.

The judgment is affirmed.

CHASS v. UNITED STATES.*

(Circuit Court of Appeals, Third Circuit. June 26, 1919.)

No. 2476.

1. CRIMINAL LAW ⇐552(3)—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.
   To justify a conviction of crime on circumstantial evidence, the latter must be such as to exclude every reasonable hypothesis but that of guilt.

2. RECEIVING STOLEN GOODS ⇐8(4)—EVIDENCE—SUFFICIENCY.
   In a prosecution for violation of Act Cong. Feb. 13, 1913 (Comp. St. §§ 8603, 8604) for feloniously having in possession certain plush knowing it to have been stolen from an interstate freight shipment, evidence, although

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*Certiorari denied 250 U. S. —, 40 Sup. Ct. 12, 64 L. Ed. —.

circumstantial, *held* sufficient to sustain a verdict of guilty, based upon a finding that defendant had the requisite guilty knowledge that the goods were stolen.

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Philip Chass was convicted of violating Act Cong. Feb. 13, 1913, in feloniously having in his possession certain plush knowing it to have been stolen from an interstate shipment of freight. A new trial was denied, and he brings error. Affirmed.

H. P. Lindabury, of Newark, N. J., for plaintiff in error.

Samuel I. Kessler, of Newark, N. J., for the United States.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

HAIGHT, Circuit Judge. [1] The plaintiff in error, Philip Chass, and one Louis Rubin were convicted under an indictment which charged them with having violated an act approved on February 13, 1913 (37 Stat. L. 670, c. 50 [Comp. St. §§ 8603, 8604]), in that they feloniously had in their possession certain rolls or bolts of plush, which had theretofore been stolen while constituting a part of an interstate shipment of freight, knowing the same to have been stolen. Upon motion, the learned trial judge set aside the conviction of Rubin and granted a new trial to him, but declined to accord like treatment to Chass. It is not questioned that the goods were in the actual possession of the latter at the time alleged in the indictment, nor was any attempt made during the trial to controvert that part of the evidence produced by the government whch clearly warranted the inference that the goods, while in the possession of the Philadelphia & Reading Railway Company, and constituting a part of an interstate shipment of freight, were stolen from a railway car. The only alleged error now relied upon is the refusal of the court below to direct a verdict of acquittal as to Chass at the close of the whole case, upon the ground that the evidence was not sufficient to justify a finding that he had knowledge, when the goods came into his possession, that they had been stolen. There was, it is true, no direct evidence that he had such knowledge. But after a careful examination of the record, and bearing in mind the rule that to justify a conviction of crime on circumstantial evidence, the latter must be such as to exclude every reasonable hypothesis but that of guilt (Hart v. United States, 84 Fed. 799, 808, 28 C. C. A. 612 [C. C. A. 3d Cir.]; Glass v. U. S., 231 Fed. 65, 68, 145 C. C. A. 253 [C. C. A. 3d Cir]), we think that the inference could be legitimately drawn, from all the facts and circumstances which the testimony discloses, that he did have the requisite knowledge. Without even attempting to summarize all of the evidence or to point out the conflicts and contradictions therein, or attempted explanations of some incriminating facts, and lack of explanation of others, we are of the opinion that it was permissible for the jury to find therefrom the following salient facts: On March 6, 1918, Baxter, Kelly & Faust, manufacturers of plush in the city of Philadelphia, delivered 12 rolls or bolts of embossed plush, designed to be used for

lining coffins, and aggregating something over 750 yards, to the Philadelphia & Reading Railway Company, at one of its stations in that city, to be delivered by freight to the National Casket Company at East Cambridge, Mass. During the same day, and while the car in which the goods were loaded was lying at one of the freightyards of the railway company in Philadelphia, it was broken into, and these rolls of plush stolen. About two months later they were found in the possession of the plaintiff in error (hereafter referred to as the defendant), under the circumstances to be hereinafter mentioned. The defendant had come to this country from Russia about five years before that time, and at first had "worked at pants," then had peddled paper bags and twine among retail grocers and small merchants. Subsequently he had been employed for about two years by his brother-in-law Rubin, when the latter was engaged in the dress business, and for about two months preceding the robbery he had been engaged in the same business on his own account. About the 1st of March, 1918, he embarked on what he termed the business of "jobbing in woolens and silks." In the early part of that month he rented a small office in an office building in the city of Newark, N. J., which was tenanted chiefly by lawyers and real estate dealers, etc., but he never caused his name, or the name under which he claimed to be trading, to be placed on the door; nor did any customers ever come to the office during usual business hours. In the latter part of March, 11 of these rolls were delivered to him at this office by an express company, having apparently been brought from New York City. They remained in the office, in their original packages, until the 4th of the following May, when, during a search of the office by certain police authorities of Newark and New York, they were discovered and seized. The defendant, who was present at the time of the discovery of the goods, when first interrogated by the police officials as to how he had come into possession of them, stated that he did not know where they had come from other than that they, as well as a considerable quantity of other goods of entirely different character that were found in the office, had been brought there by a man whom he referred to as "Benny," who was to call later and be paid for them; the defendant having agreed to buy them. Later in the day, when further interrogated at police headquarters in Newark, he again stated that, with the exception of a "few pieces of poplins and woolens" which belonged to him, all of the goods found in the place had been brought there by this "Benny" under the circumstances before mentioned. Upon the trial he gave an entirely different version of how the goods had come into his possession. He then testified that during the latter part of March, while he was in a store in New York City, a man whom he had never seen before, and who was introduced to him as one "I. Jacobs," was endeavoring to sell the plush in question to the concern in whose place of business the defendant then was, and, being unable to make a sale to that concern, he turned to the defendant, and asked him whether he would care to purchase it; that thereupon, after some bargaining, he (the defendant), purchased it, and it was delivered to him, as before mentioned, within a few days

thereafter; and that shortly after it was delivered, Jacobs called upon the defendant in Newark, and the latter paid him $415 in cash for it, although he had not opened the packages or verified the quantity. He also testified that he paid Jacobs at the rate of 57½ cents per yard, notwithstanding that the prices at which the goods had been billed from the manufacturers to the National Casket Company ranged from 45 cents to 47½ cents only.

When one, charged with having stolen goods in his possession, makes a statement to the public authorities as to how he came to have them, and later, under oath, makes an entirely different statement, it seems quite impossible, in the light of the other circumstances above detailed, to escape the conclusion that reasonable men would be justified in drawing the inference therefrom that he knew or believed that the goods had been stolen. If he had come by them honestly or had no knowledge or reason to believe that they had been stolen, it is inconsistent with ordinary human conduct that he should have made two such utterly variant and irreconcilable explanations. In view of the contradictory statements, and the other circumstances of the case, the only hypothesis of innocence was that he had obtained possession of them in either one of the two ways that he had stated. It was unquestionably for the jury to decide whether either of the explanations which he gave was true, and, if neither were, they were certainly justified, in the light of the other circumstances in the case, in reaching the conclusion that he knew or believed that the goods had been stolen when he acquired them.

[2] As, therefore, there was substantial evidence from which the jury could find the requisite guilty knowledge on the part of the defendant, the trial court committed no error in declining to direct a verdict of acquittal.

Some question was raised on the argument, but it is not supported in the brief, that there was error in the charge to the jury in respect to reasonable doubt. An examination, however, of the charge of the learned trial judge convinces us that the case was properly and fairly submitted to the jury, both in respect to the questions of fact which it was necessary for them to decide, as well as the rules which were to govern them, in reaching their verdict.

The judgment below is accordingly affirmed.

NORMA MINING CO. v. MACKAY. *

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3319.

1. EXECUTION ⚿222(1)—NOTICE OF SALE—SUFFICIENCY.

Under Civ. Code Ariz. 1901, par. 2570, providing that "real property taken in execution shall be sold at the courthouse door of the county wherein situated between the hours of ten o'clock a. m. and four o'clock p. m.," notice of a sale "between the legal hours" on a date named *held* sufficient.

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

*For opinion denying rehearing and modifying judgment, see 258 Fed. 991, — C.C.A. —.

2. MORTGAGES ⚿510(3)—FORECLOSURE SALE—NOTICE.
In a notice of the sale of property under foreclosure decree, a description of the property as given in the mortgage is sufficient.

3. MORTGAGES ⚿529(6)—FORECLOSURE SALE—INADEQUACY OF PRICE.
Refusal of a district court to set aside a second sale of property under a foreclosure decree on the ground of inadequacy of price *held* not error.

Appeal from the United States District Court for the District of Arizona; William H. Sawtelle, Judge.

Suit by Hugh Mackay against the Norma Mining Company. From an order confirming a sale under decree of foreclosure, defendant appeals. Affirmed on condition.

See, also, 241 Fed. 640, 154 C. C. A. 398.

This is an appeal from an order confirming a sale under a decree of foreclosure of two mortgages. The cause has been before this court before in the case of Norma Mining Company v. Mackay, 241 Fed. 640, 154 C. C. A. 398.

The facts are these: On March 18, 1916, Mackay secured a judgment against the Norma Mining Company for $22,958.09, with interest and costs. On May 18, 1916, the property was sold. On April 27, 1918, upon motion of Norma Mining Company, a resale of the property was ordered, and notice thereof was published in a newspaper of general circulation. The notice of sale recited that the property described would be offered for sale "between the legal hours of sale on Wednesday, the 12th day of June, 1918," at the courthouse door of Mojave county in the town of Kingman, Mojave county, Ariz. Pursuant to notice so given, the property was sold to Mackay by special master on June 12, 1918, for $27,574.28. Appellant moved to set aside the sale and for a resale on the ground that the notice did not give sufficient notice of the time of sale, in that it did not definitely state the hour of sale, or sufficiently describe the property, particularly as to the machinery and equipment to be sold.

The statute of Arizona providing for sales under execution (section 2570, R. S. 1901) provides: "In case of real property, by posting notices in three public places in the county, * * * and publishing a copy thereof in some newspaper printed within the county, * * * for three weeks before the day of sale. Such notices shall notice the judgment, parties, amount and court in which it was rendered, and particularly describe the property to be sold. Real property taken in execution shall be sold at the courthouse door of the county wherein situated between the hours of ten o'clock a. m. and four o'clock p. m."

Grant H. Smith, Maurice T. Dooling, Jr., and Lloyd Macomber, all of San Francisco, Cal., for appellant.

Robinson & Robinson, of Denver, Colo., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] We think that the notice was sufficient. The day and place of sale were given, and it was published that the sale would be between the legal hours of sale. The law fixed the legal hours as between 10 a. m. and 4 p. m., and the presumption is that the sale was had between such hours. In Burr et al. v. Borden, 61 Ill. 389, where a sale was made under a mortgage contract, it was announced that sale would be held "on the first of March, 1860, between the hours of nine a. m. and four p. m." Upon objection to such an advertisement, the court held that it was sufficient, and said:

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

"Persons who see the advertisement and desire to attend the sale can easily ascertain the hour by inquiring of the parties about to make the sale. If unwilling to wait at the appointed place, and if deceived by them and prevented from making the desired bid, the sale might be set aside. To require the advertisement to name the precise hour would lead to much practical inconvenience, and often necessitate a postponement of the sale. It is sometimes very desirable for the interests of the debtor to delay a sale for two or three hours in order to await the arrival of persons expected to bid; or, in consequence of a storm or some other unforeseen emergency. Moreover, if a particular hour were named in all cases, the question whether the sale had been held at the hour named would be a fruitful source of litigation. The mode adopted in this case has been so generally in use as the most convenient mode, and has been so free from any evil consequences, that we are not inclined to hold an advertisement in this form to be, of itself, a sufficient reason for setting aside a sale, the hours named being within the ordinary business hours of day."

In Evans v. Roberson, 92 Mo. 192, 4 S. W. 941, 1 Am. St. Rep. 701, sale of real estate was advertised to be held between the "lawful hours" of the day. The court held that the law fixed the hours of the day between which property must be sold, and that it was not necessary that the hour should be stated in the advertisement. Fitzpatrick v. Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681, cited by appellant is not pertinent because there the notice of sale bore no signature and gave no time or place of sale. In Bondurant v. Bondurant, 251 Ill. 324, 96 N. E. 306, the court refers to the statute as one which prohibits the sale unless the time of day is specified in the notice. In Jensen v. Andrews, 39 S. D. 104, 163 N. W. 571, the notice of sale recited that the property would be sold at the front door of the courthouse "on Saturday, the 14th day of February, 1914," etc. The court held the notice fatally defective because of failure to specify the hour of the day at which the sale would take place. The statute of South Dakota (Code Civ. Proc.) § 640, prescribes that the notice shall specify the time and place of sale, and that sale must be between the hours of 9 o'clock in the forenoon and the setting of the sun on that day. The Arizona statute quoted in the statement does not contain a requirement that the notice shall specify the time and place of sale, although the general provision is that sale shall be between the hours of 10 o'clock a. m. and 4 o'clock p. m.

We cannot find that the notice complained of was inherently defective, and in the absence of a substantial showing of probable prejudice to the rights of the appellant, we believe that the court was right in refusing to hold the notice insufficient.

[2] Appellant contends that the notice did not describe the property to be sold with sufficient certainty. But the description included within the notice is exactly as given in the mortgage under which the sale was made, and was sufficient.

[3] It is said that the consideration paid was inadequate. The property involved was first sold under decree of court on the 18th day of May, 1916, but, upon showing made by appellant that if a resale were had the property would probably sell for more, the first sale was set aside and another sale was ordered by the court. At the first sale Mackay, appellee herein, bought the property, paying therefor the amount of the judgment and costs. Now, two years later, the property has again

been sold to Mackay, appellee, for the amount of the judgment and costs and interest due at the time of the last sale. Appellant, in the motion to set aside the last sale, sets forth that in June, 1918, when the sale was made, the United States government was endeavoring to sell bonds for war purposes, and that the condition of the money market made it difficult to interest people in the purchase of property, and that the price paid was grossly inadequate. The support for the alleged inadequacy of price is an affidavit made in 1916 by an experienced mining man who deposed that he knew the property, and that in his opinion in 1916 it had a value in excess of $100,000, and that since that time the value of mining machinery and silver mining property had greatly increased. The affidavit gives no detailed facts upon which the opinion as to the value rests.

The showing did not appeal to the District Court as sufficient for ordering another sale, and fails to impress us with the belief that the District Court erred in its action.

The matter of sale was long protracted, and we find no valid reason for holding that the order of confirmation last made should be disturbed. Pewabic Mining Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732.

The order denying the motion to vacate the sale is affirmed.

KAUFMAN DEPARTMENT STORES, Inc., v. CRANSTON et al.

(Circuit Court of Appeals, Third Circuit. June 14, 1919.)

No. 2466.

1. NEGLIGENCE ⚷32(1)—CARE AS TO CUSTOMERS IN STORE.
   A storekeeper does not insure the safety of customers, but must merely exercise reasonable care to keep premises in a safe condition for their proper use.
2. NEGLIGENCE ⚷32(1)—STOREKEEPER'S LIABILITY TO CUSTOMER TRIPPED BY CARPET.
   A storekeeper is not liable to a customer, injured by tripping on a worn carpet, unless he knew, or should have known, of the defective condition in time to have repaired it, or warned the customer, or the general condition was such that he should have anticipated that it would become dangerous, unless repaired or replaced.

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by Martha C. Cranston and James Cranston against the Kaufman Department Stores, Incorporated. Judgment for plaintiffs, and defendant brings error. Reversed, and new trial granted.

George C. Bradshaw, Charles F. Patterson, and Patterson & Bradshaw, all of Pittsburgh, Pa., for plaintiff in error.

W. D. Grimes, of Pittsburgh, Pa., for defendants in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

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HAIGHT, Circuit Judge. One of the defendants in error, while a customer in the department store of the plaintiff in error in the city of Pittsburgh, caught her foot in a tear or worn spot in a carpet or rug which covered one of the aisles of the store, and was thereby thrown to the floor. As a result she sustained personal injuries, to recover damages for which she and her husband brought this action, and were awarded judgment in the court below. The action was based upon the alleged negligence of the defendant in failing to maintain the carpet or rug in a safe condition. It is not disputed that, under the evidence, the question as to whether Mrs. Cranston's injuries were due to the defendant's negligence was for the jury.

[1, 2] The error relied upon for a reversal of the judgment is the failure of the trial judge to charge certain of the defendant's requests or points for instruction to the jury. Except one respecting contributory negligence, which we have found it unnecessary to consider, these requests embodied in substance the propositions that the defendant, as the proprietor of a department store, was not an insurer of the safety of its premises; that it owed to customers only the duty of exercising reasonable care to keep its store in a safe condition for their use; and that unless the defendant, before the accident, had actual knowledge of the defective condition of the carpet which plaintiffs claim caused Mrs. Cranston to fall, or, by reason of its having been in such a condition for so long a time, had constructive notice thereof, the plaintiffs could not recover. Although the learned trial judge instructed the jury that the plaintiffs' right to recover was dependent upon a finding that the defendant had been negligent in respect to the inspection or repair of the carpet, or both, and defined negligence to be "the want of ordinary care under all circumstances," we are unable to find that anywhere in his charge he covered the substance of the defendant's requests. Outside of the extent of Mrs. Cranston's injuries, the only controverted facts in the case were as to whether the defendant had actual knowledge of the worn-out condition of the carpet or rug before the accident, and as to the length of time it had been in a defective condition.

The proprietor of a store to which prospective customers are invited, like any other person who, expressly or impliedly, invites others upon his premises, is not an insurer of their safety while in the store, but owes to them merely the duty of exercising reasonable care to keep the store in a safe condition for their proper use. Toland v. Paine Furniture Co., 175 Mass. 476, 56 N. E. 608; Schnatterer v. Bamberger & Co., 81 N. J. Law, 558, 79 Atl. 324, 34 L. R. A. (N. S.) 1077, Ann. Cas. 1912D, 139; Albachten v. Golden Rule, 135 Minn. 381, 160 N. W. 1012; Chilberg v. Standard Furniture Co., 63 Wash. 414, 115 Pac. 837, 34 L. R. A. (N. S.) 1079. We are unable to interpret the decisions of the appellate courts of Pennsylvania, in Woodruff v. Painter & Eldredge, 150 Pa. 91, 24 Atl. 621, 16 L. R. A. 451, 30 Am. St. Rep. 786, Bloomer v. Snellenburg, 221 Pa. 25, 69 Atl. 1124, 21 L. R. A. (N. S.) 464, Polenske v. Lit Bros., 18 Pa. Super. Ct. 474, and Sidwell v. Gimbel Bros., 52 Pa. Super. Ct. 286, as

enunciating any different rule. As a consequence of that rule, it of course follows, in a case such as this, where the defective condition was not a structural one, as it was in some of the before-cited Pennsylvania cases, but was due to the carpet or rug becoming out of repair, that, before the defendant could be charged with a failure to perform its duty to Mrs. Cranston, it was necessary for the jury to find, either that the defendant had actual knowledge of the worn-out or defective condition of the carpet a sufficient length of time before the accident happened to have enabled it to repair it, or to have warned Mrs. Cranston of its condition, or that its actual condition, at the time of the accident, had existed for such a length of time prior thereto that the defendant, in the exercise of reasonable care, should have discovered it before the accident and remedied it, or that its general condition before the accident was such that, in the exercise of reasonable care, the defendant must have anticipated that it would, in all probability, unless repaired or replaced, become dangerous to customers or persons lawfully passing over it.

The defendant's requests or points for instructions were therefore, in the main, proper, although, as actually framed, they perhaps did not express the rule just as we have above stated it. As they, or the rule of law intended to be conveyed by them, were not covered in the charge, and thus, as the jury's attention was not directed to the crucial points on which, under the evidence, the liability or nonliability of the defendant depended, we think there was error in declining to charge them, at least in substance.

It follows that the judgment must be reversed, and a new trial granted.

ELLIS v. REED.

(Circuit Court of Appeals, Ninth Circuit. May 19, 1919.)

No. 2811.

APPEAL AND ERROR ⟹1194(1)—MANDATE AND PROCEEDINGS IN LOWER COURT.

Where the mandate of the Circuit Court of Appeals on reversal of an equity cause permitted appellee to file a motion for rehearing to enable him to introduce competent evidence on an issue, which was done and an order for rehearing made, but because of the prior ending of the term such motion was not available, the order may on petition for prohibition, properly be treated as one for further examination of the issue on which reversal was ordered.

Appeal from the District Court of the United States for the Third Division of the Territory of Alaska.

Suit by J. L. Reed against M. A. Ellis. Decree for complainant was reversed (238 Fed. 341, 151 C. C. A. 357), and cause remanded. On petition by appellant for writ of prohibition. Denied.

This proceeding grows out of the order made by this court in Ellis v. Reed, 238 Fed. 341, 151 C. C. A. 357, to which reference is had to explain the nature of the suit. This court reversed the decree of the District Court, and remanded the cause to the court below, "to afford the appellee the opportunity

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

to take such proceedings as are suggested in Roemer v. Simon, 91 U. S. 149, 23 L. Ed. 267." Ellis has now applied to this court for writ of prohibition, and, after setting forth the order of the Court of Appeals, alleges that on July 11, 1917, a petition for rehearing was presented to the District Court; that on July 11, 1917, the District Court granted a petition for rehearing, and placed the cause on the docket for hearing at Seward, Alaska. Petitioner alleges that there is nothing in the record which showed when the terms of the District Court were held in the territory of Alaska; that the original decree was entered by the court on the 12th of November, 1915, and that between the time of the rendition of the decree and the filing of the petition for rehearing the term at which the decree was entered had long since adjourned; that at the time of the entry of the order for a rehearing the time for filing a petition for rehearing had long since expired, and that the District Court was without jurisdiction.

This court issued an order that Judge Brown, as the judge of the District Court in Alaska, show cause why writ should not issue. The judge, by his return, sets forth that the complaint in Ellis v. Reed, supra, was filed in the Third division of the territory of Alaska on September 26, 1914, and the cause placed on the Seward calendar, to be heard at Seward under the rules of the court; that it was heard on the 12th of November, 1915, at Seward; that the term adjourned sine die on the 13th of November, 1915; that the findings of fact and conclusions of law and judgment were entered December 1, 1915; that thereafter time was extended to appellant, Ellis, to file and settle bill of exceptions and to perfect his appeal; that the appeal was perfected and the judgment superseded by bond approved May 27, 1916, and appeal taken; that while the appeal was pending in the Circuit Court of Appeals the term of the District Court of Alaska, Third Division, was held at Seward, Alaska, convening July 27, 1916, and adjourning sine die September 5, 1916; that the mandate reversing the judgment was issued on February 8, 1917, and filed in the District Court on June 8, 1917; that on June 13, 1917, the appellee in the case, Reed, filed motion for rehearing, and an order granting rehearing was made on July 26, and the order required the cause to be docketed and placed upon the Seward calendar for rehearing; that between the date of entry of said judgment, December 1, 1915, and the order granting the rehearing, July 26, 1917, but one term of the District Court was held at Seward, Alaska, which convened July 27, 1916, and adjourned sine die September 5, 1916, during which time the judgment was superseded and the cause was pending upon appeal in the Circuit Court of Appeals.

Otto E. Sauter and Edward Judd, both of Seattle, Wash., and Corbet & Selby, of San Francisco, Cal., for petitioner.

E. E. Ritchie, of Valdez, Alaska, for respondent.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The order of reversal in Ellis v. Reed, 238 Fed. 341, 151 C. C. A. 357, was based upon error by the District Court in ruling that the transcript of judgment in Reed v. Thompson, affirmed in 202 Fed. 870, 121 C. C. A. 228, was proof that the conveyance therein considered from Thompson to Cummings was fraudulent and binding upon the appellant in Ellis v. Reed, supra. Our expressed view was that the question whether the conveyance was fraudulent as to the creditors in Ellis v. Reed, supra, was not disposed of by prior adjudication to which certain creditors were not parties or privies; hence reversal followed. It would have been proper to have made the order a reversal with a remand to the lower court, with directions to afford appellant opportunity to offer competent evidence, if he could, to sustain the material

allegations which the District Court, by erroneous ruling, had held were sustained. But as we acted upon the hypothesis that the term of the District Court at which the decree was made was not ended, and that appellee could move for a rehearing as indicated in Roemer v. Simon, 91 U. S. 149, 23 L. Ed. 267, we added the purpose of the remand and the practice to be pursued. It is fair to say that, had the record then before us showed on its face that the term of court at which the final decree of the District Court was rendered had ended, and that therefore there could be no motion for rehearing in the District Court, our order would not have contained such limited reference to a procedure, for we clearly intended that the reversal and the remand should be without prejudice to the appellee to make proof, if he could, by competent evidence.

