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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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This is a Key-Numbered Volume

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

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

JUDGES

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

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. GEORGE H. BINGHAM, Circuit Judge.....Manchester, N. H.
Hon. CHARLES F. JOHNSON, Circuit Judge.....Portland, Me.
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Hon. AUGUSTUS N. HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN CLARK KNOX, District Judge, S. D. New York.....New York, N. Y.
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Hon. HARLAND B. HOWE, District Judge, Vermont.....Burlington, Vt.

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Hon. J. WARREN DAVIS, District Judge, New Jersey.....Trenton, N. J.
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Hon. OLIVER B. DICKINSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. CHARLES B. WITMER, District Judge, M. D. Pennsylvania.....Sunbury, Pa.
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Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
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Hon. WILLIAM I. GRUBB, District Judge, N. D. Alabama.....Birmingham, Ala.
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Hon. JOSEPH C. HUTCHESON, Jr., District Judge, S. D. Texas ..... Houston, Tex.
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Hon. ARTHUR C. DENISON, Circuit Judge.....Grand Rapids, Mich.
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Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
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Hon. JOHN E. SATER, District Judge, S. D. Ohio.....Columbus, Ohio.
Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio[3].....Cincinnati, Ohio.
Hon. JOHN W. PECK, District Judge, S. D. Ohio[4]..... Cincinnati, Ohio.
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Hon. JOHN E. McCALL, District Judge, W. D. Tennessee..... Memphis, Tenn.

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Hon. FRANCIS E. BAKER, Circuit Judge.....Goshen, Ind.
Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.
Hon. SAMUEL ALSCHULER, Circuit Judge ..... Chicago, Ill.

[1] Appointed November 5, 1919.
[2] Appointed October 22, 1919.
[3] Died September 24, 1919.
[4] Appointed November 5, 1919, to succeed Hon. Howard C. Hollister.

Hon. EVAN A. EVANS, Circuit Judge.....Baraboo, Wis.
Hon. GEORGE T. PAGE, Circuit Judge.....Peoria, Ill.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois.....Chicago, Ill.
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Hon. GEORGE W. ENGLISH, District Judge, E. D. Illinois.....Danville, Ill.
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Hon. JOSEPH W. WOODROUGH, District Judge, Nebraska.....Omaha, Neb.
Hon. COLIN NEBLETT, District Judge, New Mexico.....Santa Fé, N. M.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
Hon. ROBERT L. WILLIAMS, District Judge, E. D. Oklahoma.....Muskogee, Okl.
Hon. JOHN H. COTTERAL, District Judge, W. D. Oklahoma.....Guthrie, Okl.
Hon. JAMES D. ELLIOTT, District Judge, South Dakota.....Sioux Falls, S. D.
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Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

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Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, Cal.
Hon. WILLIAM W. MORROW, Circuit Judge.....San Francisco, Cal.
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Hon. ROBERT S. BEAN, District Judge, Oregon.....Portland, Or.
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Hon. JEREMIAH NETERER, District Judge, W. D. Washington.....Seattle, Wash.

COURT OF APPEALS OF DISTRICT OF COLUMBIA

Hon. CONSTANTINE J. SMYTH, Chief Justice.....Washington, D. C.
Hon. CHARLES H. ROBB, Associate Justice.....Washington, D. C.
Hon. JOSIAH A. VAN ORSDEL, Associate Justice.....Washington, D. C.

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CASES REPORTED

CASES ON REHEARING

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

EIGHTH CIRCUIT.

Hamlin v. Grogan, 257 F. 59. Rehearing denied Dec. 1, 1919.
Rietz v. United States, 257 F. 731. Rehearing denied Dec. 1, 1919.
Wolf v. United States, 259 F. 388. Rehearing denied Jan. 10, 1920.

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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

PORTER v. UNITED STATES et al.

(Circuit Court of Appeals, Eighth Circuit. August 19, 1919.)

No. 5321.

INDIANS ⟸27(6)—EVIDENCE SUFFICIENT TO ESTABLISH IDENTITY OF ALLOTTEE.
Evidence *held* to sustain a decree determining which of two members of the Creek Tribe of Indians, claiming the same name, was the allottee of a tract of land.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by the United States and others against Nellie Porter, alias Nellie Deer, alias Lettie McGilbra. Decree for cross-complainants, and defendant appeals. Affirmed.

Paul Pinson, of Tulsa, Okl., and Irwin Donovan, of Muskogee, Okl. (John J. Shea and Thomas F. Shea, both of Tulsa, Okl., on the brief), for appellant.

James W. Cosgrove, of Muskogee, Okl. (S. M. Rutherford, of Muskogee, Okl., on the brief), for appellees, except the United States.

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

YOUMANS, District Judge. The United States brought this suit to set aside two of three patents for as many allotments which it is alleged were made by mistake to the same Creek citizen under different names, when that citizen was entitled to but one allotment. The prayer of the bill was:

"That Nellie Porter, Nellie Deer, and Lettie McGilbra, as described in complainant's bill, be decreed to be one and the same person; that the names of Nellie Deer and Lettie McGilbra, now appearing upon the approved rolls of the Creek Tribe of Indians, be stricken therefrom; that the certificates and

patents issued in the names of Nellie Deer and Lettie McGilbra, respectively, be canceled; that the claims of all parties, of whatsoever character, to the lands allotted to said Nellie Deer and Lettie McGilbra, be held for naught; that the rights of Nellie Deer and Lettie McGilbra as allottees and entitled to further distribution of the tribal funds and property be extinguished; that all deeds, mortgages, contracts, powers of attorney, or assignments, or other instruments of whatsoever character, and all claims of all parties in the lands so allotted, be set aside; that the lands so allotted or purported to be allotted to Nellie Deer and Lettie McGilbra be decreed the lands of the Creek Nation or Tribe of Indians; and that complainant be decreed to be entitled to the immediate possession thereof."

One of the defendants answered under the name of Lettie McGilbra. In her answer she alleged:

"That she is a citizen of the Creek Nation and enrolled on the full-blood rolls of said nation; that she was erroneously enrolled as Nellie Porter, opposite roll No. 7408; also erroneously enrolled as Nellie Deer, opposite roll No. 7064, on the approved rolls of said Creek Nation of Indians; that her real name is Lettie McGilbra, and was enrolled as Lettie McGilbra, opposite roll No. 7907."

She further alleged that an allotment of land had been made to her arbitrarily under the name of Nellie Porter, that another allotment of land had been made to her arbitrarily as Nellie Deer, and that a third allotment had been made to her as Lettie McGilbra. She further alleged:

"That Nellie Porter, so called, and Nellie Deer, so called, and Lettie McGilbra, are one and the same person, and the real name, as stated above, is Lettie McGilbra, and that the real allotment belonging to defendant Lettie McGilbra, and the one she wishes to retain, is the allotment allotted to Lettie McGilbra above described; that the defendant, answering for herself, further states that she hereby relinquishes all right, title, and interest in and to the allotments allotted to her as Nellie Porter and Nellie Deer, respectively, and hereby disclaims all right, title, and interest in and to said allotments, for the reasons that said names, Nellie Porter and Nellie Deer, are erroneous, and not the real name of defendant; and that she is now Lettie Barnett, née Lettie McGilbra, and is known and designated by those who know her as such Lettie McGilbra, and as such Lettie McGilbra is entitled as a citizen of the Creek Nation, duly enrolled as such as Lettie McGilbra and entitled to the allotment made to her."

She further alleged that, when the enrollment of Nellie Porter and Nellie Deer was made, she was a minor of tender age and not able to enroll herself in her proper name, and that no one was authorized to enroll her under the name of Nellie Porter, nor under the name of Nellie Deer. She prayed that she be allowed to retain her real name as Lettie McGilbra, and to retain as her allotment that land which had been allotted to her under the name of Lettie McGilbra.

Afterwards a decree was entered in the cause, the first paragraph of which reads as follows:

"The above matter coming on to be heard on this the 6th day of October, 1916, and it appearing from the pleadings in said cause that Nellie Porter, enrolled as a full-blood opposite roll No. 7408, and Nellie Deer, enrolled as a full-blood opposite roll No. 7064, and Lettie McGilbra, enrolled as a full-blood, opposite roll No. 7907, on the Creek tribal rolls, are one and the same person, and that Lettie McGilbra files answer electing to take lands allotted under that name, and praying the court to set same aside to her, and relinquishing

all right, title, and claim in and to the land allotted in the name of Nellie Porter, and in the name of Nellie Deer, the prayer of the answer of Lettie McGilbra is hereby granted."

It was further ordered by the court in said decree that the certificates and patents theretofore issued by the Commission to the Five Civilized Tribes in the names of Nellie Porter and Nellie Deer be canceled and that the names Nellie Porter, opposite roll No. 7408, and Nellie Deer, opposite roll 7064, respectively, be stricken from the approved roll of the Creek Tribe of Indians.

Afterwards on the 9th day of November, 1917, said decree was set aside upon the application of Nancy Heaper, Minerva Frances, Jennie Washington, Annie Givens, Wisey Givens, and Wesley Asbury, upon the alleged ground that they were heirs of Lettie McGilbra, deceased, and that said decedent was a distinct and separate person from Nellie Porter, alias Nellie Deer; the court finding that the movants were not parties to the action and that the decree was not binding upon them.

On the 15th of November, 1917, Nancy Heaper, Minerva Frances, Jennie Washington, Annie Givens, Wisey Givens, and Wesley Asbury filed answer and cross-petition. In their answer and cross-petition they denied that Lettie McGilbra was one and the same person as Nellie Porter, alias Nellie Deer, and alleged that Lettie McGilbra died during the year 1901, and that she was survived by Nancy Heaper, Minerva Frances, Jennie Washington, Annie Givens, and Wisey Givens, who were the half-sisters of said Lettie McGilbra, and all of whom were daughters of one Lizzie McGilbra, who was also the mother of Lettie McGilbra, deceased.

The prayer of the answer and cross-petition is as follows:

"Wherefore these defendants pray that Nellie Porter, alias Nellie Deer, be decreed by this court to be a separate and distinct person from Lettie McGilbra, deceased, and that the heirs of Lettie McGilbra, deceased, including these answering defendants, be declared and decreed to be the rightful and lawful owners of said Lettie McGilbra allotment above described, and that said decree be set aside and modified in so far as it finds Lettie McGilbra to be identical with said Nellie Porter, alias Nellie Deer, and in so far as it decrees that said Nellie Porter, alias Nellie Deer, acting in the name of Lettie McGilbra, deceased, is entitled to said Lettie McGilbra allotment above described, and in so far as it awards the cost of said proceeding against Lettie McGilbra; that said Balboa Oil Company and said Hugh King, Jr., lessees above mentioned, be made additional defendants herein, so that their rights, if any, under and by virtue of said oil and gas lease executed to them by said Nellie Deer, in the name of Lettie McGilbra, and approved as aforesaid, may be fully determined; and that these defendants have all further relief which is equitable and just in the premises."

On the 27th of March, 1918, Nellie Porter, alias Nellie Deer, alias Lettie McGilbra, filed answer to the cross-petition of Nancy Heaper et al., in which the allegations of the cross-petition are denied.

It was conceded that Nellie Porter was identical with Nellie Deer. The question to be determined was whether Nellie Porter was also identical with Lettie McGilbra, and the allotment involved in this appeal is the one originally made in the name of Lettie McGilbra. The testimony was taken before the court.

Judge Campbell, who tried the case and entered the decree, filed a memorandum opinion in which he said:

"I find from the evidence that the name Lettie McGilbra on the 1895 Creek tribal roll did not represent the same person as Nellie Porter or Nellie Deer. The evidence is clear that Nellie Porter and Nellie Deer are the same person, to wit, the Nellie Porter mentioned as defendant in the government's bill. She is the daughter of Jennie McGilbra, and the granddaughter of Lizzie McGilbra, who appears as head of the McGilbra family on the 1895 roll. While as an infant she appears to have borne the name of Nellie McGilbra, I find that she was not known by the name of Lettie until probably within recent years, at any rate not in her early childhood. She does not appear upon the original 1895 tribal roll, but on the 1895 omitted Creek roll, compiled by authority of the tribal council to correct mistakes and omissions in the original roll, she appears as Nellie McGilbra. I find that shortly prior to the compilation of the 1895 tribal roll Lizzie McGilbra had born to her a female child, whom she named Lettie McGilbra, and that this child is the one who appears upon the 1895 tribal roll opposite No. 80 of Tulmochusee town. This, as we have seen, is the name transferred by the Commission from this roll to the census card, and hence, when the name was originally and tentatively enrolled on the census card, it stood for this child of Lizzie McGilbra, and not for the defendant Nellie Porter. When, however, this census card was later completed, it bore the additional data that Lettie McGilbra was six years of age, a female full-blood, whose father was Jonas Deer, and whose mother was Jennie McGilbra. It is urged that, because this description fits the defendant Nellie Porter, alias Nellie Deer, even though she be not the Lettie McGilbra originally appearing upon the tribal roll, which, however, is not conceded, still it is clear that she is the person whom the Dawes Commission identified as the Lettie McGilbra originally enrolled, and that she was in fact the person whom the Dawes Commission had in mind when the name Lettie McGilbra was placed on the final approved roll, and hence that she is in fact the person so enrolled, and is the owner of the land in controversy by virtue of the patents issued therefor. I cannot accept this contention as sound. Having concluded that the name Lettie McGilbra as it appeared upon the original 1895 tribal roll represented, not Nellie Porter, nor Nellie Deer, nor Nellie McGilbra, but Lettie McGilbra, an entirely different person, the appearance of that name on the 1895 tribal roll under the circumstances of this case must be treated in contemplation of law as the application of Lettie McGilbra for enrollment by the Dawes Commission. They entertained that application when they transferred the name to the census card. They then, pursuant to such application, proceeded to investigate her right to enrollment. However misleading, or however far from the truth, may have been the information secured in the course of such investigation, still the person whose right to enrollment was being investigated was the individual represented by the name on the tribal roll. She was the applicant. This applicant was Lettie McGilbra. The Commission acted favorably on said application and enrolled the applicant. It follows that this name on the approved roll represents, not Nellie Porter, nor Nellie Deer, but Lettie McGilbra, deceased, daughter of Lizzie McGilbra. Involved in this enrollment is the conclusive finding by the Dawes Commission that Lettie McGilbra was a duly and legally enrolled member of the Creek Tribe in 1895, and who was living April 1, 1899."

The clear preponderance of the evidence sustained these findings, which were incorporated in the decree rendered by the court below. A careful study of the evidence convinces us that the decree of the lower court was right, and that it should be affirmed.

It is so ordered.

LANCASTER et al. v. FOSTER et al.

(Circuit Court of Appeals, Fifth Circuit. November 15, 1918. Rehearing Denied December 19, 1918.)

No. 3231.

1. TRIAL ⊂⊃420—WAIVER OF ERROR—DENIAL OF MOTION FOR DIRECTED VERDICT.

An exception to denial of motion for direction of verdict, made at the close of plaintiff's evidence, is not waived by defendant by subsequent introduction of evidence, where such evidence is all in the record and contains nothing which strengthens plaintiff's case.

2. RAILROADS ⊂⊃348(8)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—FAILURE TO LOOK.

Circumstantial evidence, which warranted the inference that deceased was struck and killed by a passing train, while walking on a highway crossing a single railway track in the daytime, at a place where a train approaching from either direction could be seen for a mile or more, *held* to also require the inference that he was chargeable with contributory negligence.

In Error to the District Court of the United States for the Western District of Texas; Du Val West, Judge.

Action at law by Frances B. Foster and others against J. L. Lancaster and Pearl Wight, receivers for the Texas & Pacific Railway Company. Judgment for plaintiffs, and defendants bring error. Reversed.

S. N. Russell, of El Paso, Tex., for plaintiffs in error.

Walter H. Scott, of El Paso, Tex. (Winter, McBroom & Scott, of El Paso, Tex., on the brief), for defendants in error.

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

WALKER, Circuit Judge. This was an action by the defendants in error, the widow and surviving children of A. G. Foster, deceased, to recover damages resulting from the death of the latter, which was attributed to negligence in the operation of a railroad train, which it was alleged struck him as he was undertaking to cross the railroad track where it was intersected by a road on which the deceased at the time was walking. It was pleaded as a defense that, if the deceased was struck and killed by the defendant's train as alleged, it was through and on account of his own negligence and carelessness in failing to look and listen before going on the track at the crossing. An exception was reserved to the action of the court in overruling a motion, made by the defendants after all the evidence offered by the plaintiffs had been introduced, that the court instruct the jury to find a verdict in favor of the defendants. Following this ruling the defendants introduced other evidence, which is set out in the bill of exceptions. After all the evidence was in, the defendants made another motion that the court instruct the jury to find in their favor, but the last-mentioned motion was not made until after the

court had submitted the case to the jury and the jury had retired. The arguments in the case were concluded just at noon. When the court reconvened for the afternoon session, counsel for defendants were not present, and did not return to the courtroom until about 20 or 25 minutes after the court reconvened, and after the court had charged the jury and the jury had retired. Promptly after the return of the defendants' counsel to the courtroom they requested that the jury be directed to return a verdict for the defendants.

[1] In behalf of the defendants in error it is contended that the first-mentioned exception cannot be availed of by the plaintiff in error, because the latter thereafter introduced other evidence. A number of decisions are cited which indicate the existence of a rule to that effect. There is an obviously good reason to support such a rule, where the record does not disclose the subsequently introduced evidence, or where that evidence is disclosed and it is such as to make the evidence as a whole enough to justify its submission to the jury. If the subsequently introduced evidence is not disclosed to the appellate court, it may be presumed that the plaintiff's case was strengthened by it, and that the evidence as a whole was such that an instruction to find for the defendant could not properly have been given. If any deficiency in the evidence offered by the plaintiff is shown, or is to be presumed, to have been supplied by the evidence offered by the defendant, the latter is in no position to complain of the court's refusal to direct a verdict in his favor. Such a situation was presented in the case of Grand Trunk Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266. The bill of exceptions in that case did not show the evidence introduced by the defendant after the overruling of its motion that a verdict in its favor be directed. It was held that, under such circumstances, it must be presumed that when the case was closed on both sides there was enough testimony to make it proper to leave the issues to be settled by the jury. There is no room for such a presumption where all the evidence adduced on both sides is contained in the bill of exceptions, and neither the part of it which was before the court when it refused to direct a verdict for the defendant nor all the evidence on both sides was enough to make it proper to leave the issues to be settled by the jury.

The evidence introduced by the defendants in the instant case had no tendency to support the claim asserted by the plaintiffs, or to supply any deficiency in the evidence offered by the latter. If it was error to overrule the motion for a directed verdict when it was first made, nothing afterwards occurred to cure that error. The sole tendency of evidence introduced by a defendant might be to rebut or discredit that offered by the plaintiff. The act of a defendant in so undertaking to destroy whatever probative value the plaintiff's evidence might have seemed to have could not well be regarded as an abandonment or waiver by the defendant of a motion made by him at the conclusion of the plaintiff's evidence, and based on the contention that on its face it was legally insufficient to support the claim asserted. We do not think the rule invoked is applicable, where

it is affirmatively made to appear that there is an absence of any good reason for applying it. Furthermore, though the renewal of the motion by the defendants after all the evidence was in was too late to be presented by exception for appellate review, it seems that it was enough to show that defendants' introduction of evidence was not accompanied by an intention to waive the first made motion for a directed verdict. The conclusion is that, under the circumstances disclosed, the action of the court on that motion is presented for review by this court. See Lydia Cotton Mills v. Prairie Cotton Co., 156 Fed. 225, 84 C. C. A. 129; Van Ness v. North Jersey Street Ry. Co., 75 N. J. Law, 273, 67 Atl. 1027; Matson v. Port Townsend R. Co., 9 Wash. 449, 37 Pac. 705.

[2] The evidence as to when and how the deceased came to his death was entirely circumstantial. He spent the night before he was killed at the residence of a Mr. Cadwallader on a farm or ranch about eight miles from El Paso; the deceased and Mr. Cadwallader being associated in the dairy and ranch business. Shortly after 7 o'clock the next morning the deceased left the breakfast table at Mr. Cadwallader's to catch an interurban car for El Paso. He was to stop and hold that car for a young daughter of Mr. Cadwallader, who expected to accompany him to El Paso, and who had to get her schoolbooks before leaving the house. She left the house shortly after the deceased, and boarded the interurban car for El Paso. She did not see the deceased after he left the house. A road in front of the Cadwallader residence goes over the Texas & Pacific Railroad single track, about 175 feet from the residence, and then over the interurban railroad track a short distance beyond. There was evidence tending to prove that an east-bound Texas & Pacific train passed over the crossing between the time the deceased left the house and the time the interurban car stopped at or near where it crossed the road. So far as appears, no one knew anything of any mishap to the deceased until his dead body was found about noon, near the railroad track and about 90 feet east of the road crossing. The condition of the body indicated that it might have been struck by a train. About halfway between where the body was found and the crossing some books and business papers the deceased was carrying when he left the residence were found. There was evidence having some tendency to prove that the above-mentioned east-bound Texas & Pacific train did not give the signals which a Texas statute requires to be given by a locomotive before and at the time it crosses any road or street. The deceased was familiar with the locality, having for years visited it at frequent intervals, and having an interest in the farm or ranch on which Mr. Cadwallader lived. The railroad track was straight for more than a mile in both directions from the place where it crossed the road. A train approaching from either direction could be seen by a pedestrian on the road approaching the crossing, and when one is about 12 feet from the rail on the side nearer the Cadwallader residence an approaching east-bound train is in plain view for more than a mile; the view in both directions being entirely unobstructed.

It may be assumed, without being conceded, that there was evi-

dence to support the inferences that the deceased was struck at the crossing by the above-mentioned east-bound train, and received the injuries causing his death, while he was proceeding along the road with the object of catching the interurban car then nearly due, and that negligence chargeable against the defendants proximately contributed to his death. The inferences mentioned involve the further one that the deceased went on or dangerously near the crossing when the train was approaching or passing it. His doing so under the circumstances inferred amounted to negligence proximately contributing to the result complained of. While he was far enough away from the crossing to be in a safe place if an engine or train was approaching, his view in both directions was entirely unobstructed. If he went on or dangerously near the crossing without using his senses to discover that a train was approaching, he was guilty of negligence proximately contributing to the result. If he proceeded on his way, without looking and listening, knowing as he did of the presence of the railroad track just ahead, he was equally guilty of contributory negligence. When it appears from the evidence that, if proper precautions were taken, they could not have failed to be effectual, there is no support for an inference that they were taken, but were ineffectual. If the evidence supported the inference that the train struck the deceased at the crossing while he was on his way to the interurban track, it also required one or the other of the further conclusions that he either failed to look for the train, and negligently walked on or dangerously near the track as the train was approaching or passing, or that he looked and saw it, and took the risk involved in an attempt to cross the track. In either case he was clearly guilty of contributory negligence. Northern Pacific Ry. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; Railway Co. v. Houston, 96 U. S. 697, 24 L. Ed. 542; Gipson v. Railway Co. (C. C.) 140 Fed. 411; Shatto v. Erie R. Co., 121 Fed. 678, 59 C. C. A. 1. One in possession of his senses, walking in the daytime towards a single railroad track, the existence and location of which is well known to him, has all the opportunity needed to avoid danger from an approaching or passing train, if a reasonable use of his senses would inform him of any danger while he is yet far enough away to avoid it by the exercise of reasonable care.

The conclusion is that the court erred in overruling the motion of the defendants that a verdict in their favor be directed. Because of that error the judgment is reversed.

DROVERS' & MECHANICS' NAT. BANK OF BALTIMORE, MD., v. FIRST NAT. BANK OF SUTTON, W. VA., et al.

(Circuit Court of Appeals, Fourth Circuit. July 1, 1919.)

No. 1705.

1. BANKS AND BANKING ⟸117—BANK NOT LIABLE ON INDORSEMENT BY VICE PRESIDENT OF HIS NOTE IN BANK'S NAME.
A bank *held* not liable on an indorsement by its vice president in its name of his individual note to it, delivered to another bank to take up a prior note made by him before his connection with the indorsing bank, and accepted on his false representation, unverified, that the bank had assumed liability for the prior note, under circumstances which should have put the receiving bank on inquiry.

2. BANKS AND BANKING ⟸67—PURCHASE OF ASSETS OF ANOTHER BANK DOES NOT RENDER PURCHASER LIABLE FOR DEBTS OF SELLING BANK.
A purchase by definite contract by one banking corporation of the assets of another and the assumption of debts specified in the contract does not constitute a merger or consolidation, and does not, in the absence of fraud, make the purchasing corporation liable for all the debts of the selling corporation.

3. BANKS AND BANKING ⟸111—BANK NOT BOUND BY FALSE REPRESENTATIONS BY OFFICER OF MERGER WITH ANOTHER BANK.
Merger of a banking corporation with another and assumption by it of the entire debts of the other is not in the usual course of business of such corporations, and a bank is not bound by the false statement of a vice president or other officer in charge of its current business that there has been such merger and assumption of liabilities.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action at law by the Drovers' & Mechanics' National Bank of Baltimore, Md., against the First National Bank of Sutton, W. Va., and P. E. Wagner, its receiver. Judgment for defendants, and plaintiff brings error. Affirmed.

Carlyle Barton and Alfred S. Niles, both of Baltimore, Md. (Niles, Wolff, Barton & Morrow, of Baltimore, Md., on the brief), for plaintiff in error.

Connor Hall and D. C. T. Davis, Jr., both of Charleston, W. Va. (Davis, Davis & Hall, of Charleston, W. Va., on the brief), for defendants in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. On the first trial the District Judge, trying the case by consent without a jury, found in favor of the plaintiff. This court held that he should have found for the defendant. 244 Fed. 135, 156 C. C. A. 563. On the second trial the record of the testimony in the first trial was received by consent, and some additional testimony was offered. The District Court found in favor of

the defendant, and the question now is whether the new evidence, taken in connection with that offered at the first trial, should change the conclusion reached by this court in its former judgment. For the sake of clearness we restate the entire case, so that the effect of the new evidence may be considered in sequence.

In January, 1914, H. H. Dean became vice president of the First National Bank of Sutton, W. Va. In fraud of the bank and for his own benefit he made his own note for $15,000, payable to the bank, or order, three months after date, and indorsed it in the name of the bank to the Drovers' & Mechanics' National Bank of Baltimore. The issue in this action brought by the Baltimore bank is whether the First National Bank is liable as indorser, notwithstanding Dean's fraud.

[1] The surrounding details are somewhat complex, but the decision depends on the application of the law to leading facts not in serious dispute. Prior to the year 1914 Dean had no connection with the First National Bank, but was treasurer of the Farmers' Bank & Trust Company of Sutton, W. Va. On or about December 24, 1913, as treasurer, he applied to the Drovers' & Mechanics' National Bank of Baltimore for a loan to the trust company of $15,000. The Baltimore bank required a resolution of the board of directors authorizing the loan. In response, Dean sent a copy of a resolution authorizing the borrowing of $30,000, bearing on its face the date December 29, 1913. This was in reality a resolution signed by the president and vice president in 1911, Dean altering the date to suit his purposes. The Baltimore bank agreed to make the loan, and discounted a note for $15,000, signed by Dean individually, and indorsed by him in the name of the trust company, taking as collateral a note for $22,000 of J. V. Thompson and J. R. Barnes, payable to S. W. Shrader, and indorsed by Shrader, Showalter, and Dean, and by Dean in the name of the trust company. The Baltimore bank, after applying $6,000 of the proceeds to a note of the trust company for that amount, credited the trust company with the balance and paid it out in due course on checks of the trust company. That this transaction was really a discount of his own note by Dean for his own benefit was shown by a credit made by Dean on the trust company's books to himself of the net proceeds of the note, $14,775, at the same time that he made a charge for that amount in the trust company's books to the Baltimore bank.

The collateral Thompson note, with its indorsements, was as follows:

"$22,100.00. Uniontown, Pa., Oct. 15, 1913.

"One year after date we promise to pay to the order of S. W. Shrader twenty-two thousand one hundred dollars at the First National Bank, Uniontown, value received, without defalcation, from date at six per centum per annum payable annually.

"No. ———. Due ———. J. V. Thompson.

"J. R. Barnes."

Indorsed: "S. W. Shrader. Howard M. Showalter. H. H. Dean. Pay to the order of any bank, banker or trust company. Farmers' Bank & Trust Co., Sutton, W. Va., H. H. Dean, Treasurer."

On January 15, 1914, a contract was made between the trust company and the First National Bank, which was manifestly intended as a sale and transfer of the chief assets and active business of the trust company to the First National Bank. By this contract the trust company turned over to the First National Bank cash, notes, and other assets to the amount of $198,506.31. The First National Bank assumed liability for the trust company's deposits, balances due to other banks, and certain notes to other banks to the amount of $203,970.32. For the difference, $5,464.01, between the liabilities assumed and the assets turned over, the trust company gave its note to the First National Bank. The liabilities of the trust company assumed were carefully specified. The $15,000 note indorsed by the trust company to the Baltimore bank, not having been entered by Dean on the books of the trust company, was not known, and was not assumed nor mentioned. The evidence requires the inference, also, that the Thompson note for $22,000, indorsed by Dean in the name of the trust company as collateral for the $15,000 note, never appeared on the books of the trust company as an asset, and was not embraced in the notes assigned to the First National Bank. As the First National Bank never assumed the payment of the $15,000 note, and never received any benefit of that note in its contract with the trust company, this action has no support, if it depends on the contract.

After the execution of the contract between the two banks Dean became vice president of the First National Bank, and the management of the business was left mainly, if not entirely, in the hands of the vice president and his inferior officer, Casto, the cashier. Before maturity of the $15,000 note of Dean, indorsed by the trust company, Dean agreed on demand of the Baltimore bank to procure a resolution of the directors of the First National Bank authorizing the payment of the note by substitution of a new note of Dean, indorsed by the First National Bank. Dean, on March 24, 1914, wrote the Baltimore bank that a merger had taken place, and sent forward the new note signed by him individually and indorsed by him in the name of the First National Bank, with a pretended copy of a fictitious resolution of the board of directors of that bank, signed by him as secretary, and certified by him as vice president, not authorizing the assumption of a debt of the trust company, but negotiation of a loan of $15,000. Relying upon this resolution, the Baltimore bank marked the old note paid and returned it, taking in its place the new note, which Dean had undertaken to indorse in the name of the First National Bank, but retained the Thompson note as collateral. This transaction was handled through the note teller's department and did not appear in statements of account made in due course to the First National Bank. A check for $225 on a New York bank was drawn by Dean as vice president in favor of Dean as an individual, and by him indorsed in payment of the discount. On maturity of this note on June 22, 1914, it was renewed in like form, and again the transaction appeared only on the discount ledger. The discount, $225, was paid by a check on the Baltimore bank, drawn by

Dean as vice president in his favor as an individual, and indorsed by him. This check was charged in the account of the First National Bank with the Baltimore bank, and no objection was made to it. But the check indicates that Dean paid for it, and there is nothing in the record tending to show that he did not.

From this statement it will be observed that the First National Bank had nothing to do with the making of the debt which is the foundation of the note in suit; that it received no part of the consideration; that neither in the contract with the trust company nor in any other way did it assume the payment of the note; that Dean in all the transactions concerning it was acting in his own interest, and in fraud, first of the trust company, and then of the First National Bank.

Nevertheless, since Dean was intrusted with the general transaction of the business as vice president of the First National Bank, he had authority to borrow money and bind the bank therefor, by making or indorsing notes in its name and assigning its bills receivable as security in the usual course of business, and to bind the bank in any other matter which in due course of business fell under the authority of an executive officer of a bank. Auten v. United States National Bank, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920; Aldrich v. Chemical National Bank, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611.

But, on the other hand, if the transactions here under review were so out of the usual course of business as to put the Baltimore bank on notice that Dean was acting beyond his authority, or using the bank's name and credit in his own interest, or that he was representing his own interest, or any antagonistic interest, then he stood before the Baltimore bank stripped of his representative capacity, and powerless to bind the First National Bank. West St. L. S. Bank v. Shawnee County Bank, 95 U. S. 557, 24 L. Ed. 490; Lamson v. Beard, 94 Fed. 30, 36 C. C. A. 56, 45 L. R. A. 822; 7 Corpus Juris, 541; Wagner v. Central Bk. & T. Co., 249 Fed. 145, 161 C. C. A. 197.

The scope of banking business is constantly enlarging, and the usual course of business becoming broader. The number and rapidity of banking transactions require banks to rely on the authority and good faith of the executive officer of correspondent banks. But, on the other hand, the stockholders and directors of banks, especially small banks, must rely on the honesty of their executive officers, and they have a right to demand that officers of other banks shall be reasonably diligent as capable business men to observe and act upon evidences that a president or cashier is acting beyond his authority, or for himself or some other person, while using the bank's name and credit. Taking the most liberal view in favor of the Baltimore bank, every transaction it had with Dean in relation to the $15,000 note was unusual; and all the transactions taken in connection carried notice of improper use of the bank's credit by Dean.

It has been held that a note of an officer to his own bank is presumed to be for value, and if nothing more appears it may be dis-

counted for the bank on its own indorsement without question by another bank. Hiawatha Iron Co. v. John Strange Paper Co., 106 Wis. 111, 81 N. W. 1034. But assuming, without deciding, that to be the law, it does not protect the Baltimore bank, for it accepted Dean's note payable to the trust company, his own bank, and indorsed by him in the name of the bank, on the representation that he was thus making himself the primary obligor for the debt of the bank as a mere accommodation to the bank, though the bank itself was to become secondarily liable only as an indorser.

It is contended that there was nothing unusual in such a transaction; that Mr. Owens, the vice president of the Baltimore bank, suggested or required this method merely to increase the security by having Dean's personal liability. It is true he does so testify in his direct examination; but he also testified that Dean became maker of the note "simply at the suggestion, I cannot recall now, possibly of ours, to add somewhat to the security of the note." But, whoever originated the plan, it could not have been adopted to obtain additional security by making Dean liable for the debt, for he was already liable as indorser of the Thompson note taken as collateral. Indeed, Dean's willingness to make himself primarily liable for a debt of the trust company ought to have arrested attention, in view of his already existing secondary liability as indorser of the Thompson note. What is more significant, the Thompson note on its face was notice to the Baltimore bank that Dean was an officer who was using the trust company to finance his own affairs; for his indorsement and that of the trust company indicated that Dean had been the owner of the Thompson note, and had indorsed it to the trust company and received the money for it. The use of this note so indorsed by him to draw money for himself from the trust company, as collateral to his own note for $15,000 to the trust company and indorsed by him for it, we cannot help thinking so clearly signified that he was mixing his own affairs with those of the trust company as to require at least inquiry of the directors or other officers of the trust company by the officers of the Baltimore bank before proceeding further.

Much stress is laid on the testimony of Mr. Owens, vice president of the Baltimore bank, and the new testimony of other bankers that the transaction was in accordance with the usual course of business. While Mr. Owens' general statement to that effect is broad, he was candid enough to say that the transaction may not have been prudent, as it shows upon its face. The testimony of other bankers is guarded and limited to the statement that it would not be unusual to make a loan to a bank in the form of the note here involved, when there was no collateral, or the collateral given was of uncertain value. This testimony does not apply to this case (1) because there is no testimony that the Thompson note was not ample collateral; and (2) because the making of the note of $15,000 by Dean individually to the trust company and its indorsements to the Baltimore bank had no advantage over a direct note from the trust company to the Baltimore bank, since Dean was already liable as indorser of the Thompson note. Considering the transaction in all of its circumstances, we

think the conclusion inevitable that it was so out of the usual course that only the credulous would accept without inquiry Dean's false representation that the bank as indorser was to receive the entire benefit to the exclusion of himself as maker.

Next, when the note fell due, the Baltimore bank accepted Dean's untrue statement, without verification, that the trust company had been merged into the First National Bank, and inferred contrary to the fact, without a direct statement to that effect even from Dean, that in the merger the National Bank had assumed the note of Dean indorsed by the trust company. But the bank itself recognized that due care required it to have Dean's statements verified in a matter in which he was personally concerned, and required a resolution of the board of directors of the First National Bank as authority to protect it in renewal of Dean's note with the indorsement of the First National Bank substituted for that of the trust company. Indeed, the record shows that the banking custom—the usual course of business—adopted by the Baltimore bank was to require a resolution of the board of directors of the borrowing bank, duly certified, as a condition of lending money, and this makes a very marked distinction between this case and Auten v. United States National Bank, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920.

In sending his own note, indorsed by him in the name of the First National Bank, to take up his old note, indorsed by the trust company, Dean wrote of his old note as "my note," and he inclosed a fictitious paper, in form a copy of a resolution of the board of directors of the First National Bank authorizing him as vice president to borrow $15,000 from the Baltimore bank. This pretended authority to borrow, even if it had been genuine, by no means conferred authority on Dean to assume for the bank the liability of Dean and the trust company, and thus it did not even in form meet the requirement which the Baltimore bank thought necessary to bind the First National Bank. But, aside from that, it was a forged resolution, and the Baltimore bank was content to accept as sufficient proof of its authenticity the pretensive certificate of Dean alone as vice president and as secretary of the board of directors. In addition to this, the check sent to the Baltimore bank for $225, the discount, was issued by Dean, as vice president, to Dean individually and indorsed by him. Indeed, in all of its dealings about a transaction in which Dean was personally liable and interested, not only as maker of the $15,000 note, but indorser of the collateral Thompson note, the bank accepted, without verification of any kind, Dean's own statements that liability for the note had been assumed by the First National Bank.

[2] It is contended, however, that the contract between the First National Bank and the trust company was in effect a merger or consolidation of the two banks, and that by operation of law the former corporation became liable for all the debts of the latter. In the opinion rendered when the case was here before, the contract was inadvertently referred to as intended to be a merger. But it was not. A purchase by definite contract by one corporation of the assets of

another, and the assumption of debts specified in the contract, does not constitute a merger or consolidation, and does not, in the absence of fraud, make the purchasing corporation liable for the debts of the selling corporation. In this instance there was no fraud in the purchase, every asset purchased and every debt assumed was particularly specified, the stock of the trust company was not purchased, no obligation was assumed to the stockholders of the selling corporation, and the trust company continued its business for the purpose of winding up its affairs, including the payment of the note given to the First National Bank. The contract, therefore, was not a merger or consolidation and by it the First National Bank did not become liable for any debt of the trust company not mentioned in the contract. E. E. Taenzer v. Chicago, R. I. & P. R. Co., 170 Fed. 240, 95 C. C. A. 436; Hoard v. Chesapeake & Ohio Ry., 123 U. S. 222, 8 Sup. Ct. 74, 31 L. Ed. 130; W. E. Austin Co. v. T. L. Smith Co., 138 Ga. 651, 75 S. E. 1048, Ann. Cas. 1913E, 1042, and note, 7 R. C. L. 180, § 156.

It is true that, in the advertisement of the change of business published by the First National Bank after its contract with the trust company, the change was referred to as a consolidation and merger. But that could not change the actual nature of the transaction, and it could not operate as an estoppel in favor of the Baltimore bank, because it did not act upon it. Indeed, no officer or agent of that bank even knew of the publication.

[3] Dean's untrue representation that there had been a merger and assumption by the First National Bank of the debts of the trust company, even if made in good faith, would not bind the First National Bank. There is no ground in reason or authority upon which it can be asserted that an officer of a bank may bind it for the debt of another bank on his mere false assertion that his bank has merged with another and assumed all its obligations. Merger of a corporation with another, and assumption by it of the entire debts of the other corporation, is not in the usual course of business of a corporation, and the corporation is not bound by the false statement of a vice president or other official in charge of its current business that there has been such a merger and assumption of liabilities. The Baltimore bank, therefore, cannot recover on the assertion that the First National Bank was bound by Dean's false representation that a merger had taken place, and the entire indebtedness of the trust company assumed. Merchants' Bank of Valdosta v. Baird, 160 Fed. 642, 90 C. C. A. 338, 17 L. R. A. (N. S.) 526, 3 R. C. L. 425, 7 C. J. 595.

Nor can the Baltimore bank avail itself of the fictitious resolution presented by Dean, because, even if it had been genuine, that only authorized the borrowing of money, and not the assumption of the debts of another bank. We conclude the Baltimore bank cannot recover against the First National Bank for these reasons:

(1) The First National Bank did not, by its contract with the trust company or otherwise, become liable for the debts of the trust company not expressly assumed.

(2) Dean had no authority as its managing officer to bind the First National Bank by his untrue representation that there had been a merger and consequent general assumption of the debts of the trust company.

(3) Dean had no authority as an officer of the First National Bank to assume for it, by accommodation indorsement or otherwise, the debt of himself and the trust company.

(4) Even if he had been clothed with the general authority to make such representation and indorsement, he appeared before the Baltimore bank representing three separate interests. As an individual maker of the note, and indorser of the Thompson note, he was interested that he should not be called on to pay this debt; as treasurer of the trust company he was interested in having the trust company relieved of the indorsement; and as vice president of the First National Bank his duty was to see that the First National Bank should not assume the liability of another without consideration. When these interests were evidently involved in antagonistic relations, the Baltimore bank cannot hold the First National Bank bound by Dean's attempt to assume for it a debt for which it held the obligation of other parties in interest, including Dean himself, whom he attempted to represent. True, the First National Bank, in the conduct of its general current business, held Dean out as its agent; but the implied authority fell from him as soon as his antagonistic interest appeared.

Affirmed.

WEISSENGOFF v. DAVIS.*

(Circuit Court of Appeals, Fourth Circuit. July 1, 1919.)

No. 1700.

1. DEATH ⊜35—ACTION FOR WRONGFUL DEATH IN ONE STATE MAINTAINABLE IN ANOTHER STATE IF ITS PUBLIC POLICY PERMITS.

Under the decisions of the Supreme Court, which, being upon a question of general law, are binding upon all federal courts, where the statute of a state permits recovery for wrongful death an action for a death occurring in that state may be maintained in any state whose statute or public policy is not inconsistent with the statute sought to be enforced.

2. DEATH ⊜14(1)—ACTION FOR WRONGFUL DEATH LIES AGAINST ONE UNLAWFULLY RESISTING ARREST.

Where a sheriff stepped upon the running board of a moving automobile driven by defendant, and placed him under arrest for a misdemeanor, it was the duty of defendant, knowing the sheriff held a warrant, to stop the car; and where he kept it running, in an attempt to escape into another state, and engaged in a struggle for its control, until it struck a bridge support and the sheriff was killed, his action was an active and unlawful resistance of authority, which rendered him liable for the sheriff's death.

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action by George R. Davis, administrator of the estate of Donald P. Davis, deceased, against Peter Weissengoff. Judgment for plaintiff, and defendant brings error. Affirmed.

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

*Certiorari denied 250 U. S. 674, 40 Sup. Ct. 54, 64 L. Ed. —.

William L. Marbury, of Baltimore, Md. (M. M. Neely, of Fairmont, W. Va., on the brief), for plaintiff in error.

Albert A. Doub, of Cumberland, Md., and Harry G. Fisher, of Keyser, W. Va. (George A. Finch, of Baltimore, Md., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. On June 27, 1917, Donald P. Davis, sheriff of Mineral county, W. Va., in the execution of a warrant he held for the arrest of the defendant, Peter Weissengoff, stepped upon the running board of defendant's automobile as he was driving through the town of Piedmont, W. Va. The car was not stopped, but continued in somewhat rapid motion until it struck an abutment of the Potomac bridge between Piedmont, W. Va., and Westernport, Md., and killed Davis. In this action for damages for his death, brought by the administrator in the district of Maryland, the question on the merits was whether the accident was due either to the defendant's unlawful resistance of arrest or attempt to escape after arrest, carried into effect by refusal to stop the car and relinquish its actual control to the sheriff, or by running it at a reckless or dangerous rate of speed: or to wanton and unlawful conduct of Davis in seizing the wheel and struggling with the defendant for the control of the car, and in the struggle moving the accelerator and increasing the speed, and pulling on the wheel so as to drive it against the bridge.

[1] A demurrer to the jurisdiction was overruled, and the jury found a verdict of $10,000 for the plaintiff. In support of the demurrer to the jurisdiction defendant relies on Ash v. B. & O. R. R. Co., 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461, holding that the statute of West Virginia conferring a right of action for wrongful death is not enforceable in the court of Maryland, the Maryland statute on the subject being similar, but not identical. That case was decided in 1876, and it does not seem that the court of Maryland has been called on since to review the question. But it is now settled beyond debate by the Supreme Court of the United States that, when the statute of one state takes away the common-law obstacle to a recovery for an admitted tort, an action for the tort committed in that state may be maintained in any state where the statute of the state in which the cause of action arose is not in substance inconsistent with the statute or public policy of the state in which the right is sought to be enforced. The question is one of general law, and the decisions of the Supreme Court are binding in this court. Dennick v. R. R. Co., 103 U. S. 11, 26 L. Ed. 439; Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; Northern Pacific R. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; Stewart v. B. & O. R. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; Farrugia v. Pa. R. Co., 233 U. S. 353, 34 Sup. Ct. 591, 58 L. Ed. 996.

[2] The defendant knew the sheriff had a warrant for his arrest for the misdemeanor of selling liquor in West Virginia. There was testimony on behalf of plaintiff that Davis stood in front of the moving car in which the defendant had four of his children and waved to

defendant to stop, telling him he had a warrant for him and that he was under arrest; that defendant refused to stop, and increased the speed of the car, saying to Davis he would see him some other time; that Davis jumped on the running board of the car, and again said, "Pete, you are under arrest." The defendant denied that Davis signaled him to stop or said anything until he jumped on the running board; but he knew Davis had a warrant for him, and the evidence leaves no doubt that defendant knew that Davis by his action meant to arrest him. The defendant gave this account:

"Front of the bank building and I passed down this way, and he just jumped on my car, and this way some way (indicating), and grabbed that wheel, and I guess pushed that throttle on and the machine started to zigzag. I hold and children scared, one fall down on my feet, and another grab me (indicating) and hollering, 'Papa, Papa.' Machine come close to sidewalk, and I hold on as I could so get in road and find myself on bridge, and that is all I know. This throttle stand here (indicating). Stick out, like you jump and grab with left hand wheel, and then grab that right hand wheel (indicating), and shove my hands down on bar. I had my hands on bar, and he had his hands on top, and started gas, and the machine started to run fast."

Other testimony on behalf of defendant was to the effect that he and Davis were struggling for control of the wheel and talking loudly to each other, about 275 yards from the bridge, and that the struggle and loud talking continued until the car struck the bridge—Davis pulling one way and defendant the other. One of the witnesses testified that Davis gave a pull on the wheel toward the girder post before the car struck.

The distance from the bank building where Davis got on the machine to the bridge is 820 feet. The car was driven at a speed of 20 to 25 miles an hour from the bank to the bridge, and turned in its course two curves, one very sharp. This turn, it seems, would have been impossible if Davis had been then seriously interfering with the course of the car. Two other facts are evident from the testimony beyond reasonable controversy: Defendant alone had access to the brakes, and could have stopped the car at once; defendant continued to run the car in defiance of the sheriff's authority to escape arrest by getting into Maryland.

The case turns on the soundness and applicability to the evidence of the following request of defendant refused by the District Judge:

"The jury are further instructed that the offense with which the defendant stood indicted at the time when it is alleged that the sheriff, Donald P. Davis, attempted to arrest him, is a misdemeanor, and that in making an arrest for the committing of a misdemeanor the sheriff, or other officer of the law, is not justified in taking human life, or in employing any method or means in making such arrest as will expose the person to be arrested or those accompanying him to serious risk or deadly injury, unless the party whom such officer is attempting to arrest resists such arrest in some manner more serious than by attempting to run away from such officer, and even if the jury believe from all the evidence that the defendant attempted to avoid arrest at the hand of the sheriff by simply fleeing from said sheriff, and that said sheriff attempted to make such arrest of the defendant in such a reckless manner as not only greatly to endanger the life of the defendant and his four children, who were in the defendant's automobile, but in such a reckless manner that the automobile in which the defendant was then and there rid-

ing was wrecked as a result of such recklessness on the part of the said sheriff, thereby causing the death of said sheriff, then the plaintiff is not entitled to recover in this case, and the verdict of the jury should be for the defendant."

The law of the case was given to the jury in these two propositions—the first at request of plaintiff, and the second at request of defendant:

(1) "The jury are instructed that, under the uncontradicted evidence in this case, Donald P. Davis, deceased, on the 27th day of June, 1917, was sheriff of Mineral county, West Virginia, and had in his possession a warrant for the arrest of the defendant, and on said date saw the defendant driving on Child's avenue, in the town of Piedmont, West Virginia, in his motor car, and the said defendant then and there knew that the said Donald P. Davis had a warrant for his arrest; and if the jury believes from the evidence that the defendant understood that the said Donald P. Davis then and there wanted to arrest him, and that the said defendant while driving said car on Child's avenue saw the said Donald P. Davis approach his car as he believed for the purpose of arresting him, but that the said defendant then and there made an effort to escape from arrest by speeding up his automobile, and further find that the said Donald P. Davis thereupon stepped on the running board of the said automobile in order effectually to place said defendant under arrest, and further find that the said defendant then and there had his car under control, and could have stopped his car, but, on the other hand, increased the speed of the said automobile for the purpose of escaping from arrest, and further find that in his effort to escape arrest the car of the said defendant was driven at a dangerous, reckless, and unlawful speed by the defendant, and so negligently and recklessly that the said car was run against one of the iron supports of the bridge leading from Piedmont, West Virginia, to Westernport, Maryland, and that as a result thereof the said Donald P. Davis was so seriously injured that from the effects thereof he died soon thereafter, then the verdict of the jury shall be for the plaintiff."

(2) "The jury are instructed that unless they shall find by a fair preponderance of the evidence that the defendant, in a willful attempt to escape arrest, intentionally increased the speed of his automobile with a view of escaping from the state of West Virginia, or, with such intent, failed to use means (if such were accessible to him) which a reasonably prudent and law-abiding person would under the circumstances have used to stop the car, then the plaintiff cannot recover and your verdict should be for the defendant."

We think this was a fair statement of the law applicable to the facts, and that the request refused was not applicable. A sheriff may not kill or imperil life in the effort to arrest a person charged with a misdemeanor or to prevent his escape after arrest. 2 R. C. L. 471; Thomas v. Kinkead, 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68; Brown v. Weaver, 76 Miss. 7, 23 South. 388, 42 L. R. A. 423, 71 Am. St. Rep. 512; State v. Cunningham, 107 Miss. 140, 65 South. 115, 51 L. R. A. (N. S.) 1179.

In this case there can be no doubt that the act of the sheriff in stepping on the car by the side of defendant with his warrant indicated to defendant the purpose to take him into custody as distinctly as if the sheriff had walked up to him on the street and touched him on the shoulder with the announcement of arrest, and was a complete arrest. 2 R. C. L. 445; Rhodes v. Walsh, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632. The arrest not only conferred legal control and custody of the body of the defendant, but as a necessary incident the legal custody and control of the automobile in which he was riding. The fallacy in the request refused was in assuming that defendant had

legal control of the car, and asking the submission to the jury of the question whether the defendant was resisting the arrest in some manner no more serious than by simply attempting to run away and attempting to avoid arrest by simply fleeing from the sheriff. The conduct of defendant was much more than a mere attempt to escape. It was aggressive resistance. After the sheriff stepped on the car and made the arrest the struggle for control of the machine between him and the defendant was an unlawful struggle, initiated, not by the officer, but by the defendant, to wrest the machine from lawful control, asserted and taken by the officer. By initiating and persisting in the effort to wrest the control of the car from the sheriff, the defendant took the risk of his unlawful and aggressive action. It was the duty of the sheriff to overcome this active resistance by force proportionate to it. Hawkins v. Commonwealth, 61 Am. Dec. 161 (note); State v. Evans, 84 Am. St. Rep. 696 (note); State v. Krakus, 5 Boyce (Del.) 326, 93 Atl. 554; Leger v. Warren, 51 L. R. A. 215 (note); 2 R. C. L. 470. The principle stated has been applied in analogous cases.

After demanding the opening of the doors of a man's dwelling house it is the duty of an officer with a warrant charging a misdemeanor to break the doors, and if the accused resists, and in the struggle injures or kills the officer, he is a wrongdoer. 5 C. J. 426; Farmer v. Sellers, 89 S. C. 492, 72 S. E. 224.

An officer has the right to stop a train or stagecoach to effect an arrest. St. Johnsbury & L. C. R. R. Co. v. Hunt, 60 Vt. 588, 15 Atl. 186, 1 L. R. A. 189, 6 Am. St. Rep. 138; Brunswick & W. R. R. Co. v. Ponder, 117 Ga. 63, 43 S. E. 430, 60 L. R. A. 713, 97 Am. St. Rep. 152. Inevitably it follows that if in the exercise of the duty to stop the train and make the arrest the officer steps on the engine, and the engineer initiates a struggle with the officer to wrest the temporary control of the engine from him, he is liable for the consequences of the struggle. It would hardly be disputed that if defendant after arrest had pointed a gun at the sheriff as a means of effecting his escape, and in the struggle for the possession of the gun it had been accidentally discharged and killed the sheriff, the defendant would be civilly liable. It is true that, if in such a struggle initiated by the defendant the officer does a wanton or malicious act resulting in injury to the defendant, he, and not the defendant, would be responsible. 2 R. C. L. 470; 5 C. J. 424. But in this case even if the sheriff, in the excitement of the struggle initiated by the defendant, did so move the wheel that the car struck the bridge, it would be beyond all reason to say that the jury could find he maliciously or wantonly ran a car going 20 to 25 miles an hour against the bridge, when he knew that the impact would almost certainly result in his own death or serious injury. The overwhelming presumption is against such an inference. Viewing the testimony most favorably to the defendant, the only reasonable inference is that the defendant, after his arrest and after the sheriff had assumed legal control of the car, undertook to wrest it from the sheriff's legal custody, and in consequence of the struggle thus begun by the defendant the car was unintentionally driven against the bridge.

Davis was an officer of the state of West Virginia executing its warrant for the arrest of the defendant. His duty to enforce that warrant and the duty of the defendant not to resist within that state fall within the principle thus forcefully laid down by Justice Bradley in Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717:

"Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? * * *

"The argument is based on a strained and impracticable view of the nature and powers of the national government. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction."

Under these circumstances the first request of the defendant granted by the court was as favorable as the defendant had the right to ask, especially when it is considered with the conditions of recovery set out in plaintiff's first request.

The defendant had been tried in the state court under a criminal charge of responsibility for the death of Davis. By stipulation "that either the plaintiff or the defendant may read from a copy of the record in said criminal case as testimony, to the jury, the evidence of any of the witnesses who testified in said criminal case, from the record in said criminal case, without the personal attendance of any of the said witnesses, and said testimony when read to the jury is to have the same effect as if the said witnesses were present in court and so testified, so far as the same may be admissible in evidence." Under this stipulation the defendant offered, as tending to prove that defendant was not attempting to escape, the statement of Mr. Whitworth, one of defendant's counsel in the state court, which had been offered in the criminal trial there, but rejected as incompetent. This statement was to the effect that under Mr. Whitworth's advice defendant was ready to give bond for his appearance, and thus avoid formal arrest by the sheriff under the warrant held by him. As this was not the evidence of any witness who testified in the criminal case, it is not covered by the stipulation. But, waiving that, its exclusion was harmless, in view of the conclusive evidence that defendant was trying to escape.