We are satisfied, however, that motion for rehearing was not available. On the other hand, the order of the District Court for rehearing was evidently made with a view of complying with our mandate. This being so, why may not such order be regarded as, in effect, one merely for further examination by the District Court into the point upon which reversal was ordered? By regarding it in such light, the order may be safely treated not as granting a new hearing upon the pleadings and evidence already in the case, but rather as for a further examination of a point upon which the District Court, by advice of this court, could receive new or additional evidence. When regarded and limited in this way, the order may be one carrying out the substance of the decision of this court in the main case, and made without apparent violation of the order of this court.

In equity cases the practice of remanding for further examination is proper, and we are of opinion that it may be pursued in the present instance. Peoria Gas & Elec. Co. v. Peoria, 200 U. S. 48, 26 Sup. Ct. 214, 50 L. Ed. 365; Westinghouse Co. v. Wagner Elec. & M. Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; Barber v. Coit, 118 Fed. 272, 55 C. C. A. 145. Giving to the order the limited effect indicated, we do not think prohibition should issue.

The writ is therefore denied, and the petition is dismissed, at petitioner's costs.

BLANC v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3292.

1. WAR ⟹4—REGULATIONS AFFECTING CAMPS—CONSTITUTIONALITY.

The provisions of Selective Draft Act May 18, 1917, § 13 (Comp. St. 1918, Append. § 2019b), authorizing the Secretary of War to take action to prevent the keeping of houses of prostitution, etc., in the vicinity of military camps or posts, extended to naval camps by Act Oct. 6, 1917 (Comp. St. 1918, § 2813e), is not unconstitutional, as an attempt by Congress to exercise police powers within the states.

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

2. INDICTMENT AND INFORMATION ⚷4—PROPER FORM OF ACCUSATION—MISDEMEANORS.

Accusation for a misdemeanor committed against the laws of the United States may properly be by information.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Criminal prosecution by the United States against August Blanc. Judgment of conviction, and defendant brings error. Affirmed.

Frank J. Hennessy, of San Francisco, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., and James E. Colston, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Blanc was tried and convicted upon two informations, which were consolidated for the purpose of trial. One information charged that during September, 1918, in violation of section 13 of the act of May 18, 1917 (40 Stat. 76-83, c. 15 [Comp. St. 1918, Append. § 2019b]), entitled "An act to authorize the President to increase temporarily the military establishment of the United States," and the act of October 6, 1917 (40 Stat. 393, c. 92 [Comp. St. 1918, § 2813e]), entitled "An act to promote the efficiency of the United States Navy," approved the 6th of October, 1917, and the order of the Secretary of the Navy issued on August 3, 1918, Blanc unlawfully directed one Remegie to room 16 in a building on Broadway street in San Francisco for purposes of lewdness and prostitution, and that the said building was being used for purposes of lewdness and prostitution, and was within 10 miles of a place under naval jurisdiction, to wit, Goat Island. The other charged that Blanc, in September, 1918, in violation of the statutes mentioned in the preceding information and the above referred to order of the Secretary of the Navy, willfully and knowingly kept a house of ill fame at 773 Broadway street, in San Francisco, known as the Globe Hotel, where prostitution was carried on, and that said hotel was within 10 miles of Goat Island, a place under naval jurisdiction.

It is argued that the proof was insufficient to show that defendant kept a house of ill fame. The point is not well taken, for there was evidence tending to show that prostitution was habitually carried on in the room of the hotel kept by defendant and that defendant well knew of the fact.

It is contended that there is nothing to sustain the charge that defendant knowingly directed Remegie to the particular room described in the house referred to. But as the evidence of the government was that Remegie asked defendant about a girl, and that Blanc told him to go to a particular room, and that he would find a woman there, and that he did meet her there, and that she offered herself in prostitution, the court was right in submitting the evidence to the jury.

[1] It is said that the act of Congress of May 18, 1917, and the act

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

of Congress of October 6, 1917, and the order of the Secretary of the Navy of August 3, 1918, are contrary to the provisions of section 8 of article 1 of the Constitution of the United States, in that they constitute an unlawful attempt by the United States government to exercise police powers within the state. The position is not well taken. Pappens v. United States, 252 Fed. 55, 164 C. C. A. 167; Grancourt v. United States, 258 Fed. 25, — C. C. A. —.

[2] It is contended that the court should have granted a motion in arrest of judgment upon the ground that plaintiff in error had never been committed by any magistrate or indicted by a grand jury upon either of the offenses charged in the informations. The section of the act of Congress hereinbefore referred to makes one who is convicted guilty of a misdemeanor, and prescribes that he shall be punished by fine of not more than $1,000, or imprisonment for not more than 12 months, or both. Information is proper in a case of misdemeanor committed against the laws of the United States. United States v. Waller, 1 Sawy. 701, Fed. Cas. No. 16,634; United States v. Wells (D. C.) 186 Fed. 248; Mackin v. United States, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909. Section 335 of the Penal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. § 10509]) provides that—

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

By section 1022 of the Revised Statutes (Comp. St. § 1686):

"All crimes and offenses committed against the provisions of chapter seven, Title 'Crimes,' which are not infamous, may be prosecuted either by indictment or by information filed by a district attorney.".

The offense, not being punishable by imprisonment for more than a year in the penitentiary, is not an infamous crime. Parkinson v. United States, 121 U. S. 281, 7 Sup. Ct. 896, 30 L. Ed. 959; Mackin v. United States, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; In re Claasen, 140 U. S. 204, 11 Sup. Ct. 735, 35 L. Ed. 409.

We find no error and affirm the judgment.

THE NORTH AMERICA. THE P. R. R. NO. 8. THE INTERSTATE.*

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 222.

COLLISION ⟹95(2)—CROSSING TOWS—VIOLATION OF RULES.

One of two tugs, with tows, crossing at night in New York Bay, having a single scow in tow on a 100-fathom hawser, with the other tow on her starboard side, which crossed the course of the other without even signaling, *held* solely in fault for a collision between the tows.

Appeal from the District Court of the United States for the Eastern District of New York; Thomas I. Chatfield, Judge.

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*Certiorari denied 250 U. S. —, 40 Sup. Ct. 14, 64 L. Ed. —.

Suit for collision by the Central Railroad Company of New Jersey against the steam tug North America, William A. Jamison, and others, claimants, with the scow P. R. R. No. 8 and the steam tug Interstate impleaded. Decree against the North America, and her claimant appeals. Affirmed.

For opinion below, see 238 Fed. 250.

Foley & Martin, of New York City (W. J. Martin, of New York City, of counsel), for libelant.

Park & Mattison, of New York City (S. Park, of New York City, of counsel), for the Interstate.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones and Dix W. Noel, both of New York City, of counsel), for the North America.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On March 4, 1915, a collision occurred between the barge Mechanic, of the tow of the steam tug Interstate, and the scow No. 8, in tow of the steam tug North America, in the upper bay below Liberty Island. As a result thereof, a libel was filed by the libelant, as owner of the Mechanic and as bailee of the cargo thereon, and on behalf of the crew, against the North America and the scow No. 8. By petition, the owner of the North America brought in the steam tug Interstate, which had the Mechanic in tow as a party defendant. The No. 8 was picked up by the North America at the anchorage ground near the Black Tom channel, for the purpose of towing her to the dumping ground off Sandy Hook. The Interstate was bound for Spuyten Dyvil creek, Harlem River, having come from Arlington, Staten Island. The tide was flood and the night was fairly clear. The Mechanic was made fast by two short hawsers and had a cargo of structural iron. The North America made fast the bridle of her hawser on the No. 8 and started in a course across the bay, paying out her hawser, proceeding under one bell until 100 fathoms or more of the hawser were thus out. She ported her wheel to proceed on her regular course down the bay between south by west and south-southwest. The North America was exhibiting her green light to the Interstate, and when first observed was substantially ahead of her, crossing her bow from port to starboard. The Interstate was on a course from the buoy off Robins' Reef Lighthouse to a point having the lights of the Cortlandt Street ferry. The Interstate kept on that course substantially, observing two white lights about two points on her port bow, moving across the channel. It was then that she first observed the tow of the North America. The Interstate starboarded her wheel immediately, changing her course three points. There was a strong flood tide, and the starboard bow of the No. 8 struck the port bow of the Mechanic, which was being towed stern first. The Mechanic filled with water and capsized. After the North America had lengthened her hawser, she put her wheel to port and proceeded ahead with a jingle bell. She did not give a signal to the Interstate, but

kept on after the collision to the dumping grounds. The point of collision was about mid-channel off of Black Tom.

We are satisfied that the North America was solely at fault and should be held for the damages flowing from the collision. She crossed the Interstate's bow in porting her helm. The effect of this maneuver was to put the Interstate in a pocket, and this directly resulted in the collision. After the green lights of the North America were observed by the navigator of the Interstate, the course of the Interstate was changed to port, bringing her all the while nearer to the anchorage. She had a right to assume, on at first seeing the lights on the scow of the tow of the North America, that the North America would keep out of the way. The North America gave no whistle to the Interstate, and kept on down the bay without regard to the Interstate. The North America thus proceeded across the bow of the Interstate, leaving her tow behind. This was a dangerous undertaking, with the Interstate proceeding up the bay on her starboard side, and, in our opinion, constituted the fault. The tow on a long hawser was subjected to the effect of the flood tide, and this developed a pocket. It prevented the escape of the Interstate. The North America should have awaited the passing of the Interstate, or have obtained consent from the Interstate to cross her bow. We hold the North America alone at fault.

Judgment affirmed.

GORDON DRY GIN CO., Limited, v. RIGHEIMER et al.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2645.

TRADE-MARKS AND TRADE-NAMES ⟹62—INFRINGEMENT OF TRADE-MARK RIGHTS.

The practice of a saloon keeper of pouring gin from one of complainant's trade-marked bottles into another and serving drinks from the latter, due to the fact that customers preferred to pour from a nearly full, rather than a nearly empty, bottle, *held* not an infringement of complainant's trade-mark rights.

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

Suit by the Gordon Dry Gin Company, Limited, against John C. Righeimer and John C. Righeimer, a corporation. Decree for defendants, and complainant appeals. Affirmed.

George W. Tucker, for appellant.

Frank S. Righeimer, of Chicago, Ill., for appellees.

Before BAKER and ALSCHULER, Circuit Judges, and FITZHENRY, District Judge.

BAKER, Circuit Judge. Appellant, maker of Gordon gin, sold its product only in trade-marked bottles. Appellees operated a saloon

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

in Chicago, and bought Gordon gin from wholesale liquor dealers. In its bill appellant charged appellees with refilling appellant's bottles with inferior gin of other makes. The master in his report recited the conflicting evidence, and found that appellant "has failed to sustain by a preponderance of evidence" the aforesaid charge. This finding, approved by the trial court, we will not disturb, because the record discloses a dispute of fact involving the weight and credibility of oral testimony.

Under an amendment of its bill appellant contends that appellees' admitted practice of pouring Gordon gin from one of appellant's trade-marked bottles into another and selling drinks across the bar from the latter bottle is an infringement of appellant's trade-mark rights. The master found that this practice was general among saloon keepers and was due to the fact that drinkers like to pour their drinks at bars from nearly full bottles rather than from nearly empty ones. There was no deception of any one. Instead of diminishing appellant's trade, the practice of acceding to drinkers' preferences would have a tendency to increase, or at least to uphold, the consumption of Gordon gin. Manifestly appellant intended that its bottles should be opened and the contents dispensed by the drink. If consumers at saloon bars will not take the last gill in a bottle, appellant's theory of its legal rights would deprive appellees of property they had bought and paid for. The mere statement of the theory carries its own refutation, we believe. Coco-Cola Co. v. Bennett, 238 Fed. 513, 151 C. C. A. 449, has no bearing, in our judgment, upon such a situation as here is presented.

The decree is affirmed.

BLUMENSTOCK BROS. ADVERTISING AGENCY v. CURTIS PUB. CO.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2668.

COURTS ⚷403(5)—CIRCUIT COURTS OF APPEALS—APPELLATE JURISDICTION—CASES INVOLVING JURISDICTION OF LOWER COURT.

The Circuit Court of Appeals is without jurisdiction to review an order of a District Court dismissing a cause on the express grounds of want of jurisdiction.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the Blumenstock Bros. Advertising Agency against the Curtis Publishing Company. Judgment of dismissal, and plaintiff brings error. On motion by defendant to dismiss writ of error. Motion granted.

Colin C. H. Fyffe, of Chicago, Ill., for plaintiff in error.

Amos C. Miller, of Chicago, Ill., for defendant in error.

Before BAKER and EVANS, Circuit Judges, and ENGLISH, District Judge.

BAKER, Circuit Judge. Plaintiff in error, a Missouri corporation, filed its declaration in the District Court for the Northern District of Illinois against defendant in error, a Pennsylvania corporation, purporting to state several causes of action under the Sherman Act and one under the common law. Defendant entered its special appearance and moved to dismiss the action on the ground that defendant was not suable in this district on the common-law count, and that the matter set forth in the other counts was not the kind of matter covered by the Sherman Act, and consequently no jurisdiction over the person of defendant was acquired by service upon an agent within the district.

The District Court ordered "that the service of process be and the same is hereby set aside, and that this cause be and the same is hereby dismissed for want of jurisdiction."

Defendant's motion here that the writ of error be dismissed, on the ground that appellate jurisdiction over the District Court's order is vested exclusively in the Supreme Court by virtue of sections 238 and 128 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133, 1157 [Comp. St. §§ 1120, 1215]), must be sustained. United States v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Marble Co. v. United States, 213 U. S. 10, 29 Sup. Ct. 324, 53 L. Ed. 675; United States v. Congress Construction Co., 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163; Male v. Atchison Railway Co., 240 U. S. 97, 36 Sup.

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Ct. 351, 60 L. Ed. 544; Merriam Co. v. Saalfield, 241 U. S. 22, 36 Sup. Ct. 477, 60 L. Ed. 868; Crawford v. McCarthy, 148 Fed. 198, 78 C. C. A. 356.

Plaintiff urges that, because the counts under the Sherman Act in truth state good causes of action, the District Court made an adverse decision on the merits, and therefore the merits are now reviewable in this court. But the order as entered proves beyond question that the District Court declined to consider the merits, because it found that it had no jurisdiction to hear them. If the District Court erred in that respect, we are without jurisdiction to say so; and we are likewise without jurisdiction to consider the merits in advance of a decision on the merits by the District Court.

The writ of error is dismissed.

THE CORNELIA.

RED HOOK TOWING LINE v. GAUL.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 235.

MARITIME LIENS ⚷65—REPAIR WORK—EVIDENCE.

Evidence that a boiler was inspected and licensed after being repaired, etc., *held* to establish that libelant repaired boiler in a workmanlike manner, although it subsequently developed leaks and defects.

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

Libel by Ray Gaul against the tug Cornelia, her engines, etc., the Red Hook Towing Line, claimant, with cross-libel by the Red Hook Towing Line against Ray Gaul. From an adverse decree, the Red Hook Towing Line appeals. Affirmed.

The memorandum opinion of Mack, Circuit Judge, in the court below, is as follows:

The contract in this case was one for work and labor at $25 a day, at a reasonable price for the material. The boiler in question was old; it was to be welded by the acetylene process. Libelant did not guarantee the result of his work; his obligation was to do the job in a workmanlike way. In my judgment, this was done. In the absence of proof showing incompetency or fraud on the part of the inspector, the inspection and license granted in January, 1917, is the strongest evidence that at that time the boiler had been put in fit condition. Leaks and defects developing thereafter, not having been guaranteed against, furnish no excuse for the refusal to pay for the work and material theretofore done.

Decree will be entered for libelant on the libel, and the cross-libel dismissed.

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

Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.
Amos Van Etten, of Kingston, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. This appeal involves pure questions of fact, and, as we are entirely satisfied with Judge Mack's conclusion, the decree is affirmed.

KNIGHT SODA FOUNTAIN CO. v. WALRUS MFG. CO.

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

No. 2632.

1. PATENTS ⟹328—VALIDITY AND INFRINGEMENT—COMBINED JAR AND DIPPER.
The Faries patent, No. 779,271, for a jar and dipper for serving crushed fruit, etc., claim 3, *held* not infringed. Claims 4 and 5 *held* invalid for indefiniteness, in view of the prior art.

2. PATENTS ⟹165—MEASURE OF INVENTION—DEFINITENESS OF CLAIMS.
A patent is sustained, not for what the inventor may have done in effect, but for what is pointed out clearly and distinctly in his claims. As much as is not so claimed belongs to the public.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.
Suit in equity by the Walrus Manufacturing Company against the Knight Soda Fountain Company. Decree for complainant, and defendant appeals. Reversed.

Donald M. Carter, of Chicago, Ill., for appellant.
Harry Lea Dodson, of Chicago, Ill., and Zell G. Roe, of Des Moines, Iowa, for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. The patent to Faries, No. 779,271, relates to a jar and dipper for serving crushed fruit, etc. Claims 3, 4, and 5, held valid and infringed, read as follows:

"3. The combination of a jar, a cover for the jar, a rod extending below the cover, a dipper on the lower end of the rod, with its dipping edge extended away therefrom, and a handle above the cover, rigidly connected with the rod and shaped to aid in lifting the dipper in a proper filling and emptying position.

"4. The combination of a jar having a wide mouth, a cover for the mouth of the jar, a rod attached to the cover and extended downward therefrom, and a dipper on the lower end of the rod, inclined to the rod at such an angle that, when the rod is against a side of the mouth of the jar, the dipper may be made to assume an approximately horizontal position.

"5. The combination of a jar having a wide mouth, a cover for the mouth of the jar, a rod attached to the cover and extended obliquely downward

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therefrom, and a dipper on the lower end of the rod. inclined to the rod at such an angle that the dipper may be made to assume an approximately horizontal position inside the jar."

[1] Unquestionably the patent is very narrow. Only the precise form of construction described in each claim is protected. No wide range of mechanical equivalents can be indulged in. So construing the claims of the patent, we conclude that claim 3 is not infringed, because neither the last-named element, "and a handle above the cover rigidly connected with the rod and shaped to aid in lifting the dipper in a proper filling and emptying position," nor its mechanical equivalent, appears in the appellant's structures.

As to claims 4 and 5 an examination of the file wrapper is instructive. As first presented, patentee sought a patent covering, among other claims:

"The combination of a jar, a cover for the jar, a dipper adapted to be inserted into the jar, and a connection between the dipper and the cover."

Upon a division being ordered, and with several patent citations confronting him, applicant amended his specifications by inserting:

"One object of the invention is to provide a jar and dipper so shaped and proportioned that the dipping edge of the dipper may be presented downward to receive a filling of the contents of the jar, and the dipper may be raised in an approximately horizontal position by placing the back of the dipper rod against a side of the mouth of the jar."

And also:

"By making the bottom of the jar concave and shaping the ladle to conform in a general way to the concave surface, the entire contents of the jar may be readily removed."

Patentee struck from his specifications the language:

"One object of the invention is to provide a jar with a combined cover and dipper so disposed that the cover will always be on when the dipper is in," and

"Another object is to provide means for sustaining the jar in a vertical position, and still another object is to provide a readily attachable label plate to designate the contents of the jar."

Claims covering generally the combination of the jar, the cover, and the dipper, with the latter two connected, were withdrawn after the broadest claim heretofore quoted was rejected.

Novelty, if any exists in claim 4, resides in the combination by virtue of the last clause of the claim describing the angle formed by the attachment of the dipper to the lower end of the rod. In view of the use of the word "oblique" in claim 5, the word "downward" in claim 4 may well be construed as meaning perpendicular to the cover. It seems to us that the element, "and a dipper on the end of the rod inclined to the rod at such an angle that when the rod is against a side of the mouth of the jar the dipper may be made to assume an approximately horizontal position," is so indefinite and vague as to necessitate rejection of this claim.

[2] A patent is the creature of the statute. The terms and conditions upon which the grant is made are fixed by the statute. Section 9432, Compiled Statutes 1918, requires the inventor to set forth his claims in "such full, clear, concise, and exact terms as to enable any person skilled in the art * * * to make, construct, compound, and use the same." What is not claimed distinctly in the invention, the public possesses. A patent is sustained, not for what the inventor may have done in effect, but what is pointed out clearly and distinctly in his open letter. White v. Dunbar, 119 U. S. 47, 51, 7 Sup. Ct. 72, 30 L. Ed. 303; McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 116, 16 Sup. Ct. 240, 40 L. Ed. 358; Proudfit Looseleaf Co. v. Kalamazoo Looseleaf Binder Co., 230 Fed. 120, 140, 144 C. C. A. 418; Houser v. Starr, 203 Fed. 264, 267, 121 C. C. A. 462; National Cash Register Co. v. Gratigny, 213 Fed. 463, 467, 130 C. C. A. 109; Harder et al. v. United States Piling Co., 160 Fed. 463, 466, 87 C. C. A. 447; Avery & Sons v. J. I. Case Plow Works, 148 Fed. 214, 218, 78 C. C. A. 110.

While we may give liberal construction to the language used to protect the inventor, we cannot rewrite the claim, or insert an element or modify an element in the combination upon which alone validity depends. Words that describe a result may, of course, be adjective in character, that is, modifying in meaning, yet they must be definite and understandable. In this claim the words last quoted describe an angle formed by the rod and the dipper. Just what angle may not necessarily be defined, provided it is ascertainable by placing the rod against the mouth of the jar and the dipper assume a horizontal position. Unfortunately for claims 4 and 5, almost any angle will meet this test, especially if the mouth of the jar be made wide enough and the position of the dipper at the bottom of the jar be changed.

Had applicant included in the combination a jar with a concave bottom, and the dipper so attached to the lower end of the rod that it would fit in the concave bottom of the jar (such as was contemplated by the amended specifications), and the other elements appeared, a different question would have been presented.

In claim 5 the rod extends obliquely downward and the dipper on the lower end of the rod is inclined at such an angle that it may be made to assume an approximately horizontal position inside the jar. Here again the angle formed by the attachment of the dipper to the rod may vary widely and the described results still be obtained, provided the mouth of the jar be relatively large or the operator change the position of the dipper.

Nor can we ignore the prior art, even though no exact anticipation appears therein. Wettstein, in his patent, No. 356,514, covered a combination quite similar in purpose and in construction. In his specifications he says:

"My invention relates to a device for measuring and conveying liquids and small loose solid substances from one bowl or receptacle into another in an easy manner, and to provide a suitable covering for the same where required—such as cream or milk pitchers, sugar bowls, or other receptacles containing liquid or solid food—the object being to exclude impurities and also flies and

other insects and vermin therefrom; another object of the device being that it is so constructed that, when the spoon or scoop is replaced into its proper receptacle, the cover is placed thereon at the same time, where said scoop is used in combination with the cover."

White secured a patent covering caps and spoons for mustard bottles. His top and his spoon were attached. Necessarily the dipper and the rod constituting the spoon formed an angle, and whether the dipper was "approximately horizontal" would depend upon the position of the rod at its place of connection with the top. Likewise the width of the mouth of the container necessarily determined to a certain degree whether the dipper would assume a horizontal position.

As the pre-empted field excluded patentee from the claims by him first made, and later withdrawn after rejection by the Patent Office, and as his advance, as set forth in his claims, is represented by the use of jars with a wide mouth (the indefinite and uncertain angle formed by the attachment of the rod and the dipper adding nothing), we must hold claims 4 and 5 invalid.

The decree is reversed, with costs, with directions to dismiss the bill.

DOUBLE FABRIC TIRE CO. v. GENERAL TIRE & RUBBER CO.

(District Court, N. D. Ohio, E. D. August 12, 1919.)

No. 409.

PATENTS ⚿328—VALIDITY—WANT OF INVENTION—PRIOR PUBLIC USE.

Patent No. 964,446, for a blow-out patch for use in reinforcing or repairing automobile tire casings, *held* invalid for want of invention and because of prior public use.

In Equity. Bill by the Double Fabric Tire Company against the General Tire & Rubber Company. Bill dismissed.

Hull, Smith, Brock & West, of Cleveland, Ohio, for plaintiff.

Thurston & Kwis, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. Complainant's bill charges infringement by defendant of United States letters patent No. 964,446. The article of commerce said to be covered thereby and infringed by defendant is what is known as a "blow-out patch" for use in reinforcing or repairing automobile tire casings. The defenses are invalidity, for lack of invention, and for lack of novelty and prior public uses.

Upon a consideration of the record and briefs I am of opinion that all of these defenses are sustained. Inasmuch as the questions involved are simple and purely questions of fact, I deem it sufficient to state briefly, for information of counsel, the grounds upon which I have reached this conclusion.

Lack of novelty is apparent from the prior art disclosed by the file wrapper history of the application for complainant's patent, particularly applicant's admission therein of the place in the prior art

of United States letters patent No. 871,930, issued to G. and E. Hagstrom, and United States letters patent No. 866,539, issued to P. C. Traver, and the admission in lines 6 to 13, page 2, of the prior art of using flat pads of fabric and other materials having a portion of the edges thereof extending far enough to lap over the beads of the tire casing.

On this hearing in addition thereto, and supporting this conclusion, were produced United States letters patent No. 852,113, issued to C. D. Gilman, and British letters patent No. 16,660, issued to Edward Bell Raper. This admitted prior art leaves nothing remaining of complainant's alleged invention, except the tense or stretched condition of the several layers of rubber-coated fabric comprising the body portion of the blow-out patch. This file wrapper history shows that this tense or stretched condition was the only supposedly novel feature in complainant's invention, and the patent was issued apparently on this ground alone; the applicant waiving, by his acquiescence in the previous rejections by the Patent Office Examiner, his right to claim a different interpretation of the prior art, or a broader construction of his patent claims. This feature becomes unimportant, because in commercial practice it has disappeared from the blow-out patch as manufactured by complainant, and was never present in defendant's device.

In my opinion, also, it is difficult to agree with the Patent Office Examiner that the supposedly novel feature of tense or stretched condition of the several layers of the body of the blow-out patch amounted to invention, or that, independently of the prior art above recited, invention is involved in extending the edges of one of the layers, called "wings," over the bead or rim of the outer casing. This expedient is so obvious as to occur naturally to any skilled mechanic making a tire repair; in point of fact, it did naturally occur as soon as the problem was presented to the applicant himself, and also, as the evidence clearly shows, to Andrew Halter and Lemuel I. Jones, two of the tire repair men called as witnesses on behalf of defendant.

I am also of opinion that the prior uses relied on by the defendant are proved by clear and convincing evidence and beyond a reasonable doubt. They are four in number, all prior in time to complainant's alleged invention. One was at the repair shop of the Republic Tire & Rubber Company, at Youngstown, Ohio, in May, 1906, proved by Andrew Halter and Lemuel I. Jones; another at the repair shop of the Lake Shore Rubber Company, at Jeannette, Pa., proved by Frank D. Gable and Edward J. Considine; another at the Michelin Tire Repair Company, in New York, proved by Edward J. Considine and Frank D. Gable; and another at the repair shop of D. E. Foote, Frankfort avenue, Cleveland, Ohio, proved by Fred Hitzman, F. J. Steadley, and D. E. Foote.

Complainant urges that the testimony of all these witnesses is not sufficient to meet the legal requirements of proof of prior use, in that it is not convincing beyond a reasonable doubt. Their testimony, in my opinion, can be disregarded, and these prior uses ignored, only on one or the other of two grounds: First, that all these witnesses

are lying; or, second, that all of them are mistaken. Having seen and heard these witnesses testify, I am not willing to accept either view, and disregard their testimony. Most verdicts in criminal cases, in which guilt must be proved beyond a reasonable doubt, are rendered on testimony less clear, direct, and convincing. If only one use were proved, and the proof of that use rested on oral testimony exclusively of two or three witnesses, a more careful scrutiny of their testimony might be required; but, when exactly similar uses in so many different places are proved by different sets of witnesses, any doubt yet remaining is an unreasonable doubt, one conjured up by the ingenuity of counsel, and not one arising out of the failure or insufficiency of the evidence.

A decree will be entered dismissing complainant's bill, at its costs.

THE ISABELA.

(District Court, D. Maryland. May 26, 1919.)

WHARVES ⟹16—STATUTE—CONSTRUCTION—GOVERNMENT USE OF DRY DOCKS FOR VESSELS "BELONGING" TO UNITED STATES.

Act Cong. June 19, 1878, granting to libelant a portion of the Ft. McHenry reservation on condition that grantee construct a dry dock and afford the United States the right to use the same for examination and repair of vessels "belonging to the United States free from charge of docking," *held* to include a vessel in United States service under a charter amounting to a demise, although being repaired for immediate return to the owner upon leaving the dock; the word "belonging" not meaning absolute and unqualified ownership.

In Admiralty. Libel by the Baltimore Dry Docks & Shipbuilding Company against the steamship Isabela, in which the United States intervened. Dismissed.

George Weems Williams, of Baltimore, Md., for libelant.

George Forbes, of Baltimore, Md., for respondent, The Isabela.

Samuel K. Dennis, U. S. Atty., of Baltimore, Md., for intervener.

ROSE, District Judge. This case calls for the construction of a provision of Act June 19, 1878, c. 310, 20 Stat. 167, which authorizes the Secretary of War to convey to the Baltimore Dry Dock Company a portion of the Ft. McHenry reservation, in consideration of the grantee constructing thereon a dry dock 450 feet long, and affording the United States the right to the use forever of "the dry dock at any time for the prompt examination and repair of vessels belonging to the United States, free from charge of docking."

The Isabela is an American steamship, and is owned by the New York & Porto Rico Steamship Company. For some time before she was docked the government had her in its service upon a bare boat charter. By the terms of the charter she, while the government held her, was manned and operated by the government, which bore her expenses, and assumed all risk of accidents or injury to her, and bound

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

itself to return her in as good order and condition as when received, ordinary wear and tear excepted. The government was through with her and sent her to the dry dock to put her, at its expense, in order, for surrender to its owner. She was turned over to the latter when she came out of the dock. She was at once arrested under a libel, which was filed while she was still in the government's possession, but process under which was not served until after she had passed into the custody of her owner.

The libelant holds under the grant made in accordance with the act of Congress already mentioned, and admits that it is bound by its terms. It says, however, that it is not thereby required to dock, free of charge, any vessel of which the government is not the owner, for in its view such a ship does not belong to the United States within the meaning of the act. On the other hand, the government contends that a ship belongs to it within the sense of the statute when, as in the instant case, there has been a complete demise of the ship to it, and it is responsible for repairs and docking charges. In answer the libelant says that, if Congress had meant that the government should have free all docking done for its account, it would have omitted the words "belonging to the United States," for they, if the government's contention be sustained, are superfluous. It points out that there is, or in 1878 appeared to be, in the nature of things some limit upon the number of ships which at any particular time the government was likely to own, but almost none as to those which it may upon occasion hire. It argues that it is unreasonable to conclude that the parties intended to impose or assume so indefinite and conceivably burdensome an obligation. The word "belonging" is not a technical one. Its meaning depends to a large extent upon the circumstances under which it is used. In common speech and to ordinary understanding, something may well belong to one, although he has less than an absolute and unqualified ownership of it.

Occasionally, in the course of the last hundred years or more, English courts have had occasion to pass upon questions which were quite similar to that now under consideration. They concluded that, where a charter amounts to a demise of a ship, the charterer will be deemed the owner, so far as concerns his rights and obligations to third parties, including the state. Trinity House v. Clark, 4 Maule & Selwyn, 288; Sir John Jackson v. S. S. Blanche, [1908] L. R. App. Cases, 126; In re The Sarpen, [1916] L. R. Probate, 312.

In the absence of a clearer guide, I am inclined to follow these rulings, feeling as I do that, if such a case as the one now at bar had in 1878 been put up to Congress and the Dry Dock Company, they would both have agreed that the government should have the service free. This conclusion renders it unnecessary to pass on the contention of the owner that, even assuming that the government was bound to pay for the service, the ship was not liable therefore in rem.

It follows that the libel will be dismissed.

MOUND VALLEY VITRIFIED BRICK CO. v. MOUND VALLEY NATURAL GAS & OIL CO. et al.

(Circuit Court, D. Kansas, Third Division. May 1, 1911.)

1. ASSIGNMENTS ⚷109—EXECUTORY CONTRACT—LIABILITY OF ASSIGNEE.
An assignee of an executory contract relating to property in which there can be no privity of estate cannot be held liable for a breach, unless there has been a novation which releases his assignor from liability.

2. ASSIGNMENTS ⚷109—EXECUTORY CONTRACT—LIABILITY OF ASSIGNEE.
Where one of two defendants contracted to furnish to plaintiff natural gas required to operate its brick-making plant and kilns for a term of years at a stated rate, and assigned the contract to its codefendant which performed it for a number of years and received the payments thereunder, and then refused further performance, plaintiff *held* not to have a joint cause of action against defendants for the breach, for which, there being no novation, the defendant with whom plaintiff contracted is alone liable.

3. COVENANTS ⚷30—EXECUTORY CONTRACTS—LIABILITY OF ASSIGNEE—PERSONAL COVENANTS.
The covenants in a contract to furnish natural gas to a purchaser during a term of years are purely personal, and a provision that it shall be binding upon the heirs and assigns of the parties is inoperative to bind an assignee of the seller; nor does such an assignment, without consent of the purchaser, release the seller from its obligations.

At Law. Action by the Mound Valley Vitrified Brick Company against the Mound Valley Natural Gas & Oil Company and the Bankers' National Development Company. On separate motions of defendants in arrest of judgment and for new trial. Sustained as to the Gas Company, and denied as to the Develpoment Company.

Farrelly & Evans, of Chanute, Kan., and John Madden, of Wichita, Kan., for plaintiff.

Jepson & Jepson, of Sioux City, Iowa, and Glasse & Burton, of Parsons, Kan., for defendants.

POLLOCK, District Judge. This action at law was brought by plaintiff against defendants jointly to recover damages for breach of contract to supply plaintiff with natural gas used by it in its work of manufacturing brick. A trial before the court and jury was had, resulting in a verdict in favor of plaintiff against defendants, jointly, for the sum of $15,000. On the return of the verdict, the court, on its own motion, directed the clerk to not enter judgment thereon until certain matters of law might be presented and determined by the court. Separate motions of defendants, raising questions of law on the record, have been filed and presented in oral argument and on briefs of counsel, and now await decision.

The facts necessary to a decision of the pending motions may be briefly stated, as follows: The plaintiff, being about to construct a plant for the purpose of engaging in the manufacture of brick, and being desirous of obtaining in advance a supply of fuel used in such business, on February 13, 1904, entered into the following contract in

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

writing with defendant the Bankers' National Development Company (hereinafter called the "Development Company"):

"This contract and agreement made and entered into this 13th day of February, 1904, by and between the Bankers' National Development Company, a corporation, organized and existing under the laws of the state of South Dakota, and doing business under the laws of the state of Kansas, and having an office for the transaction of business in the city of Mound Valley, Labette county, Kan., its successors and assigns, party of the first part, and the Mound Valley Vitrified Brick Company, a corporation organized under the laws of the state of Kansas, and doing business in Labette County, Kan., and having an office in the city of Mound Valley, Kan., its successors and assigns, party of the second part, witnesseth:

"(1) That the party of the first part hereby agrees to undertake to furnish to party of the second part natural gas from the wells in the field owned, leased, and operated by them in Labette county, Kan., in sufficient quantities to operate the brick plant now owned by the second party near Mound Valley, Kan., located on the north fractional part of the west half of the southeast one-fourth of section 35, township 32, of range 18, formerly known as the I. M. Hinds land, to lay and maintain a pipe line to said brick plant, including one three-inch high pressure gas regulator, and two two-inch low pressure regulators, and furnish sufficient gas to furnish the power to operate all machinery used by said second party in operating its said brick plant; also to supply gas for all drier houses, and also gas to burn two kilns of brick at the same time at full heat; that is to say, said party of the first part, its successors and assigns, undertake to furnish to said second party natural gas in sufficient quantities to enable the said second party to run and operate its brick plant at full capacity and at the same time to furnish gas for all drier houses and for the burning of two kilns of brick at full heat at all times day and night, and at all seasons of the year, and for lighting and heating said brick plant, when required by said second party, during the existence of this contract.

"(2) The party of the second part agrees to receive and use gas for the purposes above named, and to use all reasonable means and modern appliances, so as not to waste any gas, and to pay to said first party, its successors and assigns, for said gas used, at the rate of 60 cents per 1,000 brick burned, and to pay for the same on the 15th day of each month after the kilns are emptied; and the party of the first part may shut off the gas if the party of the second part shall fail to pay for the same as herein provided within five days after the same is due and payable.

"(3) It is expressly agreed and understood by and between the parties hereto that gas for domestic purposes shall be reserved over and above the uses of gas for manufacturing purposes; and should the gas supply of the party of the first part be not sufficient to furnish gas for heating and lighting and for the operating of the brick plant belonging to the party of the second part as above provided, then and at that time the party of the first part will drill in other and sufficient wells on the lands leased then held and operated by them, and to use all diligent effort to supply the deficiency, and in conjunction with the board of directors of the party of the second part, to make all reasonable effort in their power to make the supply sufficient for the needs of the party of the second part. The party of the first part shall not be liable for a failure to furnish gas to second party as herein provided, after due diligence shall have been used by first party in the way of securing the necessary quantity of gas.

"(4) It is further agreed to by party of the first part that if they should, at any time after the date of this contract, agree to furnish gas to any other party or parties for manufacturing purposes, and the gas supply should fail so that there would not be a sufficient quantity of gas to supply all so contracted with, and it should cause the supply furnished the party of the second part to be insufficient for the needs of the second party, then the party of the first part are to cease to furnish (for manufacturing purposes only) to party or parties contracted with subsequent to the date of this contract, until sufficient gas

has been secured to reinforce the supply until there shall be sufficient gas for all; in other words, the party of the second part are to be furnished gas by the party of the first part in preference to others contracted with after the date of this contract, except as to domestic users.

"(5) It is expressly agreed and understood by and between the parties to this agreement, in case that the party of the first part shall, at any time during the existence of this contract, fail to furnish the said party of the second part sufficient gas for the purposes above named, and in the manner above named, and in the quantities required in this contract for a period of fifteen days, the said second party shall have the right to terminate this contract at any time after such failure, upon written notice deposited in the post office, addressed to the secretary of the party of the first part.

"(6) It is further expressly understood by and agreed to by the parties to this contract, that its terms, conditions, premises and duties to be performed by each and both of the parties hereto, shall be for the term of fifteen years from the date of the execution hereof.

"In witness whereof, the parties hereto have each caused this contract and agreement to be executed by its president, attested by its secretary and the corporate seal attached, this 13th day of Feb., 1904. Bankers' National Development Co., by A. D. Jones, President. Attest: Geo. F. Hammar, Secty. Mound Valley Vitrified Brick Co., by E. R. Dickerson, Pres. Attest: James Lear, Jr., Secty."

The respective obligations of this contract were fully performed by the parties thereto until May 4, 1904, on which day the Development Company assigned its rights under the contract to defendant the Mound Valley Natural Gas & Oil Company, (hereinafter called the "Gas Company") by the following assignment in writing:

"In consideration of one dollar and other valuable considerations in hand paid by the Mound Valley Natural Gas & Oil Company, the receipt of which is hereby acknowledged, we hereby sell, assign and transfer all our right and title to the within contract unto the said Mound Valley Natural Gas & Oil Company. Bankers' National Development Company, A. D. Jones, President. [Seal.] Attest: Geo. F. Hammar, Secretary.

"State of Kansas, Labette County—ss.:

"Be it remembered that on this 2d day of May, A. D. 1904, before me, the undersigned, a notary public in and for said county and state aforesaid, came A. D. Jones, president of the Bankers' National Development Company, and Geo. F. Hammar, secretary of the Bankers' National Development Company, who are personally known to me to be the same persons who executed the above instrument of writing, and who duly acknowledged the execution of the same.

"In testimony whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

"[Seal.] H. T. Swain, Notary Public.

"My commission expires July 30, 1917."

Thereafter the Gas Company proceeded with performance of the conditions of the contract obligatory on the part of the Development Company to be performed, and received from plaintiff the consideration expressed in the contract for the performance of such service until the month of December, 1908, when it refused longer to perform said contract. Whereupon this action was brought by plaintiff against both the Development Company and the Gas Company, jointly, to recover damages sustained by reason of such breach.

The question of law on which the court requested advice of counsel on return of the verdict by the jury is this: May the plaintiff in this action, as a matter of law, proceed against both defendants jointly un-

der the terms of the contract and its assignment, and hold both liable for damages sustained by it by reason of the breach? If not, which of defendants is liable to plaintiff for the amount of damages as found by the jury in its verdict? It is the contention of defendant Gas Company, in support of its motion, notwithstanding the assignment of the contract to it by the Development Company, its acceptance of such assignment, its performance of the conditions of the contract, as by its terms imposed on the Development Company for more than four years, and its receipt from the plaintiff for such time of the price stipulated in the contract to be paid for natural gas furnished, that in the absence of an express undertaking with the plaintiff, and in the absence of such facts as constitute a novation of the contract, releasing the Development Company from liability thereunder, it cannot be by plaintiff in this action at law held liable for breach of the continuing executory contract relied upon by plaintiff. On the contrary, it is the insistence of plaintiff, although there is no expressed undertaking on the part of the defendant Gas Company with plaintiff to perform, the conditions of the contract found in the record, and although it is not ended by plaintiff the facts found in the record constitute a novation of the contract between plaintiff and the Gas Company, yet it is by plaintiff insisted both defendants are primarily liable to it in damages for the breach of the contract, leaving the question of the ultimate liability as between defendants to be determined in the absence of plaintiff after it has been satisfied in damages. And this contention of plaintiff is based on the following propositions: (1) That the Development Company is liable to it by reason of the express terms of the contract; (2) that the Gas Company is liable to it on the theory of privity of estate existing between the plaintiff and the Gas Company, by reason of the assignment of the contract from the Development Company to the Gas Company.

[1] As plaintiff concedes in its briefs and arguments, here was no novation of the original contract as between it and the Gas Company, by which the Development Company was released from liability thereunder, as must be done in case it sought to hold the Gas Company on that theory. Butterfield v. Hartshorn, 7 N. H. 345, 26 Am. Dec. 741; Bag Co. v. Van Nortwick, 52 Fed. 752, 3 C. C. A. 274; Illinois Car & Equipment Co. v. Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504. And as it further concedes there exists no express agreement between plaintiff and the Gas Company by which it may be maintained liable, but, on the contrary, it has brought this action jointly against both defendants, and now seeks to maintain both liable for the payment of damages as awarded by the verdict of the jury in direct opposition to the theory of novation of the contract as between it and the Gas Company, it is evident, if the verdict is in other respects right, judgment must go thereon in favor of plaintiff and against the Development Company.

[2] The question of merit presented is: Can plaintiff have judgment against both the Development Company and the Gas Company on the theory of privity of estate as contended by it? The decision of this question must depend on the inherent nature of the contract

itself. By reference thereto it will be seen it has no relation in any manner to real property, but is a continuing contract, by which the Development Company obligates itself to furnish natural gas to plaintiff at a stipulated price on certain conditions for a period of years; that is to say, by its terms the Development Company sold personal property in indefinite amounts and on certain conditions to be delivered to plaintiff as the exigencies of its business might demand through a series of years, at a stipulated rate. Did the defendant Gas Company, merely by accepting an assignment of this contract, by delivering natural gas to plaintiff as therein stipulated, and by receiving the consideration to be paid therefor for a period of years, bind itself to the continued performance of the contract according to its terms during the life of such contract?

It may be first noted the contract in express terms contains a stipulation which attempts to bind, not only the Development Company, but "its successors or assigns," to the obligations therein imposed, and from this it is thought by plaintiff, as the Gas Company admittedly occupies the relation of assignee to the contract, it thereby became bound by its terms. Does this conclusion follow?

While it is undoubtedly true as contended by counsel for plaintiff, one who accepts an assignment of a lease of real property with the consent of the landlord, or enters into possession thereunder, becomes liable to the landlord for payment of the rent reserved in the lease, and while he continues as such assignee of the lease for breach of its covenant to pay rent the landlord may charge the original lessee on the ground of privity of contract and the sublessee or assignee of the lease on the doctrine of privity of estate. Washington Natural Gas Co. v. Johnson, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553; Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; Woodland Oil Co. v. Crawford, 55 Ohio St. 171, 44 N. E. 1093, 34 L. R. A. 62; Hogg v. Reynolds, 61 Neb. 758, 86 N. W. 479, 87 Am. St. Rep. 522.

[3] Yet all covenants of parties to a contract are either real or personal, depending on the subject-matter of the contract. All contracts of conveyance of real property and all other contracts so closely connected with real property that the benefits or burdens of such contract pass by a conveyance of the property itself are what is termed in the law covenants real. All other covenants or agreements of parties in the nature of covenants in their contracts are personal. Thus the covenant in a lease to pay rent reserved is a covenant which runs with the possession of the land, and for this reason when the lease is assigned the covenants being for the benefit of the land, and being for the payment of that which arises out of the use and enjoyment of the land, follows the property in the hands of the assignee and binds him to the payment of all rents accruing while he enjoys its possession. In other words, by the very act of assignment of such a contract and its acceptance by the assignee, the privity in estate created between the landlord and the original lessee by the lease passes out of the original lessee into the assignee for the reason that thereby a right in or to the land itself passes. However, as has been seen, the contract here in controversy has no relation whatever to real estate or any right

thereto, or title or interest therein, and the covenants or agreements of the parties contained in this contract are therefore purely personal. An action on a personal covenant or agreement will not lie in favor of a person not a party to it, and as a general rule, only the covenantor, his executors and administrators are bound by such personal covenants. Heirs at law are bound when expressly named in the contract. Assignees are not bound at law, although they may be named, but in certain instances they may be charged in equity. Van Doren v. Robinson, 16 N. J. Eq. 256; 11 Cyc. L. & P. subject, "Covenants," p. 1058.

In the case of Lisenby v. Newton, 120 Cal. 571, 52 Pac. 813, 65 Am. St. Rep. 203, the facts, as stated by the court in the opinion, were as follows:

"Prettyman Barr, the plaintiff's intestate, entered into a written contract with defendant Newton whereby Barr agreed to sell and Newton agreed to buy a certain tract of land; Newton promising to pay the stipulated price and interest thereon within two years from the date of the contract, and Barr covenanting to convey the land to Newton or his assigns on receiving such payment. The contract contained a provision that the stipulations thereof 'are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties.' Afterwards, in consideration of a sum of money to him paid by defendant Sharples, said Newton assigned all his right, title, and interest in and to the contract, and the premises which were the subject thereof, to said Sharples. In virtue of such assignment Sharples took possession of the land and made certain payments to Barr of principal and interest on account of the contract price. Plaintiff brought this suit on said contract against both Newton and Sharples."