Affirmed.

OLD DOMINION TRUST CO. v. FIRST NAT. BANK OF OXFORD et al.

(Circuit Court of Appeals, Fourth Circuit. July 1, 1919.)

No. 1697.

1. EXECUTORS AND ADMINISTRATORS ⟸122(1)—NONRESIDENT CURATOR MAY SUE IN STATE OF DEBTOR'S RESIDENCE.

The curator of an estate appointed under the law of Virginia, which made a valid contract with a nonresident debtor of the estate, by which it obtained collateral security, *held* authorized to maintain a suit in the state of the debtor's residence to enforce such contract.

2. JUDGMENT ⟸822(3)—AGAINST DEBTOR OF ESTATE CONCLUSIVE AS TO SET-OFF IN ANOTHER ACTION IN ANOTHER STATE.

The judgment of a court of Virginia in a conformity proceeding by the curator of an estate, by which an account was stated with a nonresident debtor, which appeared and presented claims against the estate as a set-off, *held* conclusive as to the amount it was entitled to set off in a suit by the curator against it in another state.

3. BANKS AND BANKING ⟸110—PRESIDENT MAY SUBMIT CLAIMS AGAINST DECEDENT ESTATE IN FOREIGN JURISDICTION.

The president of a banking corporation *held* to have authority, as an incident of his office, to submit claims of the bank against the estate of a decedent to the appropriate court in a foreign jurisdiction, and to bind the bank by such action.

Appeal from the District Court of the United States for the Eastern District of North Carolina, at Raleigh; Henry G. Connor, Judge.

Suit in equity by the Old Dominion Trust Company against the First National Bank of Oxford and others. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 252 Fed. 613.

H. M. Smith, Jr., and S. S. P. Patteson, both of Richmond, Va., for appellant.

A. A. Hicks, of Oxford, N. C., and T. T. Hicks, of Henderson, N. C. (Hicks & Stem, of Oxford, N. C., on the brief), for appellees.

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

KNAPP, Circuit Judge. The allegations of appellant's bill, which was dismissed by the court below, may be summarized as follows: W. H. Gooch, of Clarksville, Va., died intestate November 14, 1915. He left a large estate, the greater part of which was in Virginia, the balance in North Carolina. He was twice married. His sole heir at law is a daughter by his first wife, Mrs. Annie Wayne Suhor. About a month before his death he married Margaret Corwin Radcliffe, who survives him. On the day of their wedding, and just before the ceremony, they executed an antenuptial agreement which provided, in substance, that if she outlived him the sum of $50,000 should be paid to appellant, Old Dominion Trust Company, to hold the same in trust, and to pay over to her the net income therefrom so long as she remained unmarried.

A few days after Gooch's death his brother, J. H. Gooch, of Stem, N. C., was appointed administrator in that state, and shortly afterwards was also appointed by the clerk of the circuit court of Mecklenburg county, the county in which the intestate resided, administrator in Virginia. The latter appointment was opposed by the widow, who as such claimed administration for herself; but upon her appeal the circuit court decided against her, and against J. H. Gooch as well, and thereupon, on December 22, 1915, appointed appellant curator of the estate of W. H. Gooch, under a Virginia statute of applicable provisions. Just before this appointment, and on the 15th of December, Mrs. Suhor paid to appellant, as the trustee named in the antenuptial contract, and in accordance with its terms, the sum of $50,000, which sum she borrowed from appellee, the First National Bank of Oxford, on her demand note, bearing interest at 6 per cent., and an order for its payment on J. H. Gooch, the North Carolina administrator.

Among the assets which came into appellant's possession, upon its appointment as such curator, was a certificate of deposit for $80,300, dated December 22, 1914, and bearing interest at the rate of 4 per cent., issued to W. H. Gooch by the Oxford bank on the day of its date, and held by him at the time of his death. The trust company having called upon the bank to pay this certificate, or secure its payment, an arrangement was made and put into effect in February, 1916, by which the bank turned over to the trust company, to secure payment of the certificate, the note of Mrs. Suhor which it held, and agreed that the interest charged on the same should thereafter be but 4 per cent., the same as the certificate. It also agreed that all other notes held by it against Gooch's estate should from that time bear interest only at the rate of 4 per cent.

In August, 1916, the trust company as curator filed in the circuit court of Mecklenburg county a bill for conformity, according to Virginia practice, naming the widow and daughter as defendants; and since that time the Gooch estate, so far as administered in Virginia, has been administered under orders of the court in that suit. Among these was an order directing a commissioner of the court to take an account; that is, as we understand, ascertain the debts and liabilities of the estate. Accordingly there was a hearing on due notice by Commissioner Reeks at Clarksville, on August 14, 1917, at which the president of the bank and its attorney appeared and presented a number of notes made by Gooch and owned by the bank, which were claimed to be valid debts of his estate. Of the notes so presented four were payable on demand to F. A. Burton, a young man who had been Gooch's secretary or confidential clerk, two of them for $9,755 each, dated March 3, 1915, one for $525, dated April 5, 1915, and one for $150, dated June 23, 1914. There was a fifth note for $525, dated April 5, 1915, and payable on demand to R. E. Burton, a brother of F. A. Burton. These five notes, bearing interest at 6 per cent., were purchased by the bank on November 26, 1915, or 12 days after the death of Gooch, and with full knowledge that he was then dead. The production of these notes before the commissioner, the signature of the maker not being disputed, of course made a prima facie case of liability of the estate

for the amount of principal and interest appearing to be due thereon, and of a set-off of that amount against the certificate of deposit held by the trust company, and the burden was upon the latter to show that they should not be allowed accordingly. Claiming that the Burton notes were without consideration, if not fraudulent, counsel for the trust company thereupon examined the bank's president, without objection on his part, as to the circumstances under which the notes were purchased, and his testimony is made an exhibit to the bill of complaint. A further hearing was held at Clarksville a month later, at which the president and attorney of the bank appeared, and for reasons stated asked to withdraw its entire claim on the notes previously presented.

It seems that in the meantime the bank had made up a statement, crediting itself with all the Gooch notes it held, including the five Burton notes, and also with the Suhor note; and thus showing a balance due from it on the certificate of deposit of only $1,643.97. This statement, with the Gooch notes and a check for the balance, was mailed to J. H. Gooch, the North Carolina administrator, but he refused to accept the same, and promptly returned the papers to the bank. Of course the Suhor note was not sent, as it was in the trust company's possession, and for the same reason J. H. Gooch, if he had so desired, could not have surrendered the certificate. And here it may be mentioned that J. H. Gooch, although appointed administrator in North Carolina, appears to have performed none of the ordinary acts of administration, such as taking possession of assets, collecting debts due the estate, advertising for claims, paying creditors, and the like. Indeed, the Bank of Stem, of which J. H. Gooch was president, voluntariiy paid to the trust company, after it became curator, a certificate of deposit for some $30,000, which that bank had issued to W. H. Gooch in his lifetime, and which was turned over to the trust company upon its appointment. In this connection the bill alleges that the North Carolina administrator has never claimed, and does not now claim, the certificate in question, but has always recognized the right of complainant to hold and collect the same; and this is virtually admitted by him in an answer filed after the decree below was rendered.

The request of the Oxford bank to withdraw the claim it had presented was refused, and thereupon its representatives retired from the hearing. Examination of other witnesses then followed, and later, upon the whole testimony, the commissioner found and reported that the F. A. Burton notes were without consideration, being a mere gift inter vivos, and therefore not a valid claim against the Gooch estate. The other notes held by the bank, including the R. E. Burton note, were allowed. By decree of October 23, 1917, the circuit court confirmed the findings and report of the commissioner, and no appeal therefrom has been taken. This decree recites that the curator holds a certificate of deposit of the Oxford bank dated December 22, 1914, for the sum of $80,300, payable to W. H. Gooch; recites that the bank has valid claims against his estate, represented by described notes, amounting, with interest, to $8,950.15; expressly disallows the several F. A. Burton notes, which are stated to be held by the bank, "and

asserted by it in this suit as an offset to said certificate of deposit"; and directs the curator "to proceed to make settlement of the said matters with the said bank, allowing it credit for the sum of $8,950.15 only, with interest on the principal thereof, from the 1st of September, 1917, and taking such steps as it may be advised necessary and proper to accomplish such settlement and to collect the balance that may be so found due by said bank to the estate of said Gooch."

Upon the entry of this decree the trust company demanded payment of the balance which it was thereby directed to collect, but the bank refused such payment, and instead brought suit in the superior court of Granville county, N. C., against J. H. Gooch, as administrator of the estate of W. H. Gooch, and F. A. Burton, the object of which was, in substance, to compel a settlement upon the basis of the statement sent by it to J. H. Gooch as above recited. Not long afterwards the trust company commenced this action.

In addition to the foregoing the bill alleges that, upon refusal of the bank to make payment in accordance with the Virginia court's decree, it became the duty of complainant to sell the Suhor note, which the bank had pledged to secure the certificate, and that, as complainant has no power of attorney and the bank is a nonresident, it cannot sell the collateral or enforce the obligation secured thereby without the aid of the court in which the suit is brought.

The case made against the sheriff is this: That the tax he seeks to collect is levied on the $80,300 for which the bank issued the certificate of deposit, and on nothing else; that this asset of Gooch's estate is not taxable in Granville county, N. C., but only in Mecklenburg county, Va., where he resided; that the same is listed for taxation in the latter county; and that complainant has paid the taxes thereon for the period since Gooch's death, and also delinquent taxes "for a great number of years" prior thereto.

The bill prays that the bank "be required to pay over to your complainant the debt in question, with interest as aforesaid"; that complainant be directed as to how and when and on what terms it may sell the Suhor note; that the bank be enjoined from prosecuting its suit in the state court; that the sheriff be enjoined from attempting to collect the tax levied in Granville county; and for general relief.

[1] The court below sustained the bank's motion to dismiss the bill, on the ground that complainant, appointed only under the laws of Virginia, was without authority to sue in another jurisdiction; and the correctness of that ruling, as apply to the facts of record, is the question to be decided. The law is not doubtful. It is clearly stated in Moore v. Petty, 135 Fed. 672, 68 C. C. A. 310, citing numerous cases, as follows:

"The general rule undoubtedly is that an executor or administrator in his representative capacity cannot maintain an action in the courts of any sovereignty, other than that under whose laws he was appointed and qualified, without obtaining an ancillary grant of letters in the state where the action is brought, unless the right so to do is conferred upon him by the law of the forum. * * * But whenever the cause of action declared upon by the foreign executor or administrator is one which involves an assertion of his own right, rather than one of the deceased, or which has accrued directly to

him through his contract or transaction, and was not originally an asset of the estate in his charge, he may maintain an action in another state for the enforcement thereof, although express authority so to do may not be found in a statute of the forum. The principle underlying this modification of the general rule is that, when the cause of action accrues directly to the executor or administrator, it is assets in his hands for which he may sue in his personal capacity, and, if he sues as executor or administrator, the words so describing him will be regarded as merely descriptive, and be rejected as surplusage."

If, then, as the bank concedes, the arrangement of February, 1916, constituted a valid and binding contract between it and the trust company, the latter may sue in North Carolina, the state of defendant's domicile, to enforce that contract; or if, as is also conceded, the decree of the Virginia court is a valid judgment in favor of the trust company and against the bank, the trust company may sue in North Carolina to collect that judgment. Considering, first, whether there was a valid contract, we have to take into account the situation of the parties when the arrangement in question was made. The bank owed Gooch's estate $80,300 and some interest, a debt then due, the evidence of which was the certificate of deposit, payable on demand, which passed to the possession of the trust company on its appointment as curator. The size of the debt fully warranted the trust company in requiring it to be paid or secured. Naturally, the bank desired not to lose a large deposit on which it was paying only 4 per cent., while lending the money at 6 or more. J. H. Gooch was in effect disclaiming any right or desire to administer this asset of his brother's estate, and not in fact acting as administrator in North Carolina. On the contrary he was apparently quite willing that the entire estate should be administered by the trust company in its capacity of curator. The bank had loaned Mrs. Suhor $50,000, and held her note for that amount. It does not appear that the order she gave on the North Carolina administrator had been accepted by him, or that there was ever any expectation that he would pay the note. The certificate of deposit which his own bank had issued to the intestate was voluntarily paid to the trust company, and the arrangement under review must be presumed to have been made with his knowledge and approval, as he was a director of the Oxford bank at the time. The note of Mrs. Suhor was given after her father's death, and its subsequent hypothecation conferred rights which were not originally an asset of Gooch's estate, but which accrued directly to the trust company through its own contract with the bank. The whole arrangement, including the pledge of the note, was entered into by or with the assent of the several parties in interest, and evidently regarded as beneficial to all concerned. There was not only an acknowledgment of the trust company's right to hold and collect the certificate, but, in effect and intention, a promise by the bank to pay the same to the trust company at such future time as payment should be required. The agreement was lawful, the parties competent, and the consideration sufficient. To say nothing else, the bank gained by being allowed to retain indefinitely a large deposit, which otherwise it might have been compelled to pay at once; and Mrs. Suhor, to whom the money would ultimately go, got

a reduced rate of interest on her note. We perceive no infirmity in the contract thus made, and which was long treated by the bank as binding, and no substantial reason why the same, as a contract of the trust company itself and not of the decedent in his lifetime, may not be enforced in a foreign jurisdiction. In our judgment, the case made by the bill comes clearly within the well-recognized exception to the rule invoked by the bank, and should be sustained accordingly.

Nor can it be doubted that the trust company's right of action was of equitable cognizance. It could not sue Mrs. Suhor on her note, for the title thereto was in the bank, which had merely pledged the note as security for the certificate; it could not sue the bank, for the bank had not indorsed it; and it could not sell the collateral without an order of the court. In this situation the trust company's proper if not only resort was a court of equity. The proposition is too plain for argument.

[2] If the above-stated conclusions are correct, it is not necessary to decide whether the decree of the circuit court of Mecklenburg county was a valid judgment against the bank, on which of itself the trust company could sue in North Carolina; it is sufficient to hold, as we do, that it was a final adjudication, since there was no appeal, of the bank's claim against Gooch's estate, and therefore fixed the amount which the bank was entitled to set off against the certificate of deposit. Granted that the Virginia court had no power, under the bill for conformity or otherwise, to determine the indebtedness of the bank to Gooch's estate, or to the trust company, it nevertheless had power, and that power was duly invoked, to determine the estate's indebtedness to the bank. It was clearly within the scope of the bill for conformity to ascertain the debts and liabilities of the estate, and its sufficiency for that purpose has been affirmed by the highest court of the state. Gooch v. Old Dominion Trust Co., 121 Va. 30, 92 S. E. 846. The proceeding was regular and in full compliance with the Virginia statutes. The president and attorney of the bank voluntarily appeared before the commissioner, produced the notes held by it, and asked to have them allowed at their face value. To say that this was not an "appearance" in a legal sense, and the formal presentation of a claim, is to contradict the outstanding and conceded facts. For what else were they there? It is surely beyond question that a foreign creditor may, if he choose, come into the state of a decedent's domicile and present his claim against the decedent's estate to the official authorized by the laws of that state to examine and pass upon the same. By so doing he submits his rights to the adjudication of the local tribunal and is bound by its decision.

[3] And if the foreign creditor be an incorporated bank, as in this instance, we deem it equally beyond question that its president has authority, as an incident of his office, to submit the bank's claim and bind the bank by such action. For argument's sake, it may be granted that the bank would not be bound by a judgment of the Virginia court in an action brought therein against the bank, where jurisdiction depended upon the voluntary appearance of the president on his own motion; but it by no means follows that he had not authority to submit the bank's claim against Gooch's estate, just as he might have au-

thorized a suit thereon against Gooch himself if he had been living. The plea of want of authority is without merit.

Moreover, as the record shows, the presentation of the claim at the first hearing was complete, and at that time supposed to be final. The notes were produced, Gooch's signature proved or admitted, and the bank's president examined by counsel for the trust company. This closed the hearing, and the case thus made was submitted to the commissioner for decision, both parties consenting. Later, on the commissioner's own motion, the case was reopened and a date fixed on due notice for further hearing. The bank's president and attorney again appeared, and then for the first time objected to the proceeding and sought to withdraw the claim. We are clearly of opinion that the attempt to do so came too late and was wholly ineffectual. The Virginia court had acquired jurisdiction of the bank by the voluntary appearance of its president and the final submission of its claim a month before. The right to litigate elsewhere was gone, and the commissioner correctly decided to refuse the requested withdrawal and to take the testimony which the trust company thereupon offered. The decree afterwards entered, confirming the findings and report of the commissioner, was therefore a valid determination of the amount which Gooch's estate owed the bank, and that determination became final and conclusive upon failure to take timely appeal. If the commissioner had found that all the Burton notes were valid and just claims, and his finding to that effect had been confirmed by the court, can there be any doubt that the decree would have bound the estate? Why then should not the decree actually made, though adverse in part, be equally binding on the bank?

For the reasons thus outlined we are constrained to hold that the trust company had the right to sue in North Carolina, and therefore in the court below, and that the bank is concluded as to its claim against the Gooch estate by the proceeding in Virginia to which it made itself a voluntary party.

The decree dismissing the bill will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

KENAN, McKAY & SPIER v. YORKVILLE COTTON OIL CO.

(Circuit Court of Appeals, Fourth Circuit. July 1, 1919.)

No. 1695.

SALES ⊂=71(4)—CONTRACT FOR SALE OF SEASON'S PRODUCT—BREACH.

A contract by a cotton seed oil mill for the sale of its "season's output of linters, about 400 bales," *held* not violated by the closing of the mill before the end of the season for sufficient reasons not connected with the contract.

In Error to the District Court of the United States for the Western District of South Carolina, at Rock Hill; Charles A. Woods, Judge.

Action at law by Kenan, McKay & Spier, a corporation, against the Yorkville Cotton Oil Company. Judgment for defendant, and plaintiff brings error. Affirmed.

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

J. A. Marion, of York, S. C., and Winfield P. Jones, of Atlanta, Ga., for plaintiff in error.

John R. Hart and George W. S. Hart, both of York, for defendant in error.

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

KNAPP, Circuit Judge. Plaintiff in error, plaintiff below, a Georgia corporation, is a dealer in cotton linters. Defendant, a South Carolina corporation, is the owner of a cotton seed oil mill at Yorkville, in that state. In July, 1915, these parties entered into a contract whereby plaintiff bought and defendant sold its "season's output of cotton linters for season 1915–1916, about 400 bales," on terms specified. In this oil mill business the "season" is said to begin with August and end with the following July; but it appears that the period of active operations, during which most of the available seed is consumed, covers ordinarily only four or five months. Defendant started up its mill in September, and kept it running until the latter part of November, when it was closed down. In that time it produced 155 bales of linters, all of which were delivered to and paid for by plaintiff according to the contract. On the last invoice was indorsed the statement:

"On account of not being able to borrow money for operating purposes, our mill has been forced to close down for the season 1915–1916."

And under date of December 18th the defendant wrote:

"We have shipped you our entire output, and, should we resume operations this season, we will ship you any further linters we make. We have nothing to add to this, and from our standpoint it closes the matter."

In the following February plaintiff brought suit for breach of contract in the court of common pleas for York county, S. C. Upon the trial of the cause, and at the close of plaintiff's testimony, the court granted defendant's motion for a nonsuit, and this ruling was affirmed by the Supreme Court of the state in March, 1918. 96 S. E. 524, 1 A. L. R. 1387. Not long afterwards the present action was commenced to recover damages for breach of the same contract. In the court below a verdict was directed for defendant, and plaintiff comes here on writ of error.

There is little dispute about the facts, and the case turns on the construction of the contract. Plaintiff contends that it obligated defendant to operate its mill during the season named, and that raises the decisive question. It is well settled that such a contract as is here considered carries no guaranty that the estimated quantity will be delivered. The promise of the seller is not absolute. It is essentially a pledge of good faith; and so the courts have held. In Brawley v. United States, 96 U. S. 168, 171 (24 L. Ed. 622), a case frequently cited, it is said:

"Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a cer-

tain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about,' or 'more or less,' or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it."

Among numerous cases to the same effect are Pfann & Co. v. Lumber Co., 194 Fed. 71, 114 C. C. A. 89; Ramey Lumber Co. v. Schroeder Lumber Co., 237 Fed. 39, 150 C. C. A. 241; Wemple v. Stewart, 22 Barb. (N. Y.) 154; Drake v. Vorse, 52 Iowa, 417, 3 N. W. 465; McKeever, Cook & Co. v. Canonsburg Iron Co., 138 Pa. 189, 16 Atl. 97, 20 Atl. 938; Loeb v. Winnsboro Cotton Oil Co. (Tex. Civ. App.) 93 S. W. 515; McIntyre v. Jackson, 165 Ala. 271, 51 South. 767, 138 Am. St. Rep. 66, and cases cited in 35 Cyc. 208. Very much in point also is the English case of Burton v. Great Northern Ry. Co., 9 Exchequer, 507. In that case Burton had a contract for the cartage between Hatfield and Ware of such merchandise as the railway company might present to him for that purpose; that is, as we understand, such merchandise as the company had occasion to transport between the points named, and it was evidently in contemplation that merchandise for cartage would be furnished during the year covered by the contract and the optional period of its renewal. Some six months later the railway company leased its line to another road and agreed not to carry between Hatfield and Ware, with the result that the cartage service contracted for was no longer required. But the court held that the company was not bound to operate its line, and therefore could terminate Burton's contract without liability to him. The principle upon which this decision rests applies with controlling force, as we think, to the facts of the instant case.

This identical contract was before the Supreme Court of South Carolina, as above stated, and that court held that defendant was not bound to operate its mill in order to make the estimated quantity of linters, and that its obligation was discharged by the delivery to plaintiff of all the linters actually produced. The court says:

"The buyer is bound to take the output, because he agreed to that. The seller is not bound to furnish more than the 'output,' because he has only agreed to furnish that much."

A similar contract, to which plaintiff was a party, was passed upon by the Supreme Court of Alabama, Kenan et al. v. Home Fertilizer & Cotton Oil Co. (Ala.) 79 South. 367, and that court said:

"It is not possible to imply an obligation to make an article from an assumption of the limited obligation to sell, not a definite number of an article, but simply merely what the seller makes. * * * The seller having acted upon the buyer's promise to take his output, the buyer becomes bound to take what the seller has made, in reliance upon the buyer's promise, and the seller becomes likewise bound to deliver the output of his plant."

It is true that the Court of Appeals of Georgia overruled the demurrer to a complaint of plaintiff, based on alleged breach of a like contract for the purchase of linters. Dawson Cotton Oil Co. v. Kenan, McKay & Speir, 21 Ga. App. 688, 94 S. E. 1037. But the complaint

in that action alleged that the Dawson Company shut down its mill wrongfully and in bad faith, that is, for the purpose of evading its contract obligations, and that allegation was necessarily assumed to be true on demurrer. Nevertheless the court took occasion to say:

"Of course, had the defendant discontinued the operation of its mill for some providential cause, or for any cause or causes not in any wise attributable to it, a delivery on the part of the mill of its output up to the time it ceased to operate would be all that the law would require."

And it cited from Brawley v. United States, supra, the paragraph above quoted, emphasizing by italics the final clause that the naming of the quantity is not in the nature of a warranty, but only an estimate of probable amount, "in reference to which good faith is all that is required of the party making it."

The complaint in this suit contains a similar allegation of bad faith, but the record is searched in vain for any evidence to support it. On the contrary, it is shown by convincing and undisputed testimony that persistent efforts were made to continue the business. The mill was shut down solely for lack of money to keep it going. It appears that defendant had little or no working capital, that its own borrowing power was exhausted, and that it had no assets with which to secure advances. In previous years the necessary funds had been procured on notes indorsed by the directors; but this year the directors refused to indorse, as they had the undoubted right to do, and defendant was destitute of other resource. It could not go on without ready money and its inability to borrow is admitted. In this helpless condition it is not perceived that it could do otherwise than suspend operations, and there is nothing of record to indicate that it did not act in good faith in closing down its mill. This being so, we are clearly of opinion that plaintiff failed to make out a cause of action, and the learned trial judge was therefore right in directing a verdict for defendant.

Moreover, and this of itself seems conclusive, the commercial products derived from the process of crushing cotton seed are oil, meal, hulls, and linters. As the value of the latter is barely 10 per cent. of the total, it is not to be supposed that defendant would go out of business in order to avoid the comparatively small loss on its contract with plaintiff. Indeed, we think it evident that this contract had practically nothing to do with the discontinuance of operations; and on the whole case we agree with the Supreme Court of South Carolina in saying:

"The plaintiff proved that the reason the plant was not operated was for the lack of money and the inability to borrow it, and the plant would have been operated if money could have been had. There is not a suggestion to the contrary. It is contrary, too, to the reason of the case that the cotton oil company would forego crushing seed and making oil and cake in order to curtail its by-product of linters."

We have not considered, and do not decide, whether the decision of that court in the former suit was res adjudicata of the question here in dispute, preferring to affirm the judgment on the merits for the reasons above outlined.

Affirmed.

THE DORSET. THE POCAHONTAS. THE CRISFIELD. THE NO. 18.

(Circuit Court of Appeals, Fourth Circuit. July 1, 1919.)

Nos. 1691, 1692.

1. COLLISION ⊂=102—MUTUAL FAULT ON STEAMSHIP LEAVING PIER AND PASSING TOW.

A collision between a steamship being backed from her pier and headed for sea by a tug, and the tow of a tug passing in the channel, *held* due to faults of the masters of both tugs, each of whom left it to the other to keep out of the way and failed to take any precautions.

2. COLLISION ⊂=106—WHAT ARE "SPECIAL CIRCUMSTANCES" REQUIRING REASONABLE CARE FROM BOTH VESSELS.

The case of a steamship backing from her pier into a channel and a passing tug with a tow is one of "special circumstances," within Inland Navigation Rules, art. 27 (Comp. St. § 7901), and both vessels are required to navigate with reasonable care to avoid collision.

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

3. COLLISION ⊂=96—VESSEL BACKING INTO CHANNEL HAS BURDEN OF GREAT CARE.

A vessel backing into a channel, where other vessels are passing, is under the burden of great care in her movements and in giving and responding to signals.

4. COLLISION ⊂=95(1)—VESSEL IN CHARGE OF TUG NOT LIABLE FOR FAULTS OF MASTER OF TUG.

A steamship, under the exclusive control of the master of a tug employed to move her from her slip and start her to sea, is not liable for faults in her navigation which contribute to a collision.

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

Suit in admiralty for collision by Arthur Lloyd Hughes, master of the British steamship Dorset, against the tug Pocahontas and the tug Crisfield and barge, the New York, Philadelphia & Norfolk Railroad Company, claimant, with cross-libel. Decree holding both tugs in fault, and the Lambert's Point Towboat Company, claimant of the Pocahontas, appeals. Affirmed.

For opinion below, see 250 Fed. 867.

E. E. Blodgett, of Boston, Mass., and Braden Vandeventer, of Norfolk, Va. (Hughes, Vandeventer & Eggleston, of Norfolk, Va., on the brief), for appellant Lambert's Point Towboat Co.

Robert M. Hughes, of Norfolk, Va. (Willcox, Cooke & Willcox, Hughes, Little & Seawell, and Thomas H. Willcox, all of Norfolk, Va., on the brief), for appellant New York, P. & N. R. Co.

Edward R. Baird, Jr., of Norfolk, Va., and John M. Woolsey, of New York City (Kirlin, Woolsey & Hickox and Robert S. Erskine, all of New York City, on the brief), for appellee Hughes.

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

WOODS, Circuit Judge. [1] On the morning of January 25, 1917, the British steamship Dorset, with full cargo, starting to sea from

Pier No. 4 at Lambert's Point, Va., in charge of the tug Pocahontas, collided with barge No. 18 moving down the channel in tow of the tug Crisfield. For the resulting damage the master of the Dorset on January 30, 1917, filed a libel against both tugs and the barge. On February 7, 1917, the New York, Philadelphia & Norfolk Railroad Company, owner of the Crisfield and the barge, filed a libel against the Pocahontas and the Dorset. The causes were consolidated, and the libel of each of the parties was treated as the answer to that of the others. On the Pocahontas' plea of limitation of liability to both libels, by stipulation her value was fixed at $15,000. Upon evidence taken by deposition and in open court, the District Court held, that the collision resulted from the negligent navigation of the tug Pocahontas and the tug Crisfield, and held their owners equally liable for the damages $25,500. The case turns chiefly on conflicting estimates of time and distance, founded on recollection of impressions received at a time of crisis and excitement, and as usual in such cases it is difficult to find the truth.

The Dorset is a twin screw steamer, 7,000 gross tonnage, 4,827 net, 460 feet long, 58 feet beam, and 31 feet deep. She began to move away from the pier at 10:45 in the morning, an earlier start being prevented by fog. Her agents had employed Lambert's Point Towboat Company to take charge of turning the ship in the channel and starting her to sea, and the towing company used its tug Pocahontas, in command of Capt. Mills, for that purpose. Mills took entire charge of the steamer, and its officers and crew acted under his orders. There is conflict in the evidence as to whether the Pocahontas was ever attached by a hawser to the Dorset, but all the witnesses agree that she was used to push the Dorset around. As the lines were let go the Dorset gave one long blast to indicate that she was about to leave the pier for the channel, and by order of Mills her engines were put slow astern and her helm hard aport. There was no answer to the whistle. She moved out of the dock with her engines slow astern at the speed of about a mile to a mile and a half an hour. When the Dorset was about halfway out of the dock, the Crisfield, coming down the channel about half mile away with the car float in tow, gave two blasts of her whistle, indicating her desire to pass astern of the Dorset. The vessels were in view of each other. The movements of the Dorset were obvious to the master and crew of the Crisfield, and Capt. Mills on the Dorset could not have failed to discern the course and position of the Crisfield and her tow. The Dorset made no response to this signal, and continued her course astern without reversing either engine, being then at a considerable angle with the dock. In a very short time, probably a minute, the Crisfield again blew two blasts, and to this signal the Dorset assented by two blasts.

According to the testimony of Capt. Mills, when these signals were given the Crisfield was only about 30 or 40 feet away. If that be true, it is evident that he continued his movement astern with the obvious risk of collision towards the course which he saw the Crisfield was making without reversing either engine. However that may be, the log of the Dorset and other evidence show that, with the Crisfield

and her course and the danger of collision perfectly obvious, Capt. Mills delayed one minute to put his starboard engine full speed ahead and two minutes to put his port engine full speed ahead. The use of these two minutes almost certainly would have prevented the collision. Indeed, Scott, the pilot who was to take the Dorset to sea, testified that she continued her movement to effect the swing or turn until the collision was imminent, and only then put full speed ahead. Seeing the course and nearness of the Crisfield, the navigator of the Dorset, on hearing her first signal, had two courses open: He should have given the signal of dissent or the danger signal before continuing his movement, thus putting upon the Crisfield the duty either to stop or alter her course; or he should have assented to the first signal of the Crisfield and immediately put both engines full speed ahead to get out of the way of the approaching tug. His negligence was in doing neither, and continuing his course, as he himself testified, after hearing the signal from the Crisfield.

Against this inference it is contended on behalf of the navigator of the Dorset that the testimony shows there was abundant space on the other (the west) side of the channel for the Crisfield and her tow, that the Crisfield was bound to use that space, and that Capt. Mills had a right to assume that it would do so. The evidence is in hopeless conflict as to the space left open between the Dorset and the vessels anchored on the other side. It is impossible to say with certainty what the open space was; but, allowing for exaggeration on both sides, it seems reasonably certain that the space was so narrow as to require the navigator of the Dorset to reverse promptly his engines when he saw the approaching tug and tow and the course they were taking after his signal of assent. It is contended, also, that the Dorset would have run into the pier if she had put her engines full speed ahead when the Crisfield first signaled. It is true that at the time of the collision she was at an angle of 30 to 45 degrees with the channel; but the master of the Dorset testified that the order to go full speed ahead should have been given by Capt. Mills before it was, thus clearly indicating that in his opinion the order would not have resulted in striking the pier; and the fact is that when the movement ahead was made it did not result in striking the pier.

[2, 3] The situation was one of special circumstances under article 27 of the Inland Navigation Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 102 [Comp. St. § 7901]), not a crossing or overtaking case (The Transfer No. 17, 254 Fed. 673, — C. C. A. —; The M. Moran, 254 Fed. 766, — C. C. A. —; The William A. Jamison, 241 Fed. 950, 154 C. C. A. 586), and required reasonable care to avoid immediate danger. Atlas Transp. Co. v. Lee Line Steamers, 235 Fed. 492, 149 C. C. A. 38, is relied on as holding the signal of the Crisfield and the assent of the Dorset imposed no obligation on the Dorset. But that was an overtaking case, where ordinarily there is no duty on the overtaken vessel, except to keep her course, unless she perceives danger not obvious to the overtaking vessel. A vessel backing across a channel is in a very different position, and is under the burden of great care in her movements and in giving and responding to sig-

nals. The Sicilian Prince (D. C.) 128 Fed. 133, 144 Fed. 951, 75 C. C. A. 677; The Norman B. Ream, 252 Fed. 409, 164 C. C. A. 333. This burden of care we have shown the navigator of the Dorset did not discharge.

The fault of the Crisfield is even more manifest. No certain conclusion can be reached as to the length of the hawser. Experienced navigators testifying for her say it was only 200 feet; those testifying against her say it was much longer. The District Court's conclusion that it was 600 feet is of great weight. If this finding be correct, she was violating the rules of navigation, and so assumed the burden of showing, not only that the collision might not or was probably not caused by her violation of the rules, but that it could not have been. Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726. But, assuming that her hawser was not unlawfully long, there is no doubt of her negligence in other respects. She was moving 7 miles an hour, her full speed, with a cumbrous tow, turning a bend in water where there were many vessels anchored, and where vessels going to sea might back into the channel at any moment, and with knowledge, not only from signal, but by sight, that the Dorset was actually doing so. Yet she continued her course and speed until it was too late to escape collision, recognizing no duty to take into account the movements of the Dorset. Under such conditions it was the duty of the Crisfield to take every reasonable precaution, especially as to course and speed, not to interfere with the Dorset or other vessels leaving their slips. The Illinois, 87 Fed. 574, 31 C. C. A. 111; Greenwood v. The William Fletcher (D. C.) 38 Fed. 156.

Mills, the navigator of the Dorset, testified that, although he assented to the passing signal of the Crisfield, he considered that he owed no duty to keep out of her way; that she proceeded at her own risk in all respects. Forrest, the navigator of the Crisfield, testified that when the Dorset gave her two whistles of assent he did not understand that he was under any obligations to keep out of her way. This curious attitude and misconception of duty of two experienced navigators explain the faults of both which, acting together, resulted in the collision.

[4] It remains to say that the owners of the Dorset were not liable for the faults in her navigation. She was under the exclusive control of Mills, not as a pilot, but as the master of the tug Pocahontas, employed by the agents of the Dorset to take her from the dock and start her to sea, and the tug was actually pushing her in making the maneuver. Under these circumstances the negligence in the navigation of the Dorset was the negligence of the towing company as an independent contractor. The Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600; Sturgis v. Boyer et al., 24 How. 110, 16 L. Ed. 591; Wilmington Railway Bridge Co. et al., v. Franco-Ottoman Shipping Co., 259 Fed. 166, — C. C. A. —.

Affirmed.

SHUGART et al. v. CRUISE.

(Circuit Court of Appeals, Fourth Circuit. July 1, 1919.)

No. 1689.

1. PARTIES ⟸95(1)—AMENDMENT TO CHARGE DEFENDANTS JOINTLY.
Under Acts Va. 1914, c. 331 (Code Supp. Va. 1916, p. 993), providing for allowance of amendments to pleadings, in a proceeding under Code Va. 1904, § 3211, against two defendants charged with several trespasses, an amendment may properly be allowed charging them jointly.

2. VENUE ⟸14—FALSE IMPRISONMENT—ACTIONS—JURISDICTION.
Under Code Va. 1904, § 3215, providing that an action may be brought "in any county * * * wherein the cause of action or any part thereof arose, although none of the defendants reside therein," an action for false arrest and false imprisonment may be brought in the county of imprisonment, where defendants were served, although they resided and the arrest was made in another county.

3. FALSE IMPRISONMENT ⟸31—ACTION FOR DAMAGES.
Evidence that defendants arrested plaintiff at his home without a warrant, searched his house without a search warrant or his permission, and took him to another county and placed him in jail, and that he was subsequently discharged for want of prosecution, *held* to sustain a verdict and judgment for false imprisonment.

In Error to the District Court of the United States for the Western District of Virginia, at Danville; Henry Clay McDowell, Judge.

Action at law by Thomas Cruise against H. V. Shugart and J. N. Wood. Judgment for plaintiff, and defendants bring error. Affirmed.

R. E. Byrd, U. S. Atty., of Richmond, Va., for plaintiffs in error.

J. R. Smith, of Martinsville, Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This suit was instituted in the circuit court of West Virginia for Henry county. It was removed to the United States District Court under section 643, R. S. (Comp. St. § 1015). The parties will be designated according to the respective positions they occupied in the court below.

In the state court action was instituted against defendants under section 3211 of the Code of Virginia. In the original action it was charged that the defendants—

(a) Did without authority of law search the home of plaintiff in Henry county, Va.

(b) Did unlawfully arrest plaintiff at his home in Franklin county, Va.

(c) Did unlawfully imprison plaintiff in jail at Martinsville, Henry county, Va.

It was alleged that each of these trespasses was done by "you and each of you" (meaning the defendants).

[1] Demurrer was interposed by defendants, which was sustained. However, against the objection of defendants, leave was given

to amend the motion, so as to charge the several trespasses as joint. The plaintiff then filed a bill of particulars, showing that suit was for three distinct causes of action—unlawful search and unlawful arrest in the county of Franklin, Va., and unlawful imprisonment in the county of Henry, Va.

It is insisted by the first assignment of error that the court below erred in granting the plaintiff leave to so amend his notice as to allege a joint tort; the contention of the defendants being that, while the courts of Virginia are liberal in permitting amendments, they have "not gone so far as to permit the very structure of the suit to be changed by amendment."

In the original motion it was declared that the acts complained of were several and unrelated acts of each of the defendants. By the amendment the plaintiff was permitted to charge a joint trespass. Chapter 331 of the Acts of 1914 (Pollard's Code, vol. 4, 993), contains the following provision:

"Be it enacted by the General Assembly of Virginia, that in any suit or action hereafter instituted, the court may at any time, in furtherance of justice, upon such terms as may be just, permit any proceeding or pleading to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The object of the notice is to afford the defendants definite information as to the grounds upon which they will be called upon to pay the sum demanded. In Burks' Pleading and Practice, p. 292, among other things it is said:

"In proceedings by motion under sections 3210 and 3211 of the Code, the notice takes the place of both writ and declaration, and being presumed to be the act of the parties themselves, is to be liberally construed, so as to uphold the motion, if possible. No particular form is necessary. Any form will be sufficient if the defendant cannot mistake the object of the motion."

It cannot be said that the amendments were in any sense in the nature of a surprise to the defendants, or that the structure or basis of the suit was disturbed in the slightest by the action of the court below in granting the motion of the plaintiff to amend.

[2] While the question of jurisdiction is not raised in the assignments of error, it is now suggested that the court below was without jurisdiction, in that both defendants were at the time of the institution of the suit residents of Franklin county, and therefore neither of them could be tried for a trespass in Franklin county, unless they were served with process there; that the evidence showed that they were sued in Henry county and served with process in that county.

This ordinarily would be true, were it not for the provisions of section 3215 of the Virginia Code, which is in the following language:

"An action may be brought in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein."

The plaintiff, as we have said, while residing in Franklin county, was carried to Henry county, and there falsely imprisoned by the

defendants. This clearly brings the case within the purview of the above-quoted section of the Virginia Code, inasmuch as a part of the cause of action arose in Henry county. It also further appears that the defendant Wood, who it is insisted was not served with process, appeared and submitted himself to the jurisdiction of the court, thereby waiving service of process. That the court had jurisdiction against Wood under the circumstances we think is not a debatable question.

It is admitted that the court had jurisdiction to try defendants for trespass in Henry county; however, it is contended that it had no jurisdiction to try defendants for trespass committed in Franklin county, and that the court below was in error in not requiring plaintiff to elect upon which cause of action he would proceed, and in compelling them to submit to a trial of three causes of action, in only one of which the court had jurisdiction, and that the verdict of the jury included damages for three trespasses, when they could only have ascertained the damages for one.

The home of plaintiff in Franklin county was invaded, and the trespass which began there was continued until his lodgment in jail in Henry county, and was therefore a continuing tort, and the amendments in question amplified the grounds upon which plaintiff sought to recover damages, which gave them adequate information as to the nature of the plaintiff's demands. Therefore under the circumstances we can see no prejudicial error in granting the same.

[3] Among others, plaintiff introduced a witness by the name of Lovel, who testified as follows:

"That on the 24th day of January, 1918, he was at the house of the plaintiff, Thomas Cruise, in the county of Franklin, Va.; that there were present in the house Thomas Cruise's brother-in-law, Manning; the plaintiff's wife, who was then pregnant, a monthly nurse, and Cruise's children, and that to this house on that date came H. V. Shugart and J. N. Wood; that Shugart and Wood behaved boisterously and frightened the wife of the plaintiff, and that they found the plaintiff, Cruise, making a box in one of the two rooms of the house, and that they took an axe and knocked the box to pieces; that they searched the house without a warrant and without permission of the plaintiff, Cruise; that they arrested Cruise and the brother-in-law, Manning, and took them to Martinsville, in Henry county, where Cruise was imprisoned; that Cruise was bailed to appear at a subsequent day before the commissioner; that when he appeared on that day a new warrant was sworn out, and Cruise was again bailed to appear at a later day before the commissioner on the new warrant; that he did appear on that day, and that no one appeared against him, and he was dismissed by the commissioner at Martinsville."

Plaintiff also introduced his brother-in-law, Manning, who corroborated his testimony in the main. From the testimony of these witnesses it appears that the arrest of plaintiff was made in the county of Franklin by defendants; that they abused plaintiff's wife, who was in a delicate condition, and by their boisterous conduct greatly frightened her; that without any reason for so doing they knocked a box to pieces that was being made by plaintiff, and arrested and carried him to Martinsville, in Henry county, over his protest, where he was imprisoned.

It is admitted by defendants (who testified in their own behalf) that the plaintiff was arrested without a warrant, and that while under arrest they took him to Henry county and put him in jail; that they then returned to Franklin county to get their horses, in the meantime leaving plaintiff in jail; that during their absence a warrant was sworn out for plaintiff by a revenue officer attached to another department, but it appears that that warrant was based on a misunderstanding of the nature of the offense for which they sought to convict him. Whereupon, at the suggestion of defendant Shugart, the warrant was dismissed, and another warrant charging plaintiff with illicit distilling was obtained; that some days thereafter, in the absence of defendants plaintiff was tried on that warrant and acquitted. It was insisted that the case was dismissed owing to the fact that no government witnesses were present when the case was called for trial. However, it does appear that no bill of indictment was obtained against plaintiff, nor was he ever bound to court upon any warrant charging him with the offense upon which the alleged arrest was made.

Defendants contend that Cruise gave them permission to search the house and that they were not in any way violent. They deny having knocked the box to pieces in the house, but say they took it in the yard, and that they had reason to believe and did believe that Cruise was the operator of the distillery which they found. Thus it appears that plaintiff was arrested by defendants in utter disregard of law, by taking him into custody without first having procured a warrant. Plaintiff also insists that they searched his house without permission, and defendants admit they had no search warrant. There is no provision in the statute which authorizes a deputy marshal or other officer to make an arrest without a warrant, except where a party is found engaged in the actual violation of law. This was not the case in this instance. There were only circumstances, to say the most of it, that could have been used on the trial of the plaintiff; but even then it would have been a question for the jury to say what inferences should be drawn therefrom.

Plaintiff bases his action upon the ground that defendants invaded his home and arrested him without first having obtained authority for so doing. The defendants having committed these acts, the burden was upon them to show: (a) That they had a search warrant; (b) that they had a warrant for arrest of plaintiff. There being a total absence of proof to sustain either of these propositions, we think the jury very properly found in favor of plaintiff.

Therefore, in any view of the case, the defendants were trespassers, and continued to be such from the time the arrest was made until defendant was discharged from imprisonment. It is true that they insist, as we have stated, that plaintiff gave them permission to make the search; but the jury were the sole judges as to this point, and, having found against the defendants, we are not inclined to disturb the verdict.

Under these circumstances the court very properly treated the whole transaction as being continuous in its nature, and, the trespass being

continuous, we think the court not only acquired jurisdiction as to the transactions in Henry county, but also had jurisdiction to hear and determine the questions involved in the arresting and transporting of the defendant against his will from Franklin to Henry county jail.

In view of what we have said, it follows that the judgment of the court below should be affirmed.

CAMUNAS et al. v. NEW YORK & P. R. S. S. CO.

(Circuit Court of Appeals, First Circuit. June 3, 1919.)

No. 1369.

1. COURTS ⟸262(1)—JURISDICTION OF FEDERAL COURT—CONSTRUCTION OF PORTO RICO STATUTE.
   While it is undesirable for a Porto Rico statute to be first construed in a federal court, plaintiff cannot be refused equitable relief on that ground alone.

2. TERRITORIES ⟸32—SUITS AGAINST—PORTO RICO.
   A suit to restrain the Porto Rican Workmen's Relief Commission from requiring plaintiff employer to make reports or pay premiums to it may be maintained against the objection that the suit is really against the people of Porto Rico.

3. INJUNCTION ⟸74—IRREPARABLE DAMAGE—WORKMEN'S COMPENSATION.
   An injunction to restrain the Porto Rican Workmen's Relief Commission from requiring plaintiff to furnish reports and pay premium taxes to the commission will be denied, upon the ground that compliance will cause plaintiff no irreparable injury, since the premiums may be paid under protest and recovered, pursuant to Act March 9, 1911.

4. TAXATION ⟸607—RESTRAINING COLLECTION.
   An injunction against the collection of taxes will be issued only in a very plain case.

5. STATUTES ⟸207—CONSTRUCTION—INCONSISTENT PROVISIONS.
   Inconsistent provisions in a statute must be reconciled, if possible, by determining the legislative intent from the act as a whole, construed under the circumstances surrounding the Legislature at the time of its enactment.

6. STATUTES ⟸207—CONSTRUCTION—CONTRADICTORY WORDS.
   Words apparently inserted through inadvertence, which would destroy the obvious purpose of the statute, work injustice, or contradict other provisions of the act, will be rejected, as controlled by the general purpose and by other provisions otherwise impossible of fair interpretation and application.

7. STATUTES ⟸184—CONSTRUCTION—REMEDIAL STATUTES.
   Remedial statutes will be liberally construed, to give effect to the humane purpose of the Legislature.

8. MASTER AND SERVANT ⟸351—PORTO RICO WORKMEN'S COMPENSATION ACT—ELECTION BY EMPLOYER.
   The Porto Rico Workmen's Accident and Compensation Act of February 25, 1918, which is obligatory upon employés and makes the public treasury liable to them for compensation, etc., *held* also compulsory as to employers.

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

Suit by the New York & Porto Rico Steamship Company against Manuel Camunas and others. Decree for plaintiff, and defendants appeal. Reversed and remanded, with directions to dismiss the bill.

Edward S. Bailey, of Washington, D. C. (Howard L. Kern, of San Juan, Porto Rico, on the brief), for appellants.

Charles Hartzell, of San Juan, Porto Rico (Henry G. Molina, of San Juan, Porto Rico, on the brief), for appellee.

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

ANDERSON, Circuit Judge. This is an appeal from a decree of the District Court of the United States for the District of Porto Rico, granting a permanent injunction restraining appellants, who constitute the Workmen's Relief Commission created by the act of the Legislature of Porto Rico approved February 25, 1918, known as the "Workmen's Accident and Compensation Act," from requiring the plaintiff below to file any statement or report as provided in said act, and from assessing any quota or premium to be paid by plaintiff into the Workmen's relief trust fund created by said act, or in any manner enforcing any orders against the complainant, and also restraining the defendant, Benedicto, as treasurer of Porto Rico, from attaching any of the plaintiff's property or otherwise proceeding against the plaintiff for the recovery of the insurance premium assessed against the plaintiff under the terms of the Workmen's Compensation Act.

The plaintiff is a New York corporation, and the amount in controversy is alleged to exceed $3,000. The jurisdiction rests on diverse citizenship.

The bill was filed September 13, 1918. The plaintiff is a common carrier of freight and passengers between Porto Porto and the United States, and operates a pier in the harbor of San Juan, where it employs approximately 75 laborers, besides a number of other laborers in various other ports of Porto Rico.

The bill alleges that the defendants under the provisions of the act required the plaintiff to file certain statements under oath showing the number of its workmen and the amount of wages paid them during the fiscal year ending June 30, 1918; that the plaintiff, in order to avoid criminal proceedings, filed said statements, but protested that it did not accept the benefits of the act, and was therefore neither required to file such statements nor to contribute to the fund referred to in section 28 of said act; that the defendants fixed the plaintiff's annual quota under the act at the sum of $7,639.68; that the defendant Benedicto, as treasurer of Porto Rico, claiming to act under the authority of said act, notified the plaintiff to pay one-half of said sum, otherwise attachment proceedings would be instituted against the plaintiff and its property for the collection of said sum, with interest at 1 per cent. monthly and costs

That section 28 of the act provides as follows:

"That all employers accepting the benefits of this act and employing laborers under the conditions specified in this act shall contribute to the Workmen's Relief Trust Fund in the form and manner provided herein."

That in consequence of plaintiff's election not to accept the benefits of said act the plaintiff was not liable for said payment, and ought not to be required by the defendants to file any of the statements, reports, or other documents referred to in said act; that the acts of the defendants in requiring the plaintiff file such statements and reports and to make such payments were unwarranted and illegal, and caused irreparable damage to the plaintiff, for which it had no adequate and complete remedy at law. The prayer is that the defendants be enjoined generally from enforcing the act as against the plaintiff. The bill is supported by affidavits. The defendants appeared specially and moved to dismiss, on the ground that the suit was in reality against the people of Porto Rico, and that the people of Porto Rico had not consented to be sued; that the court was therefore without jurisdiction. This motion was denied. The parties agreed in open court that, if the court should rule against the motion to dismiss, the case should be considered as submitted on the merits, the facts to be taken as set forth in the bill. On September 19, 1918, the court sustained the plaintiff's contentions, and on September 24, 1918, a final decree was entered, permanently enjoining the defendants from enforcing the act in any particular as against this plaintiff.

The appellants' 15 assignments of error and their arguments raise not only the question of jurisdiction set up in the motion denied, but attack broadly the court's decision, claiming, inter alia, that the plaintiffs have a full, adequate, and complete remedy at law, and also that the Workmen's Compensation Act is not elective, but compulsory.

No question arises under the Constitution or laws of the United States, or under the Organic Act of Porto Rico. The equity jurisdiction asserted is based on diverse citizenship, and upon the claim that acts and threatened acts of interference with the plaintiff's property will do it irreparable damage. The District Court as a court of equity simply enjoined the defendants as officials of Porto Rico from acting pursuant to what the District Court held was an erroneous construction of the Porto Rico statute.

The gist of the District Court's decision was that the Porto Rican Legislature had enacted an elective and not a compulsory, Workmen's Compensation Act, so far as employers are concerned, and that therefore the Porto Rican officials should be enjoined from enforcing the act as against a rejecting employer.

In considering the problems thus presented, it is desirable to have in mind the legislative and constitutional status of compulsory Workmen's Compensation Acts when this act was passed. It is a matter of general knowledge that for many years courts, lawyers, and legislators were divided in their opinion as to the constitutionality of compulsory Workmen's Compensation Acts. See Ives v. So. Buffalo Railroad Co., 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156; Jensen v. So. Pacific Co., 215 N. Y. 514, 109 N. E. 600, L. R. A.

1916A, 403, Ann. Cas. 1916B, 276; and cases and authorities therein cited; State v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; State v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645, L. R. A. 1917D, 10.

This question finally reached the Supreme Court of the United States in the two cases of New York Central R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; and Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642, where they were originally argued on February 29 and March 1 and 2, 1916. They were reargued on January 30 and February 1, 1917, and decided on March 6, 1917. The decision was in favor of the constitutionality of compulsory Workmen's Compensation Acts.

Turning now to analogous legislation in Porto Rico: We find that by the act of April 13, 1916 (Laws of Porto Rico 1916, Act No. 19, p. 51), "An act providing for the relief of such workmen as may be injured, or of the dependent families of those who may lose their lives while engaged in trades or occupations, and for other purposes," the Porto Rican Legislature had provided for an elective compensation act. Section 23 is as follows:

"Sec. 23.—*Election by Employer.* This act, except the section relating to defenses (section 25), shall apply to all employers or, as provided in section 4 of this act, unless prior to the injury they shall have rejected the benefits of this act in the manner hereinafter provided.

"The rejection by the employer of the benefits of this act shall be signified by filing with the Workmen's Relief Commission a written statement expressing such election: The said statement must be filed by the employer on or before the fifteenth day of June, 1916, and on or before the thirtieth day of April of each succeeding year.

"It shall be the duty of the Workmen's Relief Commission to keep official records showing all refusals made by employers."

Section 24 is headed "Election by Employés," and provides an elaborate plan for signifying such election and the results thereof. Section 25 deals with "defenses abolished in case employer rejects the benefits of this act," and cuts off from such employer the defenses of contributory negligence, fellow servant, assumption of risk, and negligence of an uninsured independent contractor or subcontractor.

This act was amended in 1917 (Laws of Porto Rico, 1917, No. 9, approved April 12, 1917), by an act entitled "An act to amend an act entitled 'An act providing for the relief of such workmen as may be injured, or the dependent families of those who may lose their lives, while engaged in trades or occupations and for other purposes,' approved April 13, 1916."

This act simply amends sections 3, 4, 10, 13, 14, and 23 of the act of 1916. The amended section 23 is entitled "Election by Employer" and contains explicit provisions for such election to be made in writing. Section 24 of the act of 1916, providing for "Election by Employés," is left unchanged.

Under section 1 of the act of 1916, which is left unchanged by the amendment of 1917, a trust fund is created, starting with an appropriation of $25,000 from the treasury of Porto Rico, and thereafter

based upon insurance premiums levied upon employers who do not elect to reject the benefits of the act by filing with the Workmen's Relief Commission a written statement expressing such election.

But the next Porto Rican Legislature that convened after the Supreme Court of the United States had in the above-cited cases held compulsory Compensation Acts constitutional, passed the act in question of February 25, 1918. This is a new act. By section 32 all laws and parts of laws in conflict therewith are repealed. It does not purport to be an amendment of the old acts. Its title is as follows:

"An act to promote the welfare of the inhabitants of Porto Rico in regard to accidents causing death or injuries to workmen while engaged in their work; establishing the duty of employers to compensate their employés or heirs, as defined in this act, for injuries or death irrespective of negligence, and to provide ways and means for the enforcement of this duty; creating an insurance fund to secure employers against such liability and providing for the management and regulation of such insurance; creating a Workmen's Relief Commission and determining its powers and duties; establishing the liability of the people of Porto Rico with regard to their laborers for injuries or death of such laborers in works performed by administration and for other purposes."