The precise question presented and determined in that case was the liability of defendant Sharples for the balance of purchase money remaining unpaid. This liability was contended for by the plaintiff on two grounds: (1) On the theory that the agreement contained in the contract to pay the purchase price was a covenant running with the land; (2) because of the stipulations in the contract extending it to the heirs, personal representatives, and assigns of the respective parties. In passing on the personal liability of defendant Sharples the court in its opinion said:

"Plaintiff contends on appeal that Sharples was personally responsible for the purchase money and interest. Of course, no assignee of the purchaser in an executory contract for the sale of real estate can require the vendor to convey unless the purchase money be paid; but this conditional right to a conveyance is quite a different thing from personal liability to compulsory payment at the suit of the vendor. Such liability can result only from some express or implied contract of the assignee, and is not implied from the mere assignment of the original contract, although followed by possession of the land. There are authorities which deny that a covenant can run with an equity, or without a legal estate in the land. We need not inquire what limitations attend the principle, for it is clear that the promise to pay the agreed price in a contract for the purchase of real estate is not of itself a covenant running with the land, or accompanying the equitable interest of the purchaser into the hands of his assignee. Champion v. Brown, 6 Johns. Ch. 398 [10 Am. Dec. 343]; Civ. Code, § 1461, et seq. See Irrigation Co. v. Rowell, 80 Cal. 114, 22 Pac. 53 [13 Am. St. Rep. 112]. Hence, if Sharples is liable at all in this action, it must be in consequence of the clause of the contract which in terms extends the obligations of the instrument to the assigns of the parties; but, since the promise to pay was only the personal covenant of the promisor, the attempt to include in its force the assigns of the vendee is inoperative. It was

not competent for the parties in this manner to create a contract for such assigns. Such is the ancient rule of the common law. Thus, it is said in the Touchstone: 'In some cases an assignee shall be charged though he be not named, and in some cases shall not be charged though he be named, and in some cases he shall be charged when he is named. * * * And, if the covenant be to do a thing merely collateral; in that case it will not bind the assignees, albeit they be named expressly. Also, when a contract is personal only, and a man doth bind himself and his assigns, his assigns shall not be bound thereby.' Pages 178, 179. And in Sir Edward Coke's report of Spencer's Case, 5 Coke, 16a, we are informed that: 'It was resolved, * * * if a man demises a house and land for years, with a stock or sum of money, rendering rent, and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant; for, although the rent reserved was increased in respect to the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only, and therefore, as to the stock or sum, the covenant is personal, and shall bind the covenantor, his executors and administrators, and not his assignee.' Equally, in the case before us, the covenant is to pay a sum in gross, not issuing out of the land, and not for its benefit or protection; in other words, it is a personal, and not a real, covenant. Still the appellant seeks to liken the case to the covenant to pay rent in contracts between landlords and tenants. In the particular under view there is no resemblance—at least so far as the rules of positive law are concerned—between the contract of lease and that of sale. It is sufficient for present purposes to point out that our statute allows the covenant to pay rent to run with the land. Civ. Code, §§ 1462, 1463. The assigns of the lessee are now, as they have been from remote times, bound by the covenant, whether they are named in the lease or not. But we have seen that the purchaser's promise to pay the price agreed in a contract of sale does not run with the land, and the agreement of the parties could not confer that transitive quality upon it. Smith, Lead. Cas. (6th Am. Ed.) 158, 162, 211. By the assignment from Newton to Sharples it may be that as between them Sharples became impliedly bound to protect his assignor against the demands of the vendor on the contract (Cutting Packing Co. v. Packers' Exch. of California, 86 Cal. 574, 25 Pac. 52 [10 L. R. A. 369, 21 Am. St. Rep. 63]); but that it is no concern of the plaintiff. Such an obligation (if it arose) did not spring from a contract expressly made for the vendor's benefit, and he cannot take advantage of it."

In like manner the executory agreement of the Development Company in the case at bar to furnish the plaintiff natural gas to be used by it in the conduct of its business throughout a term of years was the personal engagement of that company, from which obligation to plaintiff it could not and did not escape by the assignment of the contract to the Gas Company. For the continued performance of its obligation to plaintiff, notwithstanding the assignment of the contract made, the Development Company remained liable as before. As has been seen, the parties were powerless to extend the personal obligations of the contract to their assigns, and, as it is not contended by plaintiff a novation of the contract between it and the Gas Company arose out of the assignment made, or the acts and conduct of the parties thereto succeeding such assignment, and as the Gas Company did not agree with plaintiff to continue during the life of the contract, or any portion thereof, to perform the continuing obligations of the Development Company, it must follow, of necessity, by virtue of the assignment made, it came under no legal obligation to plaintiff to continue such performance, and correspondingly the plaintiff, by virtue of the assignment of its contract with the Development Company to the Gas Company, was placed under no obligation to that company to continue the

receipt of gas from it and to pay it the price stipulated in the contract; but, in so far as the rights of that company were concerned, it might have terminated the contract at will.

The grounds on which the foregoing conclusion is based are apparent from the very nature of the contract involved. The contract, by its terms, not only confers a right on the plaintiff to receive the natural gas contracted for therein during a period of years, and the corresponding right of the Development Company to receive payment therefor when furnished, but it also imposes on the Development Company the continuing obligation to furnish the gas during the life of the contract, and the reciprocal obligation on the part of the plaintiff to continue to receive and pay for it when furnished. While contract rights may be assigned by one party to a contract without the consent of another, contract obligations may not be so assigned. In other words, where a personal contract involves, not only mutual rights of the parties thereto, but also mutual obligations, as in this case, both parties must consent to an assignment to make it effective. Such is the settled rule of decision.

In Arkansas Smelting Co. v. Belden Co., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246, Mr. Justice Gray, delivering the opinion of the court, said:

"At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable.

"But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.' Humble v. Hunter, 12 Q. B. 310, 317; Winchester v. Howard, 97 Mass. 303, 305 [93 Am. Dec. 93]; Boston Ice Co. v. Potter, 123 Mass. 28 [25 Am. Rep. 9]; King v. Batterson, 13 R. I. 117, 120 [43 Am. Rep. 13]; Lansden v. McCarthy, 45 Mo. 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' Pollock on Contracts (4th Ed.) 425.

"The contract here sued on was one by which the defendant agreed to deliver 10,000 tons of lead ore from its mines to Billing and Eilers at their smelting works. The ore was to be delivered at the rate of 50 tons a day, and it was expressly agreed that it should become the property of Billing and Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But, as often as 100 tons of ore had been delivered, the ore was to be assayed by the parties or one of them, and, if they could not agree, by an umpire; and it was only after all this had been done, and according to the result of the assay, and the proportions of lead, silver, silica and iron thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price, the defendant had no security for its payment, except in the character and solvency of Billing and Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted."

In Delaware County v. Diebold Safe Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674, the same justice, delivering the opinion, said:

"A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations cannot be assigned without the consent of the other party to the original contract."

In Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578, which was a suit in equity to enforce the rights of an assignee of a contract, Mr. Justice Brewer, delivering the opinion of the court, said:

"We have thus far rested the nonassignability of this contract, or any interest therein, to plaintiff's grantor upon the express stipulation of clause 26; but, even in the absence of such a clause, it was not competent for Schnell, by his own act and without the consent of the state, the other contracting party, to transfer any interest in this contract. It is a contract of that nature which is not susceptible of assignment without the consent of the other party. Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379 [8 Sup. Ct. 1308, 32 L. Ed. 246]; Delaware County v. Diebold Safe & Lock Co., 133 U. S. 473, 488 [10 Sup. Ct. 399, 404 (33 L. Ed. 674)]. In the latter case it was said by this court: 'A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligation performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract.'"

Whether by virtue of the assignment any obligation was cast on the Gas Company to protect the Development Company from loss by reason of a breach of the contract it is unnecessary to here consider. That is no concern of the plaintiff, and it did not in terms agree to so do. This is not a controversy between the assignor and assignee of a contract as to validity of the assignment.

Again, whether under all the facts and circumstances of this case the defendant Gas Company would be held precluded from denying any obligation to plaintiff in equity by virtue of the assignment of the contract, and its acts done thereunder and in pursuance thereof, on authority of Wiggins Ferry Co. v. O. & M. Railway, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055, Rock Island Railway v. Rio Grande Railroad, 143 U. S. 596, 12 Sup. Ct. 479, 36 L. Ed. 277, and many other cases cited and relied upon by plaintiff, need not be here considered, for this is an action at law, and plaintiff must recover, if at all, on its legal, not its equitable, rights.

It follows the motion to arrest the judgment and for a new trial on the part of the Development Company, defendant, must be overruled and denied. The like motions on behalf of the Gas Company must be sustained. It is so ordered.

MARDIS v. HINES, Director General of Railroads, et al.

(District Court, W. D. Arkansas, Ft. Smith Division. July 17, 1919.)

No. 792.

RAILROADS ⚿5½, New, vol. 6A Key-No. Series—FEDERAL OPERATION OF ROAD—RIGHT TO SUE CARRIER.

Under Act Aug. 29, 1916, Presidential Proclamation of Dec. 26, 1917 (Comp. St. 1918, § 1974a, note), whereby the President assumed control of railroads, together with Act March 21, 1918 (Comp. St. 1918, §§ 3115¾a–3115¾p) and in view of General Order No. 50 of the General Director of Railroads, *held* that action cannot be maintained against a railroad company for injuries to a passenger resulting from negligence of employés occurring after the President had assumed control of railroads, for Act March, 1918, did not annul the previous presidential proclamation as to orders of the Director General, and the employés of the railroad being no longer subject to the orders of the railroad company, the maxim respondeat superior does not apply.

At Law. Action by Earle J. Mardis against Walker D. Hines, Director General of Railroads, and the Missouri Pacific Railroad Company. On separate demurrer of the Missouri Pacific Railroad Company. Demurrer sustained.

H. H. Ragon, of Clarksville, Ark., and Jeptha H. Evans, of Booneville, Ark., for plaintiff.

Thos. B. Pryor, of Ft. Smith, Ark., for defendants.

YOUMANS, District Judge. This is a suit by plaintiff, Mardis, against Walker D. Hines, Director General of Railroads, and the Missouri Pacific Railroad Company, for an injury sustained by the plaintiff while being transported as a passenger.

The amended complaint makes the following allegations:

"Walker D. Hines, as successor to William G. McAdoo, is the Director General of Railroads in the United States, having control for war and other purposes of the railroads in the United States, including the railroads of the defendant, Missouri Pacific Railroad Company.

"The Missouri Pacific Railroad Company is a railroad corporation of the state of Missouri, and on and prior to the 28th day of December, 1917, it was engaged in the business of a common carrier of freight and passengers for hire over its railroads. One of its railroads over which on said date it was doing the business of a common carrier of passengers and freight for hire extends through the counties of Pope, Johnson, Franklin, Crawford, and Sebastian in the state of Arkansas, with stations on its said line of road in each of said counties. On said 28th day of December, 1917, the President of the United States of America by his proclamation dated December 26, 1917 (Comp. St. 1918, § 1974a, note), under and by virtue of the power conferred on him by the Act of Congress of August 29, 1916, c. 418, 39 Stat. 619, took control of the railroad transportation systems in the United States, including the railroads of the defendant Missouri Pacific Railroad Company. In said proclamation it is provided as follows: 'It is hereby directed that the possession, control, operation, and utilization of such transportation systems hereby by me undertaken shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers and employés of said systems of transportation. Until and except so far

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

as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers and employés of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers in the names of their respective companies.'

"The directors, officers, and employés continued to operate the railroad of the defendant company as authorized and provided for in the above-quoted paragraph of the proclamation of the President of the United States.

"On the morning of January 26, 1918, at Clarksville, Johnson county, Ark., the plaintiff became a passenger for hire on the west-bound passenger train of the defendant company, commonly called the 'Dinky,' running from Russellville, Ark., to Ft. Smith, Ark. The plaintiff was seated in the front end of the smoking car on said train, and when the train on which he was a passenger was a short distance east of the station of Denning Yards in Franklin county, Ark., and running west, it collided, head-on, with a freight train of defendant company, running east on the same track, meeting the passenger train on which plaintiff was riding as a passenger.

"By said collision both trains or portions thereof were wrecked or damaged, and the plaintiff was thrown with great force and violence several times against the walls, floor, and furniture of the car in which he was riding, and the plaintiff was greatly and permanently injured thereby in his right wrist and in his back and hips; one of plaintiff's dorsal vertebræ was dislocated, and his spine was otherwise injured, and the muscles, flesh, and nerves of his back were wrenched, bruised, and torn, and his entire nervous system was shocked and permanently injured.

"Said collision and consequent injury to the plaintiff were caused by the negligence of the engineer, conductor, and other servants of the defendant company who were operating said freight train, in running said train east out of Denning Yards on the track and time of the passenger train on which plaintiff was a passenger, and by the negligence of said defendants in causing, allowing, and permitting the passenger train on which plaintiff was being transported and the freight train with which it collided to run in opposite directions, meeting each other on the same track, at the same place, and at the same time. * * *

"By reason of the injuries so caused to him by the negligence of the defendants the plaintiff has sustained damages to an extent that he is unable fully to estimate, but he places the same at the sum of $50,000.

"By section 6661 of Kirby's Digest of the statutes of the state of Arkansas the plaintiff has a lien on the railroad of the defendant company in the state of Arkansas for the damages aforesaid, and said lien applies to the roadbed, building, equipments, income, franchise, right of way, and all other appurtenances of said railroad superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees, and beneficiaries under trusts or owners.

"The premises considered, the plaintiff prays that he have judgment for said sum of $50,000 damages, for costs of suit and for all legal relief, and that his lien upon the railroad as above set out be established and declared in the judgment rendered by the court."

The railroad company demurs separately to the complaint on two grounds:

(1) That the complaint does not state facts sufficient to constitute a cause of action against it.

(2) That plaintiff has not a lien on the railroad for the damages alleged to have been sustained by him.

From the allegations of the amended complaint it is clear that plaintiff's injury occurred after control of the railroad was taken by the Director General under the proclamation of the President. The extent of such control under the acts of Congress and the proclamation of the President is set out by Chief Justice White in the

case of Northern Pacific Railway Co. et al. v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. —, decided June 2, 1919, as follows:

"No elaboration could make clearer than do the act of Congress of 1916, the proclamation of the President exerting the powers given, and the act of 1918, dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came, and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing."

From the time that the proclamation of the President became effective on December 28, 1917, the Director General as the representative of the President has been in the exclusive possession and control of the railroad. The railroad company exercises no control whatever. The railroad is operated under the orders of the Director General. The Railroad Company has nothing to do with such operation. When the Director General assumed control all the employés on the railroad ceased to be employés of the railroad company and became employés of the Director General. At that time the relation of master and servant ceased to exist between the employés operating the railroad and the railroad company. That relation then began and still exists between such employés and the Director General.

In the case of Brady v. Chicago & G. W. Ry. Co., 114 Fed. 100, 107, 52 C. C. A. 48, 55 (57 L. R. A. 712), Judge Sanborn speaking for the United States Circuit Court of Appeals for the Eighth Circuit, said:

"The power of control is the test of liability, under the maxim respondeat superior. If the master cannot command the alleged servant, then the acts of the latter are not his, and he is not responsible for them. If the principal cannot control and direct the alleged servant, then he is not his agent, and the principal is not liable for his acts or his omissions. In such case the maxim respondeat superior has no application, because there is no superior to respond. In an action against an alleged master or principal for the act of his alleged servant or agent under the maxim respondeat superior, there can be no recovery in the absence of the right and power in the former to command or direct the latter in the performance of the act charged, because in such a case there is no superior to answer."

The railroad, therefore, cannot be held for the negligence of the employés of the Director General, unless liability is imposed by section 10 of the act of Congress of March 21, 1918 (40 Stat. 456, c. 25 [Comp. St. 1918, § 3115¾j]). That section provides:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws, or at common law, except so far as may be inconsistent with the provisions

of this act or any other act applicable to such federal control or with any order of the President."

Is the liability sought to be fastened on the railroad company under the facts alleged in the complaint in this case inconsistent with the provisions of the acts of Congress referred to, or with the order of the President?

In the proclamation of the President assuming control of the railroads it was provided that—

"Suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director General may, by general or special orders, otherwise determine." Pages 89–91, Proclamations 1917, pt. 2, Statutes U. S. 1917–1918 (Comp. St. 1918, § 1974a, note).

That proclamation, as indicated by the foregoing quotation, authorized the Director General to modify or change the permission given in the proclamation to bring suits against carriers. The act of March 21, 1918, did not modify any of the provisions of the proclamation of the President. On October 28, 1918, by General Order No. 50, the Director General ordered "that actions at law, suits in equity and proceedings in admiralty hereafter brought in any court based on contract binding on the Director General of Railroads, claim for death or injury to persons, or for loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad system or transportation by the Director General of Railroads, which action, suit or proceeding but for federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise."

In this case it is alleged that the injury was sustained on the 26th of January, 1918. That was after the Director General assumed control. This suit was brought in the Johnson county circuit court on January 21, 1919. This was after the date of General Order No. 50. The order of the Director General does not contravene the acts of Congress. It is authorized by the proclamation of the President, and directs a procedure that is in strict accordance with the actual facts and the rules of legal liability. Rutherford v. Union Pacific R. R. Co. (D. C.) 254 Fed. 880; Dahn v. McAdoo (D. C.) 256 Fed. 549.

In my opinion the judgment sought to be recovered against the railroad company is inconsistent with the acts of Congress and the order of the President.

The separate demurrer of the railroad company must be sustained on the ground that the amended complaint does not state a cause of action against it. The second ground of demurrer with regard to the lien is included in the first, and judgment on the first will cover the second.

THE DJERISSA.

THE NEWA.

(District Court, E. D. Virginia. June 19, 1919.)

1. COLLISION ⚷123—LIABILITY—FAULT—BURDEN OF PROOF.
In a libel for damages sustained in a collision between vessels which were anchored, one of which, in a violent storm, dragged into the other, the former vessel, claiming the accident was inevitable, must establish freedom from fault on her part.

2. COLLISION ⚷106—FAULT—VESSELS IN STORM.
In a libel for damages sustained in a collision between vessels anchored, the vessel dragging anchor in a storm cannot escape responsibility by insisting that the other vessel should have pursued a different course looking to her own protection from the storm, where such vessel's anchors did not drag.

3. COLLISION ⚷22—FAULT OF NEITHER PARTY.
Where a collision between steamships occurs, exclusive of natural causes and without the fault of either party, the loss must rest where it falls; but such a case requires that both parties must have endeavored by every means in their power, with due care and caution and a proper display of nautical skill, to prevent the collision.

4. COLLISION ⚷106—PRECAUTION—STORMY WEATHER.
In a libel to recover damages sustained in a collision, *held*, that libelee's navigators were not shown to have exercised such a degree of care as to relieve libelee from loss, but were negligent in not sooner dropping a port anchor and making earlier efforts to prevent the light vessel from dragging her anchors, in view of their notice of stormy weather.

In Admiralty. Libel by one Paramor, master of the steamship Djerissa against the steamship Newa, to recover damages sustained in collision. Decree for libelant.

Hughes, Vandeventer & Eggleston, of Norfolk, Va., for the Djerissa.

Allen D. Jones, of Newport News, Va., and Hughes, Little & Seawell, of Norfolk, Va., for the Newa.

WADDILL, District Judge. About midday of the 11th of June, 1918, the Djerissa, a large ocean-going steamship, 350 feet long, 50 feet beam, 25 feet deep, was anchored in the waters of James river, Newport News harbor, about half a mile west of the Chesapeake & Ohio Railway passenger pier and the Newa, also a large ocean steamship, 305 feet long, 43 feet beam, 23 feet deep, was anchored about 2 o'clock on the evening of the 12th of June, about a quarter of a mile to the westward of the Djerissa. While lying at anchor, about 9:30 on the night of the 12th of June, the Newa, in a sudden and violent storm, dragged into and collided with the Djerissa, causing serious injury to both vessels.

The Djerissa relies on the negligence and failure of the officers of the Newa to exercise good seamanship in anchoring and handling their vessel; whereas the Newa insists that she was without fault, and that the accident was inevitable as a result of the violence of the storm, the dangers of which they could not reasonably have anticipated or provided against.

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Prior to and until a few minutes before the impact, the Djerissa had out her port anchor on 30 fathoms of chain, and the Newa her starboard anchor on 50 fathoms. Shortly before the storm, the Djerissa paid out 30 fathoms additional chain, and 15 or 20 minutes before the collision, and as the storm approached, dropped her starboard anchor on 45 fathoms of chain. The Newa, preceding the storm, had 50 fathoms on her starboard anchor, and paid out 35 fathoms additional, and about the time of the collision, but too late to be of service, dropped her port anchor on 45 fathoms.

The harbor was comparatively free from conditions and obstructions likely to affect this collision. The tide had been running flood for about an hour, but that is not material here. Evidence of an approaching storm was apparent as early as 6 p. m. and the weather, accompanied by thunder and lightning, was threatening for two hours prior to the collision, although the wind did not reach high velocity until immediately preceding it. The Weather Bureau record at Norfolk shows that from 8:59 to 9:09 the wind blew from the southwest 18 miles an hour; from 9:09 to 9:15, at 20; at 9:27 it dropped to 19; from 9:27 to 9:29 it increased to 44 miles; from 9:29 to 9:30, to 68 miles; at 9:37 it dropped to 60 miles; at 9:38, to 58 miles; at 9:39, to 48 miles; at 9:41, to 35 miles; and gradually declined until 9:59, when it had dropped to 15 miles. Doubtless the velocity out in the harbor of Newport News was something higher than shown by these figures; one witness describing it at its height, for short periods, at 75 miles an hour.

No question is made of the failure of the Newa to allow ample room to swing; nor is any denial made of the fact that she dragged into the Djerissa, and that the latter ship did not drag her anchor, nor do anything tending to bring about the collision, further than it is claimed she should have paid out anchor chain upon observing the Newa drifting into her, and thereby have lessened the violence of the impact; and the Newa relies solely upon this suggestion, and the fact that the collision could not have been avoided on her part by reason of the suddenness of the storm, as absolving her from responsibility for the accident.

[1] The case thus turns almost entirely upon whether the Newa, the burdened vessel, met the obligation imposed on her under the law, to entitle her to invoke the defense of inevitable accident. She must establish freedom from fault on her part to escape liability. The Severn (D. C.) 113 Fed. 579; The Juniata (D. C.) 124 Fed. 861; The Fullerton, 211 Fed. 833, 128 C. C. A. 359; The Bertha (D. C.) 244 Fed. 319; The Barge No. 123 (D. C.) 250 Fed. 476. The storm was an unusually violent one for a while, and it is true that several other vessels in the harbor dragged their anchors. But it by no means follows that, had the Newa's navigators exercised the nautical skill reasonably to be expected of them, having regard to the admonition of the impending weather conditions, by paying out more chain on her starboard anchor, or by earlier dropping her port anchor, they probably would have entirely avoided danger, such as was encountered.

[2] The Newa cannot escape responsibility for her action by insisting that the other vessel should have pursued a different course looking to her own protection from the storm in which the vessels were caught. The latter vessel put out her second anchor, and the two held the ship. While it may be true that if she had not done this, and had continued to swing on the single chain, she might have lessened the chances of the Newa dragging into her, still she might have been set adrift, and we would have two vessels running loose, instead of one. She selected the course that her navigators thought wisest for her safety, and she should not be held liable for not adopting a course conformable to the ideas of those navigating the other vessel.

[3] Where a collision occurs exclusive of natural causes, without fault of either party, the loss must rest where it falls. No one should be held responsible for an accident brought about from causes which could not be reasonably anticipated or provided against; but, where either party is at fault, this doctrine has no application. Inevitable accident, as applied to a case of this description, means a collision which has occurred, when both parties have endeavored by every means in their power, with due care and caution and a proper display of nautical skill, to prevent the happening of the same.

[4] Measuring the action of the respondent by this test, it cannot be said, under the facts of this case, that her navigators exercised the degree of care, prudence, and caution required of them, in order to sustain in their behalf the defense of inevitable accident. Having special regard to the weather indications, the impending storm, and the dangers of the particular anchorage arising from the likelihood of sudden storms and high winds reasonably to be expected at that season, and the fact that the Newa was light, her navigators should earlier have dropped the port anchor, and paid out more chain on the starboard anchor.

To sustain the Newa's defense would be in effect to hold that the harbor of Newport News was an unsafe one, by reason of dangers likely to arise from high winds and sudden storms. The court does not consider that the facts of this case, and those within its knowledge in the trial of many others before it, warrant this conclusion. On the contrary, by the exercise of reasonable nautical skill and judgment in anchoring ships, and maintaining such anchorage, no undue danger need be incurred. It would not seem to be at all unreasonable, in view of the large expanse of water there, and the fact that summer thunder storms, accompanied by high wind, occasionally happen, to expect ships to exercise special care when first casting anchor, and to see that provision is made to secure additional anchorage protection promptly, when needed. This is particularly true of light vessels, whose freeboards readily subject them to the force of the wind, and, of course, constant observation should at all times be kept of weather indications. Good seamanship and the plainest duty of self-protection would seem to indicate to the navigators of ships that they should omit nothing reasonably to be required of them that would tend to produce safety to themselves and others lawfully using the harbor.

It follows from what has been said, that the collision occurred solely as a result of the Newa's negligence, and a decree may be entered so ascertaining.

HATCHER & SNYDER v. ATCHISON, T. & S. F. RY. CO.

(District Court, D. Colorado. June 25, 1919.)

No. 6849.

RAILROADS ⟹5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—ACTIONS.
Where the federal government has taken over the entire operation of a railroad under Act Aug. 29, 1916, § 1 (Comp. St. 1918, § 1974a), and Act March 21, 1918, so as to exclude the company from active management, the company cannot be made liable for negligence or injuries to shipments, though section 10 of the Act of 1918 (Comp. St. 1918, § 3115¾j), subjects the carrier to all laws and liabilities, whether arising under state or federal law, or at common law, and providing that actions at law and suits in equity are to be brought by and against such carriers, and judgments rendered as provided by law.

At Law. Action by Hatcher & Snyder, a copartnership composed of J. S. Hatcher and W. A. Snyder, against the Atchison, Topeka & Santa Fé Railway Company. On motion to substitute as defendant the Director General of Railroads and to dismiss as to the Railway Company. Motion denied.

Melville & Melville, of Denver, Colo., for plaintiff.

Henry T. Rogers and Erl H. Ellis, both of Denver, Colo., for defendant.

LEWIS, District Judge. This is an action brought to recover a large amount as damages on account of the alleged negligence of the railroad company in an interstate shipment of about ten thousand sheep.

The plaintiffs resist the motion of the defendant to substitute the Director General of Railroads in its stead, in accordance with General Orders Nos. 50 and 50a, made by the Director General. The plaintiffs have signified their consent to the Director General of Railroads coming in as a defendant, but oppose the dismissal of the case against the railroad company. He has not asked to come in as a codefendant.

The complaint sets out a verbatim copy of the contract for shipment. It appears to have been executed by the railroad company and the shipper; and the answer admits the execution of the contract and the receipt of the sheep. It, however, denies all allegations of negligence on its part and that of its employés, as charged in the complaint. When the motion was called up the question arose between counsel and the court as to whether there could be any liability on the part of the railroad company for acts complained of in operation of the road during Federal control, it appearing from the complaint that the shipment was made during that time, to-wit, June 10, 1918. The court expressed a doubt as to such liability, and plaintiffs' counsel have filed a brief. At that time the construction of the applicable

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Acts of Congress (Act Aug. 29, 1916, c. 418, 39 Stat. 619, and Act March 21, 1918, c. 25, 40 Stat. 451 [Comp. St. 1918, §§ 3115¾a-3115¾p]) by the Supreme Court in Northern Pacific v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. —, was not at hand. Court and counsel were in agreement that if the Congressional Acts only gave the right and power of a superintending unification and control to the President over railway companies and their properties, and if the President and the Director General went no further, and left the operation of the roads to the companies that owned them, there could be no doubt of liability in such a case as this. But if the Acts contemplated more, and gave to the President and through him to the Director General, either expressly or by necessary implication, the right to take exclusive possession of the roads and operate them for the time being as a Governmental agency, or if such exclusive possession and operation had been taken even without Congressional authority, liability would be seriously doubted.

But since the opinion in the North Dakota case there is no further doubt as to the extent of the power given the President by the Congressional Acts. In construing the Acts and the Proclamation of the President of December 26, 1917 (Comp. St. 1918, § 1974a, note), the court in that case said:

"No elaboration could make clearer than do the act of Congress of 1916, the proclamation of the President exerting the powers given, and the act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing."

And we know, as a matter of public information, that the construction there given as to what was intended by Congress should be done has in fact been done. The railroad companies have been entirely excluded from participation in the operation of their properties. They receive none of the income from them. It goes to the Government. They have no voice in the employment and discharge of men engaged in the upkeep and repair of their roads and rolling stock, and the operation of trains. All of their properties, of every kind, needful for transportation purposes have been taken over by the Government, and their possession and operation rest in the exclusive control of the Director General.

The plaintiffs' contention is based at last upon section 10 of the Act of March 21, 1918 (Comp. St. 1918, § 3115¾j). My view as to the part of that section relied on is so clearly expressed in Vaughn's Case, 81 South. 417 (Alabama Court of Appeals, March 18, 1919), cited in the plaintiffs' brief, that I quote the language used:

"The only authority for suing a carrier while under Federal control must be rested upon the act of Congress which subjects them 'to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law,' with certain exceptions, and provides that 'actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law,' etc. U. S. Comp. Stat. 1918, pp. 456–458. And the validity of this statute is sustainable on no other theory than that the transportation companies are operating their respective systems under Federal control. If such companies are in no way connected with the operation of their respective transportation systems, we submit that it would not be within the power of Congress to subject them to liability and suits thereon for the torts, miscarriages, and defaults of the employés of the Federal Government. Such an act would be an arbitrary exercise of legislative power contrary to the established principles of private rights and distributive justice and tantamount to a denial of due process of law. Zeigler v. S. & N. A. R. R. Co., 58 Ala. 594; Mobile Light & R. R. Co. v. Copeland & Sons. 15 Ala. App. 235, 73 South. 131; Bank of Columbia v. Okley, 4 Wheat. 235 [4 L. Ed. 559]; Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232; Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; Giozza v. Tiernan, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599; Jones v. Brim, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677; Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; 6 Rul. Cas. Law, pp. 433–446, embracing paragraphs 430 to 442, on Constitutional Law.

"On the other hand, if the carriers are operating under Federal control and are agencies of the government, the authority of Congress to impose liability on the carriers for the torts of their employés is clearly sustainable on the theory that such responsibility encourages caution on the part of the carriers and their employés, promotes efficiency and safeguards the interests of the government and the general public.

"There is no proof in this case that the railroad administration, in the exercise of Federal control, has excluded the transportation companies from the exercise of their functions in the operation of their respective systems, and we cannot assume that it has done so contrary to the manifest purpose and spirit of the authority conferred by the act of Congress and the proclamations of the President."

That court, however, appears to have taken the view that the Congressional Acts only authorized a superintending control and management by the Government of the companies and their roads, and expressly said that there was no evidence in the case before them showing that the companies had been excluded "from the exercise of their functions in the operation of their respective systems," which is not in accord either with the construction of the Acts given in the North Dakota case nor with the actual facts now of common knowledge. Certainly there is no power in Congress to make A. liable and suable for the acts of B. Fundamental principles of justice cannot be overturned by legislative fiat, to say nothing of Constitutional guarantees. Non-liability of the company was sustained at nisi prius in Schumacher v. Pennsylvania R. R. Co., 175 N. Y. Supp. 84. The construction of the Act there given is in accord with that in the Dakota case, and the reasoning on which the conclusion was reached appears to me sound.

However, plaintiffs have a right to prosecute their case to final judgment against the railroad company, and in a sense the views above expressed may be premature. Indeed, they may be greatly modified at the final hearing. They are given now only that parties may be advised as to the present attitude of the court on the question raised

when the motion was up. Further, a consideration of the effect of the answer may render wholly inapplicable to this case the views above expressed.

The motion to substitute the Director General of Railroads and dismiss the case as to the railway company must be denied

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OUTTEN v. ROYSTER GUANO CO.

THE NANNIE MAY.

(District Court, E. D. Virginia. June 28, 1919.)

1. WHARVES ⚿20(3)—CRANE ON WHARF—LIABILITY FOR INJURY TO VESSEL.
A crane on a dock, so constructed that its boom would swing 38 feet over the navigable part of the river, being erected without lawful authority, *held* an unlawful obstruction to navigation, rendering owner liable for damage to vessel colliding, without fault, with the boom.

2. SALVAGE ⚿32—RAISING SUNKEN VESSEL.
The owner of a vessel, sunk near wharf and constituting a menace to navigation, taking no steps to raise her, the owner of the wharf, raising her, may recover against her a reasonable amount therefor and the expenses in connection therewith.

In Admiralty. Two libels, one by L. A. Outten, master of the Nannie May, against the Royster Guano Company, and the other by the Royster Guano Company against the Nannie May, to recover damages for injury received in collision and for salvage services. Decree for libelants.

G. M. Dillard, of Norfolk, Va., for Royster Guano Co.

Cadwallader J. Collins, of Norfolk, Va., for the Nannie May.

WADDILL, District Judge. These two cases—the first-named a suit in personam against the Royster Guano Company, to recover for damages sustained in collision between the libelant's sloop and a crane extending from the wharf of the respondent company in the waters of the Elizabeth river, Norfolk, Va., and the second a proceeding in rem by the Royster Guano Company against the Nannie May to recover for salvage services rendered in connection with raising her—were by consent of parties, heard together.

The first case briefly is that on the 7th of February, 1919, the schooner Nannie May, propelled in part by sail and in part by gasoline, anchored at the wharf of the respondent to take on part of a cargo of fertilizer for transportation to the eastern shore of Virginia. She remained at the wharf several hours, and left about 5 o'clock p. m. At the time a large barge, some 200 to 250 feet long, was also made fast to the wharf, below and to the northward of the Nannie May. On the wharf was maintained a crane or derrick, so constructed that its boom would swing around and outward from the wharf over the navigable part of the river, a distance of 38 feet. This boom, at the time of the collision with the Nannie May, was extended from the wharf across and over the barge, about amidship, and protruded out-

ward from the outer side of the barge over the stream for some 12 feet. The crane was not then in operation while its boom was thus projecting over the stream, and the Nannie May, upon moving out from her berth forward of the barge, under the influence of the strong ebb tide, swung in close proximity to the barge, and her main mast came in contact with the boom with such force that she was thereby immediately sunk.

The owner of the sloop took no steps to raise her, and, it being a menace to navigation at the point where it was submerged, the Royster Guano Company employed a wrecking company to raise and take her to a marine railway for repairs. For services rendered and money paid out in connection with repairs sufficient to float the Nannie May, the respondent filed its libel for salvage.

The navigators of the sloop claim that she was navigated in a proper and seamanlike manner, and the accident was brought about by no fault on her part, or that of her navigators, officers, or crew, and was caused by the obstruction of the fairway by the extension of the crane aforesaid over the stream. The Royster Guano Company contends that the collision was brought about by the failure of the owner and master of the sloop to navigate with ordinary care, caution, and skill, and without fault on its part, and denies that the crane or derrick was an unlawful obstruction to navigation in said stream.

[1] Considerable testimony was adduced by the parties to support their respective contentions, and the court's conclusion, after mature consideration thereof, is (1) that the crane in question constituted an unlawful obstruction to the navigable capacity of the stream over which it swung; (2) that the same was erected there without lawful authority; and (3) that the navigator of the Nannie May was not chargeable with fault in coming into collision with the boom of the crane, under the circumstances under which the collision occurred.

[2] Considering the second case for salvage for raising the Nannie May, the court's conclusion is that the libelant, the Royster Guano Company, is entitled to recover against the said sloop, assuming the owners thereof elect to take her, a reasonable amount for raising her and the expenses incurred in connection therewith, the same not to exceed the value of the vessel in its raised condition; and, upon the owners electing to take the said Nannie May, they must credit, on any award of damages they may recover for sinking her, the difference between her raised value and the allowance for salvage, as aforesaid.

It follows from what has been said that in the joint cases a decree will be entered, first, awarding, in the in personam proceeding against the Royster Guano Company, the amount of damage sustained by the libelant for the sinking of the vessel; and, secondly, in the salvage proceeding, against the Nannie May in her present condition, for the amount of the costs and expenses incurred in salving her as aforesaid; and with a view of reaching a conclusion as to what the parties are respectively entitled to receive, these cases will be referred to a commissioner, with instructions to make full inquiry and report the rights of the parties, respectively, and the damages to which they are entitled.

MAXWELL v. BRAYSHAW.

(Court of Appeals of District of Columbia. Submitted March 7, 1919. Decided May 22, 1919.)

No. 3223.

1. APPEAL AND ERROR ⚷854(2)—HARMLESS ERROR—ERRONEOUS REASON FOR JUDGMENT.
A correct judgment will not be set aside because an erroneous reason was given for it.

2. PLEADING ⚷348—DISPOSITION ON MOTION—AFFIDAVIT OF DEFENSE.
An action to recover the possession of premises was properly decided on plaintiff's motion, where the affidavit of defense was nothing more than a demurrer to plaintiff's affidavit of merit, filed under rule 19 of the Supreme Court.

3. PLEADING ⚷234—AFFIDAVIT OF DEFENSE—AMENDMENT—NECESSITY OF LEAVE OF COURT.
In action to recover possession of real property, where plaintiff filed an amended affidavit of merit under rule 19 of the Supreme Court, the defendant may file an additional affidavit of defense without leave of court.

4. LANDLORD AND TENANT ⚷285(5)—RELATIONSHIP—LAW OR FACT.
In action for recovery of possession of premises held by tenant by sufferance, question whether the relationship of landlord and tenant exists is a question of law, and not of fact.

5. WAR ⚷4 — LEASED PREMISES — RECOVERING POSSESSION — SAULSBURY RESOLUTION.
Under Joint Resolution of May 31, 1918, prohibiting proceedings to recover leased premises during the war, unless a bona fide purchaser desires to occupy the premises, etc., a summary landlord and tenant proceeding to gain possession may be employed, without surrendering plaintiff's rights as a bona fide purchaser.

6. LANDLORD AND TENANT ⚷94(5)—RECOVERING POSSESSION—ACCEPTANCE OF RENT AFTER NOTICE TO QUIT.
Acceptance of a month's rent during the running of a notice to quit does not create a new tenancy, or waive plaintiff's right to demand possession under the notice.

7. STATUTES ⚷217—CONSTRUCTION—CONGRESSIONAL DEBATES AS EVIDENCE.
Congressional debates in harmony with a fair construction of an act are highly persuasive in determining the legislative intent.

8. WAR ⚷4—LEASED PREMISES—RECOVERING POSSESSION—SAULSBURY RESOLUTION.
Under Joint Resolution of May 31, 1918, prohibiting proceedings to recover possession of leased premises, except "where the property has been sold to a bona fide purchaser for his own occupancy," etc., the exception is not restricted to sales made prior to the resolution's passage, but includes sales made after date of resolution and before instituting suit.

9. WAR ⚷4—LEASED PREMISES—RECOVERING POSSESSION—SAULSBURY RESOLUTION.
Under Joint Resolution of May 31, 1918, prohibiting proceedings to recover leased premises during the war, except where property has been sold to a bona fide purchaser, etc., a purchaser collecting rents for unexpired portion of an outstanding lease, and doing nothing to establish a new relation of landlord and tenant, remains within exception of the statute, and may oust lessee on the lease's termination.

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10. WAR ⚷4 — LEASED PREMISES — RECOVERING POSSESSION — SAULSBURY RESOLUTION.
Under Joint Resolution of May 31, 1918, prohibiting proceedings to recover leased premises, except by certain bona fide purchasers, and providing that every purchaser shall take "subject to the rights of all tenants in possession," etc., the quoted words do not restrict the purchaser's previously given right of recovery, but merely mean that a purchaser not within exception takes subject to tenant's rights under the resolution, and that even bona fide purchasers take subject to unexpired leases.

11. CONSTITUTIONAL LAW ⚷46(3)—VALIDITY OF ACT—DUTY TO DECIDE.
It is unnecessary to pass upon the constitutionality of a resolution, where the case presented is not within its provisions.

Appeal from the Supreme Court of the District of Columbia.

Action by Margaret R. Brayshaw against Ida J. Maxwell. Judgment for plaintiff, and defendant appeals. Affirmed.

Julius I. Peyser and Mark Stearman, both of Washington, D. C., for appellant.

J. Barrett Carter and John C. Brooke, both of Washington, D. C., for appellee.

John E. Laskey, U. S. Atty., and Henry W. Sohon, Sp. Asst. U. S. Atty., both of Washington, D. C., amicus curiæ.

VAN ORSDEL, Associate Justice. This appeal is from a judgment in the Supreme Court of the District of Columbia in favor of appellee, Brayshaw, plaintiff below, for possession of certain premises located in the District of Columbia.

The proceedings were originally instituted in the municipal court. It was alleged that appellant, defendant below, had rented the premises and held the same as a tenant by sufferance, which tenancy had been duly terminated by service of the legal notice to quit. It was also alleged that plaintiff was a bona fide purchaser of the premises, and, as such, desired to occupy the same as a home for herself and family. From a judgment in favor of appellee, appeal was taken to the Supreme Court of the District of Columbia.

Affidavits were filed by the respective parties under rule 19 of the Supreme Court. Thereafter plaintiff, by leave of court, filed an amended affidavit of merit, to which no amended affidavit of defense was filed. On motion of plaintiff, judgment for possession was entered, from which this appeal was prosecuted.

The sole ground relied upon by plaintiff is that—

"she purchased said premises in good faith for a residence for herself and family, and that she in good faith desires to obtain possession in order to occupy the same as a residence for herself and family."

Purchase was made on April 20, 1918, and a 30-day notice to quit was served 2 days later. During the pendency of the running of the notice, plaintiff accepted from defendant one month's rent. Defendant, in her affidavit of defense, admits her tenancy, the payment of the rent, and the service of the notice to quit, but alleges:

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

"That such notice cannot be the basis of a 7-day summons and complaint issued by the municipal court, as there is no relation alleged in the affidavit to show that the said 30-day notice was to be the basis of a suit to be filed by said plaintiff in the above-entitled cause; that the said plaintiff is a landlord within the meaning of the Saulsbury Resolution, having accepted rent from the said defendant, and he is not employed in the service of the government, or officially connected therewith, but that the plaintiff is the wife of a produce dealer; that the Saulsbury Resolution does not contemplate a notice dated April 26th (the 30-day notice), but, on the contrary, was passed to prevent unnecessary evictions of war workers, that the defendant is housing a number of war workers; that the Saulsbury Resolution aims to continue all existing tenancies within the District during the period of the war, with such exceptions as are stated therein."

[1] It is contended that the court erred in rendering judgment on plaintiff's motion, based upon the alleged "failure of the defendant to file an affidavit of defense." Assuming that the original affidavit of defense might have been considered as an answer to plaintiff's amended affidavit, if the judgment was right, it will not be set aside because an erroneous reason may have been assigned in the motion.

"It is well settled that in an appellate court it is no sufficient ground of complaint that a trial judge may have given wrong reasons for a correct judgment." Howes v. District of Columbia, 2 App. D. C. 188.

[2, 3] The court committed no error in disposing of the case on plaintiff's motion, since the affidavit of defense amounted to nothing more than a demurrer to plaintiff's affidavit. If defendant desired to file an additional affidavit of defense in answer to plaintiff's amended affidavit, she could have done so without leave of court. This objection, however, was not presented to the court below, and it cannot be considered here.

[4] It is insisted that the following questions of fact were involved, which should have been submitted to a jury:

(1) "Was the acceptance of one month's rent enough to constitute appellee a landlord?"
(2) "Was she in fact a bona fide purchaser?"
(3) "Was she in the service of the government?"
(4) "Was the purchase made for her own use and occupancy," and "were the premises necessarily required by appellee?"

Whether or not the relation of landlord and tenant existed is a question of law, and not of fact. As to the questions of fact, plaintiff alleged that she was a bona fide purchaser, and this was not denied. No contention was made that plaintiff was in the employ of the government. Plaintiff alleges that the premises were purchased for her own use and occupancy, and were needed for that purpose; and neither fact is denied. Hence no issue of fact was presented.

[5, 6] It is urged that plaintiff could not maintain the summary landlord and tenant proceeding instituted in the municipal court, for the reason that, whether plaintiff was or was not a landlord, the court, in either event, was without jurisdiction. This contention is based upon defendant's interpretation of the Saulsbury Resolution, which will be considered later in this opinion. On this record, plaintiff purchased the premises in question in good faith, for her own use and occupancy. She found the property in the possession of a tenant.

She could maintain the summary landlord and tenant proceeding provided by statute to gain possession, without surrendering any rights belonging to her as a bona fide purchaser. The acceptance of one month's rent pending the running of the notice to quit did not create a new tenancy; neither did it operate as a waiver of plaintiff's right to demand possession under the notice. Byrne v. Morrison, 25 App. D. C. 72.

[7-9] This brings us to the chief question in the case, and the one upon which some of the objections just considered depend—the interpretation of the act of Congress of May 31, 1918 (40 Stat. 593, c. 90), known as the "Saulsbury Resolution." The act, eliminating the preamble, which has no material bearing upon its interpretation, reads as follows:

"That until a treaty of peace shall have been definitely concluded between the United States and the Imperial German government, unless in the meantime otherwise provided by Congress, no judicial order, decree, or judgment for the recovery of possession of any real estate in the District of Columbia, now or hereafter held or acquired by oral or written agreement of lease for one month or any longer period, or for the ejectment or dispossession of a tenant therefrom, shall be made, and all leases thereof shall continue so long as the tenant continues to pay rent at the agreed rate and performs the other conditions of the tenancy which are not inconsistent herewith, unless the tenant has committed waste, or has been guilty on the premises of conduct which constitutes a nuisance or a breach of the peace, or other misdemeanor or crime, or that the premises are necessarily required by a landlord or bona fide purchaser for occupation either by himself or his wife, children, or dependents while he is in the employ of or officially connected with any branch of the government, or where the property has been sold to a bona fide purchaser for his own occupancy; and where such order, decree, or judgment has been made, but not executed before the passage of this resolution, the court by which the order, decree, or judgment was made shall, if it is of the opinion that the order, decree, or judgment would not have been made if this resolution had been in force at the date of the making of the order, decree, or judgment, rescind or modify the order, decree, or judgment in such manner as the court may deem proper for the purpose of giving effect to this resolution; and all remedies, at law or in equity, of the lessor based on any provision in any oral or written agreement of lease that the same shall be determined or forfeited if the premises shall be sold are hereby suspended while this resolution shall be in force, and every purchaser shall take the conveyance of any premises subject to the rights of all tenants in possession thereof under the provisions of this resolution. That the term 'real estate' as herein used shall be construed to include any and all land, any building, any part of any building, house, or dwelling, any apartment, room, suite of rooms and every other improvement or structure whatsoever on land situated and being in the District of Columbia."

Until a treaty is concluded between the United States and Germany, the act broadly prohibits any judicial proceeding to recover possession of any leased premises in the District of Columbia. In other words, during the life of the act, it purports to perpetuate existing leases at the rental in force at the date of the passage of the act. There are, however, three exceptions to the sweeping provisions of the act: (1) Where "the tenant has committed waste, or has been guilty on the premises of conduct which constitutes a nuisance or a breach of the peace, or other misdemeanor or crime"; (2) where "the premises are necessarily required by a landlord or bona fide purchaser for occupation

either by himself or his wife, children, or dependents while he is in the employ of or officially connected with any branch of the government"; and (3) "where the property has been sold to a bona fide purchaser for his own occupancy."

Under the second exception the usual remedy for procuring possession is open to a landlord or bona fide purchaser connected with the government, where the property is required for occupancy by himself, his family, or dependents. In this instance, the right of action is reserved only to a person employed by or connected with the government. The third exception relates broadly to purchasers of property for their own occupancy, whether the purchaser be a person, company or corporation. The exemption also applies, whether the purchaser be connected with the government or not. Doubt may be indulged as to whether this provision of the act relates to property sold before the passage of the act or before the inception of proceedings to recover possession. The latter construction, however, is in harmony with the debates in Congress when the act was passed, and is also in harmony with the object of the act. The act is dealing primarily with limitations upon the right of action to recover possession of property, and relates to the status of the property and the parties at that date.

We are not unmindful of the rule that courts, in statutory interpretation, must be guided by the terms of the act itself; but where, as in this instance, the congressional debates are in harmony with a fair construction of the act, they are highly persuasive in arriving at the legislative intention. This exception came into the act as an amendment in the Senate. The Senator proposing it made the following statement:

"It permits property to be sold to a person other than a government employé. It might be that an individual owning property in the District of Columbia would find it necessary to sell his property to protect some interest, or perhaps in a case where a mortgage was being called, and he could not find a purchaser who was a government employé, but could find one who was not. It seems to me it would be very unfair if he was prevented from selling it and giving possession to a man who was not a government employé."

Clearly the exception was intended to apply to future sales of property within the District, and was not confined to sales made prior to the passage of the act. The act is aimed at the regulation of leasing in the District of Columbia, in view of the crowded conditions existing and made necessary by the war, and further to prevent profiteering by speculating upon the necessities of those in the employ of the government. It placed no restrictions upon the sale of real estate, where conducted in good faith for the use and occupancy of the purchaser, and not for the purpose of evading the provisions of the act.