In this title the words "the duty of employers to compensate their employés," etc., are not without significance. Section 2 of this act provides that it shall apply to laborers injured, disabled, or killed by accident occurring while engaged in their work. "This act shall not apply to any employer who regularly employs less than three laborers." Exclusio unius, inclusio alterius. This section is obviously of general application to all employés except the few excluded classes. This section also authorizes the Workmen's Relief Commission to pay compensation pursuant to the terms of the act, "drawing from the trust fund belonging to the government" the necessary sums. "The sums so paid need not be reimbursed to the people of Porto Rico out of the fund created by this act." This reference to the fund "belonging to the government," and provision that compensation shall be paid without providing for reimbursement, clearly puts the credit of Porto Rico back of the employés' right to compensation. The Porto Rican government has thus assumed the financial burden of paying compensation to the victims of all ordinary industrial accidents.

Section 7 requires "every employer subject to the provisions of this act * * * to report to the Workmen's Relief Commission as soon as possible, within a period of five days from the date of the accident, all injuries suffered by his employés in the course of their employment." The words "subject to the provisions of this act" are given full effect, if applied only to employers employing not less than three laborers. There is nothing in these words indicating an election open generally to all employers. Refusal or neglect of an employer to make such report is punishable by a fine of from $25 to $50.

Section 10 provides for the grouping of occupations, and for levying insurance rates on the estimated pay roll of the employer, considering also the risk of injury. This section is also of general application, and contains no language consistent with the theory that the employer has any option to obey or not to obey its provisions.

Section 11 authorizes the treasurer of Porto Rico to assess and col-

lect "from every employer of workmen subject to this act such annual premiums as the Workmen's Relief Commission shall determine in accordance with the preceding section," etc. Here again the words "subject to this act" are given full operation if referred back to the exception in section 2 of employers employing less than three laborers.

From the foregoing it will be observed that sections 7, 10, and 11 require all employers except those employing less than three laborers to furnish to the Workmen's Compensation Commission accident reports and data upon which the commission charged with the responsibility of administering the act may not only investigate accidents, and classify industries, but levy and collect from any employer "subject to this act such annual premiums" as it shall determine to be practicable and just. These insurance premiums are levied, not merely for the purpose of reimbursing the government, which under section 2 is made primarily responsible for the payment of the compensation, but also for the purpose of prorating the cost of industrial accidents equitably among various industries, and incidentally, under the latter part of section 10, penalizing, by high insurance rates, poor or careless management which increases the risk of industrial accidents.

Sections 20 to 22 require careful consideration. They are as follows:

"Defenses Abolished.

"Section 20.—If any accident occurs to any workman employed by an employer subject to the provisions of this act, who has failed to comply with said provisions relative to the submission of reports and the payment of premiums, the Workmen's Relief Commission is hereby authorized to charge said employer with the amount of such compensation as the commission may authorize to be paid to the injured workman and the treasurer of Porto Rico shall levy and collect said amount in the same manner prescribed for the collection of premiums. When a laborer or his heirs, in accordance with this act, and in the case specified in section 20,[1] and the Workmen's Relief Commission in the cases specified in section 21,[2] institute an action to recover damages from an employer, it shall not be a defense in the favor of the employer—

"(a) That the employé was guilty of contributory negligence;

"(b) That the injury was caused by the negligence of a fellow employé;

"(c) That the employé had assumed the risk of injury;

"(d) That the injury was caused by the negligence of a subcontractor or of an independent contractor, unless the contractor or independent subcontractor shall have been insured in accordance with the provisions of this act.

"No contract between employer and employé purporting to permit any of said defenses shall be valid."

The footnotes state that "section 20" reads in the Spanish text 21, and that "section 21" reads in the Spanish text 22. We treat section 20 as so reading; otherwise it is senseless. Sections 21 and 22 are as follows:

"Injuries by Willful Act or Gross Negligence of Employer.

"Sec. 21.—Nothing in this act contained shall be interpreted as depriving the injured workman, or his heirs, in accordance with this act, in case of death, of waiving the provisions of this act at any time prior to receiving compensation under this act and to claim and recover damages from his employer, in accordance with the provisions of the law before this act takes effect, when the injuries sustained by the said workman were caused by the illegal act or gross negligence of his employer; provided, that only in case of waiver shall

the workmen comprised in this act, or their heirs in accordance with the same, have the right to institute an action for damages against the employer.

"Liability of Third Persons.

"Sec. 22.—When the injury for which workmen are entitled to compensation under this act shall have been sustained under circumstances creating a liability against some other person or against the employer where the injury was caused by his illegal act or gross negligence or by defects in the machinery or implements and when the workman or his heirs receive compensation under this act, the Workmen's Relief Commission shall be subrogated to the rights of the injured workman or his heirs and may prosecute an action and recover damages from such third person or such employer liable for such injury, which damages when recovered shall be covered into the Workmen's Relief Trust Fund for the benefit of the particular group in which the injured workman's occupation was classified."

The effect of these three sections will be most conveniently considered by taking them in reverse order:

Section 22 (called section 21 in section 20) obviously has no bearing upon the present question of rights of action, in the ordinary case of industrial accident, remaining open to the employé. It refers merely to the right of the Workmen's Relief Commission against third persons and to be subrogated to the rights of the injured workman, in cases of gross negligence or of illegal act, when the victim of the accident has exercised his right of election to take compensation.

The proviso at the end of section 21 is significant. It reads:

"Provided, that only in case of waiver shall the workman (sic) comprised in the act, or their heirs in accordance with the same, have the right to institute an action for damages against the employer."

Manifestly this proviso is here inserted in order to make it entirely clear that the right of waiver referred to in the earlier part of section 21 is to be strictly limited to cases of illegal act or gross negligence, and that, except in such cases, all rights of action under the old law are intended to be taken away from the victims of industrial accidents.

The first part of section 21 gives to the victim of an accident caused by the illegal act or gross negligence of his employer an option either to receive compensation under the act or to recover damages. If the victim elects to recover damages, then under section 20 the employer is cut off from the defenses of contributory negligence, fellow servant, etc.

The right of waiver referred to in section 20 is thus strictly limited to cases of accidents caused by illegal act or gross negligence. In the ordinary case of industrial accident the victim has no option whatsoever. He must find his remedy under the act or he is remediless, for the proviso at the end of section 21 makes it clear that all his old rights of action are cut off.

It is thus apparent that the act of 1918 is, as to all employés, excepting only the classes specifically excluded under section 2 and the victims of accidents caused by illegal acts or gross negligence given an option under section 21, compulsory. All rights of action against employers existing under the old law are, as to the great mass of victims of industrial accidents, taken away. Whatever the right of employers to elect, employés are limited to such remedies as the new act affords

for compensation under the plan provided; and this compensation is to be paid from the treasury of Porto Rico. The great mass of victims of ordinary industrial accidents in Porto Rico are thus cut off by this act from their former rights against their employers, and are given in lieu thereof a right to claim compensation from the public treasury.

The first sentence of section 20 also shows that no failure of employers to pay their quota was intended to affect the right of employés under the new act. It provides:

"If any accident occurs to any workman employed by an employer subject to the provisions of this act, who has failed to comply with said provisions relative to the submission of reports and the payment of premiums, the Workmen's Relief Commission is hereby authorized to charge said employer with the amount of such compensation as the commission may authorize to be paid to the injured workman and the treasurer of Porto Rico shall levy and collect said amount in the same manner prescribed for the collection of premiums."

This means that failure of an employer to comply with any of the earlier parts of the act is not to be allowed to affect the right of his employé to compensation and payment thereof from the treasury of Porto Rico. The recalcitrant employer who has failed to pay the premiums provided in section 11 is, under the quoted provision, to be held to respond for the specific amount of compensation awarded his injured employé. The words "who has failed to comply with said provision" do not import the exercise of a right; they import nonperformance of a duty. Nothing in this section implies that such employer is by such failure to be exempt from the penal provisions, both civil and criminal, attached by section 11 to such noncompliance. This provision is entirely inconsistent with the theory of the court below that the employer has a right of election; it simply provides for the rights of his injured employé pending the employer's being compelled to do his duty.

We have, then, a plan for dealing with the great mass of industrial accidents which makes the treasury of Porto Rico primarily responsible for payment of compensation to the injured employés. The employés and their dependents, except the comparatively few in the excluded classes, are cut off from all their former rights against their employers, and must look to the treasury of Porto Rico as their only source of relief in case of accident causing injury or death. The treasury must pay, whether it succeeds or not in obtaining reimbursement from the employers whose former liabilities have thus been thrown upon the government. The employés have no option, even if their employers have. The treasury has no option.

There is no discussion in the opinion of the District Court as to the plight of the Porto Rican treasury resulting from that court's enjoining the Workmen's Relief Commission from assessing premiums as contemplated by the act. Nor was any consideration apparently given to the fact that the act holds forth no election to employés.

Compare Mountain Timber Co. v. Washington, 243 U. S. 219, 234, 37 Sup. Ct. 260, 263, 61 L. Ed. 685, Ann. Cas. 1917D, 642, where Mr. Justice Pitney said:

"While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed (Plymouth Coal

Co. v. Pennsylvania, 232 U. S. 531, 544 [34 Sup. Ct. 359, 58 L. Ed. 713]; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576 [35 Sup. Ct. 167, 59 L. Ed. 364]), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the quid pro quo for the burdens imposed upon him, so that if the act is not valid as against employés it is not valid as against employers."

The whole difficulty arises out of section 28, which is as follows:

"That all employers accepting the benefits of this act and employing laborers under the conditions specified in this act shall contribute to the 'workmen's relief trust fund' in the form and manner provided herein."

Upon these words, "accepting the benefits of this act," the District Court's decision entirely turns. Upon these words alone the court grounded its opinion that the act was, as to employers, elective throughout; that, without acceptance, the employer owed no duty arising under this act.

[1] While it is manifestly undesirable that a Porto Rican statute should receive its first judicial construction in the federal court, we may not, on that ground alone, refuse the plaintiff relief, if otherwise clearly entitled thereto. Compare Kuhn v. Fairmont, 215 U. S. 349, 357, 358, 30 Sup. Ct. 140, 54 L. Ed. 228; Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359; Mich. C. R. R. v. Powers, 201 U. S. 245, 291, 26 Sup. Ct. 459, 50 L. Ed. 744; Coulter v. L. & N. R. R., 196 U. S. 599, 609, 25 Sup. Ct. 342, 49 L. Ed. 615; Pelton v. Bank, 101 U. S. 143, 25 L. Ed. 901.

[2] The appellant strenuously urges that the action is in effect against the people of Porto Rico, and that the court is therefore without jurisdiction; Porto Rico having rights of sovereignty similar to those accruing to the states under the Eleventh Amendment of the Constitution. Porto Rico v. Rosaly, 227 U. S. 270, 33 Sup. Ct. 352, 57 L. Ed. 507.

Assuming that for present purposes Porto Rico is to be treated as though a state of the Union, the question thus presented is a close and difficult one. The situation is in many respects like that presented in the case of Lankford v. Platte Iron Works, 235 U. S. 461, 35 Sup. Ct. 173, 59 L. Ed. 316, in which five of the justices of the Supreme Court were of the opinion that an action by a depositor in an insolvent bank to enforce the provisions of the Oklahoma Depositors' Guaranty Fund Act was a suit against the state, and therefore could not be maintained. Four of the justices were of the opposite opinion. In that case the suit was against the state officials to compel them to perform an alleged duty, the result of which would have been to take money out of the fund, title to which was vested in the state. In the present case, the suit is against Porto Rican officials to prevent them from enforcing payments from the plaintiff into the treasury of Porto Rico. In both cases the financial status of the treasury of the state (treating Porto Rico for the moment as a state) is involved.

But if threatened acts of the Porto Rican Workmen's Relief Commission are without warrant in law, and, if not prevented, they will work irreparable injury to the plaintiff, we think the case falls within the principle of Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52

L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, and that the appellants' contention that the suit is really against the people of Porto Rico cannot be sustained. See, also, Greene v. Louisville, etc., R. R., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; Philadelphia Co. v. Stimson, 223 U. S. 605, 621, 32 Sup. Ct. 340, 56 L. Ed. 570; Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278, 293, 33 Sup. Ct. 312, 57 L. Ed. 510; Truax v. Raich, 239 U. S. 33, 37, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Hopkins v. Clemson Agricultural College, 221 U. S. 636, 642–644, 31 Sup. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243.

[3, 4] The defendants also insist that, assuming the act should be construed as the plaintiff construes it, the plaintiff has a full, adequate, and complete remedy at law; otherwise stated, that the acts of the defendants, even if unwarranted, do not work irreparable damage to the plaintiff.

Plainly, it will do the plaintiff no irreparable damage to comply with all the provisions of the act except the payment of premiums. To make report of its accidents as provided in section 7, to furnish the data required for the grouping of occupations under section 10, made expressly a duty by the provisions of section 13, cannot conceivably work any substantial, much less irreparable, damage to the plaintiff. Without more discussion of this point, it is plain that no injunction should stand against the enforcement, as against the plaintiff, of all the provisions of the act other than those directed to the collection of the insurance premium.

Does the fact that, under section 11, the defendants have taken proceedings to assess and collect, from the plaintiff, a semiannual insurance premium of $3,819.84, work irreparable damage to the plaintiff, assuming this threatened assessment and attachment to be illegal? Such premiums are to be collected "in accordance with the law and procedure which is at present or which may hereafter be in force for the collection of unpaid property taxes." If not strictly a tax, these insurance premiums are, both in their relation to the Porto Rican treasury as well as in their manner of assessment and collection, closely analogous to taxes.

Certainly it would be difficult to hold that these insurance premiums are not "revenue due the government of Porto Rico." Now, by the Porto Rican act of March 9, 1911, entitled "An act to provide for the payment of taxes under protest," there is a plain and explicit remedy provided for the recovery of taxes and revenue illegally collected. That statute is as follows:

"Section 1. That in all cases in which an officer charged by law with the collection of revenue due the government of Porto Rico, shall institute any proceeding or take any steps for the collection of the same, alleged or claimed by such officer to be due from any person, the party against whom the proceeding or step is taken shall, if he conceives the same to be unjust or illegal, or against any statute, pay the same under protest.

"Sec. 2. Be it further enacted that, upon his making such payment, the officer or collector shall pay such revenue into the treasury of Porto Rico, giving notice at the time of the payment to the treasurer that the same was paid under protest.

"Sec. 3. Be it further enacted that, the party paying said revenue under protest may, at any time within thirty days after making said payment, and not longer thereafter, sue the said treasurer for said sum, for the recovery thereof in the court having competent jurisdiction thereto; and if it be determined that the same was wrongfully collected as not being due from said party to the government, for any reason going to the merits of the same, the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded, and thereupon the treasurer shall repay the same, which payment shall be made in preference to other claims on the treasury. Either party to said suit shall have the right of appeal to the Supreme Court.

"Sec. 4. Be it further enacted that, there shall be no other remedy in any case of the collection of revenue, or attempt to collect revenue illegally.

"Sec. 5. Be it further enacted that, no writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same, shall in any wise issue, either supersedeas, prohibition, or any other writ or process whatever; but in all cases in which, for any reason, any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and none other."

We think this statute affords the plaintiff full and adequate relief for any unlawful assessment under the new Workmen's Compensation Act.

It requires no discussion or citation of authorities to show that only a very plain case would warrant a court of equity in issuing an injunction tending to cripple a government in the collection of taxes necessary for its existence and performance of its essential public duties.

In Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 684, 23 Sup. Ct. 452, 453 (47 L. Ed. 651), the court by Mr. Justice Peckham, said:

"It has long been the settled doctrine of the federal courts that the mere illegality of a tax, or the mere fact that a law upon which the tax is founded is unconstitutional, does not entitle a party to relief by injunction against proceedings under the law; but it must appear that the party has no adequate remedy by the ordinary processes of the law, or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc. See Cruickshank v. Bidwell, 176 U. S. 73, 80 [20 Sup. Ct. 280, 44 L. Ed. 377], where many of the authorities on this subject are collected in the opinion which was delivered by Mr. Chief Justice Fuller. See, also, Pittsburgh, etc., Railway v. Board of Public Works, 172 U. S. 32 [19 Sup. Ct. 90, 43 L. Ed. 354], where Mr. Justice Gray dealt with the subject quite fully. We must judge the case at bar under the rules laid down by the authorities cited."

In Pittsburgh, etc., Railway v. Board of Public Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354, Mr. Justice Gray states the rule as follows:

"The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction."

Moreover, in considering the alleged irreparable damage to be done the plaintiff by enforcing payment by it of its insurance premium, it should not be overlooked that the plaintiff gets full consideration for this payment; the government has already assumed the plaintiff's

financial responsibility for industrial accidents. The right of election that the plaintiff really insists upon is not a right to retain responsibility under the old law for accidents suffered by its employés. There is no contention by the plaintiff's counsel, or suggestion in the opinion of the District Court, that the plaintiff, by exercising its alleged right of election, remains liable under the old law to its employés. Apparently it is recognized that financial responsibility for industrial accidents has now been assumed by the treasury of Porto Rico. The plaintiff really therefore, seeks to escape, entirely, liability for industrial accidents. It would unload its entire burden, both under the new and under the old law, upon the treasury of Porto Rico, which of course means upon the general taxpayers or upon other employers who hold different theories of civic duty.

We hold that the court below had no jurisdiction to entertain this suit and to enjoin the enforcement by the defendants as against the plaintiff of the Workmen's Compensation Law.

What we have said above goes upon the assumption that the plaintiff and the District Court were correct in construing section 28 as holding forth an election to the employers to accept or reject the insurance provisions of the act. But if we are in error in holding that even on that assumption plaintiff is not entitled to relief in a court of equity — if it is the duty of the federal court, without previous construction of this act by the local Porto Rican courts, to put its own construction thereon—then we are constrained to reject the interpretation put thereon by the plaintiff and adopted by the District Court.

[5-8] We think that the act construed as a whole, as every act must be, shows that the Legislature intended it to be compulsory upon employers as well as upon employés. It is elementary that, if there are inconsistencies in various provisions of an act, the court must do its best to reconcile them, determining from the act, as a whole, construed under the circumstances surrounding the Legislature at the time of its enactment, the legislative intent. Where the language of a statute is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory results, the court must ascertain the true meaning, referring to the purpose—the spirit—of the law, not adhering slavishly to the letter thereof. See 36 Cyc. 1106, 1108, and cases cited.

Mr. Justice Field in United States v. Kirby, 7 Wall. 482, 486 (19 L. Ed. 278) states the principle as follows:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character."

Words apparently inserted through inadvertence, which, if literally construed, would destroy the obvious purpose of the Legislature, work injustice, or create contradictions with other provisions of the act which they regulate, are to be rejected, as controlled by the general purpose and by other provisions otherwise impossible of fair interpretation and application. Holy Trinity Church v. United States, 143

U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; United States v. Babbit, 1 Black, 55, 61, 17 L. Ed. 94; Zouch v. Stowell, Plowd. 366; United States v. Freeman, 3 How. 565, 11 L. Ed. 724; Stewart v. Kahn, 11 Wall. 493, 504, 20 L. Ed. 176; Hawaii v. Mankichi, 190 U. S. 197, 212, 23 Sup. Ct. 787, 47 L. Ed. 1016; Smythe v. Fiske, 23 Wall. 374, 380, 23 L. Ed. 47; 36 Cyc. 1109, and cases cited; Sweetser v. Emerson, 236 Fed. 161, 149 C. C. A. 351, Ann. Cas. 1917B, 244.

Another elementary rule is that remedial statutes are to be liberally construed in order to give effect to the humane purposes of the Legislature.

Applying these well-settled principles to the act in question, we are forced to the conclusion that the words in section 28 "accepting the benefits of this act" furnish no adequate basis for the unjust and contradictory results accruing under the construction contended for by the plaintiff and adopted by the District Court. We find it impossible to believe that the Legislature of Porto Rico intended to give employers an option to accept or reject the provisions of the new compensation act without at the same time affording analogous opportunity to employés. Equally impossible is it to believe that the Legislature intended to impose upon the public treasury liability for compensation paid to the victims of industrial accidents without at the same time providing that the industries in which such accidents occur shall by some uniform and just system reimburse the public treasury for the bulk, if not for all, of the compensation so paid. It would be a strange public policy which would permit this plaintiff or any other employer to elect himself out of all liability for the industrial accidents of his employés, throwing the entire burden of compensation therefor upon the public treasury.

As indicated above, plaintiff's contention, sustained by the District Court, is not that it may elect as between the old law and the new law, or as between the state insurance scheme and paying compensation in accordance with the terms of the act to such of its own employés as suffer industrial accidents; the decree of the District Court provides that the defendant shall be enjoined from "in any manner enforcing any of its orders against the said complainant." As the act cuts employés off from all rights except those accruing under the act, and as the decree of the court below enjoins the defendants from enforcing the act in any particular against the plaintiff, the result, beyond question, is to leave the plaintiff free from all money liability for accidents suffered by its employés.

The facts that this new act was passed at the next session of the Legislature after the Supreme Court of the United States had sustained the constitutionality of compulsory acts; that the title of the act indicates a duty imposed generally upon employers; that the old act, which contained in repeated and explicit form provisions for the exercise of election both by employers and employés, was expressly repealed; that the new act follows in general plan the old act, except in the elimination of these express provisions for election; that the new act is plainly compulsory as to all employés (except the clearly excluded classes); that the public treasury is held responsible for

paying compensation provided in the act, and that no adequate resources are provided therefor, except on the theory that the act is compulsory as to employers; that every part of the act except the short isolated phrase in section 28, imports a mandatory duty resting upon employers—these and many other considerations show that the Legislature intended to adopt a consistent, compulsory theory of workmen's compensation, substantially in accordance with the plan adopted in New York and Washington, and sustained by the Supreme Court in New York Central v. White, supra, and Mountain Timber Co. v. Washington, supra.

In the construction we adopt of this act there is far less difficulty than that with which the Supreme Court dealt in Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. The problem in that case was whether the contract labor law applied to the employment of a foreign rector by Trinity Church. The Circuit Court held that it did. 36 Fed. 303. That act provides:

"* * * That it shall be unlawful for any * * * corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien * * * into the United States * * * under contract or agreement, parol or special, express or implied, * * * to perform labor of service of any kind in the United States. * * *"

In the case of this statute, Trinity Church contracted with Mr. Warren, an alien residing in England, to remove to New York and become its rector and pastor. Yet the Supreme Court held that the act, properly construed, did not apply to this contract.

Mr. Justice Brewer used the following language:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind,' and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. As said in Plowden, 205: 'From which cases, it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance and those statutes which comprehend all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach to some persons only, which expositions have always been

founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances.' "

Reference may be had to the rest of this opinion for an illuminating discussion of other cases decided by other courts, in which far greater difficulties of sound and consistent construction were met than those presented by the Porto Rican Workmen's Compensation Act.

Compare also Knowlton v. Moore, 178 U. S. 41, 77, 20 Sup. Ct. 747, 761 (44 L. Ed. 969), where the court said:

"We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

If we were to construe section 28, standing alone and without reference to its relation to the other clear and explicit provisions in the act, and to the manifest general purpose of the Legislature, we should find difficulty in saying that the Legislature intended to authorize an employer to reject the act. Section 28 provides no method by which an acceptance or a rejection shall be signified to the Workmen's Relief Commission. Assuming for the moment a right of election was intended, it would be very strange for a Legislature to provide no machinery for indicating such election. This absence is in striking contrast with the clear and explicit provision in section 23 of the act of 1916, entitled "Election by Employer," and containing the following language:

"The rejection by the employer of the benefits of this act shall be signified by filing with the Workmen's Relief Commission a written statement expressing such election. The said statement must be filed by the employer on or before the fifteenth day of June, 1916, and on or before the thirtieth day of April of each succeeding year."

At most section 28 grounds but an ambiguous and doubtful implication of a right to elect.

If we were to construe section 28, as did the District Court, as granting to every employer the right to reject, what should we do with the plain and explicit provisions of sections 10 and 11, which contain a plain mandate for levying insurance premiums upon all employers, except the clearly excluded classes?

If we adopt this method of avoiding the alleged difficulty in construing section 28, we create a greater difficulty in construing sections 10 and 11.

Do the words "accepting the benefits of this act" mean anything more than "receiving the benefits" or "entitled to the benefits"? Certainly they do not clearly mean that "only employers who (by some undefined act done at some unnamed time) accept the benefits of this act shall be required to contribute to the trust fund."

Without further elaboration, we regard it as entirely clear that this court is not warranted in so construing this participial clause as to render nugatory other clear and explicit provisions of the act as well as to thwart the obvious dominating legislative purpose.

If there were only reasonable doubt as to whether the Legislature intended this act to be elective or compulsory, a federal court ought not to enjoin its enforcement, particularly when such injunction would or might cripple the public treasury. But, construing the act as a whole and in accordance with the well-settled rules and principles laid down in the cases cited supra, we are unable to believe that there is even reasonable doubt that the Porto Rican Legislature intended to impose, upon employers and employés alike, the compensation theory in substitution for the negligence theory.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to dismiss the bill, with costs; and the appellants recover their costs of appeal.

SAN PEDRO, L. A. & S. L. R. CO. v. MATHEWS.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1919.)

No. 5094.

RAILROADS ⊂=314—ACCIDENTS AT CROSSINGS—NEGLIGENCE.

That a railroad company permitted two engines under full steam pressure to stand on a track in its yards near a highway for a short time while awaiting the passage of another train before taking out a freight train, and that while so standing some noise, though not more than usual, was made by steam escaping through the automatic pop valves, *held* not to constitute negligence which rendered it liable for injury to plaintiff, who after passing the engines on the highway drove his team upon the main track crossing 37 feet distant, and was struck by a passing train, which was in view for a quarter of a mile.

In Error to the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Action at law by Charles Mathews, Jr., against the San Pedro, Los Angeles & Salt Lake Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dana T. Smith, of Los Angeles, Cal. (F. R. McNamee, of Los Angeles, Cal., on the brief), for plaintiff in error.

Ray Van Cott, of Salt Lake City, Utah (J. H. Moyle and H. D. Moyle, both of Salt Lake City, Utah, on the brief), for defendant in error.

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

ELLIOTT, District Judge. This is an action by Charles Mathews, Jr., defendant in error, against the railway company, plaintiff in error, to recover damages for personal injuries sustained by the former in an accident at a street crossing over the tracks constituting the railway yards of the plaintiff in error, in the town of Caliente, Lincoln county, Nev., wherein he was struck by one of the railway company's passenger trains.

The defendant in error, Mathews, for convenience will be referred to as the plaintiff, and the plaintiff in error, the railway company, as the defendant.

Following the formal allegations of the complaint, there are a number of allegations intended to assert the negligence of the defendant, the injury of the plaintiff, and the damage sustained, and the liability of the railroad company. The defendant answered with a denial and a plea of contributory negligence.

Upon the trial of the case, however, all of the issues were limited by the trial court, in the following language:

"There are a number of grounds of negligence alleged in the complaint, gentlemen of the jury, but under the evidence offered in the case I consider it my duty to take from your consideration all of the alleged grounds of negligence save and except such as I shall now read to you from the complaint.

"The complaint alleges 'that said defendant then and there negligently and carelessly caused and permitted two of its large locomotives with their respective tenders to be and remain upon one of said yard tracks immediately north of said main line of railroad in close proximity to each other, and within approximately 12 feet of the traveled portion of said public highway; that said defendant then and there negligently and carelessly caused and permitted said locomotives to be and remain under heavy steam, and to emit and discharge the same from their safety or exhaust valves with great noise, to such an extent that all sounds of the approaching train hereinafter referred to were entirely drowned and cut off from the hearing of the plaintiff.

" 'That at said time and place and while the plaintiff was in the act of driving his team of horses and wagon which he was then driving from north to south over and across the intersection of said highway, and when his team had reached a point on said highway opposite the said locomotives upon said yard track as aforesaid, plaintiff's team of horses became frightened on account of the loud noise carelessly and negligently made by the discharge and emission of said steam from said locomotives and ran forward along said public highway, and plaintiff thereupon used his best efforts and skill to bring them under control, which he did, but by the time he had thus controlled them they were upon defendant's main line of railroad; that he thereupon for the first time saw defendant's through passenger train, and the said locomotive and train of cars attached thereto, running as aforesaid, ran into the wagon of said plaintiff while he was in the act of crossing defendant's said main line of railroad at said intersection.' "

There was a verdict in favor of the plaintiff upon the issues thus submitted to the jury.

The first question presented by the record is whether the jury should have been directed by the trial court to return a verdict in favor of the defendant upon all of the issues, upon defendant's motion at the close of all of the evidence, for the reason that "there is no evidence sufficient to entitle plaintiff to go to the jury," and "there is no showing of any negligence whatever on the part of the defendant company."

An examination of the record discloses the following state of facts, upon which there is absolutely no dispute: That Caliente is a small town situated upon the railway of the defendant in the county and state above named; the main line track of defendant running generally in an easterly and westerly direction, and Spring street in

said town of Caliente running generally in a northerly and southerly direction; that the approach of said street in the vicinity of the intersection with the tracks of the defendant is on an acute angle, gradually curving to the left from the north, until it intersects the main line track at a right angle; that at this point the railway company maintains yards and extensive trackage facilities, a roundhouse, water tank, and other buildings, maintaining seven tracks, all running in an easterly and westerly direction at the point where the said street crosses and intersects said railway; on the day in question there were two locomotives with tenders on one of these tracks, both of which were headed east and away from the street, the rear of the tender of the rear locomotive being within 10 to 20 feet east of the traveled portion of the street; that these two engines were standing on this outgoing track in readiness to and did take a heavy freight train, with the assistance of a third engine, out upon the main track and up a heavy grade to the east, immediately upon the arrival of the passenger train over the main track from the east; that as plaintiff approached the crossing from the north, driving in a southerly direction along said Spring street, and before driving upon any of the tracks, he observed the two engines standing on the outgoing track, which track is the third one north of the main track; that at the time of his approach toward the standing engines one or both of said engines were exhausting steam through the safety or exhaust valve with such noise that it prevented the plaintiff hearing the approach of the train on the main track; that on what was known as the "caboose track," in an easterly direction from the standing engines, were some cabooses, and these cabooses, the two standing engines, and steam therefrom, and some fences constituted an obstruction to the view of the main track of the defendant company to the east of said Spring street crossing of a person approaching said crossing from the north along said Spring street. The plaintiff testified that as he approached the crossing, driving in a southerly direction along said Spring street, he observed the engines standing on the outgoing track, and that there was much steam being emitted from the engines, that the steam covered up and enveloped the engines, especially toward the highway. He testified that the engines were making a noise, the steam popping off when he came in sight of them, and it continued and was so loud that it was difficult to hear as he approached the point in the street directly west of the engines. It appears from other uncontradicted testimony that at the time of his approach and passing of the engines the two engineers were not in their cabs, one being on the ground beside, fixing a rod, and the other close to his engine, and that neither saw the plaintiff on the highway until he had passed the rear of the engine nearest the highway. It further appears that the south rail of the outgoing track on which said engines were standing was 37 feet from the north rail of the main track.

It is undisputed that the plaintiff was an expert horseman; that he had for many years known the crossing in question; was well acquainted with it; knew that trains might be expected to pass at

any time upon the main track; and he also knew a train was due on the main track from the east at about the time he approached the crossing. His sight and hearing were not impaired; he was not excited, and knew as he drove up toward the two engines standing east of the highway that his view toward the east was obstructed, and he therefore could not see a train approaching from that direction on the main track. He did not stop before passing the rear of the engines and as he came up to the main track. He says he looked before he came to the engines standing east of the highway, but because of the obstructions above referred to he could not see; and he listened, but because of the noise from the engines he could not hear.

It is admitted that he came up to these engines with a gentle team, with a covered spring wagon with the side curtain up and with his reins hanging loosely. Plaintiff claims that the nigh horse shied a little, and that he thereupon pulled up the lines. It does not appear that the horse shied more than 2 or 3 feet, nor that there was any attempt on the part of the team or either of them to run away, nor is it shown that the team was at any time out of the control of the plaintiff.

The record discloses that when he had reached this point he was 37 feet away from the main track, upon which he knew a train might approach at any time, and over which he knew a train was due to approach from the east at about that time, and there was an unobstructed view up the said main track toward the east for nearly a quarter of a mile. Notwithstanding this, he neither looked nor listened and paid no attention to the approaching train, although he was called to by at least two persons and his situation was seen by at least two other witnesses, all realizing the danger of his position except himself. Disregarding the opportunity to look and see, and disregarding the necessity for looking before going upon the track, without thought or care for his own safety, he went forward until his horses' heads were just approaching the track, when he saw the train, and then, instead of stopping the team, struck them in an effort to cross the track ahead of the on-coming train.

He testified that when the horses shied he straightened them up, and their heads were right on the track. He does not pretend that he made any effort to stop them, although he then saw the on-coming train. Instead of stopping them, he slapped the horses with the lines in an effort to cross ahead of the train, and the engine of the train struck the wheel of his wagon. The engineer, having used every reasonable means to stop the train when he saw the plaintiff, succeeded to the extent that only the engine and a portion of one car passed over the highway crossing.

The physical conditions show that the plaintiff could have seen the train coming, if he had looked, after reaching a point in the highway west of the two engines.

The record discloses that these two engines had just been taken by their engineers from the roundhouse east of this highway, brought down to the water tank, also located east of the highway, had taken

water, and then had been brought down to the positions they occupied at the time of the accident, preparatory to taking a heavy freight train to the east over the main track, which was traversed by the passenger train from the east which caused the accident.

This freight train was being made up by the switch engines in the yards west of the two engines and west of said highway. The engineers had brought their engines to this position, and were waiting for the brakeman to come to the switch west of the highway and signal them that the freight train was ready for them and for them to proceed west to said train. It is undisputed that this freight train was ready to start and should leave, under the orders, immediately upon the arrival of the passenger from the east; that it was the usual and regular custom to steam up the engines, getting them under full steam just prior to taking out the train; that the engines in their operations were supposed to be under pressure required to pull the train, and that the defendant's engineers of these two engines upon that day, following their usual custom, backed down near this intersection, and stood there ready for the brakeman to come to the switch and signal them; that in the usual operation of the yards it was a necessary custom for them to take water, and then to back away from the track adjacent to the tank, to the end that other engines might be supplied without delay.

Taking the testimony of the plaintiff, it appears that there was no one on the engines causing the noise; that whatever steam there was escaping from the engines was by reason of the operation of the safety or exhaust valves. Such safety valve was not operated or even set by the engineer, but by a mechanic at the roundhouse, and set by him for the purpose of safety and to prevent accidents. Taking the most liberal view of the plaintiff's evidence, there was no sudden popping off of the engines at the time the team was even with or near the engines. There is no evidence in the record from which it can reasonably be inferred that there was any change in the conditions with reference to either the noise or steam from the engines at the time the plaintiff approached the point in the highway directly opposite the engines. On the other hand, it conclusively appears that the only noise there was the noise of the pop valves and the consequent escaping steam, and that that condition obtained continuously and was observed by the plaintiff himself at a point far distant to the north of the engines.

It appears that a poppet valve is a necessary appliance; that it is a late, safety, mechanical device, and that its automatic operation is not unusual, and that such operation especially obtains at a time when the engine is being prepared for hauling a heavy load; and, further, there was nothing unusual either in the fact that the valves operated at that time and place or in the consequent noise of the escaping steam.

Defendant contends that under these undisputed facts it was not responsible for the alleged injury of the plaintiff, and that there is an entire absence of evidence of negligence on the part of the defendant.

A party charging negligence must prove it. He must show that the defendant by his act or by his omission has violated some duty incumbent upon him, which has caused the injury complained of. If there is no evidence upon which a rational conclusion might be based in support of the claim of the plaintiff, the case should have been withdrawn from the jury. Juries cannot be allowed, however great the deference conceded to their province, to make mere conjecture or speculation the foundation of their verdicts. Parrott v. Wells, 15 Wall. 525, 21 L. Ed. 206.

This issue involves a determination of the elements that necessarily enter into the act or the omission that is alleged constitutes the failure to perform a duty incumbent upon the defendant, and which caused the injury complained of.

The allegation on the part of the plaintiff of the negligence of the defendant company is that "two of its large locomotives were carelessly caused and permitted to be and remain upon one of its said yard tracks immediately north of said main line of railroad in close proximity to each other, and within approximately 12 feet of the traveled portion of said public highway; that said defendant then and there negligently and carelessly caused and permitted said locomotives to be and remain under heavy steam, and to emit and discharge the same from their safety or exhaust valves with great noise, to such an extent that all sounds of the approaching train hereinafter referred to were entirely drowned and cut off from the hearing of the plaintiff."

It is further alleged that—

"At said time and place, and while the plaintiff was in the act of driving his team of horses and wagon with which he was then driving from north to south over and across the intersection of said highway, and when his team had reached a point in said highway opposite the said locomotives upon said yard track, as aforesaid, plaintiff's team of horses became frightened on account of the loud noise carelessly and negligently made by the discharge and emission of said steam from said locomotives, and ran forward along said public highway. * * *"

Did the record, when the defendant made its motion, justify the court in submitting to the jury the question of this negligence and carelessness alleged in the complaint? To determine this, a consideration of the rights and duties of the defendant in the operation of its trains and railroad yards, and especially with reference to its duty toward travelers who might cross the tracks of the defendant at said public highway, is necessary, because, unless there was a violation of a duty, there was no negligence.

The defendant's right to operate its railroad and to construct, maintain, and operate its railroad yards at the point in question included the right to make the usual noises incident to the operation and movement of its engines and trains, and it is a matter of common knowledge that the exhausting of steam from the safety valves is one of the noises very frequently accompanying the ordinary operation of engines.

The railroad company had the right to use its yards and tracks, and the public had the right to use the crossing over such tracks,

and each with due regard for the rights of the other. The right to use its tracks and the public right to use the crossing impose upon the railroad company the duty of operating its engines and trains in the usual manner and in a reasonable way, and to prevent unusual or unnecessary noises to be made by the engines; and whether or not a railroad company is responsible for an accident, frightening horses upon a crossing, is entirely dependent upon whether or not there was a sudden or unusual or unnecessary noise, of which plaintiff complains.

Under the undisputed facts in this case, the defendant was using its yards in the usual, ordinary way for the transaction of the usual business of the company. There had been no undue delay between the time the engines were brought down to the east side of this highway crossing for the purpose of pulling out the freight train and the time of the accident. This freight train, under the orders, was to leave at 12:40 or 1 o'clock, immediately upon the arrival of the train from the east, and immediately after the accident, pursuant to a signal of the brakeman at the switch on the west side of the highway, these engines were taken to the west side of the crossing, one coupled to the front of the freight train, the other with its tender placed in the center of the train, and a third engine coupled to the back of the freight train, and, thus equipped, the freight train proceeded on its way east over the main track that had just been traversed by the passenger train, which was proceeding west at the time of the accident.

The evidence clearly shows that the noise complained of by the plaintiff was the escaping of the steam through the safety valves. It is admitted that neither of the engineers were in the cabs, one being beside his engine adjusting a rod and the other on the ground close to his engine, and that neither saw the plaintiff until he had passed the rear of the engine nearest the highway. There is an entire absence of testimony of any negligence or any carelessness on the part of the defendant in the operation of its engines or in the fact that the engines were brought down just east of the crossing, but a few minutes prior to the accident, there to await the signal of the brakeman at the switch west of the crossing, when the freight train was made up and ready for them to take out; it appearing that there was no unusual noise, and that the noise was the ordinary operation of the safety valve, a necessary and proper function in the operation of engines to be immediately used in the hauling of the heavy freight train up the grade on the main track to the east.

To entitle the plaintiff to recover upon his allegation, it must be shown that the quantity of steam escaping from the engine and the noise made thereby was unusual and unnecessary. There is no suggestion of either, nor is there any testimony from which such an inference can reasonably be drawn.

The proper inquiry is not whether the accident might have been avoided if the company had anticipated its occurrence in the manner in which it happened, but whether, under the circumstances revealed by the undisputed testimony, there was any want of reason-

able care and diligence on the part of the company in the management of its engines and to guard against danger.

The act of negligence on the part of the company which was alleged and attempted to be established was that "its servants negligently and carelessly caused and permitted two of its large locomotives with their respective tenders to be and remain upon one of said yard tracks in close proximity to each other and within approximately 12 feet of the traveled portion of the said public highway, and to be and remain under heavy steam and to emit and discharge the same from their safety or exhaust valves with great noise, * * *" and that the team became frightened on account of the loud noise carelessly and negligently made. If this is to be taken as an allegation of the engines occupying a place near the highway an unreasonable length of time, clearly the allegation is not sustained by the evidence, as there is no controversy as to the manner in which the engines were operated, the purpose for which they were taken to that position, or that they were moved to that position immediately before the accident. Neither is the controversy as to the fact that there was no unusual noise or quantity of steam, and that it was simply the continuous action of the automatic safety valve, which has been devised and is approved by its general use for the safety of locomotives and the protection of life.

Steam escaping in such legitimate use is a necessary incident to such authorized business of operating steam engines, for which there is no liability. The law in conferring the right to use an element of danger does not accompany the right with a penalty. The right is conferred with but one limitation, that in the exercise thereof it be not abused. It is unnecessary to determine whether upon issues differently framed, under different circumstances, there might not be a recovery for the abuse of the right of the railroad company to permit the escape of steam from an automatic safety valve. Under the undisputed facts in this case, however, considering the operation of the engines, the purpose for which they were brought down, the time they were there, the necessity for the heavy head of steam in the engines to pull the load up the grade—all the undisputed circumstances considered—in our opinion but the one conclusion is justified. In the operation of the engines the defendant's servants had the privilege and duty to keep the steam at such a gauge as would enable them to pursue their course without delay. A rule that would require an engineer to draw his fires when stopping for a reasonable time at a highway or street crossing would so embarrass the operation of railways as to destroy, in a great measure, effective systems of travel and transportation. Nor is this a case of an engineer within a city where teams are constantly passing, needlessly and unnecessarily opening the valves or throttle on his engine and frightening horses and causing them to run away and commit injury. Nor is it a case of the engineer in his cab near a crossing, seeing the approach of a traveler, suddenly opening the throttle or causing the escape of steam just as the team approaches the point nearest the engine. The railroad company, in the legitimate trans-

action of its business has a right to use steam, and it is not liable for the proper and necessary use of the same, even if it result in the injury of others, as by frightening horses. Negligence cannot be predicated under ordinary circumstances or because there was a proper pop valve and because it did perform its proper office by permitting steam to escape in order to prevent a dangerous pressure. Omaha & R. V. Ry. Co. v. Clarke, 39 Neb. 65, 57 N. W. 545. And there was no evidence in this case upon which a finding could be predicated that this engine had been permitted to stand a long time at the crossing with the steam kept unnecessarily at a high pressure.

We are of the opinion that nothing unusual occurred in the operation of these engines at the time of the accident. The escape of the steam and the consequent noise was nothing out of the ordinary. Defendant had a right to operate its engines in the manner shown, without responsibility on its part for the consequences of any of the ordinary noises which the operation of the engines causes, or such circumstances as the ordinary escape of steam or smoke. If such were not the case, railway companies would be greatly embarrassed in the performance of the duties they owe to the public. There appears to have been an utter failure to show any excessive or unreasonable blowing off of steam or any unusual noise or anything not ordinarily attendant upon the usual operation of a locomotive. Dewey v. C., M. & St. P. Ry. Co., 99 Wis. 455, 75 N. W. 74; Walters v. C., M. & St. P. Ry. Co., 104 Wis. 251, 80 N. W. 451,

It is suggested that this defendant should not have approached the highway with its engines, but should have remained back in its yards so that the noises incident to their operation, such as the escape of steam, would not frighten horses of those who might desire to use the public highway. This contention of the plaintiff would deprive the railway of the use of its yards, and the practical management of its business of collecting cars, assembling trains, and removing them from the yards to the main tracks. We do not think that the railroad company should be required to remove its engines further from the crossing than is reasonably necessary to permit the free use of the highway by the public for travel, and there is no contention here, and nothing in the record to support it if made, that the highway itself was obstructed. Any other conclusion would involve the determination of how far it is necessary for the defendant to remove its engines or cars from the crossing, and the question whether that duty had been performed by the company in each given case would be dependent upon the "conjecture" or "speculation" of the particular jury to which the question might be submitted, and place it practically within the prohibition of the language of the opinion of the Supreme Court of the United States in the case of Parrott v. Wells, supra.

There was an entire failure on the part of the plaintiff to show negligence upon which his right to recover was predicated. The alleged injuries of plaintiff, upon the undisputed record, from the frightening of his horses, were concededly from the usual noises

incident to the ordinary operation of the engines of the defendant, and there is no liability on the part of the railway company therefor.

The determination of defendant's exception to the court's failure to direct a verdict for the defendant upon its motion at the close of all of the evidence renders it unnecessary to determine the question of contributory negligence on the part of the plaintiff.

The court erred in denying the defendant's motion for a directed verdict at the close of the evidence. The judgment below is reversed, and a new trial ordered.

WAYNE et al. v. VENABLE et al.

(Circuit Court of Appeals, Eighth Circuit. July 8, 1919.)

No. 5206.

1. APPEAL AND ERROR ⊜231(3)—REVIEW—RULINGS AS TO EVIDENCE—SUFFICIENCY OF OBJECTION.
   A mere objection to the admission of evidence offered, without the statement of any grounds or reason to advise the court of the particular objection relied upon, does not raise any issue of law reviewable by an appellate court.
2. COURTS ⊜282(1)—ELECTIONS ⊜57—INTERFERENCE WITH VOTERS—RIGHT OF ACTION.
   An action for damages in a proper federal court lies by a qualified voter for his wrongful deprivation of his constitutional right to vote for a member of Congress by a defendant or by an effective conspiracy of several defendants.
3. ELECTIONS ⊜58—DEPRIVATION OF RIGHT TO VOTE—ACTION FOR DAMAGES.
   In the eyes of the law the right of a qualified voter to vote for a member of Congress at a general election is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of damages is a question peculiarly appropriate for the determination of the jury.
4. ELECTIONS ⊜58—DEPRIVATION OF RIGHT TO VOTE—CONSPIRACY—ACTION FOR DAMAGES.
   Evidence *held* to warrant submission to the jury of the question whether plaintiffs were deprived of their right to vote at a general election for a United States Senator and member of Congress by an unlawful conspiracy between defendants.
5. TRIAL ⊜260(1)—INSTRUCTIONS—REQUESTS TO CHARGE.
   Where a rule of law has been fairly stated to the jury in the general charge, it is not error to refuse to repeat it in the words of a request of counsel.

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

Separate actions at law by J. A. Venable and by J. V. Boyd against Harry A. Wayne and others, consolidated for trial. Judgment for plaintiff in each case, and defendants bring error. Affirmed.

E. L. McHaney, of Little Rock, Ark. (R. L. Rogers and G. W. Murphy, both of Little Rock, Ark., on the brief), for plaintiffs in error.

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

Powell Clayton, of Little Rock, Ark. (U. S. Bratton, of Little Rock, Ark., on the brief), for defendants in error.

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

SANBORN, Circuit Judge. Each of the defendants in error, J. A. Venable and J. V. Boyd, brought his separate action in the court below on March 23, 1917, against Harry A. Wayne, Walter Alexander, and others for $5,000 damages and $10,000 punitive damages, because, as each of the plaintiffs below alleged, Wayne and Alexander conspired and combined with each other and others to prevent them who were qualified electors in Eagle Township, Ark., from casting their votes therein for presidential electors, United States Senator, and a member of Congress at the general election in that township on November 7, 1916, when and where presidential electors, a United States Senator, and a member of Congress were to be voted for and elected, whereby each of the plaintiffs was deprived of the privilege of voting for any candidate for presidential electors, or United States Senator, or for Congressman, at that election. By order of the court the two actions were consolidated and tried together, and they resulted in a verdict in favor of each of the plaintiffs against Wayne and Alexander for $2,000. Judgments accordingly were rendered, and the defendants below here complain of six alleged errors in the trial.

[1] The first is that the court overruled the objection of counsel for the defendants to the testimony of Mr. Leach, a witness for the plaintiffs below, to a conversation between him and Dr. J. R. Wayne, one of the alleged conspirators. The objection, however consisted of the two words, "We object." The second complaint is identical with the first, and relates to the same conversation, but in that instance counsel did not even use the words, "We object." The objection stated no ground or reason for it. It failed to direct the attention of the court below to the particular feature upon which objecting counsel relied, and it raised no issue of law, the decision of which was reviewable in an appellate court. Davidson S. S. Co. v. United States, 142 Fed. 315, 316, 73 C. C. A. 425; Eli Mining & Land Co. v. Carleton, 108 Fed. 24, 47 C. C. A. 166.

The third complaint is that the court erred in stating in the presence and hearing of the jury after it had overruled defendants' objection to the question propounded by plaintiffs to their witness Lee calling for the official list of the electors of Eagle township of 1916 as follows: "It may be introduced for the purpose of showing that for the purpose of carrying on the original conspiracy they failed to provide the means of voting for a sufficient number, as required by law." In this remark the court referred to the list of taxes paid in 1916 prior to the first Monday in July, which plaintiffs' counsel offered to introduce to show that the number of booths required by law, a booth for each 100 electors, had not been provided. To this remark of the court Mr. Rogers, one of the counsel for the defendants, said, "To which ruling of the court the defendants by their attorneys

duly excepted at the time." He further said, "According to the number of poll taxes paid it would be inadmissible." Thereupon the court immediately reversed its ruling and said, referring to this list of taxes, "It is inadmissible." The position that there was fatal error in the remark here challenged is untenable: (1) Because no objection or exception to any part of the remark, except the ruling admitting the list, was made or taken, and that ruling was immediately reversed, and the list was excluded from the jury before the number of poll taxes it disclosed as paid came to their knowledge; and (2) because no motion or request was made to withdraw or strike out the remark; and (3) because in view of the immediate reversal of the ruling it is clear that the effect of the remark was so completely nullified that it did not and could not have been prejudicial to the defendants. Wolf v. Edmunson, 240 Fed. 53, 57, 153 C. C. A. 89.

The fourth complaint is that the court refused to instruct the jury to return a verdict for the defendants at the close of the evidence. Upon nearly every material issue at the trial the evidence was conflicting. This complaint therefore does not present the question of the weight of the evidence, for it was the exclusive province of the jury to determine that issue, and they have decided it against the defendants. The only question within the jurisdiction of the court is whether or not there was any substantial evidence to sustain their verdict, and in considering that question every material issue of fact upon which there was a substantial conflict in the evidence must be treated as decided in favor of the plaintiffs.

[2] The right of qualified electors to vote for a member of Congress at a general state election, which is also an election at which a Congressman is to be lawfully voted for and elected, is a right "fundamentally based upon the Constitution [of the United States], which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors." Ex parte Yarbrough, 110 U. S. 655, 664, 665, 4 Sup. Ct. 158, 28 L. Ed. 274.

An action for damages in the proper federal court lies by a qualified elector for his wrongful deprivation of this right by a defendant or by an effective conspiracy of several defendants who deprive him thereof. Wiley v. Sinkler, 179 U. S. 58, 62, 63, 64, 21 Sup. Ct. 17, 45 L. Ed. 84; Swafford v. Templeton, 185 U. S. 487, 491, 492, 22 Sup. Ct. 783, 46 L. Ed. 1005.

[3] In the eyes of the law this right is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right. Scott v. Donald, 165 U. S. 89, 17 Sup. Ct. 265, 41 L. Ed. 632; Wiley v. Sinkler, 179 U. S. 58, 65, 21 Sup. Ct. 17, 45 L. Ed. 84.

[4] The plaintiffs brought this action against Dr. J. R. Wayne, Walter Alexander, Harry A. Wayne, Wright W. Wilder, James T.

Ritchie, T. L. Hughes, Zeb E. Perry, O. B. Clark, and Fred Lynn. They alleged that these defendants conspired to prevent each of the plaintiffs, who were qualified electors in Eagle township, from voting at the general election in that township in the state of Arkansas on November 7, 1916, and that by means of that conspiracy they did prevent each of them from voting at that election at which a United States Senator and a member of Congress were to be lawfully voted for and elected. The record in this case convinces that while there was a conflict in the evidence regarding nearly all the material issues of fact, there was at the close of the evidence substantial evidence of these facts. The plaintiffs were qualified electors of Eagle township at the election therein on November 7, 1916, at which election a United States Senator and a member of Congress were lawfully to be voted for and elected. At this election in Eagle township, Harry A. Wayne, Walter Alexander, and T. L. Hughes were the judges of the election. After they met at the polling place on election day they appointed James T. Ritchie a special deputy sheriff to assist in conducting the election, and instructed him how he should admit into a schoolroom, where the voting was conducted, those desiring to vote, and that he should admit them one at a time. Elbert L. Swartz, J. R. Alexander, a relative of Walter Alexander, the judge, and J. R. Venable, the son of J. A. Venable, the plaintiff, were candidates for the office of justice of the peace, and Wright W. Wilder was a candidate for the office of constable. Mr. Swartz, Mr. Alexander, and Mr. Wilder had the same supporters. Before the election Mr. Bratton had been employed by Mr. Venable to attend the election in Eagle township to take the affidavits of those who voted for Mr. Venable. Dr. J. R. Wayne met him and said, "Bratton, I just want to tell you, you had better stay away from Wampoo (the place where the election was held); it is very likely that trouble will occur, and you will endanger your life if you go down." When Mr. Bratton answered that he had been employed to go to the election, and that he would go, Dr. Wayne replied that if his fee was worth more than the risk of his head, to go ahead, and that they objected to his going there and having anything to do with their affairs. Dr. Wayne attended the election from 10 o'clock in the morning until after the polls closed, and he and Mr. Swartz frequently during the day were in the polling room and out of it when the voting was going on, although the statutes of Arkansas provide that, "Except as the electors are admitted and pass in, one at a time, to vote, no person shall, under any pretext whatever, be permitted in the polling room, from the opening of the polls until the completion of the count of the ballots and certification of the returns, except the sheriff or deputy, and the judges and clerks of the election," except under circumstances not disclosed in this record. Mr. Leach, a qualified voter in Eagle township, had a store 50 or 75 feet from the voting place. He testified that he tried to vote half a dozen times, but Mr. Ritchie was in charge of the door and would not let him in, although automobiles were coming in and the people from them voted in preference to those theretofore at the polling place waiting for an

opportunity to vote to such an extent that he tackled Dr. Wayne about it; that Dr. Wayne told him that he had the situation in his hands; that thereupon he and Dr. Wayne had an understanding that Mr. Leach and Mr. Swartz should be elected justices of the peace; that they would have Alexander withdraw; that he (Leach) should get his men up, and he (Dr. Wayne) would see that they got in to vote; that he (Dr. Wayne) would tell Ritchie to let Leach in; that he then went back to the polling place and had no trouble in voting.

The Statutes of Arkansas (Kirby's Dig. § 2812) provided: "The polls shall be opened at eight o'clock a. m. and shall remain continuously opened until half-past six o'clock p. m." The polls were not opened for voting until about 9:30 a. m., and a recess was taken for lunch. There were about 220 votes usually cast at an election in Eagle township generally, but at this election only about 105 were received. When the polls were opened, and for an hour or more before that time, there were about 100 men waiting for the polls to open so that they could vote. The electors were not admitted in the order of their arrival or of their proximity to the polling place, but Mr. Ritchie, by calling or beckoning, selected those who should vote and admitted them, while at the same time he repeatedly refused to admit those nearer the entrance who had been waiting longer. Automobile loads of voters came to the polls from Mr. Swartz's place and Mr. Wilder's place, while many voters who had been waiting to vote and had repeatedly been refused admission to the polling room by Mr. Ritchie were still waiting to vote. Mr. Swartz came out of the polling room to these men as they came up in the automobiles, led them up to the door, and they were admitted by Ritchie and permitted to vote one after the other until they had all voted, before any other voter who had been refused admission was permitted to enter the polling place. The voting was very slow—from 5 to 20 minutes were used to get in a single vote, only one voter was admitted to the polling place at a time, and no other one was admitted until he came out, save in exceptional instances until about 15 minutes before the polls closed, when announcement was made that the polls would close in 15 minutes, the door of the polling room was opened, and during that 15 minutes voters were admitted more rapidly, but it was too late for all those present to vote, and 40 or 50 of them were still there trying to get in and vote when the polls closed, while many others who had repeatedly tried to vote and had been turned back during the day, had become satisfied that they would not be permitted to vote, and had gone away and were in that way deprived of their rights to vote. Each of the plaintiffs waited long, repeatedly advanced towards the door and tried to vote, and was repeatedly prevented by Ritchie from so doing, and in this way each of the plaintiffs was deprived of his vote and of his right to vote for any of the candidates at this election.

The existence of the material facts which have been stated, was denied by the testimony of witnesses for the defendants. Whether they existed or not was, as has been already said, a question for the jury, but so many witnesses testified to their existence and so many

circumstances pointed to their existence that this court cannot hold that there was no substantial evidence to prove it, or that there was no substantial evidence that the defendants Harry A. Wayne and Walter Alexander conspired with Dr. Wayne, Mr. Swartz, and Mr. Ritchie to let the Swartz and Wilder voters exercise their electoral franchise, and by delays, hinderances, and preference to deprive the plaintiffs and other qualified electors of their right to vote at this election. It is incredible that the voting should have been so delayed that only 105 voters out of perhaps 200 voted in eight hours, or that automobile loads of voters led by Swartz or Wilder could vote promptly on their arrival, while opposing voters were repeatedly denied the opportunity, and finally deprived of their right to exercise their electoral franchise at that election without the knowledge and assent of these judges of election who chose Mr. Ritchie and had the power to direct him how to discharge his duty impartially and faithfully, and whose duty it was to see to it that every qualified elector had an opportunity to cast his ballot.

The suggestion of counsel for the defendants that the federal court has no jurisdiction over these actions because the plaintiffs produced no direct testimony that they wanted or intended to vote at this election for a candidate for United States Senator, or for a candidate for Congressman, while they proved that they were deeply interested in the election of a candidate for a justice of the peace, is insignificant and negligible. They pleaded in their complaint that they were deprived of their right to vote for a candidate for United States Senator and for a candidate for Congressman by the conspiracy of these defendants which they alleged and the attainment of its object. They proved to the satisfaction of the jury that they were deprived of their right to vote for any one at this election by the conspiracy and the attainment of its object, and as the whole is greater than any of its parts and includes all of them, they proved that they were deprived of their rights to vote for a candidate for United States Senator and for a candidate for Congressman, and that constitutes proof of a cause of action over which the federal court has jurisdiction.

[5] The fifth complaint is that the court refused, after it had delivered its charge to the jury, to modify that charge so as to give the jury certain information regarding the law of conspiracy embodied in the request of Mr. Murphy, one of the counsel for the defendants. That request has been carefully compared with the general charge of the court, and found to have been clearly and completely embodied therein, not in the exact words of counsel, but in substance and in legal effect. There was therefore no error in refusing that request. Where a rule of law has been fairly submitted to the jury in the general charge, it is not error to refuse to repeat it in the words of the request of counsel. Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 Fed. 133, 144, 52 C. C. A. 95; Chicago Great Western Ry. v. McCormick, 200 Fed. 375, 118 C. C. A. 527, 47 L. R. A. (N. S.) 18; Atchison, Topeka & Santa Fé Ry. Co. v. Phillips, 176 Fed. 663, 671, 100 C. C. A. 215.

The sixth complaint is that the District Court erred in rendering a judgment against the defendants, but that complaint presents no question of law which has not been considered and determined above.

The result is that none of the complaints of counsel for the defendants of error in the trial of these cases can be sustained. The judgment below must therefore be affirmed and it is so ordered.

NEW et al. v. DENISON CLAY CO.

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

No. 5187.

LIMITATION OF ACTIONS ⊂=24(2)—WRITTEN CONTRACTS—BILLS OF LADING.

Under the rule of law that the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation, and fixes the obligations of all participating carriers to the extent that its terms are applicable and valid, such a bill of lading obligating the owner to pay the freight, in connection with the filed and published tariffs, which become a part thereof, constitutes a written contract to pay the lawful freight as shown by such tariffs, and an action may be maintained thereon within five years, under Gen. St. Kan. 1915, § 6907(1).

Stone, Circuit Judge, dissenting.

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

Action by Alexander New and Henry C. Ferris, receivers of the Missouri, Oklahoma & Gulf Railway Company, against the Denison Clay Company. Judgment for defendant, and plaintiffs bring error. Reversed.

Arthur Miller, of Kansas City, Mo., and Edward R. Jones and Ephraim H. Foster, both of Muskogee, Okl., for plaintiffs in error.

W. E. Ziegler, of Coffeyville, Kan., for defendant in error.

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

SANBORN, Circuit Judge. The plaintiffs in this action are the receivers of the railroad and property of the Missouri, Oklahoma & Gulf Railway Company. On August 20, 1917, they commenced an action against the Denison Clay Company, a corporation, for $561.04 of underpayments for the transportation of building tile and starters, over its line of railroad, from Rex, Okl., to Durant, Okl., between May 10 and August 1, 1914. The defendant demurred to the complaint of the plaintiffs, its demurrer was sustained, and the action was dismissed, on the ground that it was barred by the statute of limitations of the state of Kansas, where the causes of action arose and the action was brought. The plaintiffs complain of this ruling.

The complaint in the court below set forth, in nine counts, nine alleged causes of action for the recovery of undercharges of freight for the transportation. These counts differed only in the amounts

sought and the respective bills of lading, which were made parts of the respective counts and attached to the complaint. The averments of each count material to the question in this case were that the defendant delivered at Coffeyville, Kan., building tile and starters, to the Missouri Pacific Railway Company on a certain day in July or August, 1914, consigned over its railroad and over the railroad of the Missouri, Oklahoma & Gulf Railway Company, to Frier & Scott, at Durant, Okl.; that the Missouri Pacific Railway Company issued to the defendant a bill of lading for this shipment, a copy of which was attached to the complaint and made a part thereof; that the defendants were connecting and delivering carriers of the tile and starters; that they received them at Rex, Okl., and delivered them to Frier & Scott, at Durant, Okl., in July or August, 1914; that the freight charges for the transportation, which were specified by Southwestern Lines Tariff 44–H, I. C. C. 1042, on file with the Interstate Commerce Commission, were 20 cents per hundredweight, but that plaintiffs' agent collected only 10 cents per hundredweight; that this mistake resulted in an underpayment by the defendant of 10 cents per hundredweight on this shipment, which, with interest, the plaintiffs asked to recover.

By the bills of lading, made a part of the complaint, the Missouri Pacific Railway Company receipts for the tile and starters and "agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination," and the bills of lading contain stipulations that "the owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery." The bills of lading were signed by both the initial carrier and the consignor. The demurrer was general. It was that no count in the petition stated facts sufficient to entitle the plaintiffs to the relief they sought, and the court below sustained it on the ground that the causes of action stated in the complaint appeared to be barred by the statute of limitations of the state of Kansas, which provide that—

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

"First. Within five years: An action upon any agreement, contract or promise in writing.

"Second. Within three years: An action upon contract, not in writing, express or implied; an action upon a liability created by statute, other than a forfeiture or penalty."

General Statutes Kansas 1915, § 6907.

The alleged causes of action accrued between July 1 and September 1, 1914, and this action was brought on October 20, 1917. There is no doubt, therefore, that the complaint fails to state a good cause of action upon a contract not in writing, express or implied, and upon a liability created by statute other than a forfeiture or penalty, because this action was not brought until more than three years after such causes of action, if any, accrued; and the only question in this

case is: Does the complaint state good causes of action upon contracts or promises in writing?

"The bill of lading required to be issued by the initial carrier upon an interstate shipment," says the Supreme Court, "governs the entire transportation and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid." Georgia, Fla. & Ala. Ry. v. Blish Company, 241 U. S. 190, 194, 195, 36 Sup. Ct. 541, 543 (60 L. Ed. 948).

The bills of lading in this action contain an agreement by the defendant to pay the freight; but they do not state the amount or the rate of the freight, and it is contended that here was a fatal defect in them as written contracts. But the rate of this freight was in writing or print and published, and was made certain beyond dispute, and beyond the power of the parties to the bill of lading to change it, by the tariff pleaded, and a mere multiplication of rate by weight would produce the amount. Interstate Commerce Commission Act as amended, United States Compiled Statutes 1916, §§ 8564–8569; Texas & Pacific Ry. Co. v. Mugg, 202 U. S. 242, 243, 245, 26 Sup. Ct. 628, 50 L. Ed. 1011; Armour Packing Co. v. United States, 153 Fed. 1, 18, 21, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400; Armour Packing Co. v. United States, 209 U. S. 56, 81, 28 Sup. Ct. 428, 52 L. Ed. 681; New York, New Haven & Hartford v. Interstate Commerce Commission, 200 U. S. 361, 391, 398, 26 Sup. Ct. 272, 50 L. Ed. 515.

That is certain which can be made certain. The agreement to pay the freight contained in the bills of lading was therefore an agreement to pay the lawful freight, that freight prescribed by the applicable tariff filed and published under the acts of Congress, and that written or printed tariff, so far as it governed this freight, was, by this agreement to pay the freight, embodied in, and it became a part of, the contract in the bill of lading. Chicago, Rock Island & Pacific Ry. v. Cramer, 232 U. S. 490, 493, 34 Sup. Ct. 383, 58 L. Ed. 554.

Conceding, but not admitting, that, if the bills of lading had never been issued or pleaded, the other facts set forth in the complaint would, barring the statute of limitations, have presented tenable causes of action upon contracts not in writing, or on statutory liabilities, still that is no answer to the contention that the bills of lading constitute written contracts, from the breach of which causes of action for like recoveries might arise. The sale and delivery of an article of personal property for an agreed price, without writing, gives a good cause of action for the recovery of the price. If, however, the vendee also gives to the vendor his written agreement to pay the agreed price for the article, the breach of the written contract also presents a good cause of action, and one that under the statute of limitations of Kansas might survive two years after the former action was barred.

These bills of lading contained valid written contracts of the defendant to pay the lawful freight for the transportation involved in this action. The plaintiffs have carefully pleaded each of them and its breach in separate counts in their complaint, and have thereby set forth good causes of action that are not barred by the statute of

limitations of Kansas. Seaboard Air Line Ry. v. Luke, 19 Ga. App. 100, 90 S. E. 1041, 1042, 1043; South Georgia Ry. Co. v. South Georgia Grocery Co., 17 Ga. App. 349, 86 S. E. 939; Boatmen's Bank of St. Louis v. Fritzlen, 221 Fed. 145, 148, 137 C. C. A. 45; Moloney v. Cressler, 236 Fed. 636, 642, 149 C. C. A. 632.

Let the judgment below be reversed, and let the case be remanded to the court below, with directions to permit the defendant to answer and have further proceedings consistent with the views expressed in this opinion.

STONE, Circuit Judge (dissenting). A carrier is required by law to collect, and the shipper to pay, the tariff rate on interstate shipments. This mutual obligation of carrier and shipper cannot be affected by mistake, design, or even by positive contract to the contrary. It is a liability arising from and fixed by law, exists independent of contract, and attaches to the status of interstate carriage. It is a "liability created by statute" within the statute of limitations of Kansas. Although the above is true, the carrier and shipper may enter into a contract for interstate carriage, a portion of which is the payment of the legal freight rate. Where such contract exists, and the carrier has mistakenly collected less than that rate, it may sue for the difference, either under the contract or under the above "liability created by statute." In my judgment the carrier here based its action on the facts of interstate carriage and of collection of less than the tariff rate. The bills of lading appear only as exhibits to the petitions, and are merely incidental. The causes of action are practically identical in form, differing only as to those facts essential to identify different shipments. Such statement is convincing to my mind, and is, so far as here material, as to count 1, as follows:

"Further complaining of said defendant, the said plaintiffs allege that on July 7, 1914, the defendant Denison Clay Company delivered to the Missouri Pacific Railway Company at Coffeyville, Kansas, 3,333 hollow tile, loaded in Missouri Pacific car No. 20340, consigned over said Missouri Pacific Railroad and the line of railroad operated by the plaintiffs herein to Frier & Scott, at Durant, Oklahoma, and the bill of lading therefor was issued to the defendant, Denison Clay Company, by the Missouri Pacific Railway Company, a copy of which bill of lading is attached hereto, marked 'Exhibit A,' and made a part hereof; that the plaintiffs were connecting and delivering carriers of said car of tile, receiving the same at Rex, Oklahoma, and delivering the same to the consignee thereof at Durant, Oklahoma, on July 11, 1914; but that the agent of the plaintiffs did not collect from said consignee the proper and correct freight charges due for the transportation of said shipment, as provided by Southwestern Lines Tariff 44–H I. C. C. 1042, on file with the Interstate Commerce Commission, applying to the commodity transported by plaintiffs; that said agent applied a rate of ten cents ($.10) per hundredweight on hollow tile moving from Coffeyville to Durant, via the line of railroad operated by plaintiffs herein, when the rate that should have been applied in accordance with said tariff above referred to was twenty cents ($.20) per hundredweight; that by reason of said error in determining said freight charges there resulted an underpayment on the part of the said defendant amounting to $60.70, and that there is now due and owing said plaintiffs by reason of said transportation the sum of $60.70, togther with interest thereon from the 11th day of July, 1914, at the rate of 6 per cent. per annum.

"Plaintiffs further state that said charges above referred to were earned and have been assessed in strict conformity with and under the lawfully established tariffs covering the rate to be charged for the transportation of this shipment in effect and on file at the time.

"Plaintiffs allege that they have made demand upon the defendant for the payment of said sum of $60.70, but defendant has failed and refused to pay the same and still fails and refuses to make payment thereof; that said charges are reasonable, just and properly assessed, and are now and have been due said plaintiff from said defendant for a long time, and that the same should be paid by the defendant herein."

MAYTAG v. CUMMINS.

(Circuit Court of Appeals, Eighth Circuit. July 8, 1919.)

No. 4996.

1. LIBEL AND SLANDER ⟸28—ACTION FOR SLANDER—REPETITIONS BY THIRD PERSONS.

   Voluntary and unauthorized repetitions of a slander by third persons, current rumors and reports thereof and damages flowing therefrom, are not regarded by law as the natural or probable consequences of the original utterance of the slander.

2. LIBEL AND SLANDER ⟸28, 101(1)—ACTIONS FOR SLANDER—MEASURE OF DAMAGES.

   The legal presumption is that a slander will not be repeated, and that its unauthorized repetition and current rumors and reports of it and the damages therefrom are not to be anticipated by the originator, and are not the natural or probable consequences thereof, but the proximate cause of such damages is the illegal intervening repetition or the making by third persons of the current reports and rumors.

3. APPEAL AND ERROR ⟸1053(2)—ERRONEOUS ADMISSION OF EVIDENCE—EFFECT OF SUBSEQUENT WITHDRAWAL.

   The general rule is that if evidence has been erroneously admitted during the trial the error is cured by the subsequent withdrawal of the evidence before close of the trial or by a clear instruction to disregard it, but when it appears from the record that it made such a strong impression on the minds of the jury that the subsequent withdrawal or instruction probably failed to eradicate it, the defeated party is entitled to a new trial.

   Stone, Circuit Judge, dissenting in part.

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

Action at law by F. I. Cummins against F. L. Maytag. Judgment for plaintiff, and defendant brings error. Reversed.

Frank R. Aikens, of Sioux Falls, S. D. (Harold E. Judge and Charles P. Bates, both of Sioux Falls, S. D., on the brief), for plaintiff in error.

J. U. Sammis, of Sioux City, Iowa (Shull, Gill, Sammis & Stilwell and E. E. Wagner, all of Sioux City, Iowa, on the brief), for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. This is an action for damages for slander. During September, October, November and a part of December, 1914, F. I. Cummins, the plaintiff below and so termed herein, was the assistant general manager and was discharging the duties of traffic manager, and F. L. Maytag, the defendant below and so called herein, was the president, of the South Dakota Central Railroad Company. Mr. Kirby and Mr. McArthur were stockholders and directors of that company, and Mr. Kirby was its general counsel. On March 5, 1915, the plaintiff sued Maytag, the defendant, for $100,000 damages for publishing certain alleged slanders of him. The defendant answered by denying many of the averments of the complaint and by pleading that the alleged slanders were privileged communications made to the officers of the railroad company, to enable them to protect its interests. The complaint set forth five alleged causes of action. Two of them were dismissed before the case was submitted to the jury.

The material averments of the three which went to the jury were: (1) That on or about December 18, 1914, at Sioux Falls, S. D., in the office of Mr. Kirby, in the presence and hearing of Mr. Kirby and Mr. McArthur, the defendant, Maytag, made this false statement, willfully and maliciously, to Mr. Cummins: "I have conclusive evidence that you stole a large amount of coal shipped to the South Dakota Central Railway Company, and diverted the proceeds to your own use. My suspicions have covered a period of several months, and have been confirmed by a report of an investigation instituted by the Interstate Commerce Commission at the time said investigators came to Sioux Falls in the fall of the year 1913;" (2) that in Chicago, Ill., on or about November 20, 1914, the defendant, Maytag, said to E. T. Radcliffe, "How long will it take to check up the records on the 52 carloads of coal that Cummins has gotten away with;" and, (3) that on or about December 17, 1914, at Sioux Falls, S. D., he falsely and maliciously said to E. L. Crimmens, "There has been a systematic steal going on down there (meaning down at the headquarters of the South Dakota Central Railway Company in the city of Sioux Falls, or in its yards and terminals in said city), and I have evidence that he has taken the coal from this list (meaning a list of cars defendant held in his hand at said time) of cars, and that the coal in these cars has been stolen by Cummins."

The trial of the action occupied five days. In the course of it evidence was introduced tending to prove that the defendant had made the statements alleged in the complaint, that after the dates when he was alleged to have made them third persons, without his authority or request, repeated them, and stated that Maytag had made them, and that rumors and reports to that effect were current in Sioux Falls. All the evidence of these repetitions of the defamatory statements, of the reports of such third persons that Maytag had made such statements, and of the current rumors and reports, were objected to by counsel for the defendant on the grounds that they were hearsay, that they were not traceable to or binding upon him, and that they were incompetent and immaterial. These objections

were overruled, exceptions were taken to this ruling, and for several days testimony of these repetitions of the slanderous charges by unauthorized third persons, of their statements that Maytag had made them, and of the current reports and rumors of them was poured into the ears of the jurymen. At the close of the trial, however, the court on motion of counsel for the defendant, struck all this testimony from the record and directed the jury to disregard it.

Counsel for the defendant, Maytag, assigned the rulings admitting this evidence as error, and contend that the injurious effect of it was not cured by the final ruling upon, and direction regarding it. There are seventy other alleged errors assigned. But if the admission of this evidence was error and if the endeavor of the court to withdraw it failed to extract the vice of its admission, there must be a new trial, and this assignment will therefore first be considered.

[1] Is it then the law that evidence of the voluntary and unauthorized repetition of a slander and of rumors and reports thereof by third persons, not under the control of and without the request of the originator, is admissible in an action against him for damages caused by his utterance of it to others? Counsel for Mr. Cummins contend that this question should be answered in the affirmative: (1) Because the originator of a slander is responsible for the natural and probable consequences of his utterance of it; and (2) because whether the subsequent unauthorized repetition, reports, and rumors are such a consequence is a matter of fact ordinarily to be determined by a jury. Let the proposition that the originator of a slander is responsible for the natural and probable consequences of his utterance of it be conceded. Then the question becomes, Is it the law that the voluntary and unauthorized repetition of a slander by third persons, current rumors and reports thereof, and damages flowing therefrom, are not as a matter of law the natural or probable consequences of the original utterance of the slander, and that therefore evidence thereof is not admissible in an action for damages against the originator? Or is it the law that the question whether or not the voluntary and unauthorized repetition of a slander by third persons, current rumors and reports thereof, not connected by evidence with the originator of the slander, and the damages flowing from such repetitions, rumors, and reports, are the natural and probable consequences of the original utterance is an issue of fact that should ordinarily be submitted to a jury, and therefore evidence of such unauthorized repetitions, rumors, and reports, and the damages therefrom is admissible in evidence against the defendant in an action for slander?

The court below, at the close of the trial, evidently after a searching examination and careful consideration of this matter, decided that the first question must be answered in the affirmative and the second in the negative.

In an action at law this is a court for the correction of errors of law of the trial court exclusively, and the question here is whether or not the court below, by making this ruling, fell into an error of law. The question it became the duty of that court to decide, and

that it now becomes the duty of this court to determine, was not a new one. It was a question which had been repeatedly adjudged by the courts of England and of this country. It was not, and it is not, what in the opinion of the court below or of this court the rule on this subject ought to be if no rule had ever been made by controlling authority or by the general consensus of judicial opinion. But the question was and is: (1) Had the rule of law on this subject become established by the weight of respectable authority or the consensus of judicial opinion when the court below made its ruling? And, if it had been so established, was the ruling of the court below in accordance with such weight of authority or judicial opinion? If it was, that ruling ought not to be held to be erroneous because it was the duty of the court below so to rule, and because a settled and certain rule of law on such a subject as that here in question is far more conducive to the administration of justice than conflicting authorities and that uncertainty which makes it impossible for laymen or lawyers to know what the rule is.

Counsel for the plaintiff, Cummins, in support of their contention that the rule of the court below on this subject is erroneous, insist that their view is supported by these authorities: Merchants' Ins. Co. v. Buckner, 98 Fed. 222, 223, 39 C. C. A. 19; Williams v. Fulks, 113 Ark. 82, 167 S. W. 93; Moore v. Stevenson, 27 Conn. 14; Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9; Rice v. Cottrel, 5 R. I. 340; Nott v. Stoddard, 38 Vt. 28, 88 Am. Dec. 633; Smith v. Moore, 74 Vt. 81, 52 Atl. 320, 321; Davis v. Starrett, 97 Me. 568, 55 Atl. 519. In the citation, discussion, and treatment of these and other authorities, counsel fail to notice and consider the wide distinction between the line of materiality of evidence in actions for libel and the line of materiality in actions for slander which results from the fact, among others, that the written or printed instrument which contains the libel proves it, and proof of the circulation or repetition of that writing or print does not, so far as it proves what the libel was, run counter to the basic rule against hearsay, while evidence of the repetition of a slander or of rumors or reports thereof by third persons to whom the originator never uttered it is incompetent, under the rule against hearsay, to prove what the alleged slander was, because the repetitions, reports, and rumors are necessarily either simple or multiple hearsay, either hearsay or hearsay of hearsay. Board of Commissioners v. Keene Five-Cent Savings Bank, 108 Fed. 510, 511, 47 C. C. A. 464. This distinction will be further considered later.

We turn to the consideration of the authorities. In addition to those which have been cited attention is called to the facts that in McBride v. Ledoux et al., 111 La. 398, 35 South. 615, 100 Am. St. Rep. 491, it was held that there was no responsibility for an unauthorized repetition of a communication which was privileged when it was made by the defendant, and that in Wheaton v. Beecher, 79 Mich. 443, 44 N. W. 927, the court left to the jury the question whether or not the defendant procured the publication of the defamation in a newspaper when he communicated it to a reporter, but these

two cases failed to rule the issue of law here under consideration. And decisions to the effect that when the defendant publishes a libel in a newspaper, pamphlet, or magazine, evidence of the extent of the circulation thereof may be proved, such as Palmer v. Mahin, 120 Fed. 737, 57 C. C. A. 41, Bigelow v. Sprague, 140 Mass. 425, 427, 5 N. E. 144, Fry v. Bennett, 28 N. Y. 324, 330, Dalton v. District Court, 164 Iowa, 193, 145 N. W. 498, Ann. Cas. 1916D, 695, and Farrand v. Aldrich, 85 Mich. 593, 48 N. W. 628, 630, are also irrelevant, because the extent of such circulation is the result of the publication and of the damage therefrom, which the defendant directly causes by the publication he makes or procures. Turning then to the authorities cited as directly ruling the legal issue in hand against the court below, a careful perusal of the opinions of the courts in those cases discloses these facts: Merchants' Insurance Co. v. Buckner, 98 Fed. 222, 223, 39 C. C. A. 19, was an action for a libel contained in a letter sent by the defendant to the addressee, the secretary of the local board of an insurance company, with the intention on the part of the defendant, which appeared on the face of the letter, that the secretary should communicate its contents to the members of the board. Moore v. Stevenson, 27 Conn. 14, was an action for a libel published in a newspaper by the defendant. Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9, was an action for a libel published in a newspaper by the defendant. In these three cases the courts held that in these actions for libel, not for slander, the question whether or not the repetition or circulation of the libel, which the terms of the letter in the first case, and the fact that the defendants published the libels in the newspapers, in the other two cases showed that they caused and intended to cause, and the damages therefrom, were the natural and probable consequences of the original publications was a question of fact for the jury, and they admitted evidence thereof. In Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9, the case of Miller v. Butler, 6 Cush. (Mass.) 71, 74, 52 Am. Dec. 768, decided in 1850, is cited. In that case two defendants sent a libelous private letter to one Bartlett, and the Massachusetts court held that the defendants were responsible "for the natural and probable publicity that would be given to the libel by sending it to Bartlett; not for Bartlett's acts, but for the tendency and consequences of their own acts, in putting the libel into circulation."

But this decision has been overruled by the Massachusetts Supreme Court and the weight of respectable authority, even in actions for libel, runs counter to the decisions just reviewed, and sustains the rule applied to this action of slander by the court below. Thus in Burt v. Advertiser Newspaper Co., 154 Mass. 238, 247, 28 N. E. 1, 6 (13 L. R. A. 97), decided in 1891, the trial court in charging the jury said:

"[The defendant] is not responsible for the injurious acts of another in publishing, but he is under obligation to the plaintiff to take into account and into consideration what will be the natural and probable consequences of his act in putting the libel into circulation. To that extent he is responsible, and only to that extent."

Of this charge the Supreme Judicial Court of Massachusetts in a unanimous opinion, delivered by Judge Holmes (now Mr. Justice Holmes of the Supreme Court) said:

"The general proposition laid down is correct, no doubt, if rightly understood, and it was applied to libel, under what circumstances and with what meaning does not appear, in Miller v. Butler, 6 Cush. 71, 74. But if applied to libel or slander without further explanation it is likely to be misleading, and when put as a qualification of the ruling asked hardly can fail to be so. The meaning which naturally would be conveyed to the jury is that, although a particular republication cannot be recovered for, damages may be enhanced by the general probability of unlawful republications. This is not the law. Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual. Hastings v. Stetson, 126 Mass. 329, 331 [30 Am. Rep. 683]; Shurtleff v. Parker, 130 Mass. 293, 296 [39 Am. Rep. 454]; Hayes v. Hyde Park, 153 Mass. 514 [27 N. E. 522, 12 L. R. A. 249]; Leonard v. Allen, 11 Cush. 241, 246."

And the general rule, even in libel cases seems to be that the publisher of a libel is not liable for the voluntary republication or repetition thereof by others without his request or authority, or for current rumors or reports thereof, or the damages therefrom. Gough v. Goldsmith, 44 Wis. 262, 265, 28 Am. Rep. 579; McDuff v. Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. 671, 673, 22 Am. St. Rep. 673; Age-Herald Publishing Co. v. Waterman, 188 Ala. 272, 287, 66 South. 16, 20, 25, Ann. Cas. 1916E, 900; 25 Cyc. 506, note 82.

[2] But this action is for slander, not for libel, for spoken, not for written or printed, words. Evidence of repetition by third persons without the request of the originator, and of rumors and reports of the scandal, is as to the substance and form of the alleged slander hearsay, or hearsay of hearsay, and it falls under the ban of the rule against hearsay, while the form and substance of a libel is legally evidenced by the writing or print that contains it. The injurious natural and probable consequences of slander are far less than those of libel. Slander is but the utterance of words. That utterance is ordinarily made in the hearing of one or of a few persons. That utterance is often, it is probably not too much to say that it is generally made in private, in confidence, in the faith that it will not be and the intention that it shall not be repeated. This belief and intention is not without foundation in reason and in law. It is an illegal act to repeat a slander, an act for the damages from which the victim of the repetition may maintain an action against the repeater. The basic legal presumption on which law and the general action of mankind is based is that men will refrain from unlawful acts, will obey the law and discharge their duties, and the great majority do so. So it is that the legal presumption is that a slander will not be repeated, and that its unauthorized repetition and current rumors and reports of it and the damages therefrom are not to be anticipated by the originator, and are not the natural or probable consequences thereof. But the proximate cause of such damages is the illegal intervening repetition or the making by third persons of the current reports and rumors which turn aside the natural sequence of events and isolate

the damages from the unauthorized repetition from those from the original slander. Again, a slander is preserved in no fixed or permanent form. It ordinarily soon fades out and is forgotten like the sound that carries it. But one who publishes a libel in a newspaper or pamphlet which circulates among many people, or even in a private letter, thereby places it in permanent form where it will be more likely to continue in existence and to be read by many people, and where he causes it to be published in a newspaper or magazine he thereby evidences his intention that the readers shall read it, so that the natural and probable effect of publishing a libel is far more permanent, extensive, and injurious to the victim than the mere speaking of the words it contains to one or more persons. These striking differences in the line between material and immaterial evidence in actions of libel and slander, and in the difference between the natural and probable consequences of them, is evidenced in the decisions of the courts and in the text-books.

Thus Odgers in his fifth edition of his work on Slander and Libel, at page 177, states the distinction in this way:

"If I am in any way concerned in the making or publishing of a libel, I am liable for all the damages that ensue to the plaintiff from its publication, but if I slander A., I am only liable for such damages as result directly from that one utterance of my own lips. If B. hears me and chooses to repeat the tale, that is B.'s own act, and B. alone is answerable should damages to A. ensue."

Newell, in the third edition of his book on Slander and Libel, published in 1914, which is the latest and most authoritative American text-book on this subject at hand, states the rule on that subject in actions for libel, and the marked difference between that rule and the rule in actions for slander in the same terms.

When we turn to the decisions of the courts on the subject under consideration, only five authorities in actions for slander have been cited, or have come to our attention, which seem to sustain the position that the ruling of the court below was erroneous. These are Williams v. Fulks, 113 Ark. 82, 85, 167 S. W. 93, Rice v. Cottrel, 5 R. I. 340, 342, Nott v. Stoddard, 38 Vt. 25, 28, 88 Am. Dec. 633, Smith v. Moore, 74 Vt. 81, 52 Atl. 320, 331, and Davis v. Starrett, 97 Me. 568, 55 Atl. 516, 519. But Williams v. Fulks does not rule the question. While at page 85 of 113 Ark., at page 94 of 167 S. W., the Supreme Court of that state held that evidence of the fact that the slander had been generally circulated in the community as the result of the slanderous words was competent to show the extent of the damages, it added:

"The question whether the defendants are responsible for damages resulting from mere repetition by other persons is not properly raised in this case, and the court will not undertake to decide it."

The four other cases run directly counter to the ruling of the court below and to the rule established and sustained by the authorities which follow: Townsend on Slander and Libel, § 114; Ward v. Weeks, 7 Bing. 211, 215, 331; 131 English Reprint, 81, 83; Hastings v. Stetson, 126 Mass. 329, 331, 30 Am. Rep. 683; Stevens v. Hartwell, 11 Metc. 542, 549; Elmer v. Fessenden, 151 Mass. 359, 362, 24 N. E.

208, 5 L. R. A. 724; Terwilliger v. Wands, 17 N. Y. 54, 59, 72 Am. Dec. 420; Olmsted v. Brown, 12 Barb. (N. Y.) 657, 661, 665; Fowles v. Bowen, 30 N. Y. 20, 22; Bassell v. Elmore, 48 N. Y. 561, 564; Carpenter v. Ashley, 148 Cal. 422, 426, 83 Pac. 444, 7 Ann. Cas. 601; Prime v. Eastwood, 45 Iowa, 640, 644; Zurawski v. Reichmann, 116 Iowa, 388, 389, 90 N. W. 69; Hereford v. Combs, 126 Ala. 369, 380, 28 South. 582, 585; King v. Sassamann (Tex. Civ. App.) 54 S. W. 304; Cameron v. Cockran, 2 Marv. (Del.) 166, 42 Atl. 454, 457.

In Leonard v. Allen, 11 Cush. 241, 246, a judgment in an action for slander, in that the defendant charged the plaintiff with burning a schoolhouse, was reversed because evidence was admitted that after the fire it was currently reported in the neighborhood that the defendant had charged the plaintiff with the burning, and the Supreme Judicial Court of Massachusetts said:

"The objection arises from the want of proof that the defendant had circulated those charges which were abroad generally in the community. The evidence, so far as it went to connect the defendant with them, was mere hearsay. It proved the existence of current reports that the defendant had made such a charge, but it went no further."

This statement is equally true of the evidence of the repetitions, rumors, and reports in the case at bar.

In Carpenter v. Ashley, 148 Cal. 422, 426, 83 Pac. 444, 7 Ann. Cas. 601, the Supreme Court of that state held that the trial court rightly excluded from the evidence, newspaper articles which purported to state slanderous words the defendant was charged with having spoken.

In Hastings v. Stetson, 126 Mass. 329, 331, 30 Am. Rep. 683, Chief Justice Gray, afterwards Mr. Justice Gray of the Supreme Court, delivering in 1879, the unanimous opinion of the Supreme Judicial Court of Massachusetts, stated the law on this subject in these words:

"It is too well settled to be now questioned that one who utters a slander is not responsible, either as on a distinct cause of action or by way of aggravation of damages of the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the persons slandered, and that such repetition cannot be considered in law a necessary, natural, or probable consequence of the original slander."

It is the endeavor of writers of text-books to state the rules of law as they have been established by the decisions of the courts at the times they respectively write. Newell, in the Third Edition of his work on Slander and Libel, published in 1914, stated the rule on this subject as he found it to be at that time, in the words of Chief Justice Gray, which have just been quoted.

The result of this review of authorities on this subject is that, when the trial court ruled that the law was that the voluntary and unauthorized repetition of the slander without the request or intention of the originator by persons over whom he had no control, the current reports and rumors thereof, and the damages flowing therefrom as a matter of law were not the natural or probable consequences of

the original slander, that evidence thereof was not admissible against the defendant, and instructed the jury to disregard it, there had been four decisions to the contrary, one from Rhode Island (Rice v. Cottrel, 5 R. I. 340, 342, rendered in 1858), two from Vermont (Nott v. Stoddard, 38 Vt. 25, 28, 88 Am. Dec. 633, and Smith v. Moore, 74 Vt. 81, 52 Atl. 320, 331, rendered in 1855 and 1902, respectively), and one from Maine (Davis v. Starrett, 97 Me. 568, 55 Atl. 519, rendered in 1903), while the rule of law which the trial court announced and applied had been the law in all the courts in England ever since the decision in Ward v. Weeks, in 1830, had been declared by Chief Justice Gray in 1879, in Hastings v. Stetson, 126 Mass. 329, 331, 30 Am. Rep. 683, and by Mr. Newell in 1914, to be too well settled to be questioned, and had been adopted, sustained, and applied to the trials of actions in slander by the courts of the populous communities of New York, Massachusetts, California, Iowa, Texas, Alabama, and Delaware. In view of this great weight of authority, of this general consensus of judicial opinion and adjudication which established and maintained the rule of law which the court below followed and applied in its final ruling, that ruling cannot be held to be error, but must be affirmed as the law of this case.

The unavoidable result of this conclusion is that the rulings of the court below during the progress of the trial admitting the evidence of the repetitions, rumors, and reports of the slander during the several days occupied in the introduction of evidence were erroneous, and the defendant demands a new trial on that account. The only answer to that demand is that the admission of this evidence was not prejudicial to him, because at the close of the trial the court on his motion withdrew it and instructed the jury to disregard it.

[3] The general rule is that if evidence has been erroneously admitted during the trial, the error of its admission is cured by its subsequent withdrawal before the close of the trial or by a clear peremptory instruction to the jury to disregard it. Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; Specht v. Howard, 16 Wall. 564, 21 L. Ed. 348; Washington Gaslight Co. v. Lansden, 172 U. S. 534, 555, 19 Sup. Ct. 296, 43 L. Ed. 543; Turner v. American Security & Trust Co., 213 U. S. 257, 267, 29 Sup. Ct. 420, 53 L. Ed. 788; Union Pacific Ry. v. Thomas, 152 Fed. 365, 371, 81 C. C. A. 491; Balaklala Copper Co. v. Reardon, 220 Fed. 585, 587, 136 C. C. A. 186; Oates v. United States, 233 Fed. 201, 204, 147 C. C. A. 207; Looker v. United States, 240 Fed. 932, 935, 153 C. C. A. 618.

But there is an exception to this rule. It is that, where the appellate court perceives from an examination of the record that the inadmissible evidence made such a strong impression upon the minds of the jury that its subsequent withdrawal or the instruction to disregard it probably failed to eradicate the injurious effect of it from the minds of the jury, there the defeated party did not have a fair trial of his case, and a new trial should be granted. Waldron v. Waldron, 156 U. S. 361, 381, 383, 15 Sup. Ct. 383, 39 L. Ed. 453; Armour v. Kollmeyer, 161 Fed. 78, 88 C. C. A. 242, 16 L. R. A. (N. S.) 1110; Chicago, Milw. & St. Paul Ry. Co. v. Newsome, 174 Fed.

394, 396, 98 C. C. A. 1; Knickerbocker Trust Co. v. Evans, 188 Fed. 549, 566, 567, 110 C. C. A. 347. This case clearly falls under the exception. One of the chief purposes of providing a judge learned in the law to preside over trials by jury, and one of the principal duties of such a presiding judge, is to exclude from the evidence, and consequently from the knowledge and consideration of the jury, matters which his learning, experience, and judgment enable him to know are irrelevant and immaterial to the issues on trial. Such matters tend to draw the attention of the jury away from a consideration of the real issues to a contemplation of other questions, and unconsciously to lead them to render their verdict on the real issues in accordance with their views upon false issues. Knickerbocker Trust Co. v. Evans, 188 Fed. 549, 566, 567, 110 C. C. A. 347. Trials of actions for slander and libel are peculiarly susceptible to evil influences from irrelevant and immaterial matters, as are all actions which excite unusual personal feeling or public interest, so that it is peculiarly desirable that such matters should not creep into the evidence in cases of this character. The record in this case discloses the fact that much immaterial and irrelevant evidence, aside from the testimony relative to the repetitions, rumors, and reports of the slander, was introduced in evidence before the jury, and that for several days a great mass of evidence on the latter subject was daily accumulating in their hearing under the erroneous first ruling of the court upon this subject. The result of this trial was a verdict against the defendant in this action for slander for the unusually large sum of $22,500. A careful review of the record leaves no doubt that the immaterial and irrelevant matter introduced in evidence before the jury made so strong an impression upon their minds that its evil effect was not and could not be eradicated by the court's attempted withdrawal and its instruction to disregard it, and that this irrelevant matter enhanced the amount of the verdict and deprived the defendant of a fair trial.

There are many other alleged errors assigned by the defendant, but under the rule of law here affirmed, the course of a new trial will differ so radically from that of the trial that has been considered that even if some of these alleged errors are well assigned they are not likely to be committed again, and it would be a useless task to state and review them now. Let the judgment below be reversed, and let a new trial be granted.

STONE, Circuit Judge. I concur in the result because I agree that the evidence of repetition in this case was such that under the present circumstances its effect could not be removed from the jury even by the clear, forcible charge of the court, and this left in their minds the effect of the evidence with no aid in properly considering it from the court through the charge, or counsel through argument.

I dissent from the rule that one who originates a slander cannot be held for damages arising from repetitions which are the natural and probable consequences of the original utterance. The majority opinion bases this rule upon two grounds, to wit: First, that it is a

settled rule of law; and, second, that there exists a difference between libel and slander which cannot justify the rule in cases of slander. I am unable to assent to such views. Of 12 witnesses 10 were interrogated along the same line, which may be illustrated by the following from the testimony of witness Crimmen:

"Q. Was it reported and did you hear the reports on the streets of Watertown and Sioux Falls, during the month of December, 1914, that Mr. Maytag had charged Mr. Cummins with stealing coal, or words to that effect? A. Yes, sir; I did."

The interrogation of the other two was as follows:

C. A. Wooley: "Q. Following the 18th day of December, 1914, and in the early part of 1915, was it currently reported in Sioux City, to your knowledge, that Mr. Cummins had been discharged from the South Dakota Central Railway Company because of being charged with irregularities in connection with the loss of coal? A. I heard the statement. Yes, sir."

A. E. Ayres: "Q. On or about that time, Mr. Ayres, did you hear rumors in Sioux Falls to the effect that Mr. Cummins had been discharged by reason of having been charged by Mr. Maytag with theft or stealing coal and other property from the railroad company? A. I heard that Mr. Cummins had been discharged for a cause, but I didn't hear by what agency or by whom.

"Q. What was the cause as you heard it? A. Shortage in his accounts."

The decisions are in conflict as to whether evidence of unauthorized and unprivileged repetitions of a defamation by third parties, or evidence of rumors and reports along the line of the defamatory statements are admissible, as affecting the amount of damages. The cases excluding such evidence are based upon the theory that damage flowing from such repetitions, rumors, or reports is not the proximate result of the original utterance, unless authorized or intended by defendant. This is an application to the law of defamation of the general rule that the intervention of an independant illegal act breaks the causal chain, since the defendant cannot be held to have anticipated and (without other evidence thereof) intended the unlawful act of another as the consequence of his wrong. The rejection of the above character of evidence in defamation cases is followed in England, Alabama, California, Massachusetts, New York, and Wisconsin. Ward v. Weeks, 7 Bing. 211; Age-Herald Publishing Co. v. Waterman, 188 Ala. 272, 287, 66 South. 16, Ann. Cas. 1916E, 900; Hereford v. Combs, 126 Ala. 369, 380, 28 South. 582; Carpenter v. Ashley, 148 Cal. 422, 426, 83 Pac. 444, 7 Ann. Cas. 601; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97 (opinion by Mr. Justice Holmes); Elmer v. Fessenden, 151 Mass. 359, 362, 24 N. E. 208, 5 L. R. A. 724 (opinion by Mr. Justice Holmes); Shurtleff v. Parker, 130 Mass. 293, 296, 39 Am. Rep. 454; Hastings v. Stetson, 126 Mass. 329, 331, 30 Am. Rep. 683; Leonard v. Allen, 65 Mass. (11 Cush.) 241; Stevens v. Hartwell, 11 Metc. 542; Bassell v. Elmore, 48 N. Y. 561, 564; Fowles v. Bowen, 30 N. Y. 20; Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420; Austin v. Bacon, 49 Hun, 386, 3 N. Y. Supp. 587; Olmsted v. Brown, 12 Barb. 657; Gough v. Goldsmith, 44 Wis. 262, 28 Am. Rep. 579. None of the above cases is based upon any presence of hearsay evidence, nor any difference between libel and

slander affecting this question. The sole ground is as stated above. That this is the only ground is further shown by such cases as Fowles v. Brown, 30 N. Y. 20, 22, cited above and in the majority opinion, where the originator of the slander was held liable when the repetition was lawful, being privileged. The Delaware case, Cameron v. Cockran, 2 Marv. 166, 42 Atl. 454, cited in the majority opinion, was from the superior court. The two Iowa cases cited, Zurawski v. Reichmann, 116 Iowa, 388, 90 N. W. 69, and Prime v. Eastwood, 45 Iowa, 640, do not hold that such evidence is never admissible, but that it is inadmissible unless "the circumstances under which it was repeated" be shown, clearly intimating that under some circumstances it would be admissible. The Texas case cited, King v. Sassaman (Tex. Civ. App.) 54 S. W. 304, contained no such question. The point there was one of variance between words said and those proven. As to that the court said defendant was liable for what he had actually said, not for what others might say he had said. The opposed doctrine that such evidence is admissible in defamation cases is based upon the theory that defendant is responsible for the natural and probable consequences of his utterance and whether the subsequent repetition or rumor is such a consequence is a matter of fact ordinarily to be determined by the jury. This view is supported in the federal courts, Arkansas, Connecticut, Minnesota, and Rhode Island. Merchant's Ins. Co. v. Buckner, 98 Fed. 222, 39 C. C. A. 19 (6th C. C. A., opinion by Mr. Justice Day); Williams v. Fulks, 113 Ark. 82, 167 S. W. 93; Moore v. Stevenson, 27 Conn. 14; Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9; and Rice v. Cottrel, 5 R. I. 340. In McBride v. Ledoux, 111 La. 398, 35 South. 615, 100 Am. St. Rep. 491, it was held that there was no responsibility for an unauthorized repetition of a communication which was privileged when made by defendant. In Wheaton v. Beecher, 79 Mich. 443, 44 N. W. 927, it was left to the jury to determine whether the defendant "procured" the publication of the defamation in a newspaper when he communicated it to a reporter of that paper. With the decisions of respectable jurisdictions conflicting I see no reason for deciding that the matter has been authoritatively settled. This very case illustrates the doubtfulness of the question, for a capable trial judge first admitted and then excluded this testimony. While the question was not and is not a settled one, yet if it were true that all of the courts which had spoken had been one way that should not control in this jurisdiction, where there had never been any expression, if that view of the law were regarded as incorrect. Not infrequently federal courts refuse to follow earlier expressions of the highest courts of a state within the same territorial jurisdiction. If this conflict of law in the same jurisdictional limits is justifiable because it is the duty of each court to decide the law as its wisdom and conscience dictate, how much more should this be done where the authority relied upon is entirely from outside. This is peculiarly so in actions sounding in tort. Men may deal with titles and make contracts in view of what they think the law to be, as established by decisions, but they do not commit torts on any such basis. As no

decision controlling in this circuit exists, and as decisions outside the circuit conflict, this seems to me an instance where the justice of the contending views should be examined and a decision reached on that basis alone.

While recognizing the plausibility of the rule rejecting this evidence and the high authority supporting that view, I cannot think that it is correct. All compensatory damages are based upon injury actually suffered by the plaintiff because of defendant's wrongful act and the amount of such damages by the extent of the injury. The injury from defamation is, as to extent, unique in one important feature. Usually the extent of injury depends almost entirely upon the extent of the circulation of the defamation. This has been recognized in this court (Palmer v. Mahin, 120 Fed. 737, 746, 57 C. C. A. 41), and in other jurisdictions, including some which hold third party repetitions, rumors, and reports inadmissible. Bigelow v. Sprague, 140 Mass. 425, 5 N. E. 144 (opinion by Mr. Justice Holmes); Fry v. Bennett, 28 N. Y. 324, 330; Dalton v. Dist. Court, 164 Iowa, 187, 193, 145 N. W. 498, Ann. Cas. 1916D, 695; and Farrand v. Aldrich, 85 Mich. 593, 48 N. W. 628. The very decisions which exclude this evidence when "unauthorized" by the defendant concede its importance and approve its admission if it is affirmatively shown that the defendant authorized or "intended" the repetition, rumor, or report. Clearly there should be very substantial reason for excluding evidence so vitally bearing upon the important inquiry as to the extent of injury and ensuing damages. The most fundamental rule in the law of proximate cause would not only sanction but compel the admission of this character of evidence. That rule is that a wrongdoer is answerable for the natural and probable results of his act, or, as often expressed, for such results as he might reasonably have anticipated. Certainly the repetition of a defamation or its growth into a rumor or current report is a natural and probable result of its utterance and to be reasonably anticipated. That unfortunate result as surely follows and spreads as do the ever-widening circles from a stone thrown into water. The human weakness to repeat the unusual, the salacious, and the scandalous is an ever-present agency which common knowledge recognizes as needing only the impetus of a defamatory statement to awaken into full activity. The actually existing, well-known tendency and result should not, in my judgment, be obliterated by any presumption that persons will not commit an unlawful act by repeating slander. Why then should one who *starts* a false, malicious attack upon the character of a man or woman, with full knowledge that it will spread like wild fire, beheld innocent of the general conflagration?

The reason given for this unusual freedom from responsibility is that there is a corollary to the above general rule to the effect that the intervention of an independent wrongful agency breaks the legal causal connection, and that the unprivileged repetition of a defamation is such an agency. Such a rule exists and such a repetition is an independent wrongful agency. There is a prima facie ground therefore for the application of the rule. But nowhere is it more im-

portant to apply the basic axiom that "reason is the soul of the law" than when a rule of law, apparently applicable to a set of facts, results in seeming injustice. This necessity is accentuated when the set of facts under consideration is not merely vagrant and unusual, but is typical of a large and important class of frequent recurrence. The reason and history of this rule require examination to determine whether a situation possibly within its letter is within its real intent and spirit.

Sedgwick in his work on Damages (9th Ed.) § 111b, has well said that—

"The legal distinction between what is proximate and what is remote is not a logical one, nor does it depend upon relations of time or space; it is purely practical, the reason for distinguishing between proximate and remote causes being a purely practical one."

The practical reason for treating the intervention of a wrongdoer as an insulation breaking the causal connection is that such wrongdoer is nearer to the resulting injury, may himself be held in damages therefor, and the plaintiff should not be given a duplicate recovery. The origin and usual application of this rule connect it with the common character of tort where the injury is a single occurrence, as harm to person or property. As so applied this rule ordinarily accords well with the demands of justice. We are not concerned here with instances where the fault of the intervening wrongdoer was simply non-action in failing to nullify the effect of the wrongful act before it reached the plaintiff. However, a well-known exception or parallel rule is that where the original wrongdoer intended the result actually brought about by the intervening wrongdoer he is liable. The considerations of practical justice forming these rules seem to be as follows: That plaintiff should be allowed one complete recovery for an injury wrongfully inflicted; that this requisite is ordinarily sufficiently afforded when it is given against the active wrongdoer nearest in the causal sequence to the injury without looking further back; that it is unjust to permit a wrongdoer, who intended the injury and foresaw the intervention of the later wrongdoer, to escape liability. Keeping in mind these practical reasons for practical rules designed to work justice, the application of those rules to the tort of defamation may be tested. Having in view cause and effect, this tort is often unlike any other. Unless the entire claimed damage is special, the plaintiff is seeking to recover for the general damage done to his reputation. Knowing, as reasonable men, that this depends largely upon how widely the defamation has been spread, how can the jury intelligently gauge that damage, or how can the court later rule upon the justice of the amount of verdict if there be denial of all evidence upon that point? How is the plaintiff to be accorded his complete recovery, or how is the defendant to be protected against excessive recovery if neither party can show the extent of the injury? Another suggestion bearing upon the practical, substantial justice of the situation is this: The wider the circulation, the greater the damage, yet there is a correspondingly increasing difficulty, often impossibility, of the plaintiff being able to locate, for purposes of legal sat-

isfaction, all or any appreciable number of the talebearers whose busy tongues have been set wagging to his grievous injury by defendant's act. Leonard, C., in Bassell v. Elmore, 48 N. Y. 561, 568. So that, if the theory of the rule that responsibility ceases with the injury to his reputation in the minds of those to whom defendant communicated the defamation is really carried into practice, the plaintiff could require of the defendant but a minimum of the injury he had received. Yet every one knows that none of this entire injury would have been received had not the defendant set rolling the growing ball of defamation which has finally crushed the fairest one of plaintiff's possessions. The publication may have been made under circumstances designed and shaped to prevent or confine its further circulation, and such are for the jury to consider. On the other hand, if intent is to govern, why exclude the operation of a fundamental principle used throughout the law in determining intent, namely, that one is presumed to know and to intend the natural and probable consequences of his act. The question here is not of punitive damages and evil motive, but of compensatory damages and legal intent. Since the defamer must know what all men know, that the natural and probable consequence of publishing a defamation is its repetition and wide circulation, he should be held to intend that result and be held responsible for it. If he is thus responsible the measure of that responsibility lacks a gauge of fact, unless the extent of that repetition or circulation can be shown.

Here an honorable man has been, the jury found, falsely and maliciously branded as a felon by his employer and in connection with that employment. The charge meets him when he seeks employment, shames his children among their schoolmates, ruins his credit, and blights the well-earned reputation of a lifetime. Defendant made the statement to seven different persons, of whom four testified affirmatively that they did not believe the charge, one denies hearing such a charge, and two were not witnesses. If defendant is liable only for the injury done plaintiff's reputation in the minds of these seven persons, the court would be puzzled, even under the existing liberal rule as to amount of verdicts in defamation cases, in upholding the jury assessment of $22,500. The effect upon these seven hearers is not the gist of plaintiff's injury. It is: That having before borne a good name, thereafter this charge originated by defendant became common rumor, so that it was widely known that defendant had made such an accusation, and that because thereof, he (plaintiff) sought employment in vain, he suffered anguish on account of his children being shamed among their schoolmates, his credit was ruined, and his reputation besmirched. Whether this rule be applicable where the defendant is a mere *conveyor* of the defamation as distinguished from the *originator* thereof we need not inquire, because here the defendant was the originator. Nor do I think it necessary that the testimony show that any of the particular persons named in the petition as hearing the slander repeated it to others. Defendant is shown to have been the originator of the slander, and the repetitions covered by the testimony gave him as the origin. He sent out the poison, and it

traveled everywhere under the sanction of his name. I cannot doubt that the rumors and reports which injured plaintiff are parts of the stream of which he alone was the source. To hold that this cannot be shown, nor defendant be held responsible therefor, does not meet my ideas of justice. As said by Leonard, C., in Bassell v. Elmore, 48 N. Y. 561, 568:

"A slanderous charge gets in circulation and is many times repeated until it often becomes impossible to trace it so that it shall appear to have been carried directly from the slanderer to the person from whom the pecuniary injury has been sustained by the party complaining. The rule is entirely too favorable for the malicious slanderer. He should be held responsible when it can be proven, as in this case, that the slander uttered did come to the knowledge of some person, who acted upon it to the pecuniary injury of the plaintiff."