We think, therefore, that all bona fide purchasers of real estate in the District of Columbia for their own occupancy, both before and after the passage of the act, are excepted from its provisions; and, though the relation of landlord and tenant may be created technically where the purchaser acquires title to leased premises in the possession of a tenant, it should not be construed as preventing the purchaser from promptly bringing the usual proceeding to recover possession. To hold

otherwise would, in effect, foreclose a bona fide purchaser of leased premises from securing possession; for, immediately upon title passing to the purchaser, he, ipso facto, becomes a landlord until possession is procured. It is inconceivable that Congress would confer this exemption upon a purchaser, and, by the same act, deprive him of the means of enforcing it. If the purchaser, therefore, does nothing which would operate legally to establish a new relation of landlord and tenant, he is entitled to avail himself of the exemption afforded bona fide purchasers.

[10] Nor is the provision of the act, that "every purchaser shall take the conveyance of any premises subject to the rights of all tenants in possession thereof under the provisions of this resolution," any restriction upon the right of a purchaser to recover possession of property purchased for his own occupancy. It merely amounts to a declaration that any purchaser not coming within the exception to the act takes the premises subject to the rights of a tenant in possession under this resolution, and that even a bona fide purchaser takes the premises subject to an unexpired lease thereon, and cannot proceed to recover possession until the termination thereof, at which time the usual remedy provided by statute is open to him, regardless of the present act.

[11] It is unnecessary to pass upon the constitutionality of the act, since the present case is not within its provisions. The judgment is affirmed, with costs.

Affirmed.

GILDER v. DICKENS.

(Court of Appeals of District of Columbia. Submitted March 7, 1919. Decided May 22, 1919.)

No. 3222.

WAR ⚷4—RECOVERING POSSESSION OF LEASED PREMISES—SAULSBURY RESOLUTION.

Under Joint Resolution of May 31, 1918, prohibiting proceedings to recover possession of leased premises, except where property has been sold to a bona fide purchaser for occupancy, etc., a bona fide purchaser may recover possession against a tenant engaged in war work.

Appeal from the Supreme Court of the District of Columbia.

Landlord and tenant proceeding to recover possession of leased premises by Emma J. Dickens against Roy A. Gilder. Judgment for plaintiff, and defendant appeals. Affirmed.

Fulton Brylawski, of Washington, D. C., for appellant.

Edwin L. Wilson, of Washington, D. C., for appellee.

VAN ORDSDEL, Associate Justice. Appellee, plaintiff below, the owner of certain premises in the District of Columbia, as landlord brought this action to recover possession from defendant as tenant by

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

sufferance. It appears that plaintiff was at the date of the bringing of this action in the employ of the government as a war worker and required the leased premises for occupancy as a residence. It is not material, therefore, that defendant was also a war worker, since the case is ruled by our opinion in Maxwell v. Brayshaw, 49 App. D. C. —, 258 Fed. 957.

The judgment is affirmed, with costs.

Affirmed.

WHITE v. HICKMAN et al.

(Court of Appeals of District of Columbia. Submitted April 4, 1919. Decided May 22, 1919.)

No. 3232.

WAR ⟹4—SAULSBURY RESOLUTION—DISTRICT OF COLUMBIA—RENT PROFITEERING.

Joint resolution of May 31, 1918, relating to rent profiteering in District of Columbia, does not prevent the purchasers of premises subject to a lease from ousting the lessee at the expiration of the lease, irrespective of fact that two of the purchasers were employed by the government, or that the lessee was caring for persons employed by the government.

Appeal from the Supreme Court of the District of Columbia.

Action by Mary P. Hickman, Sallie P. Jenkins, Annie H. Perrie, and J. Porter Perrie against Mrs. M. D. White. Judgment for plaintiffs, and defendant appeals. Affirmed.

Julius I. Peyser and Charles F. Carusi, both of Washington, D. C., and E. B. Mayer, of Chicago, Ill., for appellant.

George C. Gertman, of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. Appellees, plaintiffs below, on August 1, 1918, purchased certain premises in the District of Columbia for occupancy as a residence. The purchase was subject to a lease held by defendant which expired September 4, 1918. At the expiration of the lease, this action was brought to recover possession of the premises. From a judgment for plaintiffs, this appeal was taken.

It matters not, either that two of the plaintiffs were in the employ of the government, or that defendant was caring for 11 persons in the employ of the government; since the case is not within the provisions of the Saulsbury Resolution of May 31, 1918. 40 Stat. 593, c. 90. Maxwell v. Brayshaw, 49 App. D. C. —, 258 Fed. 957.

The judgment is affirmed, with costs.

Affirmed.

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

WILLIAMS v. JACOBS et al.

(Court of Appeals of District of Columbia. Submitted April 4, 1919. Decided May 22, 1919.)

No. 3234.

WAR ⚷4—SAULSBURY RESOLUTION—DISTRICT OF COLUMBIA—RENT PROFITEERING.

Joint Resolution of May 31, 1918, relating to rent profiteering in the District of Columbia, does not prevent the purchaser of premises subject to a lease from ousting lessee at termination of lease, although lessee was harboring war workers.

Appeal from the Supreme Court of the District of Columbia.

Action by Louis Jacobs and Fannie Jacobs against Nathan B. Williams. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. L. B. Atkisson and Chapin Brown, of Washington, D. C., for appellant.

J. U. Gardiner, of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. Appellees, plaintiffs below, husband and wife, jointly purchased certain real estate in the District of Columbia for occupancy as a home. The purchase was made in November, 1917, subject to a lease which expired August 31, 1918. At the expiration of this lease, this action was promptly brought to recover possession; and from a judgment in favor of plaintiffs defendant appealed.

The record discloses that the plaintiffs were bona fide purchasers, and it is no defense under the Saulsbury Resolution of May 31, 1918 (40 Stat. 593, c. 90) that defendant was harboring war workers. The case is ruled by Maxwell v. Brayshaw, 49 App. D. C. —, 258 Fed. 957.

The judgment is affirmed, with costs.

Affirmed.

BIGGS v. SPARKS et al.

(Court of Appeals of District of Columbia. Submitted April 4, 1919. Decided May 22, 1919.)

No. 3236.

WAR ⚷4—RECOVERY OF POSSESSION OF LEASED PREMISES—SAULSBURY RESOLUTION.

Under Joint Resolution of May 31, 1918, prohibiting proceedings to recover possession of leased premises during the war, except where the property has been sold to a bona fide purchaser for occupancy, etc., bona fide purchasers may recover possession at termination of lease, irrespective of whether they are engaged in war work.

Appeal from the Supreme Court of the District of Columbia.

Landlord and tenant proceeding to recover possession of leased premises by Andrew W. Sparks and Mary Sparks against Albert Biggs. Judgment for plaintiffs, and defendant appeals. Affirmed.

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

J. H. Bilbrey, of Washington, D. C., for appellant.
Walter P. Plumley, of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. This appeal is from a judgment for possession of leased premises in a landlord and tenant proceeding. On July 31, 1918, appellees, plaintiffs below, purchased the premises in question for occupancy as a home, subject to the monthly tenancy of defendant. Notice to quit was given, and this proceeding to recover possession followed. Plaintiff Andrew W. Sparks and defendant were war workers. But this is not important, since plaintiffs were bona fide purchasers and entitled to possession, under the exception to the provisions of the Saulsbury Resolution of May 31, 1918 (40 Stat. 593, c. 90). Maxwell v. Brayshaw, 49 App. D. C. —, 258 Fed. 957.

The judgment is affirmed, with costs.

Affirmed.

NEW ARCADE CO. v. OWENS.

(Court of Appeals of District of Columbia. Submitted January 10, 1919. Decided June 2, 1919.)

No. 3178.

1. EVIDENCE ⚷158(28)—SECONDARY—BOOK ENTRIES.
In an action for damages to celery during cold storage, the market value of undamaged celery and price at which the celery was actually sold may be shown by any one having a knowledge of the facts, and need not be established by original book entries.

2. APPEAL AND ERROR ⚷232(2)—RESERVING GROUNDS FOR REVIEW—EVIDENCE.
An objection that papers admitted in evidence were not original entries does not save the point that memoranda used to refresh a witness' recollection are inadmissible.

3. EVIDENCE ⚷501(7)—OPINION—MARKET VALUE.
A witness' testimony that he asked different people what they secured for celery, that he watched market quotations, etc., formed a sufficient basis for his testimony regarding market value of celery.

4. EVIDENCE ⚷589—WITNESSES ⚷83—COMPETENCY—PARTY IN INTEREST.
That a witness is a party to the action goes to his credibility, and not to his competency.

5. APPEAL AND ERROR ⚷203(3)—RESERVING GROUNDS FOR REVIEW—EVIDENCE.
The objection that a witness lacked sufficient knowledge to express an opinion on the market value of goods damaged in a cold storage warehouse cannot be considered on appeal, when not raised below.

6. DEPOSITIONS ⚷101—ADMISSIBILITY.
A deposition taken by one party may be introduced in its entirety by the opposing party.

7. APPEAL AND ERROR ⚷1052(2)—HARMLESS ERROR—DEPOSITIONS.
Any error in permitting one party to introduce only a portion of a deposition taken by his opponent becomes immaterial, where the party taking the deposition subsequently introduces all of it.

8. APPEAL AND ERROR ⚷691—RESERVING GROUNDS FOR REVIEW—EVIDENCE.
The contention that a ruling permitting appellee to introduce part only of a deposition taken by appellant prejudiced appellant by prevent-

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ing him securing a directed verdict cannot be sustained, where the bill of exceptions does not contain all the evidence, and record contains no assurance that appellee would not have introduced the entire deposition, or other evidence to the same effect, if a contrary ruling had been made.

9. COURTS ⚿445—DISTRICT OF COLUMBIA—SUPREME COURT—CERTIORARI—SET-OFF.

Where a case over which the municipal and Supreme Courts of District of Columbia have concurrent jurisdiction is transferred to the Supreme Court by certiorari, defendant is not required to plead a set-off until the case is in the Supreme Court.

10. COURTS ⚿445—DISTRICT OF COLUMBIA—SUPREME COURT—SET-OFF—AMOUNT IN CONTROVERSY.

Where a case over which the municipal and Supreme Courts of District of Columbia have concurrent jurisdiction is transferred to the Supreme Court by certiorari, and defendant then pleads a set-off, the Supreme Court has jurisdiction to render judgment on the set-off for an amount exceeding the municipal court's jurisdiction.

11. APPEAL AND ERROR ⚿699(4)—RESERVING GROUNDS FOR REVIEW—INSTRUCTIONS.

Where the record does not set forth the court's charge, but contains a statement that the charge was in substance as requested, and that no objections were taken, an assignment that the court refused to grant certain requested instructions does not establish prejudicial error.

Appeal from the Supreme Court of the District of Columbia.

Suit by the New Arcade Company against Ernest V. Owens. Judgment for defendant on its plea of set-off, and plaintiff appeals. Affirmed.

S. Herbert Giesy and Maurice D. Rosenberg, both of Washington, D. C., for appellant.

Edwin C. Dutton and Tracy L. Jeffords, both of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This suit was brought in the municipal court of the District of Columbia by appellant to recover storage charges amounting to $181.50 on certain celery stored by appellee in appellant's cold storage warehouse.

The case was removed by writ of certiorari to the Supreme Court of the District, where appellee admitted his indebtedness to appellant, but filed a plea of set-off, claiming damages in the sum of $1,045.90 for failure of the appellant to keep the storage room at a proper temperature, resulting in injury to the celery stored. On trial, appellee was awarded judgment for the full amount of his claim, less the amount admitted to be due appellant. From the judgment, appellant appeals.

[1, 2] The first assignment of error relates to the admission in evidence of certain sales sheets showing the prices at which the various crates of celery were sold and the average market prices of undamaged celery at the times of such sales. The witness Davis testified that these sheets were made by him from memoranda and sales slips, some of the latter being produced in evidence. The memoranda and the balance of the slips had been destroyed. It is not clear from the record upon

just what theory appellee sought to introduce these sheets; but the court interposed the following question:

"Do you know, Mr. Davis, that the prices were correct at the time the paper was made?"

To which the witness answered:

"Yes."

The following objection was then made by counsel for appellant:

"For the reason, first, the original entry was the slips, and it does not appear that the paper offered in evidence was made at the time of the transaction, but was compiled afterwards; and, secondly, it is not competent testimony to prove market value, and inadmissible for such purpose."

It was not necessary to prove by original entries the respective prices at which the celery was sold, or the market value of undamaged celery at the time of such sales. Proof could have been made by any one having a knowledge of the facts. It appears that Davis had this knowledge, at least at the time he compiled the sales sheets. In Jones on Evidence, § 883, it is stated:

"Although it is clear that the document is not admissible as evidence when it so recalls the facts to the mind of the witness that he remembers them and can testify from his actual recollection, it has frequently been held that *another rule prevails when the witness*, after examining the memorandum, *cannot testify to an existing knowledge of the fact, independently of the memorandum, but can testify that,* at or about the time the writing was made, *he knew of its contents and of its truth* or accuracy. In such cases, both the testimony of the witness and the contents of the memoranda are held admissible."

It is apparent that it was upon this theory the court admitted the sales sheets.

"Whether, under the conditions stated, the memorandum so made by one party may be introduced in evidence on his behalf, presents a question concerning which there is a decided conflict of authority. This question is an open one in the Supreme Court of the United States. Bates v. Preble, 151 U. S. 149, 157, 14 Sup. Ct. 277, 38 L. Ed. 106." Sechrist v. Atkinson, 31 App. D. C. 1.

In that case it was held unnecessary to decide the question. Neither is it necessary here; since the objection made by counsel for appellant was limited solely to the fact that the sheets did not contain original entries, a requirement not necessary under the theory upon which they were admitted.

[3, 4] The second contention of counsel for appellant is that the testimony adduced on behalf of appellee as to the market value of good celery was merely hearsay. Defendant Owens testified that he "went down the line and asked different people what they got for good celery," and that he "was posted, watching market quotations, and noticing what different people did." The knowledge thus acquired formed a sufficient basis for his opinion. The fact that defendant was a party in interest goes to his credibility, and not to his competency. The case of National Union v. Thomas, 10 App. D. C. 277, relied upon by appellant, is not in point. There the court held that market value might be proved by the "private entries of disinterested persons," but

it did not foreclose to the litigant other methods of proof. In Chaffee & Co. v. United States, 18 Wall. 516, 542 (21 L. Ed. 908), also relied upon by counsel for appellant, the court said:

"A party, without having been previously engaged in any mercantile transaction, may be able to give with great accuracy the market value of an article the dealing in which he has watched, and in stating the grounds of his opinion as a witness he may very properly refer to all these circumstances, and even the verbal declarations of dealers."

See, also, Cliquot's Champagne Case, 3 Wall. 114, 141, 18 L. Ed. 116.

[5] As to the testimony of the witness Davis in this connection, it is contained in the sales sheets, supported by his statement that he "found out the price of good celery." No objection was made in the court below on the ground that this witness lacked sufficient knowledge to express an opinion on this point, and hence none can be considered here.

[6-8] It is next urged that the court committed error in permitting appellee to introduce in evidence the daily logs kept by a former engineer of appellant company, showing the varying temperatures of the room in which the celery was stored. These logs were a part of a deposition taken on behalf of appellant, and were first submitted to the court in appellee's case in chief. Under the great weight of authority:

"A deposition containing competent evidence taken by one of the parties and filed in court is admissible even when it is offered in evidence by the adverse party." Note to Doggett v. Greene (Ill.) Ann. Cas. 1913B, 1166.

Hence, appellee had the right to introduce the whole deposition. If any error was committed in admitting but a portion thereof (and on this point we express no opinion), it became immaterial upon the subsequent introduction of the whole deposition by appellant. The contention of appellant that he was prejudiced by the ruling because, had his objection been sustained, he could, with propriety, have moved for a directed verdict, is without merit. The bill of exceptions does not purport to contain all of the evidence adduced. Even if it did, the record contains no assurance that appellee would not have produced other evidence to the same effect, or the deposition in its entirety.

[9, 10] The jurisdiction of the court to award judgment for an amount in excess of the jurisdiction of the municipal court is assailed. The amount claimed by appellant gave concurrent jurisdiction to the municipal court with the Supreme Court of the district; "and when the case was brought into the Supreme Court by certiorari, it was then, and from thence became, a case pending in the Supreme Court, as fully and to all intents and purposes as if it had been originally instituted in that court." Bradford v. Brown, 22 App. D. C. 455. The claim for set-off was not made or required to be made until the case was in the Supreme Court; hence the court had full jurisdiction in the premises.

[11] The last assignment of error relates to the refusal of the court to grant certain prayers requested on behalf of appellant. While the record fails to set forth the charge of the court to the jury, it does contain the statement that "the court thereupon charged in substance as

requested, to which charge no exception was taken." It is therefore difficult to see in what way appellant could have been prejudiced.

The judgment is affirmed, with costs.

Affirmed.

DERR v. GLEASON.

(Court of Appeals of District of Columbia. Submitted May 14, 1919. Decided June 2, 1919.)

No. 1223, Patent Appeals.

1. PATENTS ⚷91(4)—REDUCTION TO PRACTICE—CUTTING CURVED GEAR TEETH.
Evidence that the junior party to an interference proceeding applied an attachment to a machine which traced a curved path, but that no attempt was made to cut curved gear teeth, etc., *held* to sustain concurrent decisions by the Patent Office tribunals that there was no reduction to practice.

2. PATENTS ⚷91(4)—INTERFERENCES—EVIDENCE OF DILIGENCE.
Evidence that the junior party to an interference proceeding renewed activities toward perfecting his device only after hearing of the senior party's progress, his failure to file an application until he had an invention which would probably supersede the prior art, etc., *held* not to sustain concurrent Patent Office findings that the junior party had been diligent.

3. PATENTS ⚷91(1)—INTERFERENCES—JUNIOR PARTY MUST SHOW DILIGENCE.
The junior party in a patent interference proceeding has the burden of showing that he acted with diligence.

4. PATENTS ⚷113(6)—REVIEW—PATENT OFFICE FINDINGS OVERRULED.
While, ordinarily, much weight is accorded concurrent decisions of the Patent Office, they will be overruled, where the court is convinced that an incorrect conclusion was reached.

5. PATENTS ⚷1—NATURE OF RIGHT.
A limited monopoly under the patent laws is granted to benefit the public.

6. PATENTS ⚷90(2)—NECESSITY OF INVENTOR'S DILIGENCE.
An inventor who slumbers on his rights does so at his own risk.

Smyth, Chief Justice, dissenting.

Appeal from the Commissioner of Patents.

Interference proceeding in the Patent Office between Charles E. Derr and James E. Gleason. From a decision by the Commissioner of Patents in favor of Gleason, Derr appeals. Reversed, and priority awarded Derr.

Milton Tibbetts, of Detroit, Mich., and Frank Parker Davis, of Chicago, Ill., for appellant.

Harold E. Stonebraker, of Rochester, N. Y., and Melville Church, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from concurrent decisions of the Patent Office tribunals in an interference proceeding awarding priority

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

of invention to the junior party, Gleason; the ground of the decisions being that Gleason had shown priority of conception and diligence.

The invention is a method for cutting curved gear teeth (gears of that character now being very generally used in the rear axles of automobiles) and a machine for practicing the method. The issue is expressed in a number of counts, but counts 1 and 12, here reproduced, are sufficiently illustrative:

"1. The method of forming the side face of a curved gear tooth, consisting in causing a cutter to describe a curved path across the face of the blank and simultaneously producing relative rolling motion between the blank and cutter along the plane of the curved path of movement of the cutter."

"12. A gear-cutting machine, comprising a cutter, means for moving said cutter in a curved path in a plane, and means for rolling a blank along the plane of the curved path of movement of said cutter."

[1] The curved gear teeth covered by this invention are alleged to possess certain advantages over the straight teeth of the prior art, such as improved power transmitting capacity and reduced friction. Prior to this invention there were two well-known types of machines for making or "generating" the straight tooth bevel gears—the Gleason" and the "Bilgram." The Gleason Works, a corporation of which appellee was vice president, manufactured and sold the former, in which two reciprocating knives or tools would cut alternately upon opposite sides of the same tooth. Appellee was the patentee of that machine, and during the winter of 1910–11 designed and caused to be constructed for it an attachment that in June of 1911 was applied to the machine, and which, it is said, caused the single knife of the attachment to trace a curved path at each reciprocation of the knife. Strange to say, however, no attempt was made to cut a gear. Gleason contends that the construction and idle operation of this one tool or knife attachment constituted reduction to practice. Each of three tribunals of the Patent Office held that it did not, and of the correctness of their ruling we entertain no doubt. After this partial and, in view of the nature of the invention, unconvincing operation of the attachment, it was removed from the machine and not replaced until this interference was in progress, when it was operated. As the Examiners in Chief well suggested, the demonstration then made might have supplemented proof of a prior actual test, but could not take the place of such a test.

[2-6] In January of 1912 a wooden model of a supposed improved arrangement was completed by Gleason, and from that time until after Derr's entry into the field there was a period of total inactivity on the part of Gleason, a circumstance to which we shall advert later.

In May of 1912, or about four months after Gleason's activity entirely had ceased, Derr, a tool maker in the factory of the Packard Automobile Company, entered the field and by May 25th had completed drawings which the Patent Office tribunals found disclosed this invention. These drawings covered an attachment for the type of Bilgram machine in use by the Packard Company. Before June 20, 1912, the attachment had been constructed and gears responding to the issue actually generated. On June 20th a test of these gears was

started in the Packard plant, and on July 28th, following, a Packard car equipped with curved gears was sent from Detroit to the Pacific Coast as a further practical test. The trip was made and demonstrated the success of the invention. The Patent Office tribunals question whether it was clearly shown that the curved gears which were in this car were produced on the Derr machine. Witnesses have testified that they were, however, and it would be a rather violent assumption that they were not, for at that time no other machine for producing such gears was in existence. But the question is of no particular importance, for drawings were started shortly after this test was made and Derr's application was filed on October 11, 1912. It thus appears that within a period of about five months Derr designed, constructed, and successfully operated his machine and filed application thereon. Not only that, but the Packard Company immediately commenced equipping its Bilgrim machines with Derr's attachment, and thousands of curved gears were turned out and used in Packard cars,

In July of 1912 Gleason directed two of his draftsmen to design what is now known as the "1912 Special Generator." Mr. Gleason now says that this generator, which admittedly was a mere improvement upon the Gleason machine of the prior art, was to be equipped with an attachment for making curved teeth. Derr meets this contention with the observation that actions speak louder than words, and hence that Gleason's intent should be deduced from what he did, rather than from what he now says he intended to do. It is undisputed that the earliest date of any drawing disclosing Mr. Gleason's purpose thus to equip this special generator was January 17, 1913. All the drawings prior to that date were for a machine admittedly incapable of performing this invention. The tribunals of the Patent Office have been at a loss to understand why the 1912 generator was designed at all unless it was intended to equip this generator with the device for cutting curved teeth. The draftsmen who designed the special generator thought they were designing an improved generating machine, and so testified. This testimony, which evidently was overlooked by the Patent Office, offers a reasonable explanation for the designing of the 1912 machine. Moreover, other facts and circumstances irresistibly lead to the same conclusion, namely, that it was not until a much later period that Gleason determined to equip this special generator with the device of the issue. In November of 1912 Mr. Gleason learned of Derr's activity. He admitted, under cross-examination, that he then "heard that Packard was doing something in the line of spiral bevel gears." To a manufacturer of automobile gears, and a man so highly skilled in the art as was Mr. Gleason, that information was quite sufficient, and we are satisfied that it accounts for the renewal of his activity. The time intervening between this discovery of Derr's activity and the date of Gleason's drawings for an attachment embodying the invention was just about sufficient for the production of such drawings. Even then, Gleason did not file an application for patent until May 26, 1913, after he had devised a rotary cutter which was capable of producing curved gears with as great rapidity as prior machines could produce straight gears, and here, we think,

is the real secret of Mr. Gleason's long delay. He was not desirous of giving his invention to the world unless and until he could produce a machine that would enable him to monopolize the manufacture of automobile gears—a machine that would practically displace the machines of the prior art. This statement is made in the brief filed for him in this court:

"The key to the history of the development of Gleason's invention in interference, which must be constantly kept in mind, is his effort to produce a curved tooth bevel gear generator which the Gleason Works could manufacture and sell to the trade, and that such a machine must necessarily be as fast and economical in operation as his standard two tool straight tooth bevel gear generator on which 90% of such bevel gears were being cut. * * * Gleason knew, while Exhibit 11 (the attachment partially operated in June of 1911) was being designed and built, that it would be too slow for adoption as a commercially salable machine."