It is suggested that in this regard there is a difference between libel and slander, which justifies a difference in rule. No case suggests such a difference, and I see no basis therefor. Material divergencies based on differences between libel and slander should be sparingly made, and only where the basis therefor is very clear, because, as said by Judge Cooley in his work on Torts (3d Ed.) p. 366, "Slander and libel are different names for the same wrong accomplished in different ways." Also see Newell's Slander and Libel (3d Ed.) § 29.

MARTIN et al. v. OLIVER.

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

No. 196.

1. COURTS ⊂=497—CONFLICTING JURISDICTION—PRIORITY OF JURISDICTION.
   The general rule is that the legal custody of specific property by one court of competent jurisdiction withdraws it, so far as is necessary to accomplish the purpose of that custody, until the purpose is completely accomplished, from the jurisdiction of every other court.
2. BANKRUPTCY ⊂=199—LIENS OBTAINED THROUGH JUDICIAL PROCEEDINGS—INSOLVENCY OF DEBTOR.
   Under Bankr. Act, § 67f (Comp. St. § 9651), providing that all levies and other liens obtained through judicial proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him upon which an adjudication is made shall be null and void, and the property affected shall pass to the trustee, the insolvency of such person at the time the levy is made or the lien attaches, and the admission or proof of that insolvency, are indispensable conditions of an avoidance of such a levy or lien.
3. BANKRUPTCY ⊂=288(2)—SUMMARY JURISDICTION OF COURT—ADVERSE CLAIMANTS.
   A creditor who caused a levy to be made on personal property of a bankrupt seven weeks prior to the bankruptcy, and a receiver appointed on his petition by a state court of competent jurisdiction who took possession of the property and held it at the time of the adjudication, both claiming the validity of the levy, *held* adverse claimants, with a right to have their claim adjudicated in the plenary action.

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4. BANKRUPTCY ⊂=391(1)—EFFECT ON SUIT IN STATE COURT.
A state court, having jurisdiction of the parties and subject-matter in a suit pending before it, in which property of the defendant had been levied upon and was in the hands of a receiver appointed by the court, and issue had been joined on the question of defendant's right to hold the property as exempt, *held* not deprived of jurisdiction to proceed to a determination of such issue by the filing of a petition in bankruptcy by defendant, where the bankruptcy proceedings were not brought to its attention by proper notice and pleadings.

5. BANKRUPTCY ⊂=20(1)—COURTS OF BANKRUPTCY—EQUITABLE PRINCIPLES.
A court of bankruptcy is a court of equity, and ought not to permit itself to be used for the purpose of perpetrating a fraud or attaining an inequitable result which a state court is successfully endeavoring to prevent.

Stone, Circuit Judge, dissenting.

Petition to Revise Order of the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

In the matter of Lula M. Oliver, bankrupt. On petition of G. W. Martin and another to revise an order of the District Court. Reversed.

J. H. Evans and C. I. Evans, both of Booneville, Ark., for petitioners.

W. B. Rutherford, of Perryville, Ark., for respondent.

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

SANBORN, Circuit Judge. G. W. Martin and W. A. McNeill have presented to this court a petition to revise an order of the District Court which affirmed an order of the referee made on February 15, 1918, in the matter of the estate of Lula M. Oliver, a bankrupt, denying the motion of the petitioners to modify the order of the referee made February 8, 1918, wherein he determined that the bankrupt was entitled to certain personal property of the value of $459.50 as her exemptions, and ordered "that the said articles be delivered to the bankrupt forthwith" by striking from it the order for the delivery of the property to the bankrupt. When this order of delivery was made, and when Lula M. Oliver filed her petition in bankruptcy and was adjudged a bankrupt, this property was in the legal custody of the chancery court of Logan county, Ark., and in the actual possession of its receiver, Martin. A brief statement of the material facts disclosed by the record will aid in the consideration of the questions of law here presented.

On December 30, 1915, Lula M. Oliver and V. E. Oliver, her husband, were indebted and gave their promissory note to the Bank of Magazine for $412.60, and mortgaged certain town lots in Magazine to secure this debt. At the same time, without consideration and for their accommodation, the petitioner, W. A. McNeill, signed this note as their surety. On September 10, 1917, in a suit brought by the bank against Lula M. Oliver, V. E. Oliver, and W. A. McNeill

in the chancery court for the Southern district of Logan county, of the subject-matter of and the parties to which that court had jurisdiction, that court rendered a decree of foreclosure of that mortgage, of a sale of the mortgaged property, and of the issue of an execution against the defendants therein for any balance of the judgment not paid by the sale. The lots were sold and the proceeds applied, but there remained unpaid a balance of $272.27. On the 1st day of November, 1917, McNeill caused the bank to issue an execution on the judgment, and to levy it upon the personal property of Lula M. Oliver, including that here in controversy. On November 8, 1917, McNeill presented to the chancery court of Arkansas in the foreclosure suit a petition in which he alleged that, on the same day on which the decree of foreclosure was rendered, Lula M. Oliver made a chattel mortgage of all her personal property to one Kent Ruble, for the fraudulent purpose of hindering and delaying the collection of her debt to the bank; and that on the 1st day of November, 1917, when the levy was made, she and her husband were loading a car at Magazine with all their visible property, billing it in the name of Meade Oliver, a brother of her husband, and shipping it permanently out of the state of Arkansas with the fraudulent intent of defeating the collection of the balance of the judgment from this property, and compelling McNeill, her accommodation surety, to pay it. He prayed for the appointment of a receiver of all this personal property, and that at the final hearing the fraudulent mortgage of Kent Ruble be set aside, and all the property be sold to pay the balance of the judgment. On this petition the Arkansas chancery court appointed W. M. Martin receiver of this personal property on the 8th day of November, 1917, and ordered him to keep it safely, subject to the further order of that court. He immediately took possession of it and still holds it. Lula M. Oliver answered this petition of McNeill that all the property levied on and in the hands of Martin, the receiver, was exempt from levy or sale, but she did not deny any of McNeill's averments of her intents and attempts to defraud him and the bank. On February 8, 1918, upon the pleadings and proceedings in the main suit, the petition of McNeill, the answer of Lula M. Oliver, and oral testimony of witnesses while "V. E. Oliver and Lula M. Oliver were present in person and by their solicitor," as its decree recites, the chancery court of Arkansas found and decreed that on November 1, 1917, Lula M. Oliver and V. E. Oliver were shipping all their property, in the name of Meade Oliver, permanently out of the state, with the fraudulent intent and purpose of defeating the collection of the balance of the judgment therefrom, and compelling McNeill to pay it; that they made the chattel mortgage to Kent Ruble on February 10, 1917, for the fraudulent purpose of delaying and hindering the collection of the judgment; that Lula M. Oliver was not entitled to hold the property in question as exempt, and that her claim of its exemption was disallowed; that the mortgage to Ruble was set aside and held for naught; and that Martin the receiver should proceed to sell the property and apply the proceeds to the payment of the balance of the judgment.

Meanwhile, on January 23, 1918, while this property was in the legal custody of the Arkansas court, and in the actual possession of Martin, the receiver, Lula M. Oliver filed her voluntary petition in bankruptcy, was adjudged a bankrupt, and notices of this adjudication, and that the first meeting of creditors would be held on February 8, 1918, were mailed to the Bank of Magazine and McNeill, but neither of them ever appeared in the bankruptcy proceedings except to challenge the jurisdiction of the bankruptcy court and of its officers summarily to try the title to or to take this property from the chancery court or its officers. At the first meeting of the creditors on February 8, 1918, without notice to, or any application for, or demand of the property from the chancery court or its receiver, Martin, the referee made his determination that the property in controversy was exempt, and ordered it delivered to Lula M. Oliver.

When the petition in bankruptcy was filed, and when the adjudication was made on January 23, 1918, and when the order for the delivery of this personal property was made on February 8, 1918, this property was in the legal custody of the Arkansas chancery court, in a suit of which and of the parties to which it had plenary jurisdiction. When that suit was commenced, when Martin was appointed receiver, and when he took possession of the property, Lula M. Oliver was the owner of it, and the bankruptcy court and its officers took their interest in and title to it subject to the actual possession of the receiver of the chancery court, to that court's jurisdiction over it, and to the rights to it of the parties to the suit in that court. In that state of the case the order of the referee that the receiver of the state court and McNeill, the lienholding creditor, should deliver this property to Lula M. Oliver, who was one of the parties defendant in the suit in the state court, was erroneous for more than one reason.

[1] The general rule is that the legal custody of specific property by one court of competent jurisdiction withdraws it, so far as is necessary to accomplish the purpose of that custody, until the purpose is completely accomplished, from the jurisdiction of every other court; that the court which first acquires jurisdiction of specific property by the lawful seizure thereof, or by the due commencement of a suit in that court from which it appears that it is, or will become, necessary to a complete determination of the controversy involved or to the enforcement of the judgment or decree therein, to seize, to charge with a lien, sell, or exercise other like dominion over it, thereby withdraws that property from the jurisdiction of every other court, and entitles the former to retain the control of it requisite to effectuate its judgment or decree in the suit free from the interference of every other tribunal. Sullivan v. Algren, 160 Fed. 366, 370, 87 C. C. A. 318; Farmers' Loan & Trust Co. v. Lake Street Elevated Railroad Co., 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667; Mound City Co. v. Castleman et al., 187 Fed. 921, 924, 110 C. C. A. 55. According to this general rule, the Arkansas court would have had exclusive jurisdiction to determine the question of Lula M. Oliver's claim to an exemption of this property and to hold and dispose of it according to its decision.

[2] But the bankruptcy law, section 67f (Act July 1, 1898, c. 541, 30 Stat. 564 [Comp. St. § 9651]), declares that all judgments, attachments, and other liens, obtained through legal proceedings, against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged bankrupt, and that the property affected shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall order the levy or other lien preserved. But under this section of the bankruptcy law the insolvency of the person against whom the legal proceedings are taken at the time the levy is made or at the time the lien attaches, and the admission or proof of that insolvency are indispensable conditions of an avoidance of such a levy or lien. Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975, 979, 142 C. C. A. 433; Keystone Brewing Co. v. Schermer, 241 Pa. 361, 88 Atl. 657, 31 Am. Bankr. Rep. 279, 281, 282; Simpson v. Van Etten (C. C.) 6 Am. Bankr. Rep. 204, 205, 206, 108 Fed. 199, 201; Severin et al. v. Robinson, 27 Ind. App. 55, 60 N. E. 966; Collier on Bankruptcy (10th Ed.) 963, par. "e." And this record contains no evidence or proof of any such insolvency. On the other hand, the only debt of Lula M. Oliver which it discloses is the unpaid balance of the judgment $272.27, and she recited the value of the personal property she mortgaged to Ruble in September, 1917, to be $830, and declared that the other property she claimed as exempt after her adjudication in bankruptcy was worth $485. McNeill, the creditor, and Martin, the receiver, therefore had, when the petition was filed, and still have, the actual possession of the personal property in controversy under an order of a competent chancery court.

[3] They were and are claiming a lien thereon to secure a valid debt under a levy made seven weeks before the petition in bankruptcy was filed, and are also claiming that the property in their possession was not exempt when levied upon, and that Lula M. Oliver was not insolvent when the levy was made. McNeill and Martin are therefore adverse claimants of their lien and of this property, in the actual possession thereof, within the meaning of the bankruptcy law; they had and have the right to a trial and adjudication of their claim to and to the possession of it in a plenary action, according to the course of the common law, or in a suit in chancery, according to the principles and rules of equity; and neither the bankruptcy court nor any of its officers had any jurisdiction or authority as against them summarily, and without any notice or application to the state court for the delivery of the property, to try or adjudge any of the issues which conditioned the validity of the claims of Martin and McNeill, or summarily to order the receiver of the chancery court to deliver that property to Lula M. Oliver, the defendant, in the suit in the state court. In re Rathman, 183 Fed. 913, 925–928, 106 C. C. A. 253; Shea v. Lewis, 206 Fed. 877, 880, 124 C. C. A. 537; Jaquith v. Rowley, 188 U. S. 620, 621, 625, 626, 23 Sup. Ct. 369, 47 L. Ed. 620; In re M'Mahon, 147 Fed. 684, 685, 77 C. C. A. 668; Frank v. Vollkommer, 205 U. S. 521, 522, 526, 529, 27 Sup. Ct. 596, 51 L. Ed.

911; Carling v. Seymour Lumber Co., 113 Fed. 483, 484, 51 C. C. A. 1; In re Silberhorn (D. C.) 105 Fed. 899; In re Michie (D. C.) 116 Fed. 749; Bardes v. Hawarden Bank, 178 U. S. 524, 532, 533, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Louisville Trust Co. v. Comingor, 184 U. S. 18, 24, 25, 22 Sup. Ct. 293, 46 L. Ed. 413; Babbitt v. Dutcher, 216 U. S. 102, 103, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Murphy v. Hofman Co., 211 U. S. 562, 570, 29 Sup. Ct. 154, 53 L. Ed. 327.

An adverse claimant, whose lien attaches within four months prior to the filing of the petition in bankruptcy, and which is not conditioned by the insolvency of the debtor at the time such lien attached, has all the rights and privileges of an adverse claimant whose lien attached more than four months before the filing of the petition, because it is excluded from the provisions of section 67f, and is entitled to the trial of its claim in a plenary suit. Jones v. Springer, 226 U. S. 148, 155, 33 Sup. Ct. 64, 57 L. Ed. 161; In re Shea (D. C.) 211 Fed. 365, 369; Tripp v. Mitschrich, 211 Fed. 424, 426, 128 C. C. A. 96; Stone-Ordean-Wells v. Mark, 227 Fed. 975, 979, 142 C. C. A. 433.

[4] Again, even if the proposition just stated were not sustainable, and if the bankruptcy court had the jurisdiction and right to draw from the chancery court of Arkansas the possession of this property and the determination of the issues there pending concerning it, still the order of the bankruptcy court upon the receiver of the state court to deliver the property to Lula M. Oliver without first causing notice of the bankruptcy proceedings to be given to that court, and without causing a motion or application to be made to it for an order on its receiver to deliver over the property, was erroneous. That court had full jurisdiction of the parties to the suit before it, of the property in its possession, and of the issues, whether or not Lula M. Oliver was insolvent when the levy was made, and whether or not the property was exempt when the petition in bankruptcy was filed and the adjudication in bankruptcy was made. It proceeded with its suit, so far as this record shows, without any notice to it of the bankruptcy proceedings, or any motion, or application in or to it, regarding the possession or disposition of the property, either by the bankruptcy court or any of its officers, and rendered its final decree that the property was not exempt, that McNeill's lien upon it was valid, and that the property be sold to pay it. As the Supreme Court said in Jones v. Springer, 226 U. S. 148, 155, 33 Sup. Ct. 64, 65 (57 L. Ed. 161), "But in a case like the present, where, under an attachment levied before the petition was filed, the property had been put into the hands of a receiver, without notice of the petition, it is not true that all power and jurisdiction of the local court were ended before notice of the bankruptcy proceedings." If the bankruptcy court or its officers took any right or title to this property or to its possession, they took it from Lula M. Oliver pendente lite, and subject to the actual possession and lawful custody of that property in the chancery court. If they had any such rights the Arkansas court, on a suitable application or motion, would undoubtedly have preserved and enforced them.

Neither the bankruptcy court, nor any of its officers, nor Lula M. Oliver nor her counsel, both of whom, the final decree recites, were present when it was rendered, caused any such petition or application or motion to be made to the state court. If rendered its final decree, and no sound reason is perceived, under this state of facts, why that decree did not render the adjudication thereby that Lulu M. Oliver was entitled to no exemption of this property, and that it be sold to pay the balance of the judgment res adjudicata, and estop her, and all claiming under her, from asserting any claim to the possession or to any interest in this property, except to the surplus of the proceeds above the amount required to pay the balance of the judgment. Eyster v. Gaff, 91 U. S. 521, 525, 23 L. Ed. 403; Dimock v. Revere Copper Co., 117 U. S. 559, 564, 565, 6 Sup. Ct. 855, 29 L. Ed. 994; Muser v. Kern (C. C.) 55 Fed. 916; Stout v. Lye, 103 U. S. 66, 67, 69, 26 L. Ed. 428.

In Eyster v. Gaff, where a state court, notwithstanding the commencement of bankruptcy proceedings and an adjudication of bankruptcy after the suit was commenced, proceeded to final judgment, the Supreme Court said:

"The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending.

"It was the duty of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. It is almost certain that if at any stage of the proceeding, before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right he had, or set up any defense to the suit. The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion to be made a party or to take part in the case, deserved no attention, and received none."

Smalley v. Laugenour, 196 U. S. 93, 96, 97, 25 Sup. Ct. 216, 49 L. Ed. 400, fails to rule this case on account of the many differences in the facts in the two cases, and, among others, because when the petition in bankruptcy was filed in the Smalley Case the property in controversy was, and it continued to be, in the possession of the bankrupt or of his successor in interest, or the bankruptcy court or its officers, until the subsequent execution sale, so that the execution creditors were not adverse claimants in the actual possession of the property at the time of the filing of the petition in bankruptcy, but the bankruptcy court, by virtue of the possession of the bankrupt and the subsequent possession coming to it, had jurisdiction to draw to itself the property, and summarily to determine the claims for liens upon it, while in the case in hand the creditor and receiver of the state court were adverse claimants in actual possession of the property in controversy when the petition in bankruptcy was filed and ever since.

Chicago, Burlington & Quincy R. R. Co. v. Hall, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306, does not rule this case for many other differences in the facts, and because in that case the insolvency of the bankrupt, at the times the liens and garnishments attached, was either admitted or proved, for the opening statement of the case declares such insolvency, so that in that case the lienholders never had any substantial claims, and were not adverse claimants in the light of section 67f, for their liens attached within four months of the filing of the petition in bankruptcy, when the bankrupt was insolvent. 229 U. S. 511, 514, 33 Sup. Ct. 885, 57 L. Ed. 1306. On the other hand, in the case at bar, the insolvency of the debtor when the lien attached was neither admitted nor proved, but both that issue and the issue of exemption, which necessarily involves it, were in litigation in the state court when the petition in bankruptcy was filed, and they have since been adjudged by that court against the bankrupt in the regular course of its procedure.

[5] Finally, a court of bankruptcy is a court of equity and it administers the law in the spirit of equity. One cannot read the record that was before the court below, and that is before this court, without a strong conviction that the petition for an adjudication in bankruptcy, and the application for the exemption of this property was another attempt of the bankrupt, like her making of the fraudulent mortgage to Ruble, and her endeavor to ship all her property permanently out of the state to Meade Oliver, by the use of the bankruptcy court, to hinder, delay, and to defraud the accommodation surety into paying her debt, and to prevent him from obtaining repayment. A federal court of equity ought not to permit itself to be used for the purpose of perpetrating a fraud or attaining an inequitable result which a state court is successfully endeavoring to prevent. Zeitinger v. Hargadine-McKittrick Dry Goods Co., 244 Fed. 719, 722, 723, 157 C. C. A. 167.

For the reasons which have been stated, perhaps at too great length, the order for the delivery of this property by the receiver of the state court to Lula M. Oliver should be stricken from the order of the referee of February 8, 1918. Accordingly let the order of the court below, made on March 20, 1918, affirming the order of the referee, entered February 15, 1918, denying the motion of the petitioners to modify the referee's order of February 8, 1918, determining the exemptions of Lula M. Oliver, and ordering that the articles thereby held to be exempt be delivered to the bankrupt forthwith, be revised and reversed, and let the court below make an order to the effect that the order of the referee of February 8, 1918, be modified by setting aside and striking from it the words, "and that the said articles be delivered to the bankrupt forthwith," and let the petitioners recover their costs.

TRIEBER, District Judge. I concur in the result upon the ground that notice of the bankruptcy proceedings should have been given to the chancery court by proper pleadings, when the cause was finally heard in that court.

I also concur in the result upon the ground that notice of the hearing before the referee, when the application for exemption was acted on, should have been given to the receiver of the state court, and McNeill, the judgment creditor and plaintiff in the action pending in the chancery court.

STONE, Circuit Judge (dissenting). This is a petition to revise an order of the District Court confirming an order of the referee in bankruptcy denying a motion to modify an order allowing certain property as exemptions to the bankrupt, and directing the delivery thereof to her by the receiver of the state court, in whose custody it then was. The motion sought to annul that portion of the order directing such delivery. The petitioners here are the receiver and the judgment creditor in the state court.

This debtor is evidently seeking to avoid payment of an honest debt. She had before endeavored to do this in an unlawful and fraudulent manner by a bogus mortgage and by a concealed removal of her property. These attempts the court will promptly prevent. But she has also attempted to attain the same result in lawful methods, by claiming exemptions. The federal and state legislative policy is to prevent a creditor from completely stripping his debtor of all property, unless the debtor is willing that such may be done. This is founded upon the theory of public policy, which deems it more important that a debtor shall be left a pittance with which to sustain himself and family than that his debts shall be paid. No exemption can be claimed by an insolvent debtor without the object and result of avoiding payment of honest debts. But this avoidance the law sanctions to the extent of the permitted exemptions. The motive of the debtor in claiming exemptions or his prior attempts, however unlawful and reprehensible, have nothing to do with his exemption rights, unless expressly made material by statute. Therefore I think the prior questionable conduct of this debtor, and her evident desire and design to escape this indebtedness, have nothing to do with her right to claim and secure exemptions allowed by the statutes of Arkansas, operating directly, or, through the Bankruptcy Act, indirectly. In my judgment the Zeitinger Case is not applicable. That was an attempt by unfaithful corporate officers, who were about to be made responsible for their derelictions, to avoid that result by throwing into voluntary bankruptcy a solvent corporation. Undoubtedly the court could inquire into such a transaction, and prevent itself being used for such a nefarious purpose, where no real ground of bankruptcy existed. But it is not wrongful to claim legal exemptions and no attack is here attempted upon the propriety of the adjudication of bankruptcy, but it is expressly admitted that the referee acted properly in allowing this very property as exempt from creditors generally.

Admitting that the property was properly allowed to the debtor as exempt from her general creditors, the controversy is as to whether it was subject to the judgment lien of petitioners and as to what tribunal should determine that matter. There is no dispute what-

soever as to the character of this lien or the time it attached. It is a judgment levy lien, attaching less than four months prior to the filing of the petition in bankruptcy. Such a lien is nullified by the bankruptcy adjudication, under section 67f of the Bankruptcy Act, if, at the time of its attachment, the bankrupt were insolvent.

Petitioners claim that any adjudication made of that matter was not binding upon them because there was lack of due process of law, since they were not notified thereof, and had no legal opportunity to be heard. The finding of the referee in ruling on the motion to modify was that they had been duly notified of the adjudication of bankruptcy and of the creditors' meeting to be held February 8th. This is not questioned and therefore must be taken as true. There being no point as to the form of that notification, we must presume that it was in accordance with law, and followed the form prescribed by general order 38, form No. 18 (89 Fed. xxxvi, 32 C. C. A. ix), which provides "at which time the said creditors may attend * * * and transact such other business as may properly come before said meeting." This broad language has been held sufficient to authorize consideration, at such meeting, of the allowance of exemptions. In re Hilborn (D. C.) 104 Fed. 866. Also see Smalley v. Langenour, 196 U. S. 93, 25 Sup. Ct. 216, 49 L. Ed. 400. It would seem entirely proper at such time to make the allowance of exemptions where, under general order 15 (89 Fed. vii, 32 C. C. A. xviii), no trustee was to be appointed. Petitioners had notice of, and are bound by, any action which could properly be taken at that meeting, and their absence is due to their own voluntary act. Again, they had, in so far as they desired it, a sufficient day in court when they were accorded full hearing upon their motion to modify that order of the referee. At that time they raised no point of lack of due process at the previous hearing, but confined themselves to questioning the jurisdiction of the referee as to part of his earlier order.

Petitioners also claim that the referee made no adjudication upon the necessary facts of insolvency of the bankrupt at the time the lien attached, and residence of the bankrupt necessary to entitle to exemptions. It may be that no oral or written testimony as to either of these facts was presented to the referee, but he was authorized to find all necessary facts from the unopposed motion for exemption allowance. When petitioners filed their motion they made no such claim, and, after resting alone on their claim of lack of jurisdiction, they cannot now question the basis in fact of the ruling of the referee.

Finally they claim that the referee had no jurisdiction to order delivery of the property set off by him as exempt. They say that they are adverse claimants, through their judgment lien, to this property, and that their rights thereto cannot be determined in a summary proceeding before the referee, but are triable only in a plenary suit before some court of proper jurisdiction, which, in this instance, is, they say, the state chancery court, having custody of the property through the possession of its receiver.

The allowance of exemptions to a bankrupt is a necessary step in the administration of his estate by the bankruptcy court. No

other court can perform or interfere with this duty of the bankruptcy court. This jurisdiction is exclusive.

The extent of this jurisdiction is the determination that certain specified property falls within the state exemption laws, that the bankrupt is entitled to exemptions, and that the particular property shall be set aside as exempt from claims of his general creditors. The conclusion, therefore, is that the state chancery court here had no jurisdiction to decide the question of exemptions after the petition in bankruptcy was filed.

Such adjudication has no necessary connection with the determination of any special claims of title or interest in, or right against, that specific property by particular creditors or by others. Such adverse titles, interests, or rights can be decided only in plenary proceedings brought in the courts designated by section 23 of the Bankruptcy Act (Comp. St. § 9607). With exceptions not here material, such courts are those, federal or state, having general jurisdiction of the persons and subject-matter. Physical custody of the res by a court is a paramount ground of general jurisdiction. Therefore the state court here had exclusive jurisdiction to determine any adverse claims to this property in its possession. No such claim was presented to that court or decided by it. The only controversy in that court was whether the debtor was entitled to exemptions under the state law. The filing of the bankruptcy petition had taken from the state court, and placed in the bankruptcy court, all jurisdiction to determine debt exemptions. That court had no jurisdiction, therefore, to order a sale of that property by its receiver for the purpose of satisfying the earlier judgment.

But is this an adverse claim within the meaning of the Bankruptcy Act and judicial decisions when the circumstances here are considered?

The bankruptcy statutes are complete within themselves as to the disposition to be made of all of the property of the bankrupt. That disposition is divided into two general classes, namely, that which the debtor is to be allowed to retain and that which is to be divided among his creditors. All of it comes into the jurisdiction of the bankruptcy court. Even that allowed to the debtor (C., B. & Q. Ry. Co. v. Hall, 229 U. S. 511, 515, 33 Sup. Ct. 885, 57 L. Ed. 1306) comes there for segregation, identification, and appraisement. As said in the Hall Case (229 U. S. 516, 33 Sup. Ct. 887, 57 L. Ed. 1306), "custody and possession may be necessary to carry out these duties." If the custody is in the hands of some one opposing delivery thereof to the trustee under an adverse claim thereto, and if the establishment of such claim could or would defeat or modify the title coming to the trustee, it might be proper to determine that claim in a plenary suit, for the trustee should acquire and administer only such titles, rights, and interests in property as belong to the bankrupt. But if, admitting the claim in so far as it is alleged to be adverse, there is no right to possession as against the trustee shown, then obviously there is no necessity for such plenary action, because, in reality, no substantial ground has been alleged for withholding from the trustee the rightful

possession. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555; Smalley v. Langenour, 196 U. S. 93, 25 Sup. Ct. 216, 49 L. Ed. 400; Lazarus v. Prentice, 234 U. S. 263, 34 Sup. Ct. 851, 58 L. Ed. 1305.

Measuring this controversy by this standard, what do we find? The facts are that the referee, in a proper manner, made the allowance of exemption; that no objection thereto has been made by any one, including these petitioners; there is no dispute that the exemptions covered all of the property of the bankrupt. The lien relied upon is an ordinary execution or judgment lien admittedly procured within four months of the filing of the bankruptcy petition. Such a lien is void if the debtor were insolvent when it was procured, whether the property be exempt or not. The petitioners nowhere allege that the debtor was then solvent. The record is barren of any such claim or issue, either in the bankruptcy court or in the state chancery court. But what would be the effect, even if it were admitted that the debtor was solvent when the lien affixed? That would in no wise affect the allowance of exemptions to the debtor. It is against just such levies and liens that exemptions protect the property of the debtor. If he had property beyond the amount allowable as exemptions, there might be some question as to the choice of property for exemption, or as to the survival of a lien against it as property beyond that allowable. No such situation is here. The undisputed facts are that the bankrupt was entitled to all of the scheduled property as exemptions, and that it was held by a state court receiver for the sole purpose of preserving it to satisfy an ordinary judgment debt belonging to a creditor listed by the bankrupt. Such a creditor could not possibly have a right to satisfaction from the property set aside, and the only property which could have been set aside, as exempt. The fact that steps had been taken through execution levy in no way affects the rights of the parties. There was no effective, substantial adverse claim. Therefore the summary order of the referee was correct.

What is really sought by petitioners is to have the state court usurp the exclusive jurisdiction of the bankruptcy court to decide and allow exemptions and to nullify its order in that matter.

I think the petition should be denied and the order affirmed.

ERIE R. CO. v. HANSEN.

(Circuit Court of Appeals, Third Circuit. July 24, 1919.)

No. 2426.

MASTER AND SERVANT ⊂⊃278(3)—ACTION FOR DEATH OF SERVANT—PROOF OF NEGLIGENCE OF SHIPOWNER.

The death of the master of a lighter, who was struck on the head and killed by the cap rail of the vessel, which was torn loose by the sudden tautening of a line from a tug to which he had just made fast, and which, when slack, hung over a corner of the rail, *held* not shown by the

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

evidence to have been due to negligence of the owner as alleged, in that the timber of the log rail was unsound; it being shown that it had been rebuilt of sound timber within three months.

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

Petition in admiralty of the Erie Railroad Company, owner of Erie Lighter 108, for limitation of liability. From a decree awarding damages to Fred Hansen, administrator of Theodore Thonassen, petitioner appeals. Reversed.

George S. Hobart, of Jersey City, N. J., for appellant.

Ralph N. Kellam, of Philadelphia, Pa., for appellee.

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

WOOLLEY, Circuit Judge. Thonassen, an employé of Erie Railroad Company, died from injuries sustained on one of its lighters when engaged in interstate commerce. His administrator brought an action against the Railroad Company in a court of the State of New Jersey, under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 291 [Comp. St. §§ 8657–8665]), to recover for damages which Thonassen's dependents had sustained through his death. While this suit was pending, the Railroad Company, the owner of the lighter, filed a petition in the District Court of the United States for the District of New Jersey, under Admiralty Rule 54, claiming the benefits of the Shipowners' Limited Liability Acts (sections 4282 to 4289, inclusive, of the Revised Statutes as amended by the Acts of June 26, 1884, 23 Stat. 57, and June 19, 1886, 24 Stat. 80 [Comp. St. § 8027]) and praying an injunction against the prosecution of the suit in the state court. Appropriate proceedings followed, including an injunction, reference for the appraisement of the lighter, her tackle, apparel and furniture, and a monition to all persons claiming damages for injuries occasioned by the disaster to appear and prove their claims. Thonassen's administrator contested these proceedings at each stage and challenged the Court's jurisdiction to limit the petitioner's liability and thereafter to determine the same, on the ground that the Federal Employers' Liability Act repealed by implication the Shipowners' Limited Liability Acts as to cases which come within the provisions of the former. The learned trial judge decided adversely to the claimant's contention on authority of The Passaic, 190 Fed. 644, and 204 Fed. 266, 122 C. C. A. 466, and on his own reasoning. The Court then proceeded to trial (The Benefactor, 103 U. S. 239, 26 L. Ed. 351) and rendered a decree holding the petitioner liable to the claimant for the full amount of the lighter's appraisal. The petitioner appealed.

As the claimant did not take a cross-appeal from the action of the trial judge in granting the petition of the shipowner to limit its liability under the applicable statutes, the correctness of his rulings in that regard is not involved in this appeal. This statement is made for the

purpose of showing that the court's rulings on the Federal statutes involved in these proceedings are in no way embraced in the reversal of the court's decree which is to follow.

In this appeal, there is no question of law; the question is one purely of fact.

The tug Waverly was preparing to tow Erie Lighter No. 108 from Weehawken to Brooklyn. The tug picked up the lighter at a Weehawken dock and by stern lines pulled her from the slip out into the river. Intending to tow the lighter, not tandem, but lashed to her side, the tug let go the lines and moved to a position slightly distant from the lighter, in which the port bow of the tug was at right angles with the starboard bow of the lighter. The tug, with bow up-stream and engines stopped, relied upon the strong ebb tide then flowing to bring the lighter down stream toward her. The tug was light and stationary; the lighter, heavily laden, moved broadside with the tide toward the tug. As the bow of the tug came into position athwart the bow of the lighter, a deck hand on the tug passed a strap to Thonassen, the captain of the lighter, and, with one end fast to the tug, directed him to make the other end fast to the lighter. The strap was a spliced loop of line six fathoms long and about one and three-quarter inches thick. The tug captain intended to use the line thus made fast to arrest the motion of the bow of the lighter, and then allow the tide to swing the stern of the lighter toward the stern of the tug. When the two craft came side by side, he intended to lash them together and thus complete the manoeuvre.

When the deck hand passed the strap to the lighter, Thonassen caught it and put it over the bow bit. One line of the loop trailed properly over the lighter rail; the other, being quite slack, fell over the starboard side and around the starboard corner. As the lighter sagged with the tide and was falling into place along the port side of the tug, the slack of both strands of the strap was quickly taken up. As the one which overhung the starboard corner became taut, it rose with great impetus, struck the corner cap rail, tore it from its fastening and threw it into the air, striking Thonassen on the head and causing injuries from which he died.

These facts are not disputed. The controversy arose out of the inferences to be drawn from them.

The claimant's position at the trial, and on appeal, was that Thonassen's death was due either to negligence or to inevitable accident, that the manner of the accident raises a presumption of negligence, and that, accordingly, the burden of proving inevitable accident rests upon the petitioner, citing Hawgood & Avery Transit Co. v. Meaford Transp. Co., 232 Fed. 564, 146 C. C. A. 522; The Lackawanna (D. C.) 201 Fed. 773. The defense was lack of negligence on the part of the petitioner and contributory negligence on the part of the decedent.

We recognize that there are maritime accidents which from their very nature raise a presumption of negligence, as, for instance, when a barge drifts from her moorings and floating down stream comes into collision with other craft. There the presumption is that the thing would not have happened but for some negligence in mooring

the barge. This presumption may, however, be overcome by proof of inevitable accident arising, for instance, from a vis major, as a flood or ice floe, against which no precaution could have prevented that which followed. It is very clear to us that the accident in this case was not of a nature that admits of any presumption of negligence. Negligence in this case, if any existed, must be proved, and must be proved as charged, to warrant recovery. The negligence with which the claimant charged the petitioner was its failure to provide the decedent with a reasonably safe place in which to work and with reasonably safe working appliances. As there was no proof of negligence with reference to unsafe appliances, the sole question, generally stated, was, whether the place in which the decedent worked was reasonably safe, and, particularly stated, whether the log rail of the lighter, from which the cap rail was torn, was sound or rotten. There was just one witness who testified for the claimant on this issue. He qualified as an expert lighter builder, and in response to a hypothetical question embracing the undisputed facts of the case, testified, that in his opinion the cap rail would not have been displaced by the strap if the log rail had been sound; though, later on cross-examination, he weakened the force of this testimony by admitting that a taut line as distinguished from a slack line could tear a cap rail from a perfectly sound log rail and that he had seen the thing done.

The horizontal cap rail was beveled on its edge and overhung the vertical log rail a distance no greater than the diameter of the bevel, which was slightly less than the diameter of the strands of the strap. The learned trial judge seemed impressed by what he conceived to be the physical impossibility of a line of the size of the one used catching under the limited beveled projection of the cap rail and wrenching it off. We have been similarly impressed; but the uncontroverted fact is that the line did something to the cap rail. It may or it may not have caught under it. Be that as it may, it did tear it off, and with a force sufficient to send it flying through the air. We think, however, this was explained by another witness who testified to what is familiar to all of us, which is, that when a slack line is suddenly made taut, it bounds from its slackened position to its taut position with great force and is capable of doing great injury. In this case, one end of the line was fast to a stationary tug of the dead weight of 200 tons, and the other end was fast to a moving lighter which with her cargo was of a dead weight of 450 tons. Manifestly, the resultant strain on the line was great. When the line yielded to the strain and jumped to its taut position it did it with a blow, or, as the witness said, with a "slam," the force of which when exerted by such a great moving weight must have been tremendous. We can imagine that such a blow from the line would alone and without the line being caught beneath the projection force the cap rail from its fastening, just as a blow of a hammer or ram would tear it away. But we are not concerned with the manner in which the cap rail was torn from its place. We are concerned with the reason for its giving way. The fact is it was torn away. The point of inquiry, therefore, is, was it torn away because of negligence of the petitioner in having it

fastened to a rotten log rail? The answer to this question, we think, dispenses with discussion of the defense of contributory negligence, and of inevitable accident, for if the log rail was sound, no negligence of the petitioner was proved.

Against the testimony of the expert that the log rail was rotten because the cap rail yielded to the blow of the line, and because also the spikes were but slightly bent—a phase of his testimony to which we give little weight—there is affirmative testimony on behalf of the petitioner that the lighter had been rebuilt but two or three months before the accident and that the log rail of the lighter had been renewed and made of sound timber. There was also testimony that the log rail was examined within forty-eight hours after the accident and was found to be perfectly sound. This is fact testimony of eye witnesses opposed to opinion testimony of an expert, and it should, we think, prevail, especially as the credibility of the witnesses so testifying was not impeached. As the log rail on the lighter at the time of the accident was on the lighter at the time of the trial, it was easily within the power of the claimant, if the rail was rotten, affirmatively and positively to prove that fact.

Slow as an appellate court always is to disturb facts found by a trial judge who has seen and heard the witnesses, we are constrained in this case to make opposite findings and to hold that the claimant has not proved that the decedent's death was due to the petitioner's negligence.

The decree below is reversed.

TATSUKICHI KUWABARA v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 4, 1919.)

No. 3161.

ALIENS ⊂=50—IMMIGRATION—EXCLUSION—TEACHERS—"LABORER."

Immigration Act, § 3, excluding contract laborers, but providing that such provisions "shall not be held to exclude * * * persons belonging to any recognized learned profession," *held* not to exclude a Japanese alien, seeking admission for the purpose of teaching the Japanese language, history, geography, and arithmetic in an established school, because (1) the doing so is not to perform labor within the meaning of the act, and (2) such teacher may properly be regarded as belonging to a recognized learned profession.

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

Appeal from the District Court of the United States for the District of Hawaii; Horace W. Vaughan, Judge.

Habeas corpus by Tatsukichi Kuwabara against the United States. From a judgment discharging the writ, petitioner appeals. Reversed.

This is an appeal from a judgment dismissing a writ of habeas corpus the court below had granted the appellant upon a petition presented by him setting forth, among other things, that he is a subject of the Emperor of Japan and

came from that empire to Hawaii July 12, 1917, by a certain named steamship, having a duly authenticated passport issued by the proper authorities of Japan, showing that he is a teacher; that he left Japan for the purpose of engaging in the practice of his profession as a teacher in Hawaii; that he is imprisoned and restrained of his liberty by the United States Immigration Inspector at Honolulu, the cause of such imprisonment being that the United States Board of Immigration Inspectors at that port had ordered the petitioner to be deported and returned to Japan, his imprisonment and restraint being for the purpose of such deportation.

By stipulation of the parties there was added to the petition for the writ the testimony presented by the petitioner to the Board of Immigration Inspectors by whose order the petitioner was denied a landing, and upon which testimony the board based its order of deportation, and there was also added to the petition a statement of the fact that the petitioner had appealed from that order to the Secretary of Labor at Washington, which appeal was by that officer denied. After argument upon the record thus made the court below dismissed the writ.

Lightfoot & Lightfoot, of Honolulu, T. H., for appellant.

S. C. Huber, U. S. Atty., of Honolulu, T. H., and Annette Abbott Adams, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). Section 3 of the Act of February 5, 1917, entitled "An act to regulate the immigration of aliens and the residence of aliens in the United States" (39 Stat. 875, c. 29 [Comp. St. § 4289¼b]), provides, among other things as follows:

"That the following classes of aliens shall be excluded from admission into the United States: * * * Persons hereinafter called contract laborers, who have been induced, assisted, encouraged, or solicited to migrate to this country by offers or promises of employment, whether such offers or promises are true or false, or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled: * * * Provided further, that skilled labor, if otherwise admissible, may be imported if labor of like kind unemployed cannot be found in this country, and the question of the necessity of importing such skilled labor in any particular instance may be determined by the Secretary of Labor upon the application of any person interested, such application to be made before such importation, and such determination by the Secretary of Labor to be reached after a full hearing and an investigation into the facts of the case: Provided further, that the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, nurses, ministers of any religious denomination, professors of colleges or seminaries, persons belonging to any recognized learned profession, or persons employed as domestic servants: * * * Provided further, that the Commissioner General of Immigration with the approval of the Secretary of Labor shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission. * * *"

The act also provided for the appointment of boards of special inquiry "by the Commissioner of Immigration or inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law," to consist of three members to be selected from such of the immigrant officials in the service as the Commission-

er General of Immigration, with the approval of the Secretary of Labor, should from time to time designate as qualified to serve on such boards, and provided for an appeal to the Secretary of Labor from the decision of a majority of such board denying the right of the alien to enter this country.

The pertinent evidence bearing upon the right of the appellant to enter the country consists of his own testimony and of the statement in the record that the applicant is possessed of a passport issued by the Japanese Minister for Foreign Affairs April 11, 1917, which passport states that he "is a teacher and that he is going to proceed to Hawaii as a teacher." The appellant testified before the Board of Special Inquiry, among other things, that a Mr. Shiji, of the Hongkong Mission in Honolulu, left Japan the year before for Hawaii as a Buddhist priest, at which time the witness told him that he would like to go to Hawaii as a teacher, if he could, and that subsequently Shiji wrote him a letter, with the Japanese Consul General's certificate, in which he said that there were many Japanese language schools in Hawaii, and that if the witness should come there he could get him a position in any place, mentioning Lahaina, if he should like to go there, and also mentioning a school on the island of Oahu. Asked what kind of a certificate from the Japanese Consul General Shiji sent him, the witness answered:

"The Hongwanji Mission made application to the Japanese consul, and stated that they wanted a Japanese language teacher, and the Consul General certified for a passport. Q. Could you not have secured a passport anyhow, without the Consul General's certificate, being a teacher? A. No; I could not get it without the Consul General's certificate from here (Hawaii). Q. Cannot all teachers get passports? A. No."

The witness further testified in effect that he attended the common school in Japan for 8 years, and finished the grammar school, and then entered the Hiroshima Ken Normal School, and went there for 4 years, and graduated March 28, 1904. The witness also testified that he had been engaged in teaching 13 years, having taught 5 years in the grammar school at Numata Hiroshima Ken, Japan, and having had charge of the Ochihai Grammar and Manual Training School for 6 months. He further testified that his intention was to go to Hongwanji School at Lahaina, Maui, to teach the Japanese language, history, geography, and arithmetic. Being asked, "In what grades are you going to teach?" he answered, "Grammar grade; but I can teach higher than that."

The question in the case is whether such a teacher is precluded by the Act of Congress of February 5, 1917, from entering the United States, which act, as has been seen, excludes "contract laborers, who have been induced, assisted, encouraged, or solicited to migrate to this country by offers or promises of employment, whether such offers or promises are true or false, or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled," but which in express terms exempts from the provisions of the act "professional actors, artists, lecturers, singers, nurses, ministers of any religious denomination,

professors of colleges or seminaries, persons belonging to any recognized learned profession, or persons employed in domestic service."

The Act of Congress of February 26, 1885 (23 Stat. 332, c. 164), entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia," provided in its first section that it should "be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its territories, or the District of Columbia."

An alien residing in England was employed by the Church of the Holy Trinity, in the city of New York, to come to that city and take charge of its church as its pastor. It being claimed on the part of the government that the church corporation in making that contract had violated that provision of the Act of February 26, 1885, it was held by the trial court that the defendant was liable to the penalty provided for therein. But on appeal to the Supreme Court (Church of Holy Trinity v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226), the judgment was reversed; that court holding that, while the contract complained of came within the letter of the statute, it did not come within the intent or spirit thereof, and that the statute had no application to such a case, the court saying, among other things:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words 'labor' and 'service' both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind,' and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

The court in that case, after citing numerous cases in support of its ruling, as well as citing the title of the act, said, at page 463 of 143 U. S., at page 513 of 12 Sup. Ct. (36 L. Ed. 226):

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at con-

temporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. United States v. Union Pacific Railroad, 91 U. S. 72, 79 [23 L. Ed. 224]. The situation which called for this statute was briefly, but fully, stated by Mr. Justice Brown, when, as District Judge, he decided the case of United States v. Craig [C. C.] 28 Fed. 795, 798: 'The motives and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage.'"

The subsequent case of United States v. Laws, 163 U. S. 258, 16 Sup. Ct. 998, 41 L. Ed. 151, presented the question whether a contract made with an alien in a foreign country, to come to the United States as a chemist on a sugar plantation in Louisiana, in pursuance of which contract the alien did come here and was so employed, his expenses being paid by the defendant to the proceeding, was such a contract to perform labor or services as was prohibited by the same act of Congress, to wit, the Act of February 26, 1885, and the court in holding that it was not, after referring to the amendment of the Act of February 26, 1885, by that of March 3, 1891 (26 Stat. 1084, c. 551), by which amendment the proviso to the fifth section of the former act was made to read so that the provision thereof should not "apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants, nor to ministers of any religious denomination, nor to persons belonging to any recognized profession, nor professors of colleges and seminaries," said:

"This amendment to the statute of 1885, although passed subsequently to the decision in the Circuit Court and prior to the decision of the same case in this court, was not mentioned in the opinion in this court, because the review was had upon the record based upon the act as originally passed in 1885. If by the terms of the original act the provisions thereof applied only to unskilled laborers whose presence simply tended to degrade American labor, the meaning of the act as amended by the act of 1891 becomes, if possible, still plainer. Now by its very terms it is not intended to apply to any person belonging to any recognized profession. We think a chemist would be included in that class. Although the study of chemistry is the study of a science, yet a chemist who occupies himself in the practical use of his knowledge of chemistry as his services may be demanded may certainly at this time be fairly regarded as in the practice of a profession. One definition of a profession is an 'employment, especially an employment requiring a learned education, as those of divinity, law, and physic.' Worcester's Dictionary, title 'Profession.' In the Century Dictionary the definition of the word 'profession' is given, among others, as 'a vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding, or teaching them, or in serving their interests or welfare in the practice of an art founded on it. Formerly, theology, law, and medicine were specifically known as the professions; but as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed

attainments in special knowledge, as distinguished from mere skill; a practical dealing with affairs, as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuits for its own purposes.'"

In the case of Scharrenberg v. Dollar S. S. Co. et al., 229 Fed. 970, 144 C. C. A. 252, Ann. Cas. 1917C, 258, this court held that it was not a violation of the Immigration Act of February 20, 1907 (34 Stat. 900, c. 1134), making it a misdemeanor to prepay the transportation or assist in the importation of contract laborers into the United States, for the operators of a merchant vessel flying the American flag to bring aliens from China, which decision was affirmed by the Supreme Court in 245 U. S. 122, 38 Sup. Ct. 28, 62 L. Ed. 189, where the court, after referring to the claim there made that the seaman described in each count of the complaint was an alien contract laborer, and that the steamship was a part of the territory of the United States, and that therefore the contracting to bring such alien to San Francisco and to there employ him upon such a vessel, was to knowingly assist and encourage the migration of an alien contract laborer into the United States for the purpose of having him perform labor therein in violation of the fourth and fifth sections of the act of 1907, said:

"The validity of this claim, and of the argument in support of it, calls for the construction of three short provisions of two statutes.

"Section 2 of the act of 1907, as amended in 1910 (36 Stat. 263), furnishes this definition of 'contract laborers,' which must be read into sections 4 and 5 of the act of 1907: 'Persons * * * who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled.'

"Section 4 makes it a misdemeanor for any corporation to 'in any way assist or encourage the importation or migration of any contract laborer or contract laborers into the United States.'

"Section 5 imposes severe penalties for every violation of the act 'by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States.'

"Thus a contract laborer is one who under the conditions described in the first of these statutes comes 'to perform labor in this country,' and the penalties denounced by the sections of the other act are against persons who knowingly assist or induce the importation or migration of such laborer 'into the United States.'

"The purpose of this alien labor legislation was declared by this court almost 30 years ago, in Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, to be, to arrest the bringing of an ignorant, servile class of foreign laborers into the United States, under contract to work at a low rate of wages, and thus reduce other laborers engaged in like occupations to the level of the assisted immigrant.

"Having these terms of the statutes and this history in mind, can it with reason be said that the men shipped on the Mackinaw as 'seamen' were 'laborers,' and that when employed upon that vessel in foreign commerce they were performing labor 'in this country' within the meaning of the acts?

"In familiar speech a 'seaman' may be called a 'sailor' or a 'mariner,' but he is never called a 'laborer,' although he doubtless performs labor when assisting in the care and management of his ship; and a 'seaman' is defined in the United States statutes applicable to 'merchant seamen' as being, any person (masters and apprentices excepted) who shall be employed to serve in any capacity on board a vessel. R. S. § 4612. In the shipping articles, which the United States law requires shall be signed by members of the crews of ships of American registry engaged in foreign commerce, the men are desig-

nated as 'seamen' or 'mariners.' Thus, neither in popular nor in technical legal language would the men employed on the Mackinaw be called or classed as 'laborers,' and such seamen are not brought 'into this country' to enter into competition with the labor of its inhabitants, but they come to our shores only to sail away again in foreign commerce on the ship which brings them or on another, as soon as employment can be obtained."

We are of the opinion that, in view of the purpose of the legislation here in question, as declared by the Supreme Court in the cases that have been cited, it cannot be held to apply to an alien who seeks to enter this country for the purpose of teaching "the Japanese language, history, geography, and arithmetic," first, because the doing so is not to perform labor in this country within the meaning of the Act of February 5, 1917; and, secondly, because a teacher of the Japanese language, history, geography, and arithmetic may be properly regarded as belonging to a "recognized learned profession."

The judgment is reversed, and the case remanded, with directions to the court below to discharge the appellant from custody.

CROWN WILLAMETTE PAPER CO. v. NEWPORT.

(Circuit Court of Appeals, Ninth Circuit. August 4, 1919.)

No. 3282.

1. DEATH ⟸31(6)—RIGHT OF ACTION FOR WRONGFUL DEATH—SURVIVING HUSBAND—CONSTRUCTION OF STATUTE.

   Under Laws Or. 1911, p. 17, § 4, which in case of death by wrongful act gives a right of action to "the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother or father, as the case may be," the husband of a woman so killed *held* to have the right of action, although she left children by a former marriage.

2. MASTER AND SERVANT ⟸101, 102(8)—DUTY OF MASTER—SAFE PLACE TO WORK.

   Under Employers' Liability Act Or. § 1, providing that employers responsible for work involving risk or danger to employés shall use every care and precaution for the protection and safety of life and limb, it was the duty of a contractor, employing a woman to cook in a tent in camp near where it was conducting blasting operations, to see that sne had a safe place to work, having in consideration the circumstances and surroundings.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Action at law by William Newport against the Crown Willamette Paper Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William Newport, plaintiff below and defendant in error here, recovered verdict and judgment for damages on account of the injury done to his wife, Gertrude; the injuries resulting in her death. The facts are substantially these:

Mrs. Newport was employed by the paper company, plaintiff in error here, defendant below, as a cook in a tent railway construction camp in Oregon. The cook tent was on the side of a mountain stream opposite to where the

roadbed was being cleared. There had been considerable blasting done by the paper company, and no damage to those in the tents had resulted. One day in December, 1917, the superintendent who had charge of the blasting went away and put another man in charge. Opposite the cook tent and on the side of the hill, about 175 yards away, the man in charge, wishing to blast two stumps, put 35 sticks of giant powder, 20 per cent. dynamite, underneath one stump, and 15 sticks under another one about 15 feet away. Mrs. Newport was serving meals to two employés of the paper company, when another employé told her and the others in the tent where she was that a blast was to be fired, and a notice by a call of "Fire!" was given. Mr. Newport, together with a little boy, the son of his wife, left the tent, not through fear, but in order to watch the effect of the blast; but Mrs. Newport and the others remained in the tent. A very few moments after the notice was given the two blasts exploded, and a large piece of wood, weighing about 120 pounds, and approximately 4 by 6 feet in size, was hurled violently through the canvas side of the tent and hit Mrs. Newport on the head and killed her. She was a healthy young woman of industrious habits, and at the time of her death was earning $90 a month as a cook. There was testimony that the charge was put in on the hill side of the stump, opposite the side which faced the cook tent, and that because of this the stump would naturally, when exploded, be driven toward the cook tent. There were a few small alder trees between the cook tent and the stumps which were exploded; but they afforded no protection to the tents.

The action is brought by William Newport in his own behalf. Mrs. Newport had previously been married, and was the mother of three children by the prior marriage, but had no children by William Newport. The action is based upon two statutes of the state of Oregon—chapter 3, General Laws of Oregon 1911, page 16, and chapter 112, General Laws of Oregon 1913, page 194. Chapter 3, called the Employers' Liability Act, provides that owners, contractors, and subcontractors, and other persons having charge of or responsible for any work involving a risk or danger to employés or to the public, shall use every care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the appliances used. Section 4 of the act reads as follows: "If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded." Section 5 provides that in actions brought to recover for injuries suffered by an employé, the negligence of a fellow servant shall not be a defense where the injury shall be caused or contributed to by any of the following causes, namely: "* * * The neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control; * * * incompetence or negligence of any person in charge of, or directing particular work in which the employé was engaged at the time of the injury or death; the incompetence or negligence of any person to whose orders the employé was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act." Section 6 provides that the contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of damage.

Griffith, Leiter & Allen, Chester A. Sheppard, and Bert W. Henry, all of Portland, Or., for plaintiff in error.

G. C. Fulton and A. C. Fulton, both of Astoria, Or., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] It is argued by plaintiff in error that the husband is not a proper party to sue under the statute hereinbefore cited, and the case of McFarland v. Oregon Electric Railway, 70 Or. 27, 138 Pac. 458, Ann. Cas. 1916B, 527, is cited. That was an action by McFarland against the railway company to recover damages resulting from the death of his son. The Supreme Court, through Justice Moore, referred to sections of the statute hereinbefore cited, and said:

"It is believed that, when these sections are construed together, the damages that are recovered in the action for the loss of life of a person killed by the act or omission of another is by section 4 of the enactment given to the person or persons there specified in the order stated; that such beneficiaries 'as the case may be' are the only persons who can maintain an action for the injury sustained; and that so much of section 7349, L. O. L., providing for the descent and distribution of personal property of a decedent, as conflicts with the dispensation of such damages to the person or persons thus declared to be entitled thereto, is impliedly repealed."

The decision was that, the son having died unmarried and without lineal heirs or adopted children, but leaving the mother surviving, she was the sole beneficiary of any sum that might be recovered as damages resulting from his death, to the exclusion of his father, who, though entitled as sole heir to all other property of which his son died seized or possessed, had no interest in or claim to the damages by the death of the son. The case is not directly in point.

If we follow the literal phraseology of the statute, in the present case there is no widow and no male who has left lineal heirs or adopted children. The husband, therefore, would be the person in whom there is a right of action. But the learned judge of the District Court adopted a broader construction, by regarding the word "his" as used rather in a generic sense, and as including both wife and husband, both sexes, and he held that it was not the intent of the act to subrogate the rights of the husband to the heirs and personal representatives. In making the ruling that the action would lie, the court said:

"I think the proper construction of the act would be to read 'lineal heirs or adopted children' after the word 'husband,' so that a proper construction would read this way: The widow of the person so killed, his lineal heirs or adopted children, mother, or father."

It is certainly reasonable to say that the Legislature intended to provide that, in case of the death of the father, his widow or lineal heirs or adopted children would have a right of action; and there is strong ground for the argument that it was not the intent of the Legislature that in case of the death of the mother the words of the statute, "his lineal heirs or adopted children," should apply. By a construction which counsel for plaintiff in error urges, the only persons who could maintain an action, in the event the husband was still living, would be the lineal heirs of the deceased mother; while by giving to the statute the construction adopted by the lower court, the right of action is in the husband or the lineal heirs or the adopted children of the deceased mother. We believe the action was properly brought.

It is said that the court, in charging the jury upon the measure of damages, erred by stating that the husband was entitled to recover "such damages as he has suffered and as the estate of his wife had suffered by reason of her death." The court told the jury that they could consider the expectancy of life of Mrs. Newport, and what assistance the deceased would have been to the husband in the accumulation of an estate during the expectancy of life, what wages she was earning and able to earn, and the state of her health, to the end that the jury could determine how much value in money, as near as the jury could arrive at it, would be added to the estate of the husband if the wife had lived the whole time of her expectancy. Plaintiff in error argues that under this instruction the loss of the society of the wife was considered an element of damage. There is no room for the contention. The charge limited the question for consideration to the measure of damages arising out of the element of wages and value in money that might have been added to the estate of the husband if the wife had lived. Furthermore, in the exception taken the only point saved was based upon the ground of an alleged lack of evidence of any character that the deceased "ever in any way contributed anything to this plaintiff, that he was dependent upon her in any respect in so far as the Employers' Liability Act is a dependency statute, that he has no right of recovery at all, and therefore the measure of damages is erroneous."

[2] It is said that the court erred in charging the jury that it was the duty of the employing company "to provide deceased with a safe place in which to work, having in consideration all the circumstances and conditions there." The court added:

"It was the duty of the defendant to see that the deceased was provided with a safe place in which to do her work. You will remember that she was employed to cook in that tent, and it was the duty of the defendant to see that the tent was a safe place in which to do her work, considering the facts which have been disclosed here, that other employés were at that time blowing these stumps," etc.

The particular criticism is that, in the charge that it was the duty of the paper company to provide Mrs. Newport with a safe place in which to work, the court used words equivalent to the statement that the employer was an insurer of the safety of the employé, and that such is not the law as laid down by the terms of the Employers' Liability Act, § 1, heretofore referred to. Under the Employers' Liability Act in Oregon, the company was obliged to use every care and precaution which it was practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the appliances and devices used. It was clearly the duty of the company to see that the cook had a safe place in which to work, having in consideration all the circumstances and conditions under which she was obliged to do her work. The facts disclosed show that stumps were being blown by dynamite and that great peril surrounded her in her occupation. These matters were all for consideration by the jury, and the court properly charged that it was the duty of the defendant to consider them and to provide a safe place, after giving due consideration to them. The language, when all considered together,

is not susceptible of the meaning that the company was an insurer of the safety of the employé. Sloss-Sheffield Steel & Iron Co. v. Russel, 247 Fed. 289, 159 C. C. A. 383.

Other errors assigned go to points of less importance than those which we have mentioned. We find none well founded.

The judgment is affirmed.

In re PAUL et al.

S. L. LESZYNSKY & CO. v. EWING.

(Circuit Court of Appeals, Ninth Circuit. August 4, 1919. Rehearing Denied October 14, 1919.)

No. 3254.

BANKRUPTCY ⊜178(1)—PROVABLE CLAIMS—SECURED CREDITOR—FRAUD.

A transaction between bankrupts, a mercantile partnership then in financial difficulty, and a creditor, by which the latter obtained the claims of other mercantile creditors at a large discount and took bankrupt's notes for the full amount, secured by chattel mortgage and afterward by bill of sale, with an agreement of repurchase, *held* not fraudulent as to bankrupts or other creditors, and such creditor's claim, after crediting the value of the mortgaged property, *held* provable against the estate.

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

In the matter of Joseph Paul and Samuel Paul, bankrupts. S. L. Leszynsky & Co. appeal from an order sustaining objections of Edwin C. Ewing, trustee, to allowance of its claim. Reversed.

See, also, 236 Fed. 811.

Leszynsky & Co., a corporation, appeals from an order of the District Court, affirming an order of the referee in bankruptcy disallowing an unsecured claim of the appellant proved in bankruptcy proceedings. The debt having been secured, the claim was proved for the balance thereof after deducting the value of the security, which had previously been determined by the District Court. The trustee in bankruptcy of Joseph Paul and Samuel Paul, bankrupts, filed a petition to disallow the claim. The referee sustained the petition of the trustee and overruled the appellant's objections to certain other claims.

The referee found substantially as follows: That the claims of Selig Paul, A. W. Kaplan, and A. S. Weguson should be allowed; that Leszynsky & Co. filed its claim against the bankrupts for $19,933.31, made up of two items, $12,567.62 in a promissory note secured by "an alleged chattel mortgage on a stock of goods which was at the time of the filing of the petition in bankruptcy, in the possession of said claimant," the value of which security has been, since the adjudication in bankruptcy, determined by order of court at $7,200; also an item on open account for $7,365.69 for merchandise furnished subsequent to the execution of the note just referred to. It is found that in the spring of 1912 bankrupts owed, in addition to the amount due claimants Paul, Kaplan, and Weguson, various creditors about $12,476.11, of which sum $2,195.83 was due to Leszynsky & Co.; that the bankrupts and Leszynsky negotiated with a view of arranging a loan to be made by Leszynsky & Co. to the bankrupts with which to settle with other creditors, the plan being to get settlement with all the merchandise creditors, except Leszynsky & Co., at the best figure that could be agreed upon and a sum advanced, together with

Leszynsky's claim in full, was to be secured by chattel mortgage upon the bankrupt's stock of goods; that afterwards in the negotiations Leszynsky & Co. was represented by one Kirske, who advised his principal of the developments of the plan, and that Leszynsky wrote to Kirske to have the bankrupts run down their stock as low as possible, converting the same into cash, as that would enable them to make a better settlement with the creditors.

It is also found that, after the bankrupts had conferred with the attorney for claimant, he sent out letters to the creditors, recommending a settlement by which the creditors agreed to accept 40 cents on the dollar in full satisfaction of their claims; that claimant, having put the bankrupts in a position of increased financial difficulties, then refused to advance the money necessary to pay the other creditors, unless the bankrupts would execute a note secured by a chattel mortgage for the full amount due claimant, together with the full amount due upon the claims of the other creditors, said accounts to be assigned to Leszynsky & Co. by the creditors upon settlement being made; that the bankrupts objected at first, but finally agreed, and on June 13, 1912, executed and delivered to Leszynsky & Co. their note for $12,476.11, secured by a chattel mortgage upon their stock of goods; that this sum represented the face of Leszynsky's claim, and of the assigned claims, together with a small sum for court costs and attorneys' expenses; that the real consideration for the note and mortgage was the sum then owing by the bankrupts to Leszynsky & Co., which was $2,195.83, together with the sum paid to creditors in settlement of their claims, $4,890.77.

The referee found that the chattel mortgage was given and taken in fraud of, and in attempt to delay and hinder, the creditors of the bankrupt; that Leszynsky & Co. paid the claims of creditors who had agreed to the settlement referred to, and assignments of the creditors' claims were made (except in one or two instances) by the attorneys for the creditors; that the purchase and assignment of the claims was a mere subterfuge to enable Leszynsky & Co. to press its advantage over the bankrupts, which had been secured by the earlier negotiations resulting in the letter to the creditors, and to give "some shade of justification to the contract, which had been wrung from the bankrupts, to repay approximately double the amount of their actual indebtedness to the claimant." The referee holds that the contract is usurious.

Further findings are: That, after the execution of the note and chattel mortgage referred to, Leszynsky & Co. took actual possession of the mortgaged property, and although the business was carried on in the name of the bankrupts, Leszynsky & Co. dictated the management and policy, kept a representative in the store, and had actual control; that the insurance policies were being canceled because of the existence of the chattel mortgage, and that when it was evident that the insurance could not be had on the stock while it was covered by a chattel mortgage, Leszynsky and the bankrupts agreed that a bill of sale should be made to claimant, and a contract providing for the repurchase of the property by the bankrupts should be given by Leszynsky & Co.; that thereupon a bill of sale was given to Leszynsky for a consideration of $1 and other valuable consideration; that the chattel mortgage was then satisfied of record and the bill of sale recorded, but that by agreement the contract for repurchase was not recorded; that the consideration named in the contract of repurchase was the same amount that was owing according to the terms of the note and chattel mortgage at the time of the release of the mortgage; that when the bill of sale was executed and delivered the value of the bankrupts' property transferred was $23,000, and the true consideration of the transfer was the money advanced by Leszynsky, $4,890.77, together with the full amount of the claims of that company, $2,195.83, less penalties provided for suit for usury, namely, $1,641.42, making the actual consideration $5,445.18.

It is found that the transfer of the bankrupts' property by the bill of sale was intended as a sale and transfer of the property and as an extinguishment of the first item ($12,567.62) in the claim of Leszynsky & Co.; that the second item named ($7,365.69) in the claim was not a charge against the estate of the bankrupts; that at the time of the delivery of the note and chattel mortgage and the bill of sale, Leszynsky & Co. knew of the existence of certain credi-

tors (Paul, Kaplan, Weguson, La France, and Litchman), and that the claims of those creditors were unpaid and unsecured; and that their claims were not included in the settlement of creditors made in pursuance of the agreement between the bankrupts and Leszynsky & Co.

As conclusions of law the referee held that the objections filed to the claims of Paul, Kaplan, and Weguson were without foundation, and that the petition to expunge the claim of Leszynsky & Co. should be granted.

Appellant contends that the District Court had no jurisdiction to investigate or decide with reference to the validity of Leszynsky & Co.'s lien rights under the chattel mortgage, or under the bill of sale, and that the court erred in holding: (1) That the transactions which culminated in the note and mortgage were fraudulent as to the creditors of the bankrupts; (2) that the transaction was usurious; (3) that the transaction by which the bill of sale given to Leszynsky & Co. by the bankrupts was an absolute transfer of the bankrupts' title to the property. Error is also assigned upon the refusal of the court to allow the claim of Leszynsky for the balance of the note, after applying in payment thereof the value of the property ascertained by the bankruptcy court as an unsecured claim, and in refusing to allow the claim of Leszynsky for merchandise sold to the bankrupts after the execution and delivery of the note and chattel mortgage.

John B. Clayberg, of San Francisco, Cal., and Preston, Thorgrimson & Turner, of Seattle, Wash., for appellant.

Jones & Riddell and Douglas & Schramm, all of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). We cannot find substantial ground in the record for upholding the position that the appellant "wrung" the contract of mortgage from the two Pauls. They were intelligent men, familiar with business affairs, and evidently had full sense of the embarrassments surrounding them, because of certain creditors' suits which were pending against them and the pressure for payment of their debts. They voluntarily sought relief, and for some weeks conferred with appellant, who was a creditor, with a view of arranging a plan under which they could get means and continue with their business. The agreement reached provided for a settlement with all merchandise creditors, such settlement to be had with funds to be loaned by appellant. Appellant's claim was to be paid in full, and for the amount of the appellant's claim and the amount advanced to pay other creditors a chattel mortgage was to be given by the Pauls to appellant, or to some one acting for it.

The controversy, in its acute phase, really narrows to the inquiry whether or not the agreement with the appellant was that it should take assignments for the claims, and whether the Pauls were to include in the note and pay the amounts represented by the face of the claims of creditors, and not the reduced amounts paid to the creditors under the settlement. Upon this matter the testimony of Paul was substantially as follows:

That appellant and its counsel said that the best they could do would be to take the amount of the money the bills would be, and take notes for the entire amount, and give him five years to pay, and if that was satisfactory they would go into the deal, and if not, that they would not advance the money; that he recalled to them their

previous letters and agreements, told them of the circular that had been mailed to the creditors, asking what offer they would accept, but that they said, if that was not satisfactory, to let it alone. Paul said he had "nothing to do but to accept," and that instead of taking the accounts they wanted a mortgage, and that they would confirm orders which would be advantageous upon the credit of Paul; that he agreed to the mortgage; that Leszynsky asked for a list of creditors that had not been heard from, and said that he was going to New York, and would tell creditors listed that appellant was to advance $5,000 to pay off creditors, and was going to accept the same percentage in settlement as the rest, and was going to give Paul five years' time to pay as per the original agreement. Paul also said that when the time came for the payment of the money he went to the office of Mr. Stern, and as he was paying out the money Stern had something drawn up that Paul knew nothing of, "but every time a man accepted money he had him sign a transfer of the account;" that the next afternoon he signed the mortgage; that on that same day Stern wanted to know about the new notes, whether they had been renewed; that he took them to Stern's office, and that Stern tore the signatures off the notes; that Leszynsky often said his idea was to put Paul on his feet again; that Leszynsky, before the mortgage, went over the accounts in the store; that he saw the accounts of the relatives of the Pauls; that after the execution of the mortgage business was carried on and the question of insurance arose. Inasmuch as the insurance companies would not carry a risk where there appeared to be a chattel mortgage against the property in the building insured, some action was necessary.

Paul testified that he called upon the agent of the appellant and was told that they had a bill of sale prepared which would enable the insurance matter to be adjusted; that he sent the bill of sale to his brother, who signed and returned it; that he himself told Leszynsky that if he signed the bill of sale appellant could put him out, and that Leszynsky referred to the poor business conditions in the country and "smoothed" things over; that witness signed the bill of sale and turned it over, and that appellant gave him back the agreement for repurchase; that the agreement between himself and appellant for repurchase was secret, and not recorded, appellant saying that it should not be recorded because they would not be able to get insurance if it were; that the value of the business at the time of the bill of sale was between $28,000 and $30,000. On cross-examination Paul said that during the negotiations he consulted with his attorney, and that the mortgage was submitted to him for his approval; that he saw the form letter prepared to creditors, and that it was satisfactory to his counsel and to himself; that he never knew that appellant wanted assignments of the claims until the day the money was paid out by appellant, which was just before the mortgage was made. Paul said of the mortgage:

"I agreed to it because I was forced to agree, not by threats of bodily harm, but by the option that Stern brought on by the torture and death of the business. I was taken totally by surprise when, at the time the money was to be disbursed, I found that Leszynsky wanted assignments of those claims."

Witness said that he never objected to the taking of the assignments at the time of the execution of the mortgage, and that so far as he knew at that time it did not make any difference to him, because he would only have to pay the same amount in either case. Paul said that he had control of the business after the mortgage, and that he told the bookkeeper to open a new account for appellant for the first of the accounts; that he did all the buying, and appellant confirmed all orders; that he handled the money and saw that it was properly checked and deposited; that he and his brother drew salaries; that after the bill of sale was given he had as much to say about the business, but they paid no attention to it; that he wanted to apply $500 from collections and sales on the contract of indebtedness; that when the original mortgage was made the amount secured included all the merchandise creditors, those who had signed up, as well as a few who had not. "We thought we could buffalo a few."

The testimony of Leszynsky was to the effect that he told the Pauls that the only way in which he could go into the transaction would be by buying the accounts and giving the bankrupts five years in which to pay him back the full face value of the accounts; that the mortgage, which was made two months after his original talk, carried out that proposition and was satisfactory to the Pauls.

Mr. Ramey, who acted as attorney for the Pauls, testified that he examined the proposed chattel mortgage, and told Paul that the mortgage contemplated would eliminate him in the right to have anything to say in the conduct of the business; that it was Paul's desire to gather everything into one indebtedness, payable at some sufficiently long distant time in the future, to be handled out of the business; that before the mortgage was drawn, at the office of Mr. Stern, who was counsel for Leszynsky, the terms discussed were that Leszynsky would pay all the claims of the creditors and take a note representing the total indebtedness so acquired; that Leszynsky was to get hold of all the claims and to have in their stead the mortgage and note; that the proposition was that the amount should be the sum advanced by appellant, and not the total of the open accounts, but whether this was afterwards changed he did not know; that he paid little attention to the amount put in the mortgage, because Leszynsky would have the same hold over Paul, no matter what amount was inserted in the instrument.

Miss Casey, cashier and bookkeeper in Seattle for appellant, said that, after the bill of sale was made, the operation of the business went on just the same as it had under the mortgage, with the exception that it was taken out of her name, and put in the name of A. S. Kirske; that everything was to be carried on the same in the matter of indebtedness evidenced by the chattel mortgage, and that the note which the chattel mortgage secured was not surrendered at the time the bill of sale was executed, so far as she knew; that after the bill of sale was made Leszynsky kept supplying goods to the store, and that orders had to be signed by appellant.

Stern, who was counsel for Leszynsky in the transaction, testified that Paul agreed to the proposition that Leszynsky should buy the

claims of other creditors; that it was understood that if the business profited Leszynsky would make the difference between the face of the claims and the actual amount paid for them; that Paul was perfectly satisfied and anxious to consummate the matter; that Paul said some of his relations had claims, but that they would abandon them or cancel them, so as to give him a chance to work out the plan of appellant, and that the relations' claims need not be considered in computing the amount Leszynsky had to invest; that when the insurance difficulty came up Paul and Kirske said that an insurance agent had advised that the business be transferred absolutely to Leszynsky & Co. on record; that appellee and Kirske discussed the legal phases of the matter, and that he told them he thought it would be safe to make a bill of sale, and that the indebtedness was still to stand between Leszynsky and the Pauls as represented by the original note; that the business was to go on just the same, and that the Pauls were to pay just the same amount as they were to pay under the mortgage, the same installments, and the same interest and terms; that Paul said he would like a writing to show that there was no change in the amounts they were obligated to pay in order to get the business back; that witness then drew an agreement whereunder appellant agreed that, when the payments and installments were made as provided in the agreement, Paul was to have the business back.

Again referring to the claims of certain relatives of the Pauls, Stern testified that Leszynsky said he did not wish those claims outstanding and to be asserted against the business, and that Paul said they were close relations, and that he would see that they did not assert their claims, or make any attempt to get payment, until he was through with his arrangements with appellant and was on his own feet. It was understood that the claims of relatives were in the form of notes, whereupon Stern advised Paul to secure the notes; that thereafter Paul brought the five or six notes signed by Kaplan, and that witness tore off the signatures and put them in his files; Stern testified positively that Paul and he discussed the question of assignments a number of times before the mortgage was executed, and that the intention of the parties in the drawing and execution of the bill of sale was not to vary the rights that existed prior to the instrument, and that the purpose was to permit appellant to control the business as it had controlled it during the time of the mortgage, and to give the Pauls the same rights they had had, namely; upon the payment of certain sums in certain installments they were to regain their business, and thus permit the securing and retaining of insurance on the business.

Kirske, representative of Leszynsky & Co., also says that the agreement was that Leszynsky & Co. would pay the accounts, 30 or 40 cents on the dollar, and that Paul would give notes and mortgages to cover the full amount that he owed the creditors; that Leszynsky & Co. should buy the creditors' claims, and that Paul would then pay Leszynsky & Co. the amount in full that he owed creditors, and would give notes running five years, secured by a chattel mortgage; that when the notes and the mortgage were given he told Paul that he had

better get back the notes made to his relatives—one to a brother-in-law, another to his father-in-law, and one to his father—and Paul said he would get them and have them canceled, but that they would not bother at all. Witness said that he saw the notes in Stern's office; that the mortgage was made in favor of Miss Casey, and that after its execution the Pauls were put in the store on salaries; that he and Miss Casey were to countersign checks, and all goods were to be bought upon orders signed by Miss Casey and himself; that an agent of the insurance company advised the bill of sale transaction, and that after it was executed insurance was adjusted, and that there was no other purpose in the bill of sale, except to effect insurance; that after the bill of sale things were conducted as they had been under the chattel mortgage—that is to say, appellant was in possession and practically in charge of the business.

The finding of the referee, that at the time of the execution and delivery of the chattel mortgage, and also of the bill of sale, the appellant knew of the existence of the creditors, Selig Paul, A. W. Kaplan, and A. S. Weguson, and that the claims of such creditors were wholly unpaid and unsecured, but that said creditors were not included in the settlement made in pursuance of the agreement between the bankrupts and Leszynsky & Co., appears to be against the weight of the evidence as furnished by the books of the Pauls. In a statement of the business offered by the trustee, compiled and certified by a public accountant, as of December 31, 1912, showing assets ($32,479.53), and liabilities, and capital, appears these items: To Weguson, $1,000; S. Paul, $500; J. & S. Paul, $7,979.85; A. W. Kaplan, $5,427.70—due as capital investments, as were the amounts due to J. & S. Paul, other members of the National Outfitting Company. In this same statement the entire indebtedness of the copartnership was presented in "Bills Payable" and "Accounts Payable"—bills payable being $12,475.61, which is the exact amount (with the exception of an apparent discrepancy of 50 cents) of the promissory note given to Leszynsky & Co. and secured by the chattel mortgage. In accounts payable, all other indebtedness, except where in the form of a written obligation, seem to have been included. Furthermore, in the trial balances of the Pauls from June, 1912, to and including February, 1914, there appeared an account in favor of Weguson for $1,000, Selig Paul for $500, and up to and including December, 1912, A. W. Kaplan, $6,330.10, thereafter reduced to $5,427.70. In these trial balances the account of bills payable was credited for December, 1912, and January, February, March, and April, 1913, with $12,476.61.

Miss McComb, the bookkeeper for the Pauls, testified that the names of Weguson, Kaplan, and Selig Paul did not appear in the bills payable account, although they may have been in a sort of memorandum, and that in the transfer ledger the names of these three parties did not appear at the time the mortgage was given as bills outstanding. She also testified that in 1910 Kaplan's account was credited on the books for his "proportion of the profit" in proportion to the money "invested by him." In 1911 his account was also treated in

the same general way, and that the entries were made by direction of Mr. Paul. Miss McComb also said that the Weguson and Selig Paul accounts were placed on the books in the same way and form as the account of Kaplan, and that since the appellant had become interested in the business no interest had been paid on any of these three accounts. Miss Casey said that, when these accounts appeared in the trial balances, Mr. Paul told her they were loans from relatives or friends in the nature of an investment. Joseph Paul said that Selig Paul was his father, Weguson his father-in-law, and Kaplan his brother-in-law. He denied that he ever told Leszynsky that the obligations to these relatives would be canceled, but said that, when he and appellant were negotiating, he took the notes due to these relatives to the office of Mr. Stern, to show Mr. Stern that the notes were "renewed," and that he told Stern that he had given new notes to his relatives, and that the obligations were to stand. Stern tore off the signatures to the notes and kept them. Miss McComb testified that there never had been any interest paid upon the notes due the several relatives. We naturally express surprise that Paul should have been willing to take the notes to Stern and deliver them up for cancellation, unless it was in accord with an agreement for cancellation of them, and that Leszynsky & Co. might be assured that they would not embarrass the transaction between the Pauls and Leszynsky.

The record evidence, when considered with the uncontradicted oral testimony, leads us to conclude that the referee and the lower court were in error. Our opinion is that it is proven that the contract made between the Pauls and appellant corporation about June 13, 1912, which was the date of the note and chattel mortgage, was that the appellant would purchase and take assignments of the claims of other merchandise creditors, and that the note to be secured by chattel mortgage to be given by the bankrupts should be for the full face value of these claims and the debt due to the appellant corporation. We must also hold that the evidence shows that, while appellant went into possession of the property mortgaged, the business was run by and in the name of the bankrupts, as it had been before the execution of the mortgage. The bankrupts collected the debts and paid the expenses of the business. It is also to be concluded that about April 12, 1913, it was agreed that the chattel mortgage should be canceled of record, and that a bill of sale should be executed by the bankrupts to the representative of the appellant corporation, and that appellant should execute and deliver to the bankrupts, to protect their interests, an agreement providing for right of repurchase upon payment by the bankrupts of the amount of the note in accordance with the terms of the contract.

As against the creditors and the bankrupts we find no fraud is shown, and the insurance companies are not before us complaining of any possible wrong done to them in taking out policies in the name of Kirske as owner. The Pauls asked financial aid from appellant. They were fully advised by counsel, and entered into the contract with appellant, knowing that it would mean the payment of their

notes to appellant in full. At the time they evidently believed that they could keep their business, establish credit, and pay out in the postponed time fixed. Appellant accepted the statements that the entire indebtedness was presented in "bills payable" and "bills receivable," and was assured that the relatives were not creditors. The very large, if not unconscionable, profit to accrue to appellant under the contract, does not warrant the conclusion in this proceeding that the contract as written did not express the real intention of the parties, and the court in bankruptcy has no power to relieve the bankrupts from the terms of the agreement as it was deliberately entered into.

As the rate of interest fixed in the notes was less than 12 per cent., and the mortgage was given for no greater amount than was due, the question of usury under the state statute does not arise.

It appears that after the bill of sale transaction the business was continued in the same manner as before. It was run in the name of the bankrupts; they collected the debts, paid the expenses, and made a payment on the note out of the proceeds of the business. The bill of sale and the contract connected therewith must therefore be considered as a security in the form substituted for the chattel mortgage. The claim of Leszynsky & Co. upon open account for merchandise sold after the execution of the bill of sale was valid, and ought to have been allowed and approved, and appellant's claim for the balance due on the notes, after applying the value of the property as determined by the court, should have been allowed and approved.

The order of the District Court is reversed, and the cause remanded, with directions to make such orders as will carry out the views we have expressed.

Reversed.

CRAWFORD et al. v. BROUSSARD et al.*

(Circuit Court of Appeals, Fifth Circuit. June 25, 1919. On Petition for Rehearing, October 7, 1919.)

No. 3325.

1. BANKRUPTCY ⊂=178(1)—FRAUDULENT TRANSFER OF PROPERTY.
   A transaction by which a creditor of a known insolvent within four months prior to his bankruptcy took in satisfaction of its debt a growing rice crop on land rented by the debtor, who was to harvest and deliver the crop, the creditor paying the rent and all expenses, *held* fraudulent as against other creditors and voidable by the trustee.

2. FRAUDULENT CONVEYANCES ⊂=181(1)—RIGHTS OF PURCHASER ON SETTING ASIDE PRIOR LIEN.
   A fraudulent purchaser of property is not entitled to have it subjected to the satisfaction of a lien on it which existed in his favor prior to his purchase.

   Batts, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

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

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

Suit in equity by J. E. Broussard and others against Walter J. Crawford, trustee in bankruptcy of E. F. Moore, and others. Decree for complainants, and defendants appeal. Reversed.

U. F. Short, of Dallas, Tex. (Smith & Crawford, of Beaumont, Tex., and E. R. Spotts, of Houston, Tex., on the brief), for appellants.

A. D. Lipscomb and Sol E. Gordon, both of Beaumont, Tex., for appellees.

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

WALKER, Circuit Judge. [1] This suit was instituted in July, 1917, by Beaumont Rice Mills, a corporation, and by individuals who prior to the organization of that corporation were members of a partnership which did business in the name of Beaumont Rice Mills (which will be referred to as the appellee), against the appellant, the trustee in bankruptcy of E. F. Moore. The averments of the bill as it was amended show the following state of facts: On and prior to January 1, 1906, E. F. Moore was indebted to sundry parties, including the appellee, in considerable amounts, the appellee holding a first mortgage on about $3,000 worth of live stock and implements to secure a debt then owing to it. About January 1, 1906, Moore verbally agreed with J. E. Broussard, as manager of the appellee, that he would rent for the year 1906 280 acres of land known as the McCrimmin farm, and plant the same in rice, devoting the crop to the payment of the appellee, on condition that the latter should advance about $1,000 for seed and other indispensable things, and the charges for rent, water, cost of harvesting, sacking and hauling, and saving said rice being first deducted or paid by the appellee. Under that agreement Broussard gave satisfactory assurances to the landlord and obtained for Moore the use of said land and made him said indispensable advances in the amount of $1,139.80, prior to and during the growing of said crop, and paid said rental in the amount of $810, as had been agreed. On April 5, 1906, Moore executed a conveyance of said crop to Broussard, the parties intending that the latter should hold the same as trustee for the benefit of the appellee. No part of the crop had been planted at the time said verbal agreement was made. Not all, if any, of it was planted when said conveyance was executed. The advances mentioned were necessary to be made because Moore was insolvent when they were made. About June 15, 1906, the said agreement was modified to this extent, viz: That the beneficial interest of the appellees in said crop should become absolute, and that the same should be accepted by it in satisfaction of all claims held by it against Moore, but that Moore should complete the cultivation, harvesting, and saving of the crop, at the cost and expense of the appellee for all, save the supervision, which was to be given by Moore, and, after such modification of the agreement, the appellee abandoned its above-mentioned first mortgage on stock and implements, and its claim of indebtedness as against Moore. While the crop was growing, Moore went into bankruptcy. The crop went into the possession of Moore's trustee in bankruptcy, who per-

mitted Moore to harvest it, the appellee paying the expenses of harvesting, such expenses, added to the amounts advanced, and that paid as rent, aggregating $5,751.52. The property covered by the above-mentioned mortgage of Moore to the appellee went into the bankrupt estate, the appellee asserting no claim to it. There was realized from the sale of the rice crop by Moore's original trustee in bankruptcy $11,651.25, which, with interest earned on that sum, making a total of $13,130.50, went into and still remains in the hands of the appellant, Moore's present trustee in bankruptcy. The prayers of the bill were: That the trustee in bankruptcy be required to pay the amount of that fund to the plaintiff, or that the trustee be ordered to pay to the plaintiff out of that fund the said sum of $5,751.52, with interest from November 1, 1906, and in the alternative that said fund in the hands of the trustee be charged with the amount secured by said mortgage to the appellee; and, if neither of the foregoing prayers be granted, that said mortgage to the appellee be foreclosed, and that the trustee be required to pay out of the fund in his custody the amount of the debt secured by said mortgage.

The record discloses that on July 16, 1906, Moore filed his voluntary petition in bankruptcy, and was adjudged bankrupt on the 25th day of the same month. It appears on the face of the bill that he was known to be insolvent when about June 15th preceding the filing of the petition in bankruptcy the appellee acquired the absolute ownership of the rice crop, which before stood as security for advances made and to be made. The evidence showed that when that transaction occurred the rice crop was in existence and had been irrigated. A result of the transaction was that the relation of the appellee to the crop was changed from that of a creditor having security to that of absolute owner of the thing which before had stood as security, from which was realized greatly more than the amount of the outlay required to obtain it, including the debt which it had secured. This happened one month and one day before the filing of the petition on which the former debtor was adjudged bankrupt, and when his insolvency was known to both parties to the transaction.

The averments of the bill as amended do not show that the appellee is entitled to the proceeds of the sale of the rice crop. The facts averred do not show that its relation to the transaction of about June 15, 1906, was that of a purchaser in good faith and for a present fair consideration. The value of the rice crop at the time of its transfer was not averred. The amount realized from it indicates that it was worth greatly more than the cost of it to the appellee. When that transfer was made the amounts chargeable against the rice crop were $1,139.80, the amount of the advances made up to that time, and $810, the amount of the rent for which the appellee had become responsible. A result of sustaining that transaction between the appellee and the bankrupt, the insolvency of the latter being known to both, would be to enable the appellee to realize out of the property transferred more than its debt and other consideration paid, while the remaining property left to the transferrer was insufficient to satisfy the demands of his other creditors. It is to be presumed that the transferrer intend-

ed the necessary consequences of his act, which, on its face, as it is disclosed by the averments of the bill as amended, included the hindering, delaying, or defrauding of his other creditors. The transfer having been made with such intent within four months prior to the filing of the petition in bankruptcy, it was void as against the transferrer's other creditors, unless the appellee was a purchaser in good faith and for a present fair consideration. Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 564, § 67e (Comp. St. § 9651). As the appellee comes into court claiming the proceeds of the sale of the rice crop by virtue of that transfer, it is incumbent upon it to aver and prove what is requisite to give validity to that transaction. Jones v. Simpson, 116 U. S. 609, 614, 6 Sup. Ct. 538, 29 L. Ed. 742. This it failed to do, in that its bill as amended shows that the transfer relied on was such a one as was void as against the transferrer's other creditors, unless the transferee was a purchaser in good faith and for a present fair consideration, but does not show that the appellee was such a purchaser.

The decree in favor of the appellee was based upon a finding to the effect that, under the original arrangement between it and Moore as to the 1906 rice crop to be grown on the McCrimmin farm, that crop was to go to the appellee for the purpose of clearing up the indebtedness of Moore to the appellee. It is to be inferred from expressions contained in the opinion rendered by the District Judge that his conclusion was "that the rice crop belonged to the Beaumont Rice Mills before it was ever planted," as was stated by Moore in testimony given before the referee in bankruptcy in a former proceeding or suit, which testimony was introduced by the appellee in this case, Moore having died before this suit was brought. There was no allegation to support such a finding. The state of facts disclosed by the appellee's amended bill has been set out above. That the original bill did not assert a claim that when the rice crop was planted it belonged to the appellee is shown by the explicit averment of that pleading that the claim of the appellee to the proceeds of the sale of the rice crop was based "on the fact that said crop of rice had first been conveyed by the bankrupt, E. F. Moore, to said J. E. Broussard in trust for Beaumont Rice Mills, as security for debt, and later transferred absolutely by said E. F. Moore, the owner of the same, to Beaumont Rice Mills before the bankruptcy of the said E. F. Moore." We do not think that the evidence was such as to warrant a finding that the appellee became the owner of the rice crop prior to about one month before the filing of the petition under which Moore was adjudged bankrupt. J. E. Broussard, the president and manager of the appellee, represented and acted for it in all its dealings with Moore in regard to the rice crop in question. He was a witness for the appellee. The following are extracts from his testimony:

"I knew E. F. Moore. He was killed by the Frisco Railroad 2 years ago. Bridgeman was his son-in-law. They were rice farmers prior to 1906. We advanced money for them to make rice crops for a number of years."

In reference to an instrument in the form of a bill of sale of the rice crop made by Moore to Broussard, dated April 5, 1906, the witness stated that that instrument was filed for registration as a chattel

mortgage in the county clerk's office, and was indexed and recorded as such, and, in reply to the question, "What was the purpose of it with reference to the indebtedness of Moore?" said:

"It was the intention that the proceeds of the crop should be applied on the debt that Moore and Moore & Bridgeman owes. * * * In addition to the advancement for payment of the rent on the McCrimmin land, the Beaumont Rice Mills made advances for seed rice, and also advanced some money to put the crop in. * * * In all we advanced Moore & Bridgeman before they went into bankruptcy $1,139.80 for seed, rice, feed, and cash for labor, etc. That was advanced against the crop. * * * After the rice was planted and growing on the McCrimmin farm I went on the place with Mr. Moore. I had an agreement with Moore, after the rice was up and growing and had been watered, that he would deliver the rice crop at the station, and we would take it in settlement of the Moore & Bridgeman and the Moore and Gregg indebtedness to the Beaumont Rice Mills. They were to harvest the crop and deliver it at the railroad station in satisfaction and cancellation of the indebtedness they owed, and the relinquishment of the mortgages we held against their property. * * * If they had been compelled to adjust their affairs in June, 1906, I would say they would be insolvent. I could not state the exact time in June that I had this contract with him to let us purchase the McCrimmin rice. I could not state exact date, but it was after the rice was worked, between the 1st and 30th of the month. * * * The agreement I had with Moore was that he was to harvest the crop at his own expense and deliver it to Beaumont Rice Mills. At the time I had that agreement with Moore we made no entry of it on our books. It is a fact that we made an agreement in June, 1906, to take that rice crop in satisfaction of the indebtedness due us, and made no entry whatever on the books at that time."

The above extracts show that the court's findings were not supported by the testimony of Broussard, who alone acted for the appellee in the transaction, and remained interested in disclosing it in the light favorable to the appellee. The opinion rendered shows that the above-mentioned testimony of Moore and the testimony of P. A. Dowlen also were relied on to support the findings made. Moore's admission of previous statements and acts wholly inconsistent with his statement that "the rice belonged to the Beaumont Rice Mills before it was ever planted" were enough to show that his testimony had little probative value. The witness Dowlen, as the agent of the owner of the McCrimmin land, attended to the renting of that land for the year 1906. In the written lease, dated January 9, 1906, Moore was named as the lessee. Testifying more than 12 years after the occurrence, the witness stated that about the time or before the contract was executed he, in behalf of the landlord and at the request of Moore, agreed to look to Broussard exclusively for the payment of the rent for the year 1906. Broussard testified that he agreed to pay the rent at the time the land was rented. Yet the written lease contract was made as above stated, and the facts that it was so made and remained unchanged are not explained. From the entire evidence on this subject it well may be inferred that Moore was the renter as the rent contract showed, and that Broussard, acting for the appellee, which was making advances to Moore on the security of the crop, stood for the rent. That was not at all inconsistent with Moore continuing to be the owner of the crop until it was sold shortly before the bankruptcy as testified by Broussard. If the appellee had alleged that the rice belonged to it from the time the crop came into existence, in view of Brous-

sard's testimony and his relation to the transaction and his interest in behalf of the appellee, we think it could not properly have been said that the evidence as a whole warranted the findings upon which the decree appealed from was based. But the absence of allegations to support such findings is enough to condemn them.

[2] The appellee alleged a sale of the rice crop by Moore to it, and, relying upon its alleged ownership, claimed the proceeds of the subsequent sale of the crop by the trustee in bankruptcy. In the alternative it prayed the enforcement of the liens which existed in its favor before it bought the crop, if the relief based on its alleged ownership should not be granted. The averments showed a sale which was valid as between Moore and the appellee, but it did not show that that sale was valid as against Moore's creditors. Though the sale was voidable at the instance of creditors of the seller adversely affected by it, neither the seller nor the buyer can question it. As between them it passed to the latter all the estate of the former, and extinguished any lien on the subject of the sale held by the buyer prior to his purchase. Moore had ceased to be the owner of the rice crop before he was adjudged bankrupt. The crop did not pass to the trustee in bankruptcy subject to any lien on it in favor of the appellee, as whatever lien the appellee formerly had had was extinguished before the bankruptcy. While the grantee of property conveyed in fraud of the grantor's creditors holds it in subordination to the right of the creditors to have it subjected to the satisfaction of their demands, he is without right, when the conveyance is attacked by such creditors, to revive liens or incumbrances on the property which existed in favor of himself or others, but were discharged when he bought or while he was in possession as owner. A fraudulent purchaser of property is not entitled to have it subjected to the satisfaction of a lien on it which existed in his favor prior to his purchase. Railroad Co. v. Soutter, 13 Wall. 517, 20 L. Ed. 543; Barnes v. Chicago, M. & St. P. R. Co., 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. Ed. 1128; Luhrs v. Hancock, 181 U. S. 567, 573, 21 Sup. Ct. 726, 45 L. Ed. 1005; U. S. Fire E. & C. Co. v. Joseph Halsted Co. (D. C.) 195 Fed. 295. In the first cited case it was decided that a fraudulent purchaser of property was not, as against defrauded creditors, entitled to charge against it, or be paid back, the amount of an incumbrance on it which such purchaser had lifted while in possession under his purchase. It was said in the opinion:

"Who are the complainants? Are they not the very bondholders, self-incorporated into a body politic, who, through their trustee and agent, effected the sale which was declared fraudulent and void, as against creditors, and made the purchase which has been set aside for that cause? Was it ever known that a fraudulent purchaser of property, when deprived of its possession, could recover for his repairs or improvements, or for incumbrances lifted by him whilst in possession? * * * But the complainants are wrong in asserting that the property was not theirs. It was theirs. Their purchase was declared void only as against the creditors of the La Crosse and Milwaukee Railroad Company. In other words, it was only voidable, not absolutely void. By satisfying those creditors they could have kept the property, and their title would have been good, as against all the world. The property was theirs; but, by reason of the fraudulent sale, was subject to incumbrance of the debts of the La Crosse Company. This was the legal effect of the decree declaring their title void. Therefore they were, in fact, paying off an incumbrance on

their own property when they paid into court the money which they are now seeking to recover back."

The appellee was not entitled to subject the proceeds of the trustee's sale of the rice crop to a lien existing in its favor prior to its purchase, as an effect of that purchase was to extinguish such lien. So far as appears, it had no mortgage on any property of Moore which went into the possession of his trustee in bankruptcy. A result of the alleged sale was a satisfaction of the previously existing mortgage on stock and implements. If after the transaction of about June 15, 1906, the appellee had a provable claim against Moore's estate in bankruptcy it lost the benefit of such claim by failing to assert it as required by the Bankruptcy Act.

The conclusion is that the averments of the bill as it was amended do not show that the appellee is entitled to the relief sought or any part of it. The decree in its favor is reversed, with direction that the bill be dismissed.

Reversed.

BATTS, Circuit Judge (dissenting). Among the creditors of E. F. Moore was the Beaumont Rice Mills, to whom he owed more than $6,000, secured by a mortgage on livestock, etc., worth about $3,000. He entered into an arrangement in January, 1906, with Broussard, manager of Beaumont Rice Mills, by which the McCrimmin farm was to be rented and planted to rice. Broussard was to make the necessary advances, and the net proceeds were to be applied to the Rice Mills' debt. Broussard paid the rent, and was recognized as the tenant. On April 5, 1906, Moore executed an instrument in the form of a transfer of the crop to Broussard, which was registered as a chattel mortgage. The parties testified, and the court found, that in June, 1906, a further agreement was made that the Rice Mills take the crop in discharge of its debt. The court also found that at the time of the sale "there was not a scintilla of evidence to show that anybody contemplated any bankruptcy proceedings." In July, 1906, Moore became bankrupt, Le Blanc, a member of the firm of Beaumont Rice Mills, becoming trustee. The crop was subsequently harvested and marketed, and $11,651.25 realized; the crop and price being much better than was expected at the time of the sale. The harvesting expenses, added to the rent, $813, and advances, $1,139.40, aggregated $5,209.45, leaving as the net proceeds an amount almost as large as the debt to the Rice Mills. The proceeds of the crop came into the hands of Le Blanc, and were by him turned over to the firm. When Le Blanc resigned as trustee, a controversy as to the proper custody of the fund resulted in litigation, determined, after a number of years, in favor of the trustee, Crawford, the crop at the time of the bankruptcy being in possession of Moore under the terms of the sale. Complainants thereupon sued for the fund, or, in the alternative, to establish a lien against it for the amount of the rent, advances, expenses of harvesting, and the prior debt. From a final judgment in their favor for the fund is this appeal.

Considering the uncertainty as to yield and price, the surrender of about $3,000 of other security, and the large expenditures required for harvesting, the sale could not be regarded as in fraud of creditors. The transaction was, in fact, greatly to the benefit of other creditors. But even if, for any reason, the sale should be held void, there is no doubt that complainants had a lien on the crop for the rent, and advances, and the debt; and the amount subsequently expended for harvesting also became proper charges against the property.

The trustee has, notwithstanding the opposition of complainants, taken over the crop or the fund which stands in its place. Under such circumstances, a trustee takes property subject to valid liens. The property in controversy, having now become money, the amount of such liens would properly be paid from it. The lienholder, making no claim against the estate generally, is not compelled to file his claim within the period prescribed by section 57n, Bankruptcy Act (Comp. St. § 9641). The trustee, not having discharged the lien upon taking possession of the property, may be sued, as contemplated by section 11d (section 9595) and within the period therein provided.

The judgment of this court will bring about results entirely inequitable. The crop would not have been raised and the fund created, except for the act of complainants in risking the money paid as rents and advances, and could not have been harvested, except for the expenditures made for that purpose. A judgment sustaining the sale, or a proper application of the fund to the liens, releases for the benefit of other creditors the property upon which complainants had a mortgage, and also gives to the other creditors the benefit of dividends which would otherwise have been payable to complainants. The judgment deprives complainants, not only of their original debt, but of all moneys expended by them in making and saving the crop. Complainants are deprived of legal rights, and the equitable principles recognized and applied in Hurley v. A., T. & S. F. Ry. Co., 213 U. S. 132, 29 Sup. Ct. 466, 53 L. Ed. 729, and the cases therein cited, are ignored.

I cannot concur in a judgment bringing about such palpably unjust results.

On Petition for Rehearing.

PER CURIAM. A petition for rehearing calls attention to the fact that after the petition in the case was amended, as stated in the foregoing opinion, there was another amendment of it, which consisted in substituting for the word "insolvent," where it appeared in an above-mentioned averment of the petition as first amended, the words "greatly in debt." The change made by the last amendment indicates an absence of any intention to claim that Moore was, or was supposed to be, solvent when he sold to the appellee the crop on the McCrimmin land. As last amended the petition showed that the appellee's becoming responsible for the rent and its advances for making the crop were necessary to enable Moore to make it, because he was then greatly indebted and had no personal credit, and all the material he then had, including his interest in a crop on another tract of land, was under mortgage to another creditor. It well may

be inferred, from the averments of the petition as last amended, that Moore's lack of credit, and his inability to get land to make a crop on without another standing for the rent, or to make a crop without obtaining advances secured by the crop to be grown, were due to his insolvency, and that he was insolvent from the time the land was rented until he went into bankruptcy, a few weeks after making the sale sought to be enforced in this suit. There is nothing to indicate that his financial condition changed from solvency to insolvency between the date of the alleged sale and the filing of the petition in bankruptcy. But, whether the petition as last amended is or is not to be regarded as showing that Moore was insolvent when he made the alleged sale, the evidence in the case shows that he was then insolvent. The transaction in question was between a creditor and a known insolvent debtor, by which the former got for its debt the latter's growing crop and his services in supervising it until it matured and was harvested. It was not alleged or proved that what the creditor parted with was even approximately equivalent in value to what it acquired from the debtor, even if the services rendered by the latter were left out of the account.

It is a fraud on a known insolvent debtor's other creditors for one creditor to get in satisfaction of his demand property of the debtor worth substantially more than the amount of the debt for which such property is given. The validity of such a transaction is dependent upon the creditor so acquiring the debtor's property paying or allowing an adequate price or fair value therefor. It being disclosed that the transaction sought to be enforced against the seller's other creditors was a sale to a creditor by a known insolvent debtor, it was incumbent on the party claiming under such sale to show that the satisfaction of the debt, which was the consideration for the sale, was a fair price for what the buyer gave for it. That the creditor, in acquiring the known insolvent debtor's property, went beyond the permissible purpose of obtaining satisfaction of the debt owing is disclosed by a comparison of the amount realized from the property so acquired with the aggregate of the items of its cost to the creditor. The cost to the creditor is shown by the following statement:

Balance of old debt owing December 31, 1905	$ 5,426.43
Six per cent. interest on same for six months	162.79
Amount of advances on crop	1,139.80
Expenses of harvesting and marketing crop	2,814.19
Amount paid for rent of land	813.00
Total	$10,356.21

The crop which, according to the pleadings and evidence in the case, cost the creditor $10,356.21, was sold for $11,651.35. If the transaction had been acquiesced in by those adversely affected by it, it would have resulted in enabling the favored creditor to realize $1,295.14 in excess of the debt and the outlay on the property taken in satisfaction of it, while the debtor's other property was worth greatly less than enough to pay what he owed to other creditors. To say the least,

there was a failure to show that the alleged sale to satisfy the debt owing to the preferred creditor was fair and valid as against the seller's other creditors.

The conclusion is that the petition for a rehearing should be, and it is, denied.

BATTS, Circuit Judge, did not take part in the action of the court on the petition for rehearing.

RAU v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 233.

1. INTERNAL REVENUE ⟸47—OFFENSES—DEFENSES.
Under Rev. St. § 3229 (Comp. St. § 5952), empowering Commissioner of Internal Revenue, with advice of Secretary of the Treasury, to compromise any criminal case arising under the internal revenue laws, one who failed to file an income tax return as required by Act Oct. 3, 1917, § 1004 (Comp. St. 1918, § 5896b), cannot be successfully prosecuted for this failure, where the collector of internal revenue offered to compromise on payment of the tax and penalty, and such offer was accepted.

2. INTERNAL REVENUE ⟸47—OFFENSES—DEFENSES—"COMPROMISE."
Where internal revenue officers, after defendant admitted he had not filed an income tax return as required by Act Oct. 3, 1917, § 1004 (Comp. St. 1918, § 5896b), accepted not only the tax, but the penalty, informing defendant that such payment would end the matter and there would be no indictment, such acceptance and statement was a "compromise," within Rev. St. § 3229 (Comp. St. § 5952), and was a bar to prosecution.

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

3. INTERNAL REVENUE ⟸47—OFFENSES—DEFENSES—EVIDENCE.
In a prosecution for failure to file an income tax return as required by Act Oct. 3, 1917, § 1004 (Comp. St. 1918, § 5896b), that sum paid by defendant to internal revenue officer after he had admitted he did not file the return was retained by the treasury is evidence that the money was received in compromise of the case, which compromise was authorized by Rev. St. § 3229 (Comp. St. § 5952).

4. INTERNAL REVENUE ⟸47—OFFENSES—EVIDENCE.
In a prosecution for failure to file an income tax return as required by Act Oct. 3, 1917, § 1004 (Comp. St. 1918, § 5896b), the question whether the internal revenue officers compromised the case, as authorized by Rev. St. § 3229 (Comp. St. § 5952), *held* for the jury.

5. WITNESSES ⟸405(2)—CROSS-EXAMINATION—IMPEACHMENT.
In a prosecution for failure to file an income tax return as required by Act Oct. 3, 1917, § 1004 (Comp. St. 1918, § 5896b), where defendant took the stand and was cross-examined as to improper and illegal business transactions, the government was bound by his answers as to such collateral matters, and he could not be impeached with reference thereto.

6. CRIMINAL LAW ⟸1053(1)—APPEAL—PREJUDICIAL ERROR.
Where the trial court improperly allowed the prosecution to offer evidence impeaching defendant, who took the stand, as to testimony given on collateral matters concerning which he was cross-examined, the striking out of such evidence did not cure the error of its admission.

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7. INTERNAL REVENUE ⟸7—INCOME TAXES—MONEY SUBJECT TO TAXATION.
Where defendant embezzled moneys which were delivered to him to be paid as insurance premiums, he committed a larceny, and the money so received was not subject to taxation under the Income Tax Act.

8. WITNESSES ⟸405(2)—EXAMINATION—IMPEACHMENT.
Where defendant takes the stand as a witness, he assumes a dual position, that of a defendant and that of a witness, and while as a witness it is competent for the prosecution to inquire into collateral matters for the purpose of impeaching his credibility, the prosecution is bound by defendant's answers, and cannot call witnesses in rebuttal to show that he was guilty of crimes other than that charged in the indictment.

Ward, Circuit Judge, dissenting in part.

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

Seymour L. Rau was convicted of violating Act Cong. Oct. 3, 1917, § 1004, making it a criminal offense to fail to file an income tax return as prescribed by law, and he brings error. Reversed.

Henry P. Kieth and Lamar Hardy, both of New York City, for appellant.

Francis G. Caffey, U. S. Atty., of New York City (Francis L. Kohlman, Sp. Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, J., Circuit Judge. The defendant was indicted and convicted for a violation of section 1004 of the Act of Congress of October 3, 1917, c. 63, 40 Stat. 325 (Comp. St. 1918, § 5896b). This statute makes it a criminal offense for a failure to file an income tax return as prescribed by law. The indictment contains two counts, charging a failure to file a return for the year 1916, and one for the year 1917. The conviction was had on both counts. It was conceded that the defendant did not file a return. The returns for 1916 and 1917 were required to be filed on or before March 1st of the following year. As to 1916, a return was required to be made by each person of lawful age having a net income of $3,000 or over for the taxable year. An exemption of $3,000, plus $1,000 additional, was granted to a person making a return if he was the head of a family or married man with a wife living with him. Section 7, Act Sept. 8, 1916 (39 Stat. 761, c. 463 [Comp. St. § 6336g]). For the year 1917 a return was required in the case of net incomes of $1,000 or over in case of an unmarried person and $2,000 or over in case of a married person.

In pursuance to a request, the defendant appeared at the office of the revenue collector on September 27, 1918, and made a statement of his earnings for 1916 and 1917, which indicated that for the year 1916 the defendant had a net income of $2,000 above exemption, and in 1917 $1,758 net above the exemption. Rau stated that he did not know these figures were subject to tax, and that he did not know the law, but wanted to pay any tax that was due the government. He was a broker or salesman on commission, and had been in the insur-

ance business for 20 years; also engaged in selling stocks and securities since August, 1917. Of course, his ignorance of the law was no excuse.

Upon the trial, he testified that he never kept books; he had no bank account; that he had been separated from his wife since 1913, and admitted that he made no effort to pay the tax until called upon by the collector. After he saw the collector, he executed income tax returns and gave figures as his correct income for five years, showing that in the year 1917 his net income was $3,834.10, and in 1916, $3,531.22. At a subsequent call at the collector's office, the amount of his tax indebtedness was calculated as $324.62. A certified check was then drawn and given to the official in charge for this amount, plus a penalty of $250 which was imposed. After the acceptance of this check, this indictment was found.

[1] Section 3229 of the Revised Statutes (Comp. St. § 5952) provides:

"The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws, instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney General, he may compromise any such case after a suit thereon has been commenced."

This statute authorized a compromise of any criminal or civil obligation. If an offer of compromise was made and accepted, no criminal proceedings could thereafter be successfully prosecuted for failure to pay the tax. Willingham v. United States, 208 Fed. 137, 127 C. C. A. 263.

[2-4] The defendant endeavored to establish that he offered to compromise and that he paid his check for the tax found to be due, together with the penalty, and that this was accepted in compromise of the criminal responsibility. He was entitled to urge this as a defense. We are of the opinion that the District Judge disregarded this right which the defendant had as a defense of the criminal prosecution. The District Judge evidently was of the opinion that the defendant could not defend upon the theory that he had compromised the criminal prosecution, for he stated:

"It makes no difference as to whether he has paid the tax or not."

This and similar remarks occur frequently in the record. For example, the court said:

"I will instruct this jury that it makes no difference whether the amount of the tax which had been agreed upon here was paid or not, so far as the criminal liability of the defendant is concerned."

And again:

"And so it is here—that if this man had committed a violation of the law at the time he made his offer in compromise or settlement, if you find that he willfully failed to file his income tax return under all the evidence of the case beyond a reasonable doubt, I instruct you that such tender of payment would not affect such criminal liability."