It thus appears that, after a period of almost a year's somnolence, Mr. Gleason was stirred into activity by knowledge that Derr was in the field. He testified that in 1911 he received an order for a large and unusual machine for use in producing gears for the Panama Canal gates, and that this work interfered with the completion of the invention of the issue. We are unable to accept this excuse. In the first place, Mr. Gleason now contends that he had completed his invention by successfully reducing it to practice in June of 1911. Certainly, he might have applied for a patent at that time. Assuming, therefore, that he had conceived the specific invention of the issue prior to Derr's entry into the field, we are constrained to hold that he has not sustained the burden of proof resting upon him as the junior party on the question of diligence. While, ordinarily, much weight is accorded concurrent decisions of the Patent Office, we ought not to hesitate to overrule them "where we are satisfied that an incorrect conclusion has been reached." Arbetter v. Lewis, 34 App. D. C. 491. A limited monopoly under the patent law is granted that the public may be benefited, and he who slumbers on his rights does so at his own risk. In the present case, when Derr entered the field, it was open, and, as he in good faith proceeded promptly to give the world the benefit of his discovery, we are convinced that under the law he is the prior inventor. Hubbard v. Berg, 40 App. D. C. 577; Brown v. Campbell, 41 App. D. C. 499.

The decision is reversed and priority awarded the senior party, Derr.

Reversed.

SMYTH, Chief Justice, dissents.

SWINGLEHURST v. BALLARD.

(Court of Appeals of District of Columbia. Submitted May 16, 1919. Decided June 2, 1919.)

No. 1233, Patent Appeals.

1. PATENTS ⟹106(3)—INTERFERENCES—JUNIOR PARTY HAS BURDEN OF PROOF.
The junior party to a patent interference proceeding has the burden of proof.

2. PATENTS ⟹106(3)—INTERFERENCES—ORDER OF PROOF.
Evidence offered by junior party to an interference proceeding to show that the senior party had derived the invention from him is part of the junior party's case in chief, and was properly excluded when first offered during rebuttal.

3. PATENTS ⟹113(6)—INTERFERENCES—HARMLESS ERROR—EVIDENCE.
Excluding testimony that the senior party to an interference proceeding constructed his machine in a factory in which a person worked who had knowledge of the junior party's invention is not prejudicial, even if erroneous, since it does not tend to prove that the senior party acquired knowledge of the junior party's invention.

4. EVIDENCE ⟹75—PRESUMPTION—FAILURE TO QUESTION WITNESS.
Where the junior party to an interference proceeding contended that the senior party secured information regarding his invention from a third person working in a factory where the senior party's machine was constructed, his failure to ask the third person whether he had disclosed the invention raises a presumption against his contention.

5. PATENTS ⟹91(1)—PRIORITY—PRESUMPTION.
Party first filing a patent application is presumptively the inventor, and that presumption remains until overcome by proof.

6. PATENTS ⟹91(4)—REDUCTION TO PRACTICE—RIB KNITTING MACHINE.
Evidence that junior party to an interference proceeding conducted a test of an attachment for rib knitting machines which reduced, but did not eliminate, certain undesirable lines, and that nothing more was done for three years, when senior party had entered the field, *held* to sustain concurrent decisions by Patent Office tribunals that there had been no reduction to practice.

7. PATENTS ⟹112(1)—EFFECT OF CONCURRENT PATENT OFFICE FINDINGS.
A concurrent decision of the three Patent Office tribunals with respect to the facts will not be disturbed, unless palpably wrong.

Appeal from the Commissioner of Patents.

Interference proceeding in the Patent Office between George L. Ballard and Harry Swinglehurst. From a decision by the Commissioner of Patents in favor of Ballard, Swinglehurst appeals. Affirmed.

Hubert Howson, of New York City, and T. Walter Fowler, of Washington, D. C., for appellant.

William F. Hall, of Washington, D. C., for appellee.

SMYTH, Chief Justice. The invention involved in this interference relates to an attachment for rib knitting machines. There are 13 counts, of which the following two are typical:

1. In combination in a circular knitting machine, a needle cylinder, a needle dial and connecting means between them to maintain them in fixed

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

relation to each other, said connecting means having a plurality of passes for the fabric, with means for effecting the opening of said passes in succession for the unrestrained movement of the fabric therethrough, the opening of each pass being followed by the closing of its members to thereby maintain the needle cylinder and dial in said fixed relation while another pass is open, substantially as described.

13. In a knitting machine, dial holding means comprising relatively fixed abutments, two or more dogs, levers carrying said dogs, an operating connection for said levers, and means for moving said operating connections to hold one or more of said dogs in an operative position with respect to said fixed abutments during release of another of said dogs.

[1] Ballard filed his application on January 9, 1915; Swinglehurst filed his on February 6, 1915. Swinglehurst is therefore the junior party, and of course, the burden is on him.

The machines of the prior art made in the knitted fabric what was known as "dog lines." This was undesirable. To develop a machine which would not make these lines was the problem to be solved. Ballard proved that a machine embodying the claims of the issue was constructed under his supervision on or about January 1, 1915, more than a month before Swinglehurst filed. Swinglehurst claims that he conceived the invention in March, 1912, and soon thereafter disclosed it to one Larkin, who made a drawing of it at or about the time. This drawing is the same as that set forth in Swinglehurst's application. At the time that Ballard filed Swinglehurst was inactive, and there is nothing to show he had done anything upon his invention for months prior thereto.

Swinglehurst contends that Ballard is not an original inventor, but derived his knowledge of the invention from Larkin, and thereby indirectly from him. He says in this regard that during the fall of 1914 Larkin was employed as a designer of knitting machines by the Wildman Manufacturing Company, Ballard's assignee, and from that circumstance he reasons that Ballard had an opportunity of acquiring the requisite knowledge from Larkin, and therefore that he had thus acquired it. In support of the claim that Larkin was employed by the Manufacturing Company, he presented in rebuttal a deposition of Larkin to that effect; but it was excluded on the ground that it was not proper rebuttal. He asserts that this was error. If he is wrong, there is no evidence of Larkin's employment by the Manufacturing Company, and the basis of his claim that Ballard derived the invention from him disappears.

[2-4] The purpose of his offer was to show that he was entitled to priority over Ballard by reason of the fact that the latter had derived the invention from him. This was manifestly a part of his case in chief, and no error was committed in denying it admission as rebuttal. Besides, if it was permissible in rebuttal, no prejudice could have resulted from its exclusion. The mere fact that Larkin possessed the knowledge and worked for the Wildman Manufacturing Company, the establishment in which Ballard's machine was constructed, did not prove, or even tend to do so, that Ballard had an opportunity of acquiring the knowledge. It was under the control of Larkin, and he does not show in his deposition that he was willing to impart it to Ballard or anybody else. How, then, can it be said that Ballard had an

opportunity to get it? Moreover, Larkin does not say that he divulged the knowledge either directly or indirectly to Ballard. He was Swinglehurst's witness, called by him in chief, and the fact that he was not interrogated upon the point at that time, or when he was put on in rebuttal, tends strongly to show that Swinglehurst knew he had not revealed the information to Ballard. Swinglehurst had it in his power to extract the truth from Larkin when he was on the witness stand. Why did he not do it, instead of asking the court to draw an unwarranted inference from the circumstance of Larkin's employment? His failure to do so raises a presumption against the verity of the contention which he makes. Gallagher v. Hastings, 21 App. D. C. 88, 98; Alexander v. Blackman, 26 App. D. C. 541; Schmidt v. Clark, 32 App. D. C. 290; Huff v. Gulick, 38 App. D. C. 334.

[5] Complaint is made because Ballard was not called to prove his inventorship, and in this relation it is asserted that an application is a mere pleading not proof. But this is a misconception of the law. He who files first is presumably the inventor, and that presumption remains with him until it has been overcome by proof. Patent Office Practice Rules, 166; Hunter v. Stikeman, 13 App. D. C. 214; Smith v. Smith, 31 App. D. C. 518.

Ballard is assailed for not testifying that he was the inventor. He swore that he was in his application, and that was enough until there was evidence to the contrary. There is no ground for the criticism.

[6, 7] Swinglehurst urges that he reduced the invention to practice in the early part of March, 1912, by building a machine embodying it, and that a satisfactory test of the machine was made about that time. The testimony of Swinglehurst and the witness Morley, the only other person interrogated concerning the matter, is to the effect that by the machine in question the objectionable dog lines were made "somewhat less"; "that there was not evidence of the same extreme dog marks" that had been "noticed in other machines of this character." But this did not remove the difficulty which the workers in the art complained of. They required a machine that would do more than somewhat lessen the undesirable lines, and this machine, according to Swinglehurst's testimony and that of his witness Morley, did not answer that purpose.

If Swinglehurst believed in 1912, at the time he made the test just mentioned, that his machine met the requirements of the situation, why did he not build it and put it upon the market? He knew that such a machine was much desired by the trade, and would command a large sale; but he did nothing until another had entered the field, nearly three years afterwards.

In view of all the facts, the acting Examiner of Interferences found that the test did not demonstrate the practicability of the machine; that, even if it did, Swinglehurst was not diligent; and that, having failed to prove that Ballard was not the original and independent inventor, Swinglehurst's case failed, and priority must be awarded to Ballard. The Examiners in Chief and the Assistant Commissioner concurred in the finding of the acting Examiner of Interferences. We have made an independent investigation of the facts and wholly agree

with the action of the three tribunals. But this investigation was not necessary, since it is an established rule of decision that where the three tribunals concur with respect to the facts, we will not disturb the ruling, unless it is palpably wrong. Malcom v. Richards, 47 App. D. C. 582, decided April 1, 1918; Jaboski v. Johnson, 47 App. D. C. 230; Bourn v. Hill, 27 App. D. C. 291; Flora v. Powrie, 23 App. D. C. 195; Bammeter v. Thropp, 42 App. D. C. 564. The case does not come within the exception.

The decision of the Commissioner is affirmed.

Affirmed.

Application of WILSON.

(Court of Appeals of District of Columbia. Submitted May 15, 1919. Decided June 2, 1919.)

No. 1230, Patent Appeals.

1. PATENTS ⚷54—ANTICIPATION—ELEVATOR FOR OIL WELL TUBINGS.

Two claims of a patent application involving an elevator device for raising oil well casings or tubings *held* not clearly anticipated by, or a perfectly obvious variation from, two devices patented, in one case three, and in the other seventeen, years previously, where no mechanic had succeeded in perfecting the prior devices, and applicant's device has since practically superseded the prior art.

2. PATENTS ⚷113(7)—DOUBT RESOLVED IN FAVOR OF PATENTABILITY.

Where the court, after giving weight to the diversity of opinion among Patent Office experts and considering other pertinent facts, is in doubt whether an applicant is entitled to certain patent claims, the doubt will be resolved in applicant's favor.

Appeal from the Commissioner of Patents.

Patent application by Elihu C. Wilson. From a decision by the Commissioner of Patents, rejecting certain claims, the applicant appeals. Affirmed in part, and reversed in part.

H. S. Hill, of Washington, D. C., for appellant.

Theodore A. Hostetler, of Washington, D. C., for Commissioner of Patents.

SMYTH, Chief Justice. This is an appeal from a decision of the Patent Office rejecting claims 4 to 19, inclusive, of appellant's application for a patent on a device relating to an elevator for raising cases or tubings out of oil wells and the like. We have no doubt with respect to the correctness of the decision, except as to claims 4 and 10, which read:

4. Improvements of the character disclosed, comprising two relatively movable clamping and holding members having a hinge connection and capable of being opened or closed at such hinge connection when a pipe is between the same, suspension means connected with one only of the clamping members, and securing means whereby said members are held together in working relation; said member with which said suspension means are connected being

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

provided with an abutment upon which is seated the swinging end of the other clamping member.

10. In improvements of the character disclosed, two relatively movable clamping and holding members, suspension means connected with only one of said members and at both ends thereof, connection means whereby the members are hinged at an end of each, and securing means whereby the free ends of the members are held together; said securing means comprising a device applied to said members parallel with the vertical axis of the bore between the members.

These claims were rejected on patent 471,896, issued to Richards, and on patent 834,537, to Riggs. The tribunals of the Patent Office do not agree as to the grounds on which they place these rulings. The Examiner says that claim 4 is anticipated by Riggs, although he admits that Riggs' device is probably inoperative. He holds, however, that invention would not be necessary to make it work. Claim 10 is disposed of by him on the footing that it, with other claims, is a perfectly obvious variation over the construction shown by Riggs. On the other hand, the Examiners in Chief find that the Riggs structure is not necessarily inoperative, but do not decide the question. They say that both claims read on Richards', which they admit might have to be changed by cutting a slot in member *B* and placing a tongue on member *F*. This, they assert, is suggested by the Riggs patent. The change, according to them, would not require invention but could be accomplished by any skilled mechanic.

The first assistant commissioner holds that the Riggs device is "obviously inoperative," and does not suggest a modification of the Richards device. He placed his decision upon the ground that claims 4 and 10, with others, do not fully bring out the difference between the appellant's device and the construction of the references.

[1, 2] The Richards device was patented in 1892, and the Riggs in 1906. In one case about 17, and in the other 3, years elapsed after the patents emerged before Wilson entered the Patent Office, which was in 1909. During this period no skilled mechanic succeeded in making the changes which the Examiner believes, and the Examiners in Chief think, might be necessary to produce the Wilson device. If the changes were taught by the references, is it not somewhat singular that no one had learned how to make them prior to Wilson's time? While this is not conclusive, it is worthy of consideration. Persons needing an elevator, and familiar presumably with the Richards and Riggs structures, have adopted the Wilson device, which has practically driven the other structures from the commercial field. We have compared a model of the Riggs patent and the Richards drawings with Wilson's application, and think that the difference between the latter's device and those of the references is quite clear. Giving full weight to the contrariety of opinion among the experts of the Patent Office, and considering the other pertinent facts mentioned, we are in doubt as to whether or not Wilson is entitled to claims 4 and 10, and, this being so, it is our duty to resolve the doubt in favor of the applicant. In re Lewis D. Rowell, 48 App. D. C. 238; In re Thomson, 26 App. D. C. 419, 426; In re Schraubstadter, 26 App. D. C. 331; In re

Eastwood, 33 App. D. C. 291; In re Harbeck, 39 App. D. C. 555; In re Handschuck, 46 App. D. C. 155.

The Commissioner's decision is affirmed as to all the claims involved in the appeal, excepting 4 and 10, and as to them it is reversed, and those claims are allowed as patentable to Elihu C. Wilson.

HART et al. v. WIIG et al.

(Court of Appeals of District of Columbia. Submitted May 16, 1919. Decided June 2, 1919.)

No. 1234, Patent Appeals.

PATENTS ⊂⊃91(4)—INTERFERENCES—EVIDENCE.

Evidence that junior parties to interference proceeding, who were officers and stockholders of corporation employing senior parties as mechanics, failed to file application for over a year after knowledge of senior parties' application, etc., *held* not to sustain finding by Commissioner of Patents that junior parties had sustained burden of proving that they had disclosed grain shocker invention involved to senior parties.

Appeal from the Commissioner of Patents.

Interference proceeding in the Patent Office between Floyd W. Hart and Orren E. Barber, senior parties, and Adolph Wiig, William J. Braden, and Lee R. Prather, junior parties. From a decision of the Commissioner of Patents in favor of the junior parties, the senior parties appeal. Reversed.

Lynn A. Williams and Williams, Bradbury & See, all of Chicago, Ill., for appellants.

Percy H. Moore, of Washington, D. C., and Milton S. Crandall, of Sioux City, Iowa, for appellees.

VAN ORSDEL, Associate Justice. This appeal is by the senior parties, Hart and Barber, from the decision of the Commissioner of Patents awarding priority of invention to appellees, the junior parties. Appellants filed their application August 14, 1914, on which a patent was issued May 9, 1916. Appellees filed their application August 24, 1915. The invention relates to a grain shocker, to be attached to and operated in conjunction with a grain binder. The Examiner of Interferences awarded priority to appellees. This decision was reversed by the Board of Examiners in Chief. The Commissioner reversed the Board, and, in effect, sustained the Examiner.

It is unnecessary to examine the claims of the issue, since the interference turns solely upon the question of originality. The appellees are officers or stockholders in the Peerless Shocker Manufacturing Company, of Sioux City, Iowa. Appellants were mechanics in the employ of the Peerless Company at the time they constructed the machine in issue. The first machine, constructed in the winter or spring of 1914, was found to be inoperative. A second machine was begun

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

about May 1, 1914, and completed and tested out in the July following. Appellants conducted their work in a private room constructed for the purpose in the factory of the Peerless Company.

Appellee Wiig, the president of the company, is the only one who, it is claimed, gave appellants instructions as to the construction of the machine. While Wiig is corroborated in some particulars by a number of the witnesses, all but one of whom are stockholders in the Peerless Company, it does not appear that either Braden or Prather gave appellants any instructions as to how they should proceed to construct the machine. Nor is any witness able to testify to any specific instructions alleged to have been given by Wiig. Although appellees allege the making of drawings in their preliminary statement, it does not appear that any sketch or any drawing of any kind was furnished by Wiig as a guide to appellants. On the contrary, Wiig depends upon certain verbal instructions, which, in our opinion, standing alone, do not amount to such a specific disclosure of the invention as would enable a mechanic to construct it.

The Board, in its opinion, analyzing the testimony of Wiig as to the instructions given, said:

"Probably the most specific statement, and in fact the only statement made by Wiig as to details of construction, is that contained in his answer to Q. 20, W. B. and P. Records. Asked by his attorney what description he gave to Hart when he first talked to Hart about working on this invention, Wiig says: 'I laid out the plans to him, to give him the idea as to how the shocker was to receive the bundle from the binder, conveyed back into a shock former, properly compressed, with a needle and knotter to tie around the shock; also the proper means for delivering this shock was gone over with him. My ideas were to roll the shock off by some means, either canvas or some other way of constructing a roller platform. This was all thoroughly gone over with him at the time.' There is no corroboration of this testimony of Wiig, and it is denied by Hart that he ever received any instructions from Wiig which enabled him, working with Barber, to construct the machine made and tested in the summer of 1914. It may be noted here that the instructions alleged to have been given to Hart would naturally have been embodied in the unsuccessful machine completed in the winter or spring of 1914. The successful machine that was begun on or about May 1, 1914, and finished in July of that year, involved features of construction not referred to in the answer of Wiig to Q. 20 quoted above. It is clear to us that there is nothing in the testimony of the junior parties or their witnesses to show that there was in the minds of the junior parties any clear conception of the invention in issue, including not only the result to be attained, but a concrete embodiment of means by which the desired result was to be secured."

While the case is a close one, and whichever way decided may leave the impression of possible, or even probable, mistake, we are of opinion, after a careful review of the testimony, that, in view of the burden resting upon the junior parties and their delay of over one year in filing their application after notice that appellants' application had been filed, the conclusion reached by the Board of Examiners in Chief is correct.

Therefore the decision of the Commissioner of Patents is reversed.

Reversed.

LANE, Secretary of the Interior, et al. v. STATE OF NEW MEXICO.

(Court of Appeals of District of Columbia. Submitted May 6, 1919. Decided June 2, 1919.)

No. 3221.

PUBLIC LANDS ⚷53—SCHOOL LAND—LIEU LAND.

Where public land, granted a state for school purposes, was included within a national forest reservation, a lieu land selection made by the state pursuant to Act June 20, 1910, and Rev. St. §§ 2275, 2276, as amended by Act Feb. 28, 1891 (Comp. St. §§ 4860, 4861), cannot be canceled by the Secretary of the Interior upon the ground that a change in the national forest boundaries between the date of the lieu land selection and its approval by the Secretary had again made the base land available for school purposes.

Appeal from Supreme Court of the District of Columbia.

Bill by the State of New Mexico against Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office. Decree for plaintiff, and defendants appeal. Affirmed.

Charles D. Mahaffie and C. Edward Wright, both of Washington, D. C., for appellants.

Patrick H. Loughran, of Washington, D. C., for the State of New Mexico.

Charles F. Consaul and Charles C. Heltman, both of Washington, D. C., amici curiæ.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District, after hearing on bill and answer, enjoining appellants from enforcing a decision holding for cancellation a lieu land selection of the state of New Mexico; the ground of that decision being that subsequent to such selection, but prior to final action thereon by the Interior Department, the base land again had been made available for school purposes by a change in the boundaries of the Alamo National Forest.

The north half of section 36 was granted to the state of New Mexico for school purposes (Act June 21, 1898, c. 489, 30 Stat. 484, 485; Act June 20, 1910, c. 310, 36 Stat. 557), and it is conceded that the state's title thereto was absolute. Subsequently the Alamo National Forest was created, which surrounded the above grant. By section 6, Act June 20, 1910 (36 Stat. 557, 561), the provisions of sections 2275 and 2276, R. S., as amended by Act Feb. 28, 1891 (26 Stat. 796, c. 284 [Comp. St. §§ 4860, 4861]) were extended to New Mexico. Section 2275 provides for lieu land selections and declares that such selections shall be a waiver of the right of the state to the base lands. Section 2276 provides that the lands appropriated by section 2275 "shall be selected from any unappropriated, surveyed public lands, not mineral in character," and section 11 of the act of 1910 provides

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

"that all lands granted in quantity or as indemnity by this act shall be selected, under the direction and subject to the approval of the Secretary of the Interior, from the surveyed, unreserved, unappropriated, and nonmineral public lands of the United States within the limits of said state," etc.

It is conceded that, as the title to the base land was in New Mexico when the Alamo National Forest was created, the state had a right to exchange this land for other land in lieu thereof, and, further that the land embraced in this lieu land selection was "surveyed, unreserved, unappropriated and nonmineral" public land. In other words, the sole contention of the Department is that the boundaries of the national forest having been changed subsequent to the filing of the lieu land selection, so that the base land in question was not embraced therein, the statutory basis for the exchange had ceased to exist.

In California v. Deseret Water, etc., Co., 243 U. S. 415, 37 Sup. Ct. 394, 61 L. Ed. 821, it was ruled that when a forest reserve is made to include a school section previously surveyed, as in this case, the state may waive its right to the section and select other land in lieu thereof, under sections 2275 and 2276 R. S., as amended. Under the authority of that case, the filing by the state of New Mexico in the present case of the lieu land selection constituted a waiver of the state's title to the base land, and the equitable title from that moment was in the United States. The statute explicitly provides that the filing of such a selection "shall be a waiver" of the right of the state to the base land.

We regard the case as ruled by our decision in Central P. R. Co. v. Lane, 46 App. D. C. 374, Ann. Cas. 1918C, 1002, where it was held that the Interior Department was without authority to reject an indemnity selection filed by the railroad company because the land, subsequent to the filing of such selection, had been included in a water power reserve site. In the present case, New Mexico having waived its right to the base land and filed on other land open to selection, the rights of the parties became fixed and the Interior Department was clothed with no authority to withhold its approval because of conditions which one of the parties to the contract subsequently created. It is unnecessary to repeat what was said in the Central P. R. Co. Case.

The decree is affirmed, with costs.

Affirmed.

VAN ORSDEL, Associate Justice, did not sit in the hearing and determination of this appeal.

GREENAWALT v. DWIGHT.

(Court of Appeals of District of Columbia. Submitted May 15, 1919. Decided June 2, 1919.)

Nos. 1231 and 1232, Patent Appeals.

1. PATENTS ⚷113(6)—REVIEW—QUESTIONS OF FACT.
The concurrent decisions of Patent Office tribunals upon a question of fact will not be disturbed, unless a mistake was clearly made.

2. PATENTS ⚷91(4)—INTERFERENCES—REDUCTION TO PRACTICE—SINTERING ORES.
Testimony by the junior party to an interference proceeding, and his brother, that they had made a private test of an apparatus and process for sintering ores, *held* to establish a reduction to practice before the senior party's applications disclosed such apparatus.

Appeal from the Commissioner of Patents.