This position was taken by the court in reference to other efforts made by the defendant to offer his defense of a compromise of the

criminal prosecution. It is presented by offers of evidence and questions asked of witnesses, to which objections were sustained, tending to show that a compromise was in fact made. Much of this evidence was erroneously excluded by the trial judge.

The defendant testified that—

"At the time of the presentation of the check, Mr. Bowden told me that there would be no further proceedings of any kind or character, that the offer of $324.62, the receipt of the government for that, the offer of $250 in compromise, that in consideration of that there would be no proceedings, no indictment; nothing would be done whatever."

He was then asked if it was on that condition that he paid the money, and his answer thereto, "I did," was stricken out upon objection by the United States attorney. Defendant then attempted to trace the money to the Treasury Department, and endeavored to show that it was never returned; by this making an effort to establish it was received by the United States Treasury after approving the compromise, and this was excluded.

The Commissioner of Internal Revenue had the power and authority by virtue of the statute above referred to, and with the advice and consent of the Secretary of the Treasury, to compromise the criminal case as well as the civil case arising under the internal revenue laws. The compromise may have been made before the institution of the criminal proceedings or after. The provision relating to the necessary consent of the Attorney General evidently intends a compromise after the institution of a civil or criminal action. If the defendant, in good faith, made the payment of the tax and penalty for the purpose of compromising the impending action, he is entitled to full protection and the benefits derived therefrom. If the money was accepted with the promise of immunity from further punishment in a criminal proceeding, it would be a complete defense to this indictment. Willingham v. United States, 208 Fed. 137, 127 C. C. A. 263.

The acceptance, not only of the tax, but of the penalty, coupled with the statement of the internal revenue officer, that payment would end the matter, and that there would be no indictment, if true, would be a good defense. The fact that the money was retained by the United States is some evidence of its acceptance in compromise. We believe that under the facts disclosed in this record, as far as the defendant was permitted to show them, it was required of the court to submit as a question of fact to the jury, under proper instructions, whether or not a compromise was entered into. It was not a question of law for the District Judge. As was said in United States v. Chouteau, 102 U. S. 603, 26 L. Ed. 246:

"He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense."

[5] Since there must be a new trial, we shall advert to errors committed in the admission of evidence, so that there may be no reoccurrence at the new trial.

[6] As a witness, the defendant was interrogated as to alleged improper and illegal transactions with Warwick, Love, and Williams. He denied charges of improprieties in business transactions and alleged embezzlements or grand larceny of money. These were matters which were collateral, and inquired into by the government attorney for the first time, and the answers thereto were binding upon the government. People v. De Garmo, 179 N. Y. 130, 71 N. E. 736. Typical of these questions were the following:

"Q. Did you ever hold out to him [Robert Warwick] that you were going to give him a policy of that kind? A. I did business with him.

"Q. Did you take any money that was coming to him from any of these policies? A. I did not.

"Q. Did you fail to turn in any of his paid premiums? A. All paid in.

"Q. Did you owe him any money on transactions for these policies? A. Only for personal transactions for money loaned."

And as to transactions with Love:

"Q. Isn't it a fact that you received his check for notes you negotiated? A. No.

"Q. How much did those notes amount to? A. I don't know exactly.

"Q. And do you remember you advised him to take a certain sum of money of his sick benefit policy you had gotten out of him? A. I remember that.

"Q. Do you remember, when you gave him the check, it was short some hundred and odd dollars? A. I don't remember there was anything said about it, because it was not my check; it was the check of the insurance company."

And as to Williams:

"Q. You owe him $1,500? A. I don't know the exact amount. It was not quite as much as that.

"Q. Did you ever make good? A. Yes.

"Q. When? A. Two or three years ago.

"Q. How did that come to be due and owing from you? A. That was owed because the man with whom I was associated in business at that time was handling the business, and there were debits and credits between us, and that transaction happened to come in at that time."

As alleged rebuttal, Warwick was called and testified:

"Q. In plain language, he [the defendant] was to get some insurance policies for you? A. He had them; he took them up.

"Q. And you advanced to him in some form or other certain sums of money? A. I paid him premiums and made my checks out to Seymour L. Rau.

"Q. For how much? A. As near as I remember, they were for $300, and $150 apiece.

"Q. The two made $300? A. Yes.

"Q. Did you thereafter pay the same amount of money on these premiums to the insurance company? A. The insurance company tried to get me to pay again the premiums which I had paid to Mr. Rau.

"Q. How was it found out the premiums had not been paid? A. The insurance company wrote to me for premiums due them, and I told them I paid the premiums to Seymour L. Rau personally. On my failure to again pay the premiums, they canceled the insurance policy.

"Q. On the ground that you had never paid the premiums? A. Yes.

"Q. And you had paid them to Seymour L. Rau? A. Yes."

After objection, the court said:

"I will strike out all of it, and allow the conversations, what the insurance companies did say, that the man was asked to pay his premiums again, and that he failed to pay them again, and the policies were canceled."

The relief thus granted by the court did not take the harm out of the testimony that was improperly received.

[7] Love was then called as a witness and gave testimony of like purport, too lengthy to include in this opinion, indicating that Rau had embezzled moneys paid to him, which were intended to pay premiums on life insurance policies. This was objected to and exception taken. Williams was called and gave similar testimony.

All this testimony was intended to show that the testimony of the defendant, on cross-examination, was untruthful. The government seeks to justify the admission of this testimony upon the theory that the receipt of such moneys had to do with the income tax of the defendant. This cannot be, for if the moneys were merely to be passed on to the insurance company, to be paid as premiums by the defendant, as agent, and if he embezzled them, he committed a larceny, and the money so received would not be subject to taxation under the income tax law. The government was not at liberty to contradict, by such testimony, the defendant on these collateral matters. People v. De Garmo, 179 N. Y. 130, 71 N. E. 736.

[8] When the defendant took the stand as a witness, he assumed a dual capacity; that of a defendant and that of a witness. As a witness, it was competent for the government to interrogate upon any competent subject for the purpose of impeaching his credibility as a witness, and in doing this, might enter the field of matters collateral to the main issue; but they were bound by the answers, and were not permitted to call witnesses in rebuttal tending to show that the defendant was guilty of crimes other than charged in the indictment. People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; People v. Greenwall, 108 N. Y. 296, 15 N. E. 404, 2 Am. St. Rep. 415. To permit this testimony violated his rights as a defendant, for it charged him with other crimes for which he was not indicted or on trial.

Upon the argument, the United States attorney conceded that a conviction could not be sustained upon count 2 of the indictment; but, since the judgment will be reversed, it is unimportant to discuss the reasons why that conviction cannot be sustained. Upon a new trial, we assume that the indictment will be nolle prosequi upon this count.

Judgment reversed.

WARD, Circuit Judge (concurring). I cannot agree with the majority of the court in holding that the District Judge erred in excluding evidence of the alleged compromise made by the defendant with the revenue collector of his criminal liability for failure to make income tax returns. The check he delivered, as he says, upon the strength of the promise that no criminal action would be instituted, has never been presented by the government for payment. But, apart from this fact, Congress has by section 3229, Rev. Stat. U. S., regulated exactly how the compromise of claims arising under the internal revenue law both before and after suit brought shall be made, and

there is no pretense that the provisions of this section were complied with. In United States v. Chouteau, 102 U. S. 603, 26 L. Ed. 246, cited by the court, the compromise was made strictly in accordance with the requirements of the section, and I think the law was correctly stated in the dissenting opinion in Willingham v. United States, 208 Fed. 137, 127 C. C. A. 263, the other case cited.

WORKIN et al. v. UNITED STATES.*

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

No. 116.

1. CRIMINAL LAW ⟸370, 371(1), 372—OTHER OFFENSES—EVIDENCE.
Under an indictment for conspiracy for the sale of narcotic drugs in connection with a physician in violation of Harrison Act Dec. 17, 1914, § 2 (Comp. St. § 6287h), evidence of sales made by defendants in the same manner after such physician had withdrawn and another had taken his place *held* admissible, as tending to show a continuing conspiracy and guilty knowledge and intent.

2. CRIMINAL LAW ⟸877—EFFECT OF ACQUITTAL OF ONE DEFENDANT.
On trial of three defendants for criminal conspiracy, the acquittal of one *held* not to invalidate a conviction of the others.

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

Criminal prosecution by the United States against Isidore S. Workin and Henry V. Meyers. Judgment of conviction, and defendants bring error. Affirmed.

Lawrence B. Cohen, of New York City (Jacob Shientag, of New York City, of counsel), for plaintiffs in error.

Francis G. Caffey, U. S. Atty., of New York City (Ben A. Matthews, Lawrence H. Axman, Benjamin P. De Witt, Asst. U. S. Attys., all of New York City, of counsel), for the United States.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The plaintiff in error Workin was the owner of a drug store at 125th street and Eighth avenue, New York City. Meyers was a licensed druggist. Workin had been a salesman for a manufacturing concern, and with one Dr. Essendon entered the pharmacy business, calling their store the "Medicine Shop." Dr. Essendon maintained an office in the back of the drug store, and shortly thereafter withdrew from the partnership. Thereafter Workin always had associated with him some doctor who had an office in the rear of the store. After such relationship with some four doctors, Dr. Corish, came in response to an advertisement inserted in a newspaper by Workin, and established his office in the rear of the drug store. Prior thereto, Meyers assumed charge of the "Medicine Shop," and when Corish appeared, Meyers made the arrangements for the hire of the room.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 250 U. S. 659, 40 Sup. Ct. 9, 64 L. Ed. —.

The proof established that the drug store did a considerable business in the sale of morphine and heroin. Addicts of these drugs patronized it regularly. The doctor connected with the medicine shop would give written prescriptions to these addicts in an alleged endeavor to comply with the law. Whenever a person came intending to purchase such drugs, he was referred to the associated physician as "our doctor" (meaning the doctor connected with the drug store), who would thereupon give a prescription for the drug. The customers were personally introduced to the doctor, usually by Workin or Meyers, who would instruct the doctor to take care of the customer. New customers were asked, "How much have you been getting?" and after replying, either Workin or Meyers would reply, "Well, you had better start off higher with us because our doctor will have to gradually cut you down." The indictment consisted of four counts. The district judge dismissed the first two, submitting the question of guilt under the second and fourth count of the indictment to the jury. In substance it charged that on the 1st of January, 1917, and up to and including the day of the indictment, the plaintiffs in error, together with John L. Corish, did, within the jurisdiction of this court, unlawfully and feloniously conspire to commit an offense against the United States, to wit, to violate section 2 of the act of Congress approved December 17, 1914, c. 1, 38 Stat. 785, 786 (Comp. St. § 6287h), by selling and dispensing and distributing compounds and derivatives of opium not in pursuance of written orders to persons to whom such articles were sold, dispensed, and disbursed on forms issued in blank for that purpose by the Commissioner of Internal Revenue.

It charged that the plaintiffs in error conspired to procure Dr. Corish, a practicing physician, to issue narcotic prescriptions to persons to whom the drug was to be sold, the plaintiffs in error knowing and intending that the said prescriptions were given by Dr. Corish not in the course of his professional practice nor in good faith, and further that the recipients of such prescriptions would be induced by them to present the prescriptions at the drug store maintained by them, and that they would fill the prescriptions and dispense and distribute to the persons the kind and quality of drugs called for by them. Overt acts are alleged to have been committed in furtherance of the conspiracy, and, further, that Dr. Corish, as overt acts, issued to three certain persons, prescriptions for heroin which were sold and dispensed to the said certain persons by Workin and Meyers, as called for by the prescriptions.

The statute provides:

"That it shall be unlawful for any person to sell * * * any of the aforesaid drugs except in pursuance of a written order * * * on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. * * * Nothing contained in this section shall apply—

"(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician * * * registered under this act in the course of his professional practice only. * * *

"(b) To the sale * * * by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, * * * registered under this act. * * *

"The commissioner * * * shall cause suitable forms to be prepared * * * to be distributed to collectors of internal revenue for sale by them."

The district judge submitted the case to the jury, instructing them that they may find the plaintiffs in error guilty if the concerted action of two or all of them was simply a mere means by which this drug should be distributed to unfortunate addicts who had indulged in the practice of using the drugs and who purchased, in the manner described by the witnesses, from the plaintiffs in error to satisfy their craving, or whether there was a genuine effort to secure their convalescence from what may be regarded as a disease. The evidence presented by the government required the submission of the guilt or innocence of the defendants to the jury. We are obliged to accept their finding.

The first assignment of error raises the constitutionality of the so-called "Harrison Act." Since the argument of the appeal and before our decision, the Supreme Court has decided that the law is constitutional, and that a conviction for crime thereunder will be sustained. Webb v. U. S., 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497; U. S. v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493, decided March 3, 1919. No further discussion is necessary as to this assignment of error.

[1] As a second assignment of error, the plaintiffs in error charge that the district judge improperly admitted evidence showing other offenses not contained in this indictment and which was the subject of another indictment. The indictment charged a conspiracy commencing on January 1, 1917, and ending with the filing of the indictment on February 20, 1918. As stated above, the plaintiffs in error used their drug store, at all times having some doctor in the rear, who maintained an office there. It appears that after Dr. Corish severed his connection with the plaintiffs in error, which apparently was about February 8, 1918 (at least that is the last date when any of the government's witnesses testified to any relations with him), Dr. Ira E. Booth became associated with them. It appears that the other indictment then pending charged a similar crime, where both plaintiffs in error and one Dr. Ira E. Booth were charged with conspiracy. One of the government's witnesses was permitted to testify to a transaction wherein he purchased the drugs upon the prescription of a Dr. Booth after first consulting him. Objection was made to this testimony, which was overruled and an exception taken. This transaction with Dr. Booth and the subsequent purchase of the drugs occurred after Dr. Corish ceased to co-operate with the plaintiffs in error and before the date of the filing of the indictment. We think this testimony was properly received. The evidence proved a continuing conspiracy down to the date of the filing of the indictment. The plaintiffs in error at one time co-operated with Dr. Corish and later with Dr. Booth. It was one conspiracy. It did not terminate when Dr. Corish dropped out, and Dr. Booth was substituted. It was not evidence of a distinct and independent crime and was admissible. Further, the rule of evidence is well settled that as to similar facts the commission of one act may not be proved by the commission of other similar acts, but to

this rule there is the exception that in certain cases evidence of similar facts may be introduced to prove, not the commission of an act, but that there was a criminal intent. By evidence indicating the relations of the plaintiffs in error with Dr. Booth, the government did not seek to prove that they sold heroin on the date charged in the second count of the indictment, and the government was well within its rights in introducing this evidence for the purpose of showing that then the plaintiffs in error sold heroin on the date charged in the indictment; that they did so, not innocently or through mistake, but with knowledge and intent to violate the law. To show guilty knowledge and intent, it is permissible to show that before and after the date on which the specific act charged was committed the plaintiffs in error sold drugs to others.

In the case of Marshall v. U. S., 197 Fed. 511, 117 C. C. A. 65, relied upon by the plaintiffs in error, the defendant was charged with a scheme to defraud and for using the mails in furtherance of the scheme. The defendant organized a so-called society to carry out this purpose. Evidence was offered on the trial that the defendant had also organized another society for the purpose of promoting another scheme to defraud. It was held that these were independent transactions, and evidence of the second transaction could not be properly received to prove the intent or guilt of the defendant as to the first.

In Hammer v. U. S., 249 Fed. 336, 161 C. C. A. 344, the defendant was charged with selling drugs in violation of the Harrison Act. Evidence was introduced showing that the defendant did business in Florida, and there conducted a medical institute frequented by dopers and persons who were sick. This court approved the receipts of evidence to show that before and after the date of the commission of the specific act charged the defendant sold drugs to others.

Thus, to permit testimony of other sales of drugs, it must be made to appear that there is some real connection between the extraneous crime and the crime charged, and it is only in the case where committed offenses are proven, which are unrelated to the subject-matter of the indictment and which the accused is not summoned into court to meet, that the courts hold the receipt of such testimony is improper. Scheinberg v. U. S., 213 Fed. 757, 130 C. C. A. 271, Ann. Cas. 1914D, 1258.

Here there was a direct and immediate connection between the transaction involving Dr. Corish and the transactions involving Dr. Booth. The employment or association of Dr. Booth immediately after that of Dr. Corish indicated but a plan to continue the service of another physician in order to obtain some one to issue these prescriptions. Merely because Dr. Corish may have withdrawn from the conspiracy, after which Dr. Booth joined the conspiracy, if the conspiracy continued until the date of the filing of the indictment, did not make incompetent evidence to show what Dr. Booth and the plaintiff in error did in furtherance of the conspiracy, for such acts constitute part of it. We think, further, that the transactions or acts of Dr. Booth were so closely related to the act in question as to show that they all sprang from a common design. Williamson v. U. S., 207 U.

S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

We find no error in the admission of this testimony.

[2] Corish was acquitted on the trial, and it is argued in behalf of the plaintiffs in error that his acquittal prevents them from being adjudged guilty under the law. The only count submitted to the jury was the conspiracy count, the others, excepting the second, having been dismissed by direction of the court, and the plaintiffs in error were found guilty of the second count (as well as the fourth) which charged a direct sale by them, aided and abetted by Dr. Corish. Judgment on this count was arrested by the district judge, and is not presented here for review. This conviction must be tested only from the viewpoint of the charge of conspiracy. The verdict of the jury must be understood as establishing only the guilt of the plaintiffs in error of having conspired to violate the law in the manner alleged, and establishing that Dr. Corish's participation in the conspiracy was not proven beyond a reasonable doubt. The fact that he was acquitted could not establish conclusively that the prescriptions for narcotics issued by him were issued in good faith. Assuming Corish was innocent, as we must assume by the jury's verdict, and that he acted in good faith, the jury may well have found that the plaintiffs in error used Corish for the purpose of accomplishing the object of the conspiracy charged against all of them. Under the charge and under the law, it was permissible for the jury to find two or more joined the conspiracy, or conspired and approved of one overt act committed by any one of the conspirators for the purpose of effecting the object of the conspiracy, and this was sufficient. During Dr. Corish's association with the plaintiffs in error, he was addicted to the habit of drinking; he was in a drunken condition most of the time. It may be that the jury thought that he was but a tool in the hands of the plaintiffs in error.

Proof is ample to justify the conclusion that the plaintiffs in error conspired to violate this statute and used Dr. Corish to write prescriptions for narcotics without any relation to the prospect of curing the disease or its alleviation. The evidence is ample that the plaintiffs in error conspired that the prescriptions should not be issued in good faith.

We find no error in the record which warrants the granting of a new trial. Judgment affirmed.

FETTERS et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. August 4, 1919. Rehearing Denied October 14, 1919.)

No. 3309.

1. CRIMINAL LAW ⊜417(10)—SALE OF LIQUOR TO MEN IN UNIFORM—EVIDENCE.

On trial of a defendant for selling liquor to a member of the military forces in uniform, the exclusion of testimony of defendant, who did not personally take the order, that he was told by the person who took the order that the liquor was ordered by, and was for, a woman, to whom he charged it, *held* error.

2. CRIMINAL LAW ⊜37—DEFENSES—ENTRAPMENT.

That a seaman in uniform encouraged and incited a defendant to sell him liquor for the purpose of obtaining evidence against him *held* not to bar the prosecution, where the act was done because of prior complaints of violation of the law by defendant.

Ross, Circuit Judge, dissenting in part.

In Error to the District Court of the United States for the Northern Division of the Northern District of California; William C. Van Fleet, Judge.

Criminal prosecution by the United States against Emma Pell Fetters and George Fetters. Judgment of conviction, and defendants bring error. Reversed as to George Fetters, and affirmed as to his codefendant.

W. F. Cowan, of Santa Rosa, Cal., and Bert Schlesinger, of San Francisco, Cal., for plaintiff in error Emma Pell Fetters.

Marshall B. Woodworth, of San Francisco, Cal., for plaintiff in error George Fetters.

Annette Abbott Adams, U. S. Atty., and Frank M. Silva, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Emma Pell Fetters and George Fetters, called defendants, were convicted for violation of section 12 of the act of May 18, 1917 (40 Stat. 82, c. 15 [Comp. St. 1918, § 2019a]), known as the Selective Draft Act, for having unlawfully sold whisky and champagne to a member of the military forces of the United States while in uniform, one B. E. Cranfill, apprentice seaman, then and there doing special duty for the Naval Intelligence Branch at San Francisco. By writ of error the case is brought to this court.

Fetters and his wife kept a hotel, dance hall, and barroom. There was evidence that, prior to the time laid in the indictment, numerous complaints that liquor was sold to men in uniform were made to the United States authorities and an investigation was ordered. One night in June, 1918, Cranfill, who was in uniform and in company with two men and a Mrs. Lewis and Miss Hughes, went to the dance hall. The evidence of the prosecution tended to show that Cranfill asked Mrs. Fetters if they could get some champagne; that Mrs. Fetter said she

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

*Certiorari denied 250 U. S. —, 40 Sup. Ct. 119, 64 L. Ed. —.

would get it after the dance; that she brought champagne to the party; that Mrs. Lewis and Cranfill, who were co-operating as investigators, ordered champagne and beer; that afterwards she brought whisky; that Cranfill handed her the money for the champagne and a bottle of whisky; that George Fetters "stuck" his head in the door and made some motion to Mrs. Fetters; and that she went out and made a motion to Cranfill to come out, and then gave him the whisky at the corner on the outside of the dance hall, but that George Fetters was not then present.

[1] There was testimony to the effect that George Fetters, who, it is admitted, was not in the dance hall, had some communication with his wife, and that he gave her a package which subsequently turned out to be liquor. Mrs. Fetters did not testify. Fetters testified that he got the order for the liquor, wine, and beer from Mrs. Lewis, and that Mrs. Fetters told him in the barroom that Mrs. Lewis wanted the "stuff" packed in a box, and that he charged Mrs. Lewis for it all. Thereupon the court struck out the testimony "with reference to the whole thing," meaning, we take it, the statements of Mrs. Fetters to Fetters; the judge stating that he thought the witness was telling about Mrs. Lewis making application for the liquor and wine. Defendants' counsel objected to striking out the testimony, whereupon the court asked Fetters if all that he knew about the person the liquors "were ordered for was what Mrs. Fetters came and told" him. Fetters replied, "Yes." Thereupon the court struck out the testimony on that subject, and defendants' counsel saved an exception. Fetters said that a few days afterwards Mrs. Lewis promised to pay the bill.

Inasmuch as it was not contended that Fetters was present with Cranfill or the party at the time the liquors were ordered, the principal circumstances relied upon by the prosecution were that Mrs. Fetters went to the barroom and got a package from her husband, and that the package contained liquor. Fetters denied having sold liquor to men in uniform, and said that he had issued orders to his employés that no liquors were to be sold to men in uniform.

As against George Fetters we think it was prejudicial error to strike out his testimony as to what Mrs. Fetters told him when she went for the liquors. As the case developed, the effect of the ruling deprived him of his main defense, an honest belief on his part that the liquors were bought by order of Mrs. Lewis for her own use. Intrinsically the delivery of the liquors would have only an ambiguous significance, and he had a right to explain the transaction, and in so doing could testify to what was then and there said to him by the person who, according to his story, was the only one present when he packed or delivered the liquors. Whether such testimony was true or false is not for us to say; but that it was competent is clear to us. Tesney v. State, 77 Ala. 33.

The case against Mrs. Fetters is in a different attitude. She cannot predicate error upon the exclusion of the testimony of her husband as just referred to, because her intentions and honesty of belief in the transaction could not be proved by the testimony of her husband that

she told him the liquors were ordered by Mrs. Lewis. The jury could not be asked to believe as a fact that she was in good faith and acting at Mrs. Lewis' request, because her husband asserted she said she was ordering the liquor for Mrs. Lewis. If Mrs. Fetters had testified and made the assertion, it would be competent; but, as she did not testify, the rule of hearsay forbids the use of such testimonial evidence.

[2] Plaintiffs in error urge that the person named in the indictment, Cranfill, encouraged and incited defendants to commit the crime charged, and that they did the act complained of solely because of such encouragement, aiding, and assisting on the part of Cranfill. But the evidence discloses that there had been prior complaints against the Fetters because they were selling liquors to men in uniform, and that it was in the investigation based upon such complaints that the transactions involved in this case were had. The rule laid down in Woo Wai v. United States, 223 Fed. 412, 137 C. C. A. 604, and Sam Yick v. United States, 240 Fed. 60, 153 C. C. A. 96, is therefore not applicable. Moreover, in the instructions to the jury the court fully covered the question of inducement.

One of the witnesses called by the defendants testified, among other things, that she was the wife of one of the party and drank with the others. On cross-examination counsel for the government was permitted to inquire into the circumstances of the marriage of the witness in 1902, whether she had been divorced from a prior husband, and whether she had had any children by a former husband. Defendant objected, but the court overruled the objection, because the evidence had a bearing upon the question of the character of the witness. While we think that the examination was carried too far, still as the answers of the witness were clear and without evasion, and in no way reflected upon her character for truthfulness, and no attempt was made to contradict her statements upon the matters objected to, there is no reason to believe that the rights of the defendant were prejudiced.

The instructions were fair, and sufficiently covered the issues in the case.

As against Emma Pell Fetters, the judgment must be affirmed. As against George Fetters, it is reversed, and the cause remanded, with directions to grant him a new trial.

ROSS, Circuit Judge, concurs in the reversal of the judgment as to plaintiff in error George Fetters, and dissents from its affirmance against the plaintiff in error Emma Pell Fetters.

MOTOTARO EGUCHI v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 4, 1919.)

No. 3162.

1. ALIENS ⟸54—IMMIGRATION—LITERACY TEST.
A rule promulgated by the Commissioner General of Immigration, providing a special method of applying the literacy test to immigrants, *held* within the statute and valid.

2. ALIENS ⟸46—EXCLUSION OF IMMIGRANTS—LITERACY TEST.
A Japanese alien *held* properly refused admission because of his failure to satisfactorily pass the literacy test.

3. ALIENS ⊂=46—IMMIGRATION—LITERACY TEST—EXEMPTION.

Under Immigration Act, § 3 (Comp. St. 1918, § 4289¼b), exempting from the literacy test aliens who have been lawfully admitted and have resided in the United States continuously for five years, and who return within six months from the date of their departure therefrom, such time cannot be extended because of the inability of the alien to obtain transportation within the six months.

Appeal from the District Court of the United States for the District of Hawaii; Horace W. Vaughan, Judge.

Habeas corpus by Mototaro Eguchi against the United States. From a judgment discharging the writ, petitioner appeals. Affirmed.

Lightfoot & Lightfoot, of Honolulu, T. H., for appellant.

S. C. Huber, U. S. Atty., of Honolulu, T. H., and Annette Abbott Adams, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The appeal in this case is from the judgment of the court below discharging a writ of habeas corpus that had been issued in behalf of the appellant, and remanding him to the custody of the immigration officer, for deportation to Japan, of which country he is a native, and from which he came to Hawaii.

The record shows that he first came to that territory about the year 1906, where he remained as a plantation laborer until December 16, 1916, on which day he left there for his native country. February 5th, following, to wit, February 5, 1917, Congress passed the act entitled "An act to regulate the immigration of aliens to, and the residence of aliens in, the United States" (Act Feb. 5, 1917, c. 29, 39 Stat. 874 [Comp. St. 1918, §§ 4289¼–4289¼u]), which act contained, among others, the following provisions:

"That after three months from the passage of this act, in addition to the aliens who are by law now excluded from admission into the United States, the following persons shall also be excluded from admission thereto, to wit:

"All aliens over sixteen years of age, physically capable of reading, who cannot read the English language, or some other language or dialect, including Hebrew or Yiddish. * * * That for the purpose of ascertaining whether aliens can read the immigrant inspectors shall be furnished with slips of uniform size, prepared under the direction of the Secretary of Labor, each containing not less than thirty nor more than forty words in ordinary use, printed in plainly legible type in some one of the various languages or dialects of immigrants. Each alien may designate the particular language or dialect in which he desires the examination to be made, and shall be required to read the words printed on the slip in such language or dialect. That the following classes of persons shall be exempt from the operation of the illiteracy test, to wit: * * * All aliens who have been lawfully admitted to the United States and who have resided therein continuously for five years and who return to the United States within six months from the date of their departure therefrom. * * *"

The record shows that the appellant returned to the territory of Hawaii arriving at the port of Honolulu July 12, 1917, where he was

examined by the board of special inquiry provided for by the aforesaid act of Congress, and was by that board ordered deported on the ground of illiteracy, from which order he appealed to the Secretary of Labor, pursuant to a provision of the act, resulting in a denial of his appeal. To the petition of the appellant for a writ of habeas corpus was annexed the proceedings before the board of special inquiry, and upon the final submission of the matter to the court below the evidence there given was by stipulation of the parties submitted.

[1] It is undisputed that the Commissioner General of Immigration is authorized, with the approval of the Secretary of Labor, to make rules and regulations for the enforcement of the law; but it is contended that, in adopting subdivision 3 of rule 4, the Commissioner General enlarged the law, which could not be legally done. The rule so complained of is as follows:

"*Special Method of Applying Reading Test.*—In all cases in which, because of lack of the qualified interpreters necessary for the observance of the general method prescribed in subdivision 2 hereof, or because for any other reason it is impracticable to adopt said general method, immigration officers shall use special printed and numbered slips, supplied by the bureau, the sentences appearing upon which are instructions to the alien to do several simple acts, his responding properly and in proper order to the instructions, or not doing so, to constitute a demonstration of whether or not he is able to read the prescribed number of words printed upon the slip handed him."

The ground of complaint is that the requirement thus made is that the applicant shall "*understandingly* read." If that be conceded, we think a sufficient answer to the objection is that Congress in enacting the law was not dealing with *parrots,* but with human beings, who are supposed to have some intelligence.

[2] The only evidence shown by the record tending to satisfy the requirement of the law is the following, taken from the examination of the applicant:

"Q. Can you read and write? A. I can read easy writing or printing, the Katakana and some Hirakana.

"(Applicant is given card No. 5003, in the Katakana, and reads for three minutes. He attempts to do what the card directs, but only does part, and also does more than is directed. He is asked what the card says, and tells partially. The interpreter states that he reads the card correctly.

"(He is tested with card No. 1001, in the Katakana, which is written out in large letters on paper, so as to avoid the objection that the print is too small. He reads for four minutes, and states that he cannot read part of it. The interpreter states that he reads correctly, except the one part. When asked what the card directs, he misses most of what it says, but states a part correctly.

"(He is given card No. 4009, in the Katakana, and reads it over three minutes. The interpreter states that he reads it correctly. He fails entirely to do what it directs.)

"Q. What does the card tell you to do? A. I cannot understand it.

"(He is given card No. 4009, in the Hirakana, which contains the same reading matter as card No. 4009 in the Katakana, with which he has just been tested. He reads it four minutes. He does part of what is directed, more than when he was tested in the same thing in the Katakana. He states partially what is directed. All these cards, except the first used, were written out in large letters and much more plainly than it is on the cards.)"

We agree with the court below that other portions of the testimony of the applicant before the board of special inquiry show that he was conscious of his inability to read.

[3] The fact, testified to by the applicant, that he was unable to procure passage on either of the two ships named by him by which he could have returned to Hawaii within the prescribed six months from the time of his departure therefrom, cannot properly be held to have extended the time fixed by Congress within which such aliens are permitted to return.

The judgment is affirmed.

DUNN v. TREFRY.

(Circuit Court of Appeals, First Circuit. May 26, 1919.)

No. 1410.

1. APPEAL AND ERROR ⟸931(1)—REVIEW—FINDINGS OF FACT.
Where there is no conflict of evidence, and a finding by the District Court is a conclusion from admitted facts, there is no presumption in favor of its correctness in the appellate court.

2. DOMICILE ⟸4(2)—DOMICILE OF ORIGIN—CHANGE—INTENT.
Where complainant's domicile of origin was in Newport, R. I., where she and her ancestors had lived for two or more generations, where she owns a house and has always claimed her residence, and where she and her husband paid personal taxes and her husband was buried and his will probated, the fact that she also acquired residences in New Hampshire and Massachusetts, in each of which she lived for portions of each year, the remainder of the time in Newport, *held* not sufficient to establish a change of domicile to Massachusetts.

Appeal from the District Court of the United States for the District of Massachusetts; George W. Anderson, Judge.

Suit in equity by Kate H. Dunn against William D. T. Trefry. Decree for defendant, and complainant appeals. Reversed.

Alexander Lincoln, of Boston, Mass. (Whipple, Sears & Ogden, of Boston, Mass., on the brief), for appellant.

Wm. Harold Hitchcock, Asst. Atty. Gen. (Henry C. Attwill, Atty. Gen., on the brief), for appellee.

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

BINGHAM, Circuit Judge. This is a bill in equity to restrain the tax commissioner of Massachusetts from assessing taxes upon the appellant for the years 1917 and 1918 under the Massachusetts Income Tax Law. St. 1916, c. 269.

In the petition it is alleged that the appellant is a resident of the city of Newport and state of Rhode Island, and a citizen of that state; that the defendant is a resident of the city of Boston, in the state of Massachusetts, and a citizen of Massachusetts; and that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,-

000. No question is raised as to the jurisdiction of the court. Relief is sought on the ground that the appellant was not an inhabitant of Massachusetts during the years in question, but was domiciled in Rhode Island, and therefore it was not within the power of Massachusetts to impose a tax upon her.

In the District Court it was found and ruled that the appellant was domiciled in Boston during the years in question, and a decree was entered dismissing the bill. It is from this decree that the appeal is taken, and the sole question is whether the evidence warrants the finding that the appellant was domiciled in Massachusetts in 1917 and 1918.

The evidence consists of the testimony of the appellant and her daughter, and two statements relating to her domicile which she had filed with the defendant. There is no conflict of evidence. The single question is what inference should be drawn from the facts shown by the evidence as to the appellant's domicile.

[1] We recognize the rule that, where there is a conflict of testimony and the credibility of witnesses is involved, the finding of the District Court is not to be disturbed, unless it is clearly wrong. But where, as here, these circumstances are not present, and the finding is a conclusion from admitted facts, we do not think the rule applies.

[2] The evidence shows that the appellant's domicile of origin was Newport, R. I., she spent her childhood days there, and on being married in 1873 went with her husband to live at 20 Kay street in that city. Shortly after her marriage she became the owner of one-third of that property; the other two-thirds being then owned by her two sisters, Anna and Mary, and later by Anna alone. This was her father's homestead, and the appellant and her sister still own and occupy the property. In 1890 she began spending her summers with her husband and family at Holderness, N. H., where she built a house, which she owns and has occupied for about four months in the summer of each year. The winter of 1912 to 1913 the appellant spent in Boston with her hsuband, and in June, 1913, she purchased a house at 178 Marlborough street, which she and her husband occupied for five or six months each winter down to May 24, 1916, when he died.

It thus appears that the appellant has three residences, one in Newport, R. I., one in Holderness, N. H., and one in Boston, Mass. Since 1912 she has spent, substantially every year, five or six months in the winter in Boston, about four months in the summer at Holderness, and from two to three months in the spring and autumn at Newport. She owns furniture and clothing in each of the three places. The family portraits which she owns she keeps in the Newport house. Her family and her husband's family have lived for two generations or more in Rhode Island. Her husband was a registered voter of Newport, and paid his personal taxes, state and federal, in that city down to the time of his death; he always described himself as of Newport; always kept his principal bank account at the Newport Trust Company, and most of his securities there. He was buried in Newport; his will was probated there, and an inheritance tax on his estate was paid in Rhode Island. No claim was made by the defendant that he was a resident of Massachusetts when he died. The appellant has paid her per-

sonal taxes in Newport since 1873; she has always described herself as of Newport, and she has always kept her principal bank account and her securities in the Newport Trust Company. Her business letters are addressed to her at Newport, and forwarded from there to her; she is a member of a church in Newport, but not in Boston. She is very much attached to her Newport home, and never desired to change her Newport domicile, and had no idea she might have done so until she was called upon by the defendant to file a tax return. Her future intentions, as disclosed by the evidence, are to continue as heretofore to spend her winters in Boston, her summers in Holderness, and the spring and autumn in Newport.

The appellant's domicile in Newport is presumed to continue there until it is shown to have been changed, and the burden of overcoming this presumption rests upon the defendant. Mitchell v. United States, 21 Wall. 350. This we think has not been done. On the contrary, the evidence shows that the appellant never has intended to abandon her domicile in Rhode Island. Her residence in Massachusetts has not differed from her residence in New Hampshire, and it is not fair to say that she has intended to make either place her domicile. It is true that her eldest son and daughter are living in Boston, and it is congenial for her to be with them there during the winter months; but to find that she has ever renounced her Rhode Island domicile and intended to acquire one in Massachusetts is not justified by the evidence. The facts as to her mode of living do not outweigh her expressed intent to retain her Rhode Island domicile.

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

SOUTH UTAH MINES & SMELTERS v. UTAH LEASING CO.

(Circuit Court of Appeals, Eighth Circuit. May 13, 1919.)

No. 5092.

1. WATERS AND WATER COURSES ⊂=285—CONTRACT TO SUPPLY WATER—MINING PURPOSES.
   Under contract whereby mining company agreed to furnish water to plaintiff engaged in extracting metal from copper tailings or refuse, *held*, plaintiff was limited to a maximum of 200 gallons per minute, and was not entitled to all water reasonably necessary for the operation of its plant.

2. CONTRACTS ⊂=143—CONSTRUCTION—POWER OF COURT.
   The court cannot by implication add to or change a contract which is clear and complete in itself.

Appeal from the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Bill by the Utah Leasing Company against the South Utah Mines & Smelters. Decree for complainant, and defendant appeals. Reversed, with instructions.

Charles C. Parsons, of Salt Lake City, Utah, for appellant.

Edward B. Critchlow, of Salt Lake City, Utah (William J. Barrette, of Salt Lake City, Utah, and George A. Critchlow, of New York City, on the brief), for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. The appellant in 1914, and for some years prior thereto, was operating a copper mine and concentrator. The crude ore was concentrated by use of a large volume of water owned and brought by it a distance of 8 or 9 miles through a steel-riveted pipe which, through long usage, was subject to breaks, and required care to keep it repaired and up to its capacity of 800 gallons per minute. The mill was incapable of extracting all the metal from the ore, and this unextracted metal was left in the tailings or refuse, which was collected in a huge dump. The appellee was engaged in the business of extracting metal from refuse of this character. With a view to mutual profit, the parties entered into a contract under which appellee was to establish a mill near that of appellant and work over this heap of tailings. A necessary medium in the operations of appellee was water. The contract, therefore, provided for the use by it of some of this water belonging to appellant. Shortly after the contract became operative, appellant shut down its mill, but continued to permit usage of water by appellee for its milling plant. Subsequently disputes arose between the parties as to the amount of water so used by appellee. Appellant claimed that the contract limited appellee's use to 200 gallons per minute, and that it was using far more and should pay for the excess. Appellee admitted it was using much more than that quantity, but claimed that the contract gave it the right to use as much as was reasonably necessary for the operation of its plant. Upon appellant threatening to cut off or limit the water supply, appellee brought its bill, praying that appellant be enjoined from interfering with, limiting, or diverting from it such supply of water as it reasonably needed for operation, which amount it then estimated at 600 gallons per minute. After hearing, the trial court enjoined the appellant from preventing the appellee from securing and using such volume of water as reasonably necessary to its operations, not exceeding 600 gallons per minute. From this decree the appeal comes here.

[1] The contract is written, and there is no dispute that the amount of water used by appellee is far in excess of 200 gallons per minute. The difference is therefore purely one as to the meaning of the contract. Does it limit the appellee to a maximum of 200 gallons per minute, or does it permit the use of all reasonably necessary to the operation of its plant? The entire expression of the contract as to water usage is as follows:

"Second. The Mining Company agrees to furnish to the Leasing Company, free of cost, fresh water sufficient for its needs, but not to exceed at any time a rate of sixty (60) gallons per minute, except as hereinafter provided. The water to be piped from the pipe lines of the Mining Company's mill at the expense of the Leasing Company. If, however, the operations of the Mining

Company shall be, at any time while this agreement is in force, suspended in its mine and mill the necessary repairs and running expenses in the keeping up of all repairs on the pipe line across the valley to the aforesaid plant of the Leasing Company shall be borne by said last-named company. The Mining Company agrees to furnish water in addition to the sixty gallons up to a total of two hundred (200) gallons per minute, to said Leasing Company, if in the opinion of the Mining Company this can be done without affecting its operations. The Mining Company also agrees to allow, during its milling operations, the Leasing Company to recover from the tailrace and slimes leaving the Mining Company's mill such amount of water as it, the Leasing Company, is able to recover without affecting the operations of the Mining Company."

It would be difficult to select language which would more clearly and certainly express an intention to limit the maximum fresh water usage to 200 gallons per minute. Appellee seeks to avoid this language by saying that—

"It did not, nor does the contract in any other provision purport to deal with the situation which might arise and which afterwards did arise, to wit, the shutting down of the mine and mill of appellant."

It then asks this court to supply that deficiency by an implication that the parties had in mind at the time the contract was made, and intended as a part thereof, that if the appellant closed down its mill it should permit the appellee to use all of the fresh water it might need beyond 200 gallons.

[2] However much a court may be tempted to do so, it cannot by implication add to or change a contract which is clear and complete within itself. This very clause of the contract shows that the parties had in mind, in connection with the water supply, that the appellant might close its mill. It provides, in such a contingency, for the upkeep of the pipe line by the appellee. When this very contingency was in the minds of the parties when they drew the contract, and when the care with which this clause and the entire contract was drawn is noticeable, what room is there to say that the parties intended to leave to implication and uncertainty the volume of water to be then used? To our minds, the reasonable view is that the parties intended to and did define that quantity in express terms. The argument of counsel is ingenious, but seems to us unsound.

The judgment is reversed, with instructions to dismiss the bill upon the merits, at the cost of appellee.

THE COMPORT.

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

No. 209.

COLLISION ⇐102—STEAM VESSELS CROSSING—MUTUAL FAULTS.

Both of two steam lighters *held* in fault for a collision in East River while on crossing courses, for failure to keep proper lookouts; the burdened one, having the other on her starboard side, for not sooner changing her course, and the other for improper navigation after crossing signal was given.

Hough, Circuit Judge, dissenting.

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

Suit in admiralty for collision by Lee's Lighters against the steam lighter Comport; the New York & Cuba Mail Steamship Company, claimant. Decree for respondent, and libelant appeals. Modified.

Herbert Green, of New York City, for appellant.

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

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. March 8, 1917, about 7:15 a. m., the steam lighter Bettie Lee with a large deckload of sugar was coming up the East River, bound to Pier 27, Manhattan, and bearing diagonally across the river to a point above the Brooklyn bridge. At the same time the steam lighter Comport was crossing the river diagonally from the foot of Wall street, Manhattan, to Pier 16, Brooklyn. The vessels were concededly on crossing courses; the Comport, having the Lee on her starboard side, being bound to keep out of the way, and the Lee being bound to hold her course and speed. Yet they came together, the bow of the Comport colliding with the starboard bow of the Lee about three feet abaft the stem; the Lee crossing the Comport's course.

The navigation of the lighters with respect to each other was as follows: The Comport, when about 200 feet away, blew one whistle and ported, so as to head more down the stream. The master of the Lee says that upon hearing this signal and without answering it he ported, but finding his lighter was going to port, instead of to starboard, he blew an alarm and reversed full speed astern. The Comport also blew an alarm and went full speed astern.

The District Judge held the Lee solely at fault. That she was at fault is perfectly apparent. She had no lookout at all. Her master was evidently in a state of alarm when he heard the Comport's signal of one whistle, and we do not credit his statement that he ported. There is no reason why, if he did so, the lighter should have gone to port. His explanation as to the effect of the flood tide on his lighter and upon lighters generally is wholly unsatisfactory.

But we think the Comport was also at fault. It is quite plain that it would not have been safe for her to continue her course across the Lee's bows. The master appreciated this and his signal of one whistle was a compliance with article 22 of the Inland Rules, requiring the burdened vessel to avoid crossing ahead of a privileged vessel if the circumstances of the case admit going under her stern. When he blew the signal of one whistle and ported, he must have nearly reached the course of the Lee. Why did he not do so sooner? In his statement to the local inspectors he says that he saw the Lee coming up when she was about 250 feet off the Brooklyn piers, which was about where the collision happened. He did not testify at the trial how far the Lee was off when he first saw her. His mate was acting as look-

out forward, but mixed up in a crowd of 16 longshoremen. We find that a vigilant lookout was not kept, and, even if we were to assume that the Lee was seasonably discovered, we think it was a fault on the part of the Comport to persist in a dangerous course until the lighters were so near together. Ordinary prudence required the Comport to indicate sooner that she was going to port her helm and pass under the Lee's stern.

The decree of the court below is modified, and the court directed to enter the usual decree for half damage, with costs of this court to the libelant.

HOUGH, Circuit Judge (dissenting). The Comport and Lee being on crossing courses, with the latter as the privileged vessel, Comport properly blew one whistle and ported to pass under the Lee's stern. A collision occurred, the bow of the Comport coming in contact with the starboard side of the Lee about three feet abaft her stem. We hold the Lee at fault for a reckless failure to hold her course, and condemn the Comport for two reasons; i. e., she had a poor lookout, and did not port sooner.

I find no evidence justifying the assertion that the lookout was defective; on the contrary, the testimony is uncontradicted that the Comport had two lookouts "way up forward," while the longshoremen passengers were "behind (them) a little way aft of (them)."

Rules for sound signals assume that the vessel to which they are given is obeying the rules, and there is no evidence in this case tending to show that the Comport's one whistle and attendant porting of her helm were not in ample time to keep out of the way of the privileged boat, if the latter had maintained her course.

It is true that the Lee's captain was (as stated by the court) in a "state of alarm" when he heard the single whistle; his reasons for such alarm are set forth at length in his evidence, and fully show that, when he heard said whistle, he was intending to violate the statutory rules, was almost in the act of doing so, and was not sufficiently quick-witted to change his unlawful program and conform to the Comport's lawful signal. I do not think that the Comport should be cast in half damages for not anticipating the other captain's incompetence, and therefore dissent.

HAWAIIAN PINEAPPLE CO., Limited, v. MASAMARI SAITO et al

(Circuit Court of Appeals, Ninth Circuit. August 21, 1919.)

No. 3374.

APPEAL AND ERROR ⇐456—SUPERSEDEAS.

Showing on petition for injunction in aid of appellate jurisdiction *held* insufficient for interference with decree of Supreme Court of territory that permanent injunction should remain vacated; bond to reimburse being given.

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

In Equity. Suit by the Hawaiian Pineapple Company, Limited, against Masamari Saito and Libby, McNeill & Libby of Honolulu, Limited. Decree for complainant was reversed by the Supreme Court of Hawaii, and complainant appealed, and petitions for injunction in aid of appellate jurisdiction. Petition denied.

Morrison, Dunne & Brobeck, Edward Hohfeld, and H. W. Clark, all of San Francisco, Cal., and Frear, Prosser, Anderson & Marx, of Honolulu, T. H., for petitioner.

Pillsbury, Madison & Sutro and Alfred Sutro, all of San Francisco, Cal., opposed.

Before MORROW and HUNT, Circuit Judges.

PER CURIAM. It is to be kept in mind that there is no certified record on appeal before us and that the questions presented arise upon a petition for injunction in aid of the appellate jurisdiction of this court. Our consideration has therefore been limited to the papers presented, and our views are expressed with relation to such limited record rather than to all questions which the court may eventually be called upon to determine.

The case comes to us with a written opinion by the Supreme Court of the territory, holding that equity would afford the relief which was prayed for in the bill of complaint. We have assumed in our consideration of the petition submitted to us that there was sufficient ground for equitable cognizance, and upon that assumption have given earnest consideration to the true interpretation of the contract between Saito and the Pineapple Company, and our opinion is that the Supreme Court of the territory appears to have been correct in holding that there was no obligation upon Saito to sell to the Pineapple Company pineapples produced from any lands which were leased or acquired by him after the date of the making of the contract.

Furthermore, we think that by the decision of the Supreme Court of the territory, which vacated the decree of the lower court, and which ordered a dissolution of the injunction which had been issued by the lower court, and which also ordered the bill dismissed, the essential rights of the parties were determined, and that the actual point of controversy was decided so far as the courts of the territory had jurisdiction to decide. The order of the Supreme Court, remanding the case for proceedings consistent with the opinion, left to the lower court nothing to do by way of adjudicating the essential rights of the parties.

The Pineapple Company then took steps to perfect its appeal to this court. Petition for appeal was filed, with a prayer for an order of supersedeas and for an order continuing the injunction. In due course the Supreme Court of the territory considered whether the jurisdictional amount was sufficient to warrant appeal, and determined that the amount was sufficient. The court, however, acting under rule 74 of the Equity Rules (198 Fed. xxxix, 115 C. C. A. xxxix), restored the permanent injunction which had been theretofore issued by the lower territorial court and which had just theretofore been vacated by the

Supreme Court, unless the respondents, Saito and Libby, McNeill & Libby, should forthwith give bond to reimburse the Pineapple Company for any and all damages which it might sustain in the event of a reversal of the decree of the Supreme Court of the territory by this the Circuit Court of Appeals for the Ninth Circuit.

The next step was taken by the issuance of the order of July 18th by the Chief Justice, which allowed an appeal to this court and granted a supersedeas to the extent that, pending appeal to this court, remand to the inferior court in the territory should be stayed. Thereafter a bond to reimburse was given by Libby, McNeill & Libby, and the permanent injunction of the inferior court, which had been vacated by the Supreme Court, was ordered to remain vacated.

Then came the application of the Pineapple Company to this court to restrain Saito and Libby, McNeill & Libby from proceeding to deal with each other with respect to fruit grown upon lands acquired after the date of the execution of the original contract. This court granted a temporary restraining order and an order to show cause. The matter came on to be heard on August 18th, and after considering the arguments of counsel and examining the authorities cited, we conclude that, as the case is submitted, there is not sufficient showing for interference with the decree of the Supreme Court of the territory and the subsequent order of the Supreme Court and of the Chief Justice, which directed that the permanent injunction should remain vacated.

This leads to a denial of any further injunction at this time by this court, and it is ordered accordingly.

Petition denied.

HOSIER v. UNITED STATES. *

(Circuit Court of Appeals, Fourth Circuit. July 1, 1919.)

No. 1713.

1. POISONS ⟸4, 9—INDICTMENT UNDER HARRISON NARCOTIC ACT NEED NOT CHARGE THAT ACCUSED WAS IN BUSINESS.
   A prosecution for violation of Harrison Anti-Narcotic Act Dec. 17, 1914, § 2 (Comp. St. § 6287h), by selling a narcotic drug without a written order from the purchaser on the prescribed form, may be predicated on a single sale, and the indictment need not charge that accused was in the business of selling narcotics.
2. CRIMINAL LAW ⟸369(1)—PURCHASER OF NARCOTICS COULD TESTIFY TO SALE OF NARCOTICS TO HIM ON SEVERAL OCCASIONS.
   On trial of a defendant charged with selling a narcotic drug to a named purchaser in violation of the statute on a specified date, it was not error to permit such purchaser to testify to sales to him at different times.

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 G. E. Hosier. Judgment of conviction, and defendant brings error. Affirmed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 250 U. S. 674, 40 Sup. Ct. 54, 64 L. Ed. —.

Henry Bowden and Thomas H. Willcox, both of Norfolk, Va., for plaintiff in error.

Hiram M. Smith, U. S. Atty., of Richmond, Va.

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

ROSE, District Judge. The plaintiff in error will be called the defendant. Three indictments, each intended to allege a violation of the Harrison Anti-Narcotic Act (Act Dec. 17, 1914, c. 1, 38 Stat. 785 [Comp. St. §§ 6287g–6287q]), were returned against him. They were consolidated. He was convicted upon all of them. Each of them charges that he had made a sale of a specified narcotic to a named individual, and that such sale had not been made in pursuance of a written order from the purchaser on a form issued in blank for that purpose by the Commissioner of Internal Revenue. Two of the indictments set forth that the defendant had not registered under the act and had not paid the special tax; the third omitted this allegation.

[1] The defendant argues that all the indictments were defective, in that none of them alleged that he was in the business of selling narcotics. He cites a number of cases in which, in prosecutions under section 3242 of the Revised Statutes (Comp. St. § 5965) and similar enactments, it has been held that it was necessary to allege and to prove that the accused was carrying on the business of a liquor seller. It was not sufficient to say and to show that he had made a single sale. These authorities are not in point. In them, what the statute forbade was the carrying on of the business of a wholesale or retail liquor dealer, etc., without paying the tax imposed thereon. The act here in question declares it to be unlawful for any person to sell narcotics to any one except upon the written order of the latter, given on a blank form issued by the Commissioner of Internal Revenue.

In the instant case, each indictment charges an offense in the language of the statute, and by setting forth the kind of narcotics sold, and to whom the sale was made, the accused was given sufficient information to enable him to prepare his defense. There is nothing in U. S. v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, which intimates that one who is not a regular dealer in narcotics, may lawfully make a sale of them otherwise than is permitted by section 2 of the act (Comp. St. § 6287h). It is true that it was held that the words "any person," in section 8 (section 6287n), prohibiting the possession of the drug, must be restricted to the class of persons named in section 1 (section 6287g), because, unless that was done, a grave constitutional question would be raised, and the familiar principle was reiterated that a statute must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score. It is not open to dispute that Congress may levy a tax upon one who sells anything, the selling of which it chooses to tax. It may, in its discretion, provide that this tax shall be required only of such persons as make a business of dealing in the commodity in question, but it is equally open to it, if it will, to say that every one who sells at all shall pay, or that

any one who makes even an occasional sale shall comply with reasonable regulations intended to prevent evasions of the law.

[2] The indictments were good. The defendant says that, if they were, it is because each forbidden sale is a separate offense, and that reversible error was committed in admitting, over his objection, evidence of other sales than those specified in the indictments. The evidence complained of was in every instance given by the purchasers named in the indictments. Each of such purchasers said that in addition to the sale, at or about the time mentioned in the indictments, the defendant had, on other occasions, made similar sales to the witness. As the government in its proof was not restricted to the precise dates set forth in the indictments, the defendant could not object to the receipt of such evidence. The most that he would be entitled to do was to ask that the government should elect upon which dates it would stand. That he did not do.

We have considered the other assignments of error, but find nothing in them which calls for discussion.

Affirmed.

PREYER v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 23, 1919.)

No. 1726.

INTOXICATING LIQUORS ⟸138 — REED AMENDMENT — TRANSPORTATION THROUGH STATE.

Conviction of transporting liquor into a state, in violation of the Reed Amendment (Comp. St. 1918, §§ 8739a, 10387a–10387c), will be reversed; trial having been under misconception that defendant could be convicted, though the liquor was merely being carried through the state.

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

Henry J. Preyer was convicted of violation of the Reed Amendment, and brings error. Reversed and remanded.