Interference proceedings in the Patent Office between Arthur S. Dwight and John E. Greenawalt. From a decision by the Commissioner of Patents, both parties appeal. Affirmed.

Emil Starek, of St. Louis, Mo., and A. J. O'Brien, of Denver, Colo., for Greenawalt.

H. H. Bliss, of Washington, D. C., for Dwight.

SMYTH, Chief Justice. [1] This is an appeal and cross-appeal from a decision of the Patent Office in a consolidated interference of three related interferences covering nine applications, and has to do with an apparatus and process for sintering ores. Thirty claims are involved. The three tribunals of the Patent Office united in awarding to Dwight all the claims, excepting 8, 14, 15, 16, 19, 20, 21, 23, 24, 26, 27, and 28. It may also be said that they agree as to claims 23 and 24, because we concur in the view of the Assistant Commissioner that they were given by the Examiners in Chief to Greenawalt through inadvertence. It is well established that, where the three tribunals agree upon a question of fact, this court will not disturb their decision, unless it is clear that a mistake was made. Jobski v. Johnson, 47 App. D. C. 230; Bourn v. Hill, 27 App. D. C. 291; Flora v. Powrie, 23 App. D. C. 195; Gammeter v. Thropp, 42 App. D. C. 564. And it is not so here. This brings us to a consideration of the 10 claims upon which, as we find, the three tribunals did not agree.

[2] Under the evidence Dwight is entitled to December 23, 1907, and Greenawalt to February 2, 1910, as their respective filing dates. Dwight built a machine for sintering ores, at Perth Amboy, N. J., in 1907, one at Salida, Colo., in 1908, and one at Douglas, Ariz., in 1909, and claims the installation of several others prior to November, 1910. In July, 1907, Greenawalt, according to his clear and positive testimony, built and tested a device designated in the record as a "slag pot," which embodies all the claims we are now dealing with. He fixes the date by an interview which he had with one Carpenter

concerning patents which had been taken out by him a few months before. During the interview a question arose as to whether a porous hearth was a necessary feature in a downdraft sintering apparatus. Soon thereafter, Greenawalt says, he constructed the "slag pot" and tested it. His brother fully corroborates him, and fixes the date of the test by a trip which he took to Costa Rica in the following August. The credibility of the brother's testimony is challenged on the sole ground that he is a brother of the appellant, but we do not think that this is sufficient reason for denying him credence. We are asked to disregard the test, because it was a private one, witnessed only by the two brothers. If the record disclosed that at the time it was made Greenawalt had been aroused to action by knowledge of what Dwight was doing, there might be force to the request (Mason v. Hepburn, 13 App. D. C. 86), but the record is devoid of any evidence to that effect.

Furthermore, it appears that the Dwight-Lloyd patent, No. 882,517, shows in Figure 2 an apparatus for carrying out a process of treating ores by desulphurizing and agglomerating ore "fines" to produce "relatively large masses, blocks, or cakes" (page 1, line 93). The operativeness of this apparatus is not denied. We agree with the Examiners in Chief that, if it "is suitable for carrying out such a process, there can be no doubt that Greenawalt's slag pot is equally suitable." Greenawalt has, in our judgment, established a reduction to practice of his "slag pot" in July, 1907.

If, however, the claims under examination read on Dwight's Perth Amboy machine installed in April, 1907, Greenawalt is not entitled to them. All of the claims are limited to a hood that is air-tight with respect to the ore holder. Neither the Perth Amboy nor any other structure or disclosure of Dwight's prior to July, 1907, supports those claims. As was said by the Assistant Commissioner, Dwight's applications "never disclosed an igniter in a closed chamber at all, for any purpose, until December, 1907, and then not in an igniting hood properly so called." From this it must follow that he is not entitled to those claims.

We might elaborate the argument in support of the conclusion which we have been constrained to reach, but we think it unnecessary, as well as unprofitable, to do so. The questions involved are of facts construed in the light of technical knowledge. Every contention advanced by the parties was met by the Assistant Commissioner, who set down in his opinion with painstaking care the reasons which induced his conclusions. We adopt those reasons and affirm his decision in all respects.

Affirmed.

ROBB, Associate Justice, dissents, on the ground that in his judgment all the claims should be awarded to Dwight.

HADLEY v. ELLIS.

(Court of Appeals of District of Columbia. Submitted May 12, 1919. Decided June 2, 1919.)

No. 1204, Patent Appeals.

PATENTS ⟹91(4) — REDUCTION TO PRACTICE — EXPANSIBLE BRACELET — EVIDENCE.

Evidence that the junior party to an interference proceeding made an expansible bracelet, which he threw away, etc., *held* to sustain concurrent findings of the Patent Office tribunals that there was no reduction to practice, since the device is not so simple that its mere making, without some test of utility, is sufficient.

Appeal from the Commissioner of Patents.

Interference proceeding in the Patent Office between Fred S. Ellis and Art Hadley. From a decision by the Commissioner of Patents in favor of Ellis, Hadley appeals. Affirmed.

James H. Thurston, of Providence, R. I., and Charles D. Davis, of Washington, D. C., for appellant.

A. D. Salinger, of Boston, Mass., for appellee.

PER CURIAM. This appeal is from the decision of the Commissioner of Patents in an interference proceeding awarding priority of invention to appellee, Ellis, for an invention relating to the manner in which the parts of an expansible bracelet are connected together, and includes the means for connecting the two parts of the guide links.

The issue is in three counts, of which count 1 is illustrative:

"1. In a bracelet, an interconnecting guide link and slide link, said guide link comprising a pair of trough-shaped members connected together at one end by an integral bridge and folded at said bridge to set opposite and spaced apart from each other, the free ends of said members being provided with extending portions folded one about the other to positively lock said free ends together, said extensions also serving as a crossbar for guiding the slide link, said slide link being slidably mounted between said trough-shaped members and a spring for normally retaining said links in contracted position."

The application of Ellis was filed November 4, 1912, on which patent issued November 24, 1914. Hadley filed his application November 4, 1914.

While Ellis alleges conception of the invention on June 15, 1912, he was properly held by the tribunals below to his filing date for constructive reduction to practice. Hadley pitches his case upon an alleged reduction to practice in April, 1912. He testified that he made a link at this time, and later a bracelet, which he showed to witnesses Kuehner and Tost. Tost was a tool maker employed by the Hadley Jewelry Company. Hadley relies upon this for a reduction to practice. It does not appear that it was tested, and Hadley admits that the links were thrown away, and nothing further done with the device until the fall of 1912, after Ellis had come into the field. As to

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

these links, Kuehner testified that he did not regard them as satisfactory, and that he told Hadley so.

The device in issue is not so simple that the mere making of it, without some test of its utility, will amount to reduction to practice. We therefore agree with the Commissioner that what Hadley did in 1912 amounted to merely an abandoned experiment. Conceding that Hadley had established conception of the invention in 1912, he spent the summer of that year perfecting an invention for Kuehner, and did nothing until after Ellis came into the Patent Office. Indeed, nothing was done toward making application for a year and a half, and then the application was not filed until the fall of 1914. The tribunals of the Patent Office were in agreement upon the issues of fact, and we find no occasion to interfere with their conclusions.

The decision of the Commissioner of Patents is affirmed, and the clerk is directed to certify these proceedings as by law required.

LEONARD et al. v. YOUNG.

(Court of Appeals of District of Columbia. Submitted May 19, 1919. Decided June 2, 1919.)

No. 1238, Patent Appeals.

1. PATENTS ⟹91(3)—INTERFERENCES—PROOF BEYOND REASONABLE DOUBT.
Parties filing an application after patent for same invention has been issued to another must establish their priority beyond a reasonable doubt.

2. PATENTS ⟹91(4)—INTERFERENCE—PRIORITY—SUFFICIENCY OF EVIDENCE.
Evidence on which the Board of Examiners in Chief, the Commissioner of Patents, and a federal District Judge had awarded priority of invention to a patentee, instead of a party filing an application after issuance of the patent, *held* to sustain the Commissioner's decision.

Appeal from Commissioner of Patents.

Interference proceeding in the Patent Office between Leonard A. Young and Charles H. and Harry C. Leonard From a decision of the Commissioner of Patents in favor of Young, the other parties appeal. Affirmed.

Frank E. Liverance, Jr., of Grand Rapids, Mich., for appellants.

Stuart C. Barnes, of Detroit, Mich., and J. H. Milans and C. T. Milans, both of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This appeal is from an award of priority of invention to appellee, Young.

[1] Appellants filed their application in the Patent Office after patent had issued to Young; hence, to succeed, they must establish their case beyond a reasonable doubt. Blackstone v. Wild, 43 App. D. C. 392.

[2] The case turns upon a question of fact. While the Examiner of Interferences awarded priority to appellants, he was reversed by both the Board of Examiners in Chief and the Commissioner. On the same evidence the right of Young to priority was sustained by Judge

Sessions in a suit brought in the United States District Court for the Western District of Michigan for the infringement of the Young design patent against the assignee of the Leonard application. Young v. Grand Rapids Refrigerator Co., decided July 11, 1918.[1] In the opinion the court said:

"Depositions taken in an interference case in the Patent Office have been stipulated into the record and constitute the evidence upon which this question of fact must be decided. * * * Construing this testimony most favorably to defendant, its officers had but a vague and general idea of what was desired, and did not attempt to go into the details of the design. In fact, they make no claim to the invention as a completed whole. The testimony of the superintendent of plaintiff's factory and the draftsman who made the drawings tends to sustain the contentions of plaintiff rather than those of defendant. * * * Upon the whole record, I am constrained to hold, that defendant has not sustained the burden of proof required to overcome the presumption of validity and priority of invention arising from the issuance of the patent to plaintiff."

From a careful review of the evidence, we are convinced that the decision of the Commissioner, sustained by the able opinion of Judge Sessions, is right. The decision of the Commissioner of Patents is affirmed.

Affirmed.

ERICKSON et al. v. DYSON.

(Court of Appeals of District of Columbia. Submitted May 13, 1919. Decided June 2, 1919.)

No. 1209, Patent Appeals.

PATENTS ⟹91(3)—INTERFERENCE PROCEEDING—EVIDENCE OF DILIGENCE.

Evidence that the junior parties to an interference proceeding were inactive for several months at about the time the senior party entered the field, etc., *held* to sustain concurrent decisions by the Patent Office tribunals that such delay constituted a lack of diligence.

Appeal from the Commissioner of Patents.

Interference proceeding in the Patent Office between Alfred H. Dyson and John Erickson and Charles J. Erickson. From a decision by the Commissioner of Patents for the first-named party, the other parties appeal. Affirmed.

Charles C. Bulkley, of Chicago, Ill., for appellants.

Curtis B. Camp and Williams, Bradbury & See, all of Chicago, Ill., for appellee.

ROBB, Associate Justice. Appeal from concurrent decisions of the Patent Office tribunals in an interference proceeding awarding priority of invention to Alfred H. Dyson, the senior party.

The invention relates to improvements in automatic telephone systems, and the issue is expressed in 11 counts. Each of the three tribunals of the Patent Office found that appellants had failed to establish conception of the invention prior to Dyson's filing date. The

[1] Case pending on appeal in Circuit Court of Appeals.

Examiner of Interferences made no finding on the question of diligence, but the Examiners in Chief and the Assistant Commissioner found that, even assuming prior conception on the part of appellants, the result would be the same, because appellants had failed to show diligence in reducing the invention to practice.

Appellants' contentions have been very thoroughly and ably presented, both by brief and argument, but, having in mind that appellants are the junior parties and that there are three concurrent decisions against them, we are not so clearly convinced that the ruling of the Patent Office on the question of diligence was erroneous as to feel warranted in reversing the case on that point. There was a period of several months of inactivity at a critical period, or just before and after Dyson entered the field, and the circumstances were such that we are unable to say that the Patent Office clearly was in error in ruling that this delay constituted lack of diligence. It is unnecessary, therefore, for us to make any finding on the question of priority of conception, and we express no view thereon.

The decision must be affirmed.

Affirmed.

In re LINK-BELT CO.

(Court of Appeals of District of Columbia. Submitted May 14, 1919. Decided June 2, 1919.)

No. 1224, Patent Appeals.

TRADE-MARKS AND TRADE-NAMES ⚷3(5)—REGISTRATION—WORDS DESCRIBING QUALITY OF GOODS—"SERVICE."

Under Trade-Mark Act Feb. 20, 1905, § 5 (Comp. St. § 9490), specifying trade-marks which may be registered, the word "Service," surmounting a bar with V-shaped ends, is descriptive of the quality of the goods, and not entitled to registration as a trade-mark for rubber and fabric belts.

Appeal from the Commissioner of Patents.

Application by the Link-Belt Company to register a trade-mark. From a decision by the Commissioner of Patents, refusing registration, the applicant appeals. Affirmed.

J. S. Barker, of Washington, D. C., and Francis W. Parker and Francis W. Parker, Jr., both of Chicago, Ill., for appellant.

Theodore A. Hostetler, of Washington, D. C., for Commissioner of Patents.

VAN ORSDEL, Associate Justice. This appeal is from the decision of the Commissioner of Patents refusing registration of the word "Service," surmounting a bar with V-shaped ends, as a trade-mark for rubber and fabric belts.

We are of opinion that the word "Service" in this instance would be descriptive of the quality of the goods. It has a fixed meaning in trade generally as indicating that goods so described are serviceable, and will not only wear well, but are especially adapted to meet the requirements of the user of the goods to which the mark is applied. It was not error to refuse registration of the mark under the provisions

of section 5 of the Trade-Mark Act of February 20, 1905 (33 Stat. 725, c. 592 [Comp. St. § 9490]).

The decision of the Commissioner of Patents is affirmed, and the clerk is directed to certify these proceedings as by law required.

Affirmed.

PARKER v. CRAFT et al.

(Court of Appeals of District of Columbia. Submitted May 16, 1919. Decided June 2, 1919.)

No. 1237, Patent Appeals.

PATENTS ⚷113(2)—APPEALS—DISSOLUTION OF INTERFERENCE PROCEEDINGS.

An order of the Commissioner of Patents dissolving an interference proceeding is a mere interlocutory order, from which no appeal lies to the Court of Appeals.

Appeal from the Commissioner of Patents.

Interference proceeding in the Patent Office between Frederick R. Parker and Edward B. Craft and John N. Reynolds. From an order of the Commissioner of Patents, dissolving the interference proceeding, Parker appeals. Appeal dismissed.

Frederick R. Parker, of Chicago, Ill., in pro. per.

William R. Ballard and D. C. Tanner, both of New York City, for appellees.

VAN ORSDEL, Associate Justice. This is an interference proceeding, in which appellant, Parker, appeals from an order of the Commissioner of Patents affirming the decision of the Board of Examiners in Chief "dissolving the interference on the ground that count 1 is unpatentable and count 2 cannot be made by Parker."

We are confronted at the threshold with a motion to dismiss the appeal for lack of jurisdiction. We have held in many cases that an order dissolving an interference is a mere interlocutory order, from which no appeal lies to this court. Carlin v. Goldberg, 45 App. D. C. 540; Field v. Colman, 47 App. D. C. 189. This is based upon the ruling that, in interference, appeal will lie to this court only from a judgment of priority. In re Fullagar, 32 App. D. C. 222; Cosper v. Gold, 34 App. D. C. 194; In re Carvalho, 47 App. D. C. 584.

Not only was there no order of priority in this case, but such a finding would have been inconsistent with the order of dissolution. A motion to dissolve an interference fundamentally challenges the right of one of the parties to make the claims. An order sustaining the motion, therefore, is equivalent to a holding that no interference in fact exists. Before an interference can exist, or a judgment of priority be rendered, not only must both parties have a right to make the claims of the issue, but the parties must have the right to claim, and in fact be claiming, the same thing.

It therefore follows that the order of the Commissioner in this case was not even the equivalent of a judgment of priority.

The appeal is dismissed.

Dismissed.

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

MEMORANDUM DECISIONS

THE BRIS. (Circuit Court of Appeals, Second Circuit. April 22, 1919.) No. 141. Appeal from the District Court of the United States for the Southern District of New York. Suit in admiralty by the Standard Varnish Works against the steamship Bris; Rederiaktiebolaget, claimant. Decree for claimant, and libelant appeals. Affirmed. For opinion below, see 253 Fed. 259. Julius J. Frank, of New York City, for appellant. Haight, Sandford & Smith, of New York City, for appellee. Before ROGERS and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

COMBINED LOCKS PAPER CO. v. PUSEY & JONES CO. (Circuit Court of Appeals, Seventh Circuit. April 29, 1919.) No. 2663. In Error to the District Court of the United States for the Eastern District of Wisconsin. Action by the Pusey & Jones Company against the Combined Locks Paper Company. Judgment for plaintiff, and defendant brings error. Affirmed. For opinion below, see 255 Fed. 700. George B. Hudnall, of Milwaukee, Wis., for plaintiff in error. Jackson B. Kemper, of Milwaukee, Wis., for defendant in error. Before BAKER and EVANS, Circuit Judges, and ENGLISH, District Judge.

PER CURIAM. In denying a motion for a new trial, the learned District Judge filed an opinion reported in 255 Fed. 700, under the title of Pusey & Jones Co. v. Combined Locks Paper Co., which fully and fairly sets forth the issues and the facts. We approve of the opinion and herewith adopt it. The judgment is affirmed.

EDWARDS et al. v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. April 22, 1919.) No. 1701. In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge. Criminal prosecution by the United States against Samuel Edwards and Lee Edwards. Judgment of conviction, and defendants bring error. Affirmed. Nathaniel T. Green, of Norfolk, Va., for plaintiffs in error. Hiram M. Smith, U. S. Atty., of Richmond, Va. Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

PER CURIAM. Careful examination of the record in this case shows that the judge was so clearly right, and the principles of law so simple and well established, that no statement of reasons for affirming the judgment would be of value. Affirmed.

LOUISVILLE & N. R. CO. v. EVANS, U. S. District Judge. (Circuit Court of Appeals, Sixth Circuit. February 7, 1919.) No. 3266. Petition for Writ of Mandamus. Helm Bruce and Henry L. Stone, both of Louisville, Ky., for petitioner.

PER CURIAM. Leave to file petition granted, motion for rule to show cause denied, and petition dismissed.

THE MORRISTOWN. (Circuit Court of Appeals, Second Circuit. April 25, 1919.) No. 211. Appeal from the District Court of the United States for the Southern District of New York. Suit in admiralty by Henry Crew and

others against the steam tug Morristown; the Delaware, Lackawanna & Western Railroad Company, claimant. Decree for respondent, and libelants appeal. Affirmed. Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellants Crew and others. A. J. McMahon, of New York City, for appellant Delaware, L. & W. R. Co. Ellis W. Leavenworth, of New York City, for the Morristown. Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

NORFOLK BANK FOR SAVINGS & TRUSTS v. WHIPPLE. (Circuit Court of Appeals, Fourth Circuit. July 12, 1919.) No. 1696. Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith and Henry G. Connor, Judges. Suit by the Norfolk Bank for Savings & Trusts against C. S. Whipple. Bill dismissed, and complainant appeals. Affirmed. E. P. Buford, of Lawrenceville, Va., and T. D. Savage, of Norfolk, Va. (B. A. Hagood, of Charleston, S. C., on the brief), for appellant. A. F. Woods and L. D. Lide, both of Marion, S. C. (T. I. Rogers, of Bennettsville, S. C., on the brief), for appellee. Before PRITCHARD and KNAPP, Circuit Judges, and WADDILL, District Judge.

PER CURIAM. We are satisfied after careful examination with the decision of this case by the court below and with the reasons assigned therefor by the learned District Judge. The decree is accordingly affirmed on his opinion. 254 Fed. 195. Affirmed.

PATAPSCO SHIP CEILING & STEVEDORE CO. v. SIEBERT. (Circuit Court of Appeals, Fourth Circuit. April 24, 1919.) No. 1690. Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge. Suit in admiralty by John Siebert against the Patapsco Ship Ceiling & Stevedore Company and others. Decree for libelant against the first-named respondent, and it appeals. Affirmed. For opinion below, see 253 Fed. 685. Whitelock, Deming & Kemp, of Baltimore, Md., for appellant. George T. Mister and Harry B. Wolf, both of Baltimore, Md., for appellee. Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PER CURIAM. We are satisfied with the disposition of this case by the court below, and deem it unnecessary to add anything to what is said in the opinion of the learned District Judge. 253 Fed. 685. Affirmed.

STENNICK v. JONES et al. (Circuit Court of Appeals, Ninth Circuit. June 2, 1919.) No. 3139. Suit by Parker Stennick, trustee in bankruptcy of the Hamilton Creek Timber Company and the Rainier Lumber & Shingle Company, against Willard N. Jones, Fred A. Kribs, and the J. K. Lumber Company. From the decree, complainant appealed. On appellant's motion in respect to the item of $50,000, referred to in the memorandum opinion filed on motions and counter motions for modification of original opinion and decision of this court, and appellees' motion with respect to costs. Motion for modified order in respect to costs denied.

PER CURIAM. Upon further consideration of the matter, we hold that when an accounting is had the item of $50,000 referred to in the memorandum opinion (256 Fed. 354, —— C. C. A. ——) filed as an addendum to our original opinion (252 Fed. 345, 164 C. C. A. 269) should not be allowed as a set-off, for the reason that defendants averred in their answer that they never sought to

exercise any of the options in the contract executed by Dodge and his companies to secure defendants in lending their names for the loan of the $50,000, and that they never attempted to enforce any of the security given them by such contract, and that they "disclaim all rights under or interest in said contract," and that the claim of Jones and Kribs for the $50,000 has been proved as an unsecured claim against the bankrupt estates, and that the J. K. Lumber Company never has had any interest in or attempted to assert any rights under the contract of security for the loan. Considering these averments, our judgment is that appellees ought not to gain any special advantage over other creditors in respect to this $50,000. Appellees' motion for modified order in respect to costs is denied. Mandate forthwith.

NORMA MINING COMPANY v. MACKAY. (Circuit Court of Appeals, Ninth Circuit. October 14, 1919.) No. 3319. On rehearing. Rehearing denied, but former judgment modified. For former opinion, see 258 Fed. 914, — C. C. A. —.

PER CURIAM. The petition for rehearing is denied. The petition for modification of the judgment of this court is granted, so as to allow the appellant herein, Norma Mining Company, a corporation, 90 days after the mandate of this court is filed in the District Court within which to redeem the property which was the subject of the sale in this action, provided the appellant herein shall, before the expiration of 90 days after the filing of the mandate of this court, repay to Hugh Mackay, appellee herein, any and all amounts paid by him by virtue of the decree entered in the cause, and also all costs which he may have paid, together with any sums which he may have paid for taxes, together with interest upon any and all of such sums so paid out by him, at the legal rate of interest within the state of Arizona. Such sums and the amounts to be paid shall be ascertained by the District Court. Mandate forthwith.

LEVINSTEIN v. E. I. DU PONT DE NEMOURS & CO., Inc. (District Court, D. Massachusetts. October 27, 1919.) No. 1102. On motion to vacate order for taking depositions. Action on dedimus suspended until further order. See 258 Fed. 667. Robert M. Morse and Frank H. Stewart, both of Boston, Mass., for plaintiff in error. Elbridge R. Anderson, of Boston, Mass., for defendant in error.

MORTON, District Judge. At the conclusion of the arguments I gave judgment orally, in substance as follows: The usual way of taking testimony after a case is at issue is under section 863 of the Revised Statutes (Comp. St. § 1472). Section 866 (Comp. St. § 1477) is not to be resorted to unless it is "necessary" to do so in order to prevent "a failure or delay of justice." The affidavits submitted do not satisfy me that the evidence which the plaintiff desires cannot be obtained in the usual way, and I am therefore unable to find that the necessity required by section 866 exists. At the same time I am not insensible to the carefully guarded statements of defendant's counsel as to the presence of witnesses and the production of books at the trial. He has reserved entire liberty of action in that respect. The plaintiff is plainly entitled to the assistance of the court in obtaining the evidence which he seeks, and I shall be disposed to use the full power of the court, as circumstances may require, to secure to him his rights. It may conceivably be to his advantage to have the present dedimus outstanding, so that its authority can be readily invoked. I therefore shall not recall it; but action under it is to be suspended until further order. If there is further disagreement about the specifications, parties may apply to me to fix the time for filing.

END OF CASES IN VOL. 258