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

S. M. Wetmore, of Florence, S. C., 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.

KNAPP, Circuit Judge. Preyer was indicted for transporting liquor into the state of South Carolina in violation of the Act of Congress of March 3, 1917 (39 Stat. 1069, c. 162 [Comp. St. 1918, §§ 8739a, 10387a–10387c]), known as the Reed Amendment. The jury found him guilty and sentence followed. At the time of his trial it was apparently assumed by the court below, as well as by counsel on both sides, that he could be convicted, if the evidence otherwise

warranted, although the liquor found in his possession was being carried to Florida, and not to South Carolina. In consequence no issue was raised as to the destination of the liquor and the attention of the jury was not directed to that question. Since then the Supreme Court has held, in United States v. Gudger, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653, decided April 14, 1919, that the Reed Amendment does not prohibit the transportation of liquor through a "dry" state into another state. It results, therefore, that Preyer did not commit the offense charged in the indictment, if he was in fact taking the liquor to Florida, and the meager testimony of record might permit the inference that this is what he was doing. The government's only witness says he was the head porter of a sleeping car in "an interstate train running from New York City to Jacksonville, Florida," and nothing else appears as to the intended destination of the liquor in question.

In view of the misconception under which Preyer was tried, and the lack of any substantial proof that the liquor he had with him was destined to South Carolina, we think it would be manifestly unjust to allow his conviction to stand. The judgment is accordingly reversed and the cause remanded, with instructions to grant a new trial.

Reversed.

PIERCE et al. v. UNITED STATES.

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

No. 5145.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

On petition for rehearing. Denied.

For former opinion, see 257 Fed. 514, — C. C. A. —. Certiorari denied 250 U. S. 670, 40 Sup. Ct. 15, 64 L. Ed. —.

S. W. Fordyce, Jr., John H. Holliday, Thomas W. White, George T. Priest, and Albert D. Nortoni, all of St. Louis, Mo., and J. Markham Marshall, of New York City, for appellants.

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

PER CURIAM. It is urged that the trial court erred in the matter of interest included in the judgment under review. As this question was not raised by the assignments of error and briefs at the hearing, we do not think it should be considered now. The other matters in the petition for rehearing were fully considered, and we see no reason for changing the conclusion.

The petition is denied.

WADE, District Judge, adheres to the views expressed in his dissenting opinion previously filed. 257 Fed. 518, — C. C. A. —.

OKMULGEE WINDOW GLASS CO. v. FRINK.*

(Circuit Court of Appeals, Eighth Circuit. April 25, 1918. On Rehearing, September 12, 1919.)

No. 5002.

1. PATENTS ⊂=215—LICENSE CONTRACT.
A written agreement by complainant to deliver to defendant formal licenses under certain patents *held* waived, when delivery of licenses at first was delayed because of some uncertainty as to their date and later was offered, but not insisted on, and where defendant proceeded to use the inventions as provided in the contract.

2. CORPORATIONS ⊂=580—REORGANIZATION—ACTION ON INDEBTEDNESS OF OLD COMPANY.
Where a new corporation is in its essence but a continuation of the activities and interests of the old company, which retains only its franchise as a corporation, a direct recovery is allowable in equity against the new company upon a contract of the old.

3. CORPORATIONS ⊂=617(2)—VOLUNTARY DISSOLUTION—EFFECT ON EXISTING CONTRACTS.
A voluntary dissolution of a solvent corporation gives no relief from liability upon existing contracts, whether executed or executory, which must be satisfied before its assets can be diverted.

4. CORPORATIONS ⊂=580—REORGANIZATION—LIABILITY FOR INDEBTEDNESS OF FORMER COMPANY.
Where a corporation is reorganized by its stockholders merely to change its situs on removal of its business to another state, the fact that stock of the new company is to be exchanged share for share for that of the old does not establish that the net assets acquired are equal in value to the amount of such stock.

On Rehearing.

5. CORPORATIONS ⊂=579(2)—REORGANIZATION—ASSETS OF OLD CORPORATION AS TRUST FUND FOR PAYMENT OF ITS DEBTS.
Upon the dissolution of a corporation which has ceased to do business, its stockholders having organized a new corporation to carry on the business of the old and to take over its assets, stock being exchanged share for share, the assets of the old corporation so taken over constitute a trust fund for the payment of the debts of the former company.

6. CORPORATIONS ⊂=580—REORGANIZATION—PERSONAL LIABILITY OF REORGANIZED COMPANY FOR INDEBTEDNESS OF FORMER COMPANY.
Where a corporation has ceased to carry on business and has been dissolved, and a new corporation has been organized to carry on the business and take over its assets, personal judgment may be obtained against it by the creditors of the former company to the amount of the value of the property so taken over by the new corporation and converted to its use.

7. CORPORATIONS ⊂=579(2)—CREATION OF ENTITY DISTINCT FROM FORMER COMPANY—EXTENT OF LIABILITY TO CREDITORS OF FORMER COMPANY.
Where a glass company has ceased to manufacture glass because of the failure of natural gas in the state wherein it operated, and has removed its property to another state, where a new corporation is formed by the stockholders of the old, the property of the corporation being the basis of capitalization of the new, but some of the old stockholders having sold all or a portion of their interest in the new corporation, and additional property has been added thereto, such new corporation is not a continuation of the old corporation, so as to make it identical therewith, and liable for its debts beyond the value of property received, but is a distinct legal entity, charged with a limited liability to the creditors of the old corporation.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Further rehearing denied December 15, 1919.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by Robert L. Frink against the Okmulgee Window Glass Company. Decree for complainant, and defendant appeals. Reversed.

William M. Matthews, of Okmulgee, Okl., for appellant.

Frederic O. Berge, of Kansas City, Mo. (N. A. Gibson and J. L. Hull, both of Muskogee, Okl., and E. N. Huggins, of Columbus, Ohio, on the brief), for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. This is a suit in equity against the Okmulgee Window Glass Company, as the alleged successor of the Coffeyville Window Glass Company, to recover minimum patent royalties under a contract between the Coffeyville Company and appellee, and to have the same "declared to be a lien upon the property and assets of the defendant company at least to the extent of the value of the assets conveyed to it by the Coffeyville Window Glass Company, and that it be ordered satisfied out of the property and assets of the said defendant," and for general relief. Defendant appeals from a decree for $90,560, which was declared to be a lien upon the property and assets of the defendant.

The assigned errors pressed upon this court are: (a) That the appellee neither pleaded nor proved issue and delivery of licenses as required by the contract, but breached the contract by failing to so issue and deliver them, which was a condition precedent to royalty payments; (b) that there was no consolidation, merger, or continuation of the two companies; (c) that no personal judgment should have been rendered against appellant; (d) that the dissolution of the Coffeyville Company terminated the contract; and (e) that the assets acquired by appellant from the Coffeyville Company did not exceed the liabilities of that company assumed and theretofore paid by appellant.

[1] (a) The contract provided for the issuance and delivery, after the payment of $4,500 and "upon the request of the licensee," of licenses of a form attached to the contract. The contract in another clause provided that appellee should place the licenses in escrow in some bank, designated by him, under instruction for their delivery upon payment of the above sum. Appellee executed the licenses but did not deliver them to the licensee or in escrow. The reasons for this failure to deliver were as follows: There arose some question between the parties to the contract as to whether the date thereof should be altered. During this uncertainty appellee wrote to the president of the Coffeyville Company:

"With the exception of filling in the date of the agreement, the licenses are ready for filing at the local bank, and upon receipt of your advices, the proper date will be inserted and papers placed in escrow."

In answer to this the president wrote:

"I note that you say with the exception of the date these agreements are ready for filing, at the local bank and upon receipt of our advice the proper date will be inserted and the papers placed in escrow. Nod (now?) I do not

see a particle of harm in changing these dates; but as I stated above, do not want to do so on my own authority, without first consulting the others, which I will do now right away and if you are still waiting on me wish you would advise and I will try and give you the information now within the next week or ten days."

To this appellee replied:

"As to the agreement, I appreciate your position relative to this, and think that your consideration of the same is perfectly proper, and inasmuch as there is no particular hurry as to the change in the date of the agreement, this can stand until it is convenient for you to take it up with your colleagues. My only concern relative to it is that it should be thoroughly understood between us, so that you would not, through any misunderstanding, anticipate that there was anything irregular in my not having placed in escrow the patent licenses, as is called for by the agreement. However, I am perfectly willing to issue these licenses, eliminating the date, and give them to you at once, should you so desire, but believe that you have sufficient confidence in me, inasmuch as it is but a minor detail at the most, and we can allow the matter to rest until we have another meeting, at which time we can fill in the dates in these licenses (which are already drawn) and I can then hand them to you complete, for so far as the licenses are concerned, the agreement covers all points as to our respective premises and obligations, and the licenses are of no particular value to you, only in the event that you wish to negotiate with other parties for sublicensing the patents, in which event I will undertake to see that you have the proper authority and credentials to enable you to do so for all territory called for in the agreement."

This status seems to have been understood and acquiesced in by the Coffeyville Company. For months afterwards the correspondence of the parties to the contract shows clearly that they regarded the contract in full force. If the issuance and delivery of the licenses was a condition precedent, it was waived. But it may well be doubted whether such importance is, under the contract, to be accorded them. The first paragraph of the agreement states that the appellee "proposes and agrees to issue licenses under the following patents and pending applications" (setting them out by number and description). The second paragraph provides that:

"The licensor hereby grants, and the licensee hereby accepts, the exclusive right within the territory of the United States west and south of the Mississippi river and to and including the Pacific Coast, to use the inventions set forth in the above identified patents and applications, subject to the terms of this agreement, and licenses under the several patents and applications shall be granted for such territory subject to the conditions set forth herein."

It would seem that the licenses could add nothing to the above positive grant of use of the inventions. A closely parallel case is American Paper Bag Co. v. Van Nortwick, 52 Fed. 753, 757, 3 C. C. A. 274, decided by the Court of Appeals for the Seventh Circuit; Mr. Justice Harlan participating. This contention of appellant is denied.

(b) We have carefully examined the entire evidence, and are convinced that the Coffeyville Company was merged in and absorbed by appellant, which is really nothing more than a continuation of the Coffeyville Company. The arrangement was as follows: The organization by the same individuals of a new company (appellant), with the same amount of capital stock, to be paid for by the assets of the old company (Coffeyville Company), for the sole purpose of continu-

ing the same character of business with the assets of the old company; a transfer to the appellant of the assets of the old company; assumption of the indebtedness of that company by appellant; exchange of stock, share for share. The legal result of such transactions is to impose upon appellant liability, up to the value of such assets, to the creditors of the Coffeyville Company. Kansas City S. R. Co. v. Guardian Trust Co., 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579, affirming 210 Fed. 696, 127 C. C. A. 184; Northern Pac. R. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931; Fogg v. Blair, 133 U. S. 534, 541, 10 Sup. Ct. 338, 33 L. Ed. 721; Union Pac. R. Co. v. McAlpine, 129 U. S. 305, 314, 9 Sup. Ct. 286, 32 L. Ed. 673; Railroad v. Howard, 7 Wall. 392, 19 L. Ed. 117; Jennings Neff & Co. v. Ice Co., 128 Tenn. 231, 159 S. W. 1088, 47 L. R. A. (N. S.) 1058. Also see 7 R. C. L. 182, with citations, and extensive notes to 11 L. R. A. (N. S.) 1119, 32 L. R. A. (N. S.) 616, and 47 L. R. A. (N. S.) 1058.

[2] (c) Appellant objects to the personal judgment against it, contending that judgment should first have been secured against the Coffeyville Company, and then after failure of execution the enforcement of an equitable lien might have gone against it. The rule here invoked is not without recognized exceptions. Where the new corporation is in its essence but a continuation of the activities and interests of the old company, which retains simply its franchise as a corporation, thus becoming practically extinct as an active entity, direct recovery is allowable. See Central of Georgia R. Co. v. Paul, 93 Fed. 878, 35 C. C. A. 639; Hibernia Ins. Co. v. Transp. Co. (C. C.) 10 Fed. 596; Id. (C. C.) 13 Fed. 516; Brum v. Merchants' Mutual Ins. Co. (C. C.) 16 Fed. 140; Harrison v. Union Pac. R. Co. (C. C.) 13 Fed. 522; Altoona v. Richardson, 81 Kan. 717, 106 Pac. 1025, 26 L. R. A. (N. S.) 651; Douglas Printing Co. v. Over, 69 Neb. 320, 95 N. W. 656; Friedenwald Co. v. Tobacco Works, 117 N. C. 544, 23 S. E. 490; Morrison v. Amer. Snuff Co., 79 Miss. 330, 30 South. 723, 89 Am. St. Rep. 598; Howe v. Robinson, 20 Fla. 352, 355. Where it can be thus seen in advance that a judgment against the old company would require the further proceeding against the new company to secure any satisfaction, equity will avoid this useless multiplicity of suits and circuity of action by permitting a direct proceeding. Central Improvement Co. v. Cambria Steel Co., 210 Fed. 696, 705, 127 C. C. A. 184. Here, however, the old company was legally dissolved shortly after appellant took over its business and before this suit was brought. Nor could its assets have been followed into the hands of the former stockholders, because it had none to distribute at dissolution and the shares in appellant which were to have been given these stockholders have never been issued to them—in fact, appellant has refused to issue them, and is now being sued therefor. To deny a direct suit would be to deny all remedy, and this equity can and will avoid. Curran v. Arkansas, 15 How. 304, 310, 311, 312, 14 L. Ed. 705.

[3] (d) Appellant contends that the dissolution of the Coffeyville Company shortly following the merger resulted in the annulment of this contract, in so far as it was executory, and therefore the rule of damages would be such as had accrued up to that time. Such is not

the law. Curran v. Arkansas, 15 How. 304, 310, 14 L. Ed. 705; Broughton v. Pensacola, 93 U. S. 266, 268, 23 L. Ed. 896; Shields v. Ohio, 95 U. S. 319, 324, 24 L. Ed. 357. A voluntary dissolution of a solvent corporation gives no relief from liability upon existing contracts and obligations. As to contracts partly or entirely executory, the dissolution is regarded as a breach, because the corporation has voluntarily incapacitated itself to further perform. The other party to the contract is placed by such act of dissolution in the position of one to whom further performance of the contract has been definitely and finally refused. He can recover for the resulting damage on the entire contract, executory as well as executed. Bowe v. Minn. Milk Co., 44 Minn. 460, 47 N. W. 151; Griffith v. Blackwater B. & L. Co., 46 W. Va. 56, 61, 33 S. E. 125, 127; Musgrove v. Gray, 123 Ala. 376, 26 South. 643, 82 Am. St. Rep. 124. Also see Schleider v. Dielman, 44 La. Ann. 463, 10 South. 934; Tiffin Glass Co. v. Stoehr, 54 Ohio St. 157, 43 N. E. 279. The assets of the company must satisfy such liabilities before they can be diverted. There can be no doubt here that the proven damage is far in excess of the assets received by the appellant and not already devoted to payment of Coffeyville Company indebtedness.

[4] (e) The contention that the assets acquired from the Coffeyville Company were equaled by the debts assumed and heretofore paid, so that there is no surplus to which this debt might attach, is a question of fact. It has required and received a painstaking examination of the entire evidence. The view of the trial court seems to have been determined by the circumstance that the appellant was, after taking over the assets and assuming the indebtedness, to exchange its capital stock of $100,000 for that of the Coffeyville Company. He takes this as an admission that the value of the net assets was $100,000. In our judgment, the force of this view is broken by the following considerations: In these transactions the stockholders of the one company were the organizers and stockholders of the other. They bought from themselves. There was present none of those considerations which contribute to a fair determination of value. What the parties had in mind was a change from a Kansas corporation, doing business in Kansas, to an Oklahoma corporation, with the same capitalization, doing the same business in Oklahoma. A geographical change in the business made it desirable to make a similar corporate change. Eliminating this factor of capitalization, the record is fairly clear as to the value of these assets with the exception of two items, concerning which there is no helpful information in the evidence. At the time the Coffeyville plant was moved to Okmulgee, the latter city gave a bonus of a building site and $20,000 in notes. Of the notes approximately $10,000 worth have been paid. The balance are probably overdue, and there is no evidence as to what, if any, value they have. There is also a singular absolute silence as to the character of title to the site—upon what, if any, conditions it was given or what value it carries. Because of this uncertainty we have been reluctantly compelled to exclude these two items. Computation of all other items touching the assets acquired from and the liabilities already paid for the Coffeyville Com-

pany results in assets of $114,689.82, liabilities of $95,278.96, net assets, $19,410.86.

Therefore the case will be reversed, with instructions to enter decree for appellee for the sum of $19,410.86 and costs, which judgment shall be a lien upon all of the property and assets of the appellant.

On Rehearing.

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

YOUMANS, District Judge. A rehearing in this case was granted upon the petition of appellee and the case has been resubmitted. Confusion has resulted by reason of a change of theory on the part of counsel for appellee since the decision of this court on the former submission. They have taken certain expressions in the former opinion which were made with regard to the position then maintained by them, and now make those expressions the basis for an entirely different position.

The amended bill of complaint was framed on the trust fund theory. That theory was adhered to by counsel for appellee on the former submission. Their contention was stated on pages 63 and 64 of their original brief as follows:

"The liability of the Okmulgee Company arises in the following way: The stockholders, directors, officers, and owners of the two corporations being identical, on the dissolution of the Coffeyville Company, became trustees for the creditors of that corporation and as such held its property in trust; and when this property was turned over by them to the Okmulgee Company, which they had organized to take and hold the property for their benefit, the Okmulgee Company, having full knowledge and notice of the trust imposed upon the property and the former trustees, and of the contract with Mr. Frink, became the successory trustee for the creditors of the Coffeyville Company.

"Furthermore, the property having been so taken without the payment of anything therefor to the Coffeyville Company, and without the payment of all claims of creditors of the Coffeyville Company, and having been so taken impressed with a trust and with full knowledge and notice thereof, then, at such time as it repudiated Mr. Frink's claim and prior right to have his claim satisfied out of the Coffeyville property, the Okmulgee Company, as such successory trustee, committed a breach of trust and became liable to be called to account for such trust property, at least to the extent of the value of the property so taken.

"Furthermore, the Okmulgee Company, as such successory trustee, having commingled trust property so taken with property of its own, and all now a constituent of and used by it as one entire plant and property, so that the original Coffeyville property has lost its separate identity, it has thereupon become liable to satisfy Mr. Frink's claim, arising out of his contract with the Coffeyville Company, in a direct personal judgment. Furthermore, the Okmulgee Company, having so taken the Coffeyville property with full notice and knowledge of its trust character, and with full notice and knowledge that the persons from whom the property was so received held it as trustees, thereupon stepped into the shoes of the former trustees and became the successory trustee for the creditors of the Coffeyville Company, with plenary notice that the interest of Mr. Frink in the property, as a creditor of the Coffeyville Company, was at least as much as the value of the stock of the Okmulgee Company, or the interest claimed therein by its stockholders, plus the indebtedness which the Okmulgee Company had assumed in taking over the property."

With regard to the amount of the recovery by appellee the contention of his counsel on the former submission is indicated by the following quotations from their original brief. On page 68 they say:

"The measure of Mr. Frink's recovery against the Okmulgee Company, under the circumstances of this case, is the value of his equity as a creditor of the Coffeyville Company, which was diverted from him as such creditor by the Okmulgee Company as successory trustee; and this would be so even as under the circumstances of this case, where it is claimed that the Okmulgee Company paid debts of the Coffeyville Company, to an amount alleged to be in excess of the value of property so taken, particularly where such alleged value as in this case was arrived at or determined arbitrarily by the parties who have benefited by the arrangement, and a long time after the property has been so transferred."

On page 69 they say:

"As a general proposition Mr. Frink probably would be limited to the subjection of the property transferred, and the Okmulgee Company would be liable only to the extent of the value of the property taken. However, where, as in the circumstances of this case, in moving the property from Coffeyville to Okmulgee, the Coffeyville Company's property got mixed up with the individual property of Dr. Skelton and into the plant that he was constructing, and where, in reconstructing the original Coffeyville plant at Okmulgee new material was added, and the reconstructed plant was enlarged by one-third over the old Coffeyville plant at Coffeyville, such mixing and intermingling of property having been brought about by the stockholders as trustees and the Okmulgee Company, which took over the property for their benefit as successory trustee, and where thereafter the Okmulgee Company took over the property of the Skelton plant and thereupon increased its capital stock to $200,000, and at the time this action was begun all of this property, including the original Coffeyville property, was a constituent part of one entire plant, and so used by the Okmulgee Company as one entire plant and property, then under such circumstances Mr. Frink is not limited to the subjection of the property so taken, but this court sitting in equity has plenary power to so conduct its proceedings and mold its decrees that full relief may be secured to Mr. Frink."

On page 70 they say:

"However, assuming for the sake of argument that Mr. Frink should be limited in his right to proceed against the property taken over by the Okmulgee Company, this would be of no material benefit to it, as the property was worth very much more than Mr. Frink's claim."

Curiously enough counsel for appellee cite in support of their contentions, so carefully and elaborately set forth, the very same authorities which they now construe to sustain a theory of personal and direct liability on the part of the Okmulgee Company.

On the former submission this court accepted the trust fund theory on which appellee based his claim, as indicated by the foregoing quotations, but did not take the same view of the testimony as was taken by counsel for appellee, nor did it accept the interpretation of the law urged by them for the determination of the amount of his recovery.

On this submission counsel for appellee seek to hold the judgment recovered by him in the court below upon the theory of direct liability. They now say that they might have brought this suit at law, and that the decision of this case should rest on principles applicable

in cases of personal liability. On page 2 of their petition for rehearing they say:

"On the facts in this case, the decision does not rest on the trust fund doctrine, but is bottomed on *principles of direct liability as effectively as though the Okmulgee Company had itself signed the contract with Mr. Frink.*"

This is a complete change of front. The time of the change appears on page 4 of the petition for rehearing. Counsel there say:

"We have diligently studied these cases and the record for over four years, and have only come to appreciate the full force and effect thereof since reading the opinion of this court."

On page 8 of the petition for rehearing they say:

"On the facts of our case, we *might have sued at law*, and the decision should rest on principles applicable in cases of personal and direct liability."

The fact is that they did not sue at law, and if they had based this suit on the theory of personal and direct liability they would have had no standing in equity. Counsel for appellee now say that the authorities sustain the direct liability theory in cases similar to the case at bar. We do not so read the cases. It is true that personal judgments have been rendered in such cases, but such judgments are based on the existence of a trust fund and on the disposition, misapplication, or conversion of such fund. Moreover, such judgment cannot exceed the amount of the fund.

That was the conclusion of this court upon the former submission. After reciting the facts Judge Stone, speaking for the court, said:

"The legal result of such transactions is to impose upon appellant liability, up to the value of such assets, to the creditors of the Coffeyville Company."

Counsel for appellee now contend that the cases cited in support of that conclusion sustain the theory of direct liability, without regard to the value of the property received. That contention makes a reexamination of the controlling decisions necessary.

In the case of Hibnernia Ins. Co. v. Transportation Co. (C. C.) 10 Fed. 596, 599, the court said:

"A corporation, having incurred liabilities, is dissolved, practically, by transferring all its property to another corporation, formed possibly for the very purpose of leaving the creditors of the former (creditors at large) without any adequate means of realizing their just dues. * * * If the new corporation knew, as charged, that the demands against the old were outstanding, and with that knowledge received all the property of the old corporation without consideration, why should it not be held to have acquired that property cum onere? * * * Here it is charged that the new corporation took all of the property of the old without consideration, charged with full notice of plaintiff's demands, and therefore, as to this plaintiff, fraudulently. It may be that serious embarrassments will ensue, pending the litigation, if the lis pendens is to hang over the new corporation concerning its rights in the transferred property. Of course, it is answerable to plaintiff's demands only to the extent of the property received; and if any serious detriment as to the use or disposal of the same should arise, the court is open for such orders as may preserve the rights of the parties pending the litigation."

In the case of Harrison v. Union Pacific Railway Co. (C. C.) 13 Fed. 522, 525, the court said:

"The cross-bill alleges and the demurrer admits that the Consolidated Company has received from the Kansas Pacific Company all its property, amounting to more than $10,000,000, and that the original corporation has practically ceased to be, and is merged in the Consolidated Company, having now no officers upon whom service can be made, and no property out of which an execution can be satisfied. We are of the opinion that, under such circumstances, the Consolidated Corporation is liable in equity for the debts of the original corporation, at least to the extent of the value of the property received from it."

In the case of Brum v. Merchants' Mutual Insurance Co. (C. C.) 16 Fed. 140, 143, the court said:

"As the Home [Insurance Company] took all the property of the old company, leaving nothing to pay the amounts due libelants, and as it took them, not as creditors, but as owner, it seems clear to me that it must pay the debts of the old company, at least to the amount of the assets converted."

The point involved here was fully discussed in three opinions in the case of Boyd v. Northern Pacific Railway Co. A very painstaking opinion was written by District Judge Whitson, who tried the case. It is reported in 170 Fed. 779. On page 794 he said:

"Complainant's counsel invoke the doctrine of equity that the assets of a corporation constitute a trust fund for the payment of its creditors. This, of course, is not disputed, but a distinction is pointed out between the personal liability of a transferee in such a case and the right of a creditor to follow the property transferred. Thus the defendants' position is stated:

" 'When, on October 1, 1888, the Cœur d'Alene Company leased its property for 999 years to the railroad company, the rights of the creditors of the former company as against that property remained just what they were before. The Cœur d'Alene Company could not diminish or impair those rights by making the transfer, and the property remained subject to the claims of creditors upon it; and if at any time prior to 1893 the plaintiff had pressed his claim to judgment the property could have been sold (subject to mortgages upon it, but freed from the lease) to satisfy that judgment.'

"If counsel have appeared to dispute concerning the rule, it may be gathered from the briefs that there is no substantial controversy between them. Defendants' counsel admit that the transferee of the property of a corporation is liable to account to the creditors of the transferring company, but limits the remedy to the property transferred, while complainant's counsel apparently have not intended to be understood as claiming a liability for the payment of indebtedness beyond the assets taken over. But, if they have been misunderstood in that regard, it must be held that there is no personal liability, except where property has been disposed of, misapplied, or converted. The general trust doctrine would not permit of a more extended application, but the personal liability of one who fails to observe the duty imposed, when the assets of a corporation come into his hands, is abundantly sustained by authority."

In the same case in the Circuit Court of Appeals for the Ninth Circuit, 177 Fed. 804, 820, 101 C. C. A. 18, 34, Circuit Judge Gilbert, speaking for that court, said:

"The purpose of the present suit is to deprive one of the parties to the foreclosure suit of a benefit which it derived under the decree therein. It is to require the railway company, which obtained the property as a result of the decree and the agreement and understanding of the parties whereon it was based, to devote a portion of the property so obtained to the payment of the

claim of one who was equitably entitled to receive the same out of the property so transferred."

Upon one branch of the same case (228 U. S. 482, 500, 33 Sup. Ct. 554, 559 [57 L. Ed. 931]) Mr. Justice Lamar, speaking for the Supreme Court, said:

"Being liable for this diversion of $465,000, the Northern Pacific Railroad remained so liable until the funds were restored to the true owner."

Upon another branch of the case (228 U. S. on page 508, 33 Sup. Ct. 561 [57 L. Ed. 931]) he said:

"If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever."

In the case of Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811, 822, 120 C. C. A. 121, 132, this court said:

"But a sale or transfer by stockholders of the property of their corporation in which they preserve an interest, whether that sale or transfer be by deed, by mortgage, by judgment, by foreclosure sale, or by any other means, is fraudulent and voidable against the unsecured creditors of their old corporation, and a purchaser who takes and converts such property to its own use with knowledge of the facts becomes legally liable to pay the unsecured debts of the old corporation, at least to the extent of the value of the property so taken and converted."

In the same case (210 Fed. 696, 703, 127 C. C. A. 184, 191) this court said:

"Moreover, the property of the Belt Company was a trust fund. The stockholders of that company were trustees charged with a duty to apply that property to the payment of the claims of the Trust Company and of the other creditors of the Belt Company before they took to themselves any share in or benefit therefrom. When the Southern Company took their stock and gave them $4,750,000 par value of its stocks and bonds for their interest in the property of the Belt Company, it stepped into their shoes and became a trustee for the creditors of the Belt Company, with plenary notice that the interest of those creditors in the property was at least as much as the value of the stocks and bonds it was giving for the interest of the stockholders, for the rights of the creditors in the Belt property were prior and superior to those of the stockholders."

On page 706 of 210 Fed., on page 194 of 127 C. C. A., in the same case, this court said:

"Moreover, where the property of a corporation is sold to a purchaser, and part or all of the purchase price thereof is paid or distributed to its stockholders, to the exclusion of its creditors from a collection of their debts from the property of the corporation, the latter may recover that part of its value from the purchaser with notice, on the ground that the conveyance is fraudulent in law."

In the same case, on page 709 of 210 Fed., on page 197 of 127 C. C. A., that court quoted from the opinion in Clements v. Moore, 6 Wall. 299, 312, 18 L. Ed. 786, as follows:

"A sale may be void for bad faith, though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys reck-

lessly, with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts, and, giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the underprice which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller, it may hold him excused from further responsibility. The cardinal principle in all such cases is that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud."

In the case of Kansas City Railway v. Guardian Trust Co., 240 U. S. 166, 173, 36 Sup. Ct. 334, 335 (60 L. Ed. 579), the Supreme Court, speaking through Mr. Justice Holmes, says:

"The Court of Appeals thought it plain that the foreclosure was part of the original plan; and, as it also thought that the mortgaged property was worth enough above the mortgage to pay the unsecured creditors, it held that the stockholders when receiving pay for their stock were receiving it in substance as the proceeds of a transaction that removed all property of the Belt Company from its unsecured creditors' reach."

[5] These authorities fully sustain the view that all the property that came into the hands of appellant belonging to the Coffeyville Window Glass Company constituted a trust fund for the payment of the debts of the latter company.

[6] They also sustain the view that, the appellant having converted that property to its own use, personal judgments may be obtained against it by creditors of the Coffeyville Window Glass Company to the amount of the value of the property.

[7] The testimony does not warrant the finding that appellant is a continuation of, nor merged into, the Coffeyville Window Glass Company, in the sense that would make the latter identical with the former, and the former liable for the latter's debts beyond the value of property received.

The Coffeyville Window Glass Company ceased to manufacture glass at Coffeyville on account of the failure of natural gas. It removed all of its property that could be removed advantageously to Okmulgee, Okl., where natural gas could be obtained. Its stockholders organized an Oklahoma corporation. The property of the Kansas corporation constituted the basis of capitalization for the Oklahoma corporation. The Kansas corporation was then dissolved. Some of the old stockholders sold all or a portion of their interest in the new corporation. Additional property was added which was made the basis for an increase of stock. The Oklahoma corporation became a distinct legal entity, charged with a limited liability to the creditors of the Kansas corporation.

There was no express assumption by the Oklahoma corporation of appellee's debt, nor does the testimony warrant the finding that there was an implied assumption. On the contrary, the testimony of appellee himself is to the effect that appellant refused to recognize his contract, or to pay the amount that had accrued thereon.

Otherwise than as qualified herein, we are satisfied with the language of the former opinion, and after full consideration agree with the result there stated, except that we are now convinced that appellee is entitled to a personal judgment only, and not that such judgment should be declared a lien on appellant's property.

Therefore the case will be reversed, with instructions to enter a decree for appellee for the sum of $19,410.86 and costs. It is so ordered.

STANDARD SEWING MACH. CO. OF OHIO v. JONES.

(Circuit Court of Appeals, Third Circuit. August 11, 1919.)

No. 2428.

1. PATENTS ⊜216—LICENSES—CONSTRUCTION OF CONTRACT.
   A contract by which a manufacturer of sewing machines granted the exclusive right to sell its machines on commission in a specified territory, which contained no reference to a patent on the machines, *held* not a contract of license, but one of agency, which did not give the manufacturer a right of action for infringement on account of sales by the agent outside of his territory.

2. PRINCIPAL AND AGENT ⊜81(4)—AGENCY TO SELL ON COMMISSION—SUIT FOR COMMISSIONS.
   Under a contract by which complainant was given exclusive right to sell sewing machines made by defendant on commission in a specified territory, and in which he agreed during the term not to sell or deal in any machines made or sold by any other concern, a sale by him of machines made by defendant outside of his territory, whether the property of defendant or another, was a breach of his contract, and he is not entitled to commissions on such sales.

Appeal from the District Court of the United States for the Western District of Pennsylvania; W. H. S. Thomson, Judge.

Suit in equity by Simeon M. Jones against the Standard Sewing Machine Company of Ohio. Decree for complainant, and defendant appeals. Modified and affirmed.

Sion B. Smith, of Pittsburgh, Pa., for appellant.

Ed. B. Scull, of Pittsburgh, Pa., for appellee.

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

WOOLLEY, Circuit Judge. In 1905, Jones, the plaintiff below, entered into a written contract with the Standard Sewing Machine Company of Ohio, the defendant below, whereby he was given the exclusive right to sell on commission, in a specified territory, sewing machines of that company's manufacture. The territory covered by the

contract included inter alia the State of West Virginia. It did not include the cities of Pittsburgh and Philadelphia.

The contract was extended by renewals to March 31, 1910, on which date it expired by its own limitation.

In 1908, the Standard Company, with the acquiescence of Jones, entered into a contract with Lloyd Souders & Company, a copartnership, giving that firm the exclusive right to sell its machines in the State of West Virginia. This contract is similar in its main features to the contract with Jones, but differs from it in two particulars, first, in restricting the exclusive territory to the State of West Virginia, and, second, in requiring that firm to sell within the term of the contract "or to purchase for their own account 500 Standard machines." In return for relinquishing West Virginia as a part of his exclusive territory, the Standard Company undertook by an oral agreement to pay Jones two dollars on each machine which Souders & Company sold or purchased under their contract.

This contract, like the one with Jones, was extended by renewal to March 31, 1910.

In June, 1910, Jones brought this action against the Standard Company for an accounting and for the recovery of commissions earned and withheld from him for machines sold under the written contract, although evidence was admitted and the case was tried as though he had declared on the oral contract also. By its answer, the Standard Company traversed all material allegations in the bill, and, by cross-bill, brought a counter-action against Jones for damages, based on facts, which, in so far as they are not disputed, are as follows: By the first of the year, 1910, Souders & Company had sold but 190 of the 500 machines they had undertaken to sell or purchase within the term of their contract. It was evident they could not sell the remaining 310 machines before the contract would expire on March 31, following. Souders & Company were anxious to be released from their contract and the Standard Company was disposed to accede to their desire. But Jones, who had surrendered his West Virginia territory to Souders & Company in consideration of a commission of two dollars a machine payable by the Standard Company, on the contract number of 500 machines, insisted, for obvious reasons, that the Standard Company enforce the contract. The Standard Company thereupon demanded of Souders & Company the performance of their contract. This placed Souders & Company in a difficult position, for they could not sell the machines in the few remaining months of the contract, and, being without funds, they could not purchase them for their own account. Jones came to their rescue, and on his representation that he could sell the machines for them in the East, Souders & Company set about to purchase them. But this was fraught with difficulties, both legal and financial. Jones still was the agent of the Standard Company with exclusive territory that did not embrace the East. The sale of Standard machines by him outside of his territory, while his contract was in force, suggested, at last, a breach of his contract. The Standard Company would not sell Souders & Company this large number of machines unless they paid for them on delivery. Souders &

Company were without funds to meet this requirement. To perform their contract Souders & Company had to borrow money. To get money, they entered into negotiations with Highland, a local banker, and obtained from him a promise to advance money to pay for the machines on the presentation of bills-of-lading. But Highland imposed as a condition of his money advances that he first be shown orders for the resale of the machines.

To meet the conflicting requirements of this circuitous transaction, the resale of the machines, evidenced by written orders, was a primary essential. To effect this, Jones began negotiations with Spear & Company in Pittsburgh and Gimbel Bros., in Philadelphia for the purchase of the 310 machines which Souders & Company were bound to take under their contract. These negotiations, indisputably commenced by Jones in February or March when under contract with the Standard Company, were completed by him in March, with his contract still in force, or in April, after his contract had expired, according as the conflicting testimony on this disputed point is believed. Spear & Company at Pittsburgh ordered and received 80 machines and Gimbel Bros. at Philadelphia ordered and received 230 machines.

In the territory of one or both of these transactions, the Standard Company had agents under similar contracts for exclusive territory, the agent in Philadelphia being John Wanamaker. When Gimbel Bros. put the Standard machines purchased through Jones on sale at cut rates, the Standard Company was forced to protect its contract with Wanamaker by taking the machines off the market. To do this, it purchased the machines from Gimbel Bros. (and likewise from Spear & Company) at prices and under an expense that caused it a loss. The Standard Company then brought the counter-action against Jones by its cross-bill in this case, whereby it seeks several recoveries on one ground. It alleges that Standard machines, the subject matter of its contracts with Jones and Souders & Company, were patented machines; that these contracts for the sale of patented machines were, therefore, patent licenses; and that Jones, in selling the machines outside of his exclusive territory, exceeded his license and infringed the patent. By the prayers of the cross-bill, the Standard Company asks for a decree finding infringement; ordering a disclosure of all sales made; directing an accounting for profits; and finally, awarding (1) damages for the infringement, and (2) "all damages * * * arising out of his (Jones') breach of contract as aforesaid."

The District Court allowed Jones commissions, inter alia, on these sales and disallowed damages to the Standard Company. The Standard Company appealed.

The confusion in this case will disappear when the true character of the contracts with Jones and with Souders & Company is determined and if the two contracts are kept separate and distinct throughout the discussion.

[1] The Standard Company maintains that, under a proper construction, both contracts are license agreements. This contention is based on the single fact that the subject matter of the contracts is (in part) patented articles, namely, sewing machines manufactured

under a patent. There is nothing in the contracts to suggest that they are license agreements beyond the circumstance that a part of their subject matter is patented articles. They contain no reference to the patent under which the machines were made and no reference to the machines as patented articles. The silence of the contracts on the subject of patents, patent rights, licenses and royalties, leads us to believe that it did not occur to the parties, or to any one of them, that they were entering into license agreements. If these contracts are to be construed as license agreements, it can only be upon the bald fact that a part of the articles covered by the contracts were patented, and that too, without regard to whether that fact was known to both parties. We are not familiar with any law that raises an agreement of license by implication from the single fact that the subject matter of the contract is patented. The minds of contracting parties must meet in a license agreement just as in any other agreement. Whatever may be their real nature, the contracts, manifestly, are not agreements to share in a patent monopoly.

True, five years after the original contract had been made with Jones, and on the eve of the expiration of both contracts, the Standard Company endeavored by correspondence to impress upon the two contracts the character of license agreements by claiming a patentee's control over the sale of the patented articles. But the character of a contract cannot be changed or its terms be varied by an interpretation asserted by one party and not acquiesced in by the other months after the contract has been made and in part performed. To be a contract of license, it had to be such when it was made, or it is not a contract of license at all. We are satisfied that the contracts in this case are not license agreements; and, in consequence, there is not involved in this case the law of patents. It follows, therefore, that the District Court was right in reversing the master's finding of infringement and his allowance of damages for infringement.

Not being license agreements, what are the two contracts? It is very clear that they are simple contracts of agency, whereby the agents, though given an exclusive right to sell the principal's articles of manufacture in their respectively specified territories, are restricted in their sales to those territories. This construction is applicable alike to both contracts, in so far as they involve sales on commission. We are not presently concerned with a construction of the contract with Souders & Company for the purchase of machines for their own account.

[2] Turning to the Jones contract, Jones contends that the award of exclusive territory to him was for his advantage alone; that it was intended only to protect him against competition in the sale of the same articles in his territory; and, that, the contract being in this sense unilateral, he was free to go everywhere else and sell the articles of his principal in competition with his principal's other agents. We do not regard this contention as sound. Manifestly, the contract involves mutuality and imposes upon the agent, in consideration of the exclusive territory granted him, the duty to limit his activities to that territory. This interpretation applies equally to

the exclusive territory features of both contracts in so far as they relate to the sale of machines on commission.

It is conceivable that another aspect of the case can arise with reference to that part of the contract with Souders & Company which required them to purchase for their own account all of the 500 machines they had not sold on commission. But this phase of the contract would require consideration only if it were found that Jones and Souders & Company had disposed of the machines after the expiration of their respective contracts on March 31, 1910, and also, if this were an action by the Standard Company against Souders & Company, instead of being, as it is, a counter-action against Jones. We shall, therefore, address our discussion solely to the Jones contract and to the liability of the parties therein one to the other.

The question of liability growing out of the Jones contract revolves around the thirty-first day of March, 1910, the date of its expiration. If the Standard Company sold Souders & Company the 310 machines after its written contract with Jones had ended, whatever may be Jones' rights under his oral contract with the Standard Company, he cannot recover commissions on that sale. If Jones sold Souders & Company's 310 machines to Spear & Company and Gimbel Bros., after March 31, 1910, that is, after his contract of agency had ended, he cannot be called upon by the Standard Company to respond in damages for a breach of an expired contract. After March 31, all contractual relations between the Standard Company and Jones ceased and neither was liable to the other for commissions or in damages for acts that followed. If the two sales were made before March 31, 1910, that is, when both contracts were in force, an altogether different situation is presented, entailing different legal consequences. The central question of fact, therefore, is, when were the sales made?

Just the precise date on which the sales were made does not appear in the testimony. There is evidence by the purchasing agent of Gimbel Bros. that negotiations were begun by Jones in the latter part of February or the early part of March and that, acting for Gimbel Bros., he gave Jones an order for the machines in the latter part of March. It is not disputed that Souders & Company ordered the machines of the Standard Company on March 15th. Highland, the banker, testified that he financed the "sewing machine deal about March, 1910," negotiations for which were begun by Souders & Company "in the early part of the year," and that the condition precedent to his money advances was the resale of the machines. The machines were delivered to Souders & Company and thence transshipped to Spear & Company and Gimbel Bros. on different dates in April and May. On this evidence, very briefly recited, we are forced to a finding opposite to that of the learned trial judge. As we read the evidence, it appears to us that the sale of the machines by the Standard Company to Souders & Company and the sales by Souders & Company through Jones to Spear & Company and to Gimbel Bros. were made in March while Jones' contract with the Standard Company still was in force, though deliveries on the several sales were not made until after the contracts had expired.

It is contended by Jones that, if this be true, any breach of contract here involved must have been a breach by Souders & Company of their contract and could not have been a breach by him of his contract, because the machines sold in Pittsburgh and Philadelphia were Souders & Company's machines and the sales were made by Souders & Company in violation of the exclusive territory provision of their contract and not of his contract. In proof of this he urges, that there could not have been two contracts with West Virginia as exclusive territory. We are not impressed by this contention because Jones is not charged with violating his contract by selling outside of his surrendered territory of West Virginia. He is charged with violating his contract by selling outside of the exclusive territory that remained to him after he had surrendered West Virginia to Souders & Company. He sold Standard machines and he sold them outside of his territory. The test of his liability for doing this, when his contract still was in force, is the ownership of the machines he sold. Who owned them? If the Standard Company, Jones violated his contract of agency by disregarding the fiduciary relation between himself and his principal and by violating the rule of good faith and loyalty which that relation imposes. If Jones sold machines of his principal outside the territory to which he was restricted, manifestly he can not recover commissions for their sale. Were the machines, when sold by Jones to Spear & Company and Gimbel Bros., the property of Souders & Company? Jones says they were, and on their ownership he bases his case. If this be true—and we regard it as true on Jones' concession only for the purpose of discussion—then we find, by referring to the contract, that Jones clearly committed a breach of his written contract which bars him from receiving commission on the sale to Souders & Company under his related oral contract. The contract provides that:

"Party of the second part [Jones] agrees that *during the life of this contract he will not sell or deal in, directly or indirectly,* sewing machines or machine merchandise manufactured or *sold* by any other concern than the party of the first part" [The Standard Company].

Now, what Jones did "during the life of this contract" was "directly" to "sell (and) deal in" sewing machines "sold by (another) concern." The other concern was Souders & Company. Jones sold their machines to Spear & Company and Gimbel Bros., as we find, during the life of the contract. In doing this, he committed a breach of this express provision. Certainly he is not entitled to commissions on sales involved in that breach.

Finding that Jones committed a breach of his contract during its life, by selling outside of his territory, Standard machines which were the property either of the Standard Company or of Souders & Company, we are constrained to reverse that part of the decree of the court below allowing commissions on the sale of these machines and interest on these commissions.

But this breach of the contract by Jones does not deprive him of a right to recover in this action commissions earned on previous sales

and withheld from him, unless, indeed, such recovery is barred, in whole or in part, by a counterclaim of the Standard Company for damages arising from Jones' breach of the contract, as a contract of agency, not as a license agreement. On this matter we express no opinion, as it is not raised by the appeal.

It is clear, however, that the damages awarded the Standard Company by the Master and disallowed by the District Court were based not on a breach of the contract as a contract of agency but on a breach of the contract as a license agreement. Therefore, in formulating a decree on this appeal, we could not—even were we so disposed—direct that the damages found for infringement shall be awarded the Standard Company as damages for the breach of the contract of agency. Nor are we satisfied that, under the pleadings in this case as they stand, damages for the breach of his contract of agency could be proved against Jones and allowed the Standard Company, because the damages the Standard Company seek by its cross-bill are such as arise only from infringement; except, it may be, as to one prayer, which is as follows:

"That the said defendant Jones be required to pay all damages to plaintiff arising out of his breach of contract as aforesaid."

This is a prayer to a cross-bill which sets up the contract and alleges the breach. The prayer as made is poor pleading in that the orator leaves the court to guess its meaning. But for the words "as aforesaid," the prayer might be construed to ask for damages for the breach of the contract whatever its character; but by the use of these words in referring to the breach of contract, we are forced to the conclusion that the breach so referred to is the breach of a contract which the orator interpreted in its cross-bill as a contract of license. As we read the bill, we find no charge of a breach of the contract of agency, and no prayer for damages arising therefrom.

We have given the remaining assignments of error careful consideration and find no errors. We affirm the decree of the court below except in the one matter in which we have indicated reversal. We leave with the trial court the fixation of all costs incurred and to be incurred in the trial, and impose the costs of this appeal upon the appellant and the appellee in equal proportions.

PETROLEUM RECTIFYING CO. OF CALIFORNIA v. REWARD OIL CO.*

(Circuit Court of Appeals, Ninth Circuit. August 4, 1919. Rehearing Denied October 14, 1919.)

No. 3219.

1. PATENTS ⊂=328—INFRINGEMENT.
The Cottrell and Speed patents, Nos. 987,115 and 987,116, for a process and apparatus for separating and collecting particles of one liquid suspended in another, *held* valid and infringed.

2. PATENTS ⊂=157(3)—CLAIMS—CONSTRUCTION.
The term "short circuiting" in a patent claim, if susceptible of two meanings, should be given the meaning which the specifications show it was intended to have, if that meaning is not repugnant to the terms used.

3. PATENTS ⊂=157(2)—CONSTRUCTION.
A pioneer process patent, which has been extensively used, should receive a fairly liberal construction to uphold it.

4. PATENTS ⊂=328—CLAIMS—"SHORT CIRCUITED."
The term "short circuiting," as used in Cottrell and Speed patents, Nos. 987,115 and 987,116, for separating and collecting particles of one liquid suspended in another by electricity, means a total short-circuiting, and not a succession of minute short circuits.

5. PATENTS ⊂=118—PROCESS—SETTING OUT SCIENTIFIC BASIS.
It is not essential that patentees should either understand or set forth the scientific principle on which the patented process operated.

6. PATENTS ⊂=253—INFRINGEMENT.
A defect in a patented process cannot be predicated upon defects in a patented apparatus intended to apply the process, nor is the fact that the patentee's first apparatus was defective any reason for denying protection to a subsequent apparatus.

7. PATENTS ⊂=253—INFRINGEMENT.
The defendant's infringement of plaintiff's process is not excused by the fact that defendant's apparatus is distinctly superior to plaintiff's apparatus.

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

Suit by the Petroleum Rectifying Company of California against the Reward Oil Company. From a decree dismissing the bill, plaintiff appeals. Reversed and remanded, with directions.

John H. Miller, of San Francisco, Cal., F. P. Fish, of Boston, Mass., and J. H. Brickenstein, of Washington, D. C., for appellant.

William K. White, of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellant brought suit in the court below for infringement of patents. Upon the issue of infringement that court found for the appellee and dismissed the appellant's bill.

The appellant is the assignee of patents granted on March 21, 1911, to Cottrell and Speed, numbered, respectively, 987,115 and 987,116, the first of which is for the process of separating and collecting particles of one liquid suspended in another liquid, and the second is for apparatus by which the process is carried out. The invention

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*For opinion below, see 260 Fed. 183. Certiorari denied 250 U. S. —, 40 Sup. Ct. 119, 64 L. Ed. —.

relates to the elimination of water from crude petroleum as it comes from wells. The specifications say:

"There is a large class of oils that cannot be economically freed from water without distillation. These are largely oils in which the water is in very small globules, often less than one-thousandth of an inch in diameter, and behaving as if surrounded with a membrane resisting coalescence of the drops. * * * Many natural petroleums as taken from the wells contain from ½% to 50% of water in the form of small drops (i. e., emulsions), and after being allowed to stand for months still hold a great proportion of the water in suspension."

The specifications go on to say that the inventors had found that, when these emulsions are subjected to the action of high potential electric charges in the manner thereinafter described, they are rapidly de-emulsified, the water settling to the bottom of the vessel, collecting into large masses, which can be readily withdrawn, leaving the oil dry.

The process involved in the invention, as shown by the specifications, is substantially this: Oil loaded with water in the form of minute globules is passed between two electrodes separated at a proper distance, the electrodes being connected to a source of electricity of sufficiently high potential to create between the electrodes an electrostatic field, or field of electric strain, which will cause the minute globules of water to conglomerate and coalesce until they become so large that they will settle out from the oil by gravity. For present purposes it is sufficient to quote the first claim:

"The improvement in the art of separating and collecting particles of one liquid suspended in another, which latter is essentially a nonconductor of electricity, consisting in bringing the material to be treated between electrodes connected to a source of electricity of sufficient voltage to produce coalescence of the suspended particles in such wise as to cause the rapid separation of the two liquids throughout the body of the mixture, and at the same time prevent the coalescing globules from forming complete chains, short-circuiting the electrodes."

The appellee, operating under a patent issued October 26, 1915, No. 1,158,253, for "Process of Dehydrating Oil," removes the moisture from oil by passing the oil between electrodes connected to a source of electricity of sufficient voltage to cause the suspended particles to coalesce in such wise as to produce rapid separation of the two liquids throughout the body of the mixture. But the appellee contends that it does not infringe the appellant's patent for the reason that it does not prevent the coalescing globules from "forming complete chains, short-circuiting the electrodes." Therein is the whole ground of controversy in the present suit. In both processes there are the electrodes, the sufficiently high voltage to produce coalescence of the moisture, and to separate the same from the oil. The only question is whether the operations involve different methods of electrical action. In the application for the McNear and Bowles patent reference was made to the appellant's patent as follows:

"Said patentees [Cottrell and Speed] relied upon the electromotive force only to break down the oil partitions between the water globules, and took especial pains to prevent short-circuiting between the electrodes, and, indeed, their inventions consisted wholly in the prevention of short-circuiting. We have discovered that far better results are obtained by relying, not upon

electromotive force, but upon heat as an agent to produce coalescence between the water globules, this heat being produced by the passage of the very large electric current which is produced by short-circuiting, the amount of heat being such as to convert water globules in the path of the current into steam, and by said conversion breaking the electric current in said path."

This fanciful explanation of the effect of the current in the appellee's process may be pardoned in view of the fact that neither the patentees of that patent nor any expert witness was able to say just what does occur in the mass of the fluid when under treatment in either process. The theory that in the appellee's process the water globules are by the electric current converted into steam is not established by evidence, and is discredited by the appellee's expert witnesses. The defense of noninfringement, therefore, rests upon the appellee's contention that in the appellant's process there is no passage of electric current from one electrode to another, and that the dehydration of oil accomplished therein is the result of the maintenance of an electrostatic condition in the fluid between the two electrodes, whereas in the appellee's process the dehydration is accomplished by the passage of currents of electricity from one electrode to another. In other words, according to the appellee, it is essential to the appellant's process that short-circuiting be avoided, while it is essential to the appellee's process that short-circuiting be produced. We are led, therefore, to the inquiry what is short-circuiting as referred to in the appellant's claims, and what is the proper construction of the appellant's claim where it provides for a source of electricity of sufficient voltage to prevent the coalescing globules from forming complete chains short-circuiting the electrodes.

[1-4] It is clear that the appellant's process contemplates the formation of chains of globules of water between the electrodes, and their disruption by electric current as soon as formed, and that the limitation of the claim is only that the chains shall not be of such number and dimensions as to afford transit through the fluid of sufficient of the electric current to short-circuit the same, and thus render the current ineffective in the process. The inventors believed that such chains were formed, and that the success of their process depended on the creation and destruction of them. Their specifications show that they had in mind the fact that between the electrodes water globules in the oil would immediately commence to arrange themselves in chains, extending out from each electrode to the other, and that in order to prevent the formation of short circuits within the liquid, due to chains of water globules forming from one electrode to the other, it was necessary to prevent the potential difference between the electrodes from falling too low to produce the disruptive forces, either electrostatic or thermal, which the high potential exerts on the chains of water. They said:

"If the potential falls too low, then * * * permanent electrolytically conducting chains are established between the electrodes, thereby reducing the potential difference of the latter still more, and wasting a part of the supplied energy in useless heat of electrolytic conduction."

The appellee's expert witness Johnson admits that in the appellant's process momentary or instantaneous chains are formed bridg-

ing the electrode gap, but he was of the opinion that these chains were broken mechanically by the movement of the oil and the movement of the electrodes, and not by an electrolytically conducted current. This opinion was expressed upon his understanding that the oil was in more rapid movement in the appellant's process than in the appellee's, and that the electrodes in the appellant's patent were not stationary as in the appellee's process, but revolved. He admitted, however, that if the current moved at the same rate of speed in both, and both had stationary electrodes, their operation would be the same. The expert witness and the court below seem to have fallen into the error of assuming that the inner electrode of the appellant's patent revolved. As described in the patents in suit, the inner electrode is stationary. It was in a subsequent patent issued to Cottrell and Wright, and assigned to the appellant, not involved in this suit, that a revolving electrode was disclosed.

But the question here is not a question of difference of apparatus or difference of speed with which the oil is conducted through the same. It is simply the question whether or not the appellee's process can be read upon the appellant's claims. There is no mention in any of those claims of any mechanical means for preventing short-circuiting. There can be no doubt, we think, that the appellee prevents short-circuiting in the same manner and for the same purpose, if not to the same degree, as does the appellant. The degree is unimportant. It is obvious that neither the appellant's nor the appellee's process will work if the current is entirely short-circuited. It is necessary in both to maintain a high voltage, and to permit the passage from one electrode to the other of small portions only of the current. That the appellee maintains such high voltage is indicated by the oscillographs taken by its own expert. These show that during the process there is no lowering of the potential to such a degree as to make the process inoperative, but that there is at all times sufficient electric charge in the electrodes to maintain the necessary electric strain. Professor Cory, expert witness for the appellee, testified concerning the appellee's treaters:

"I am not at all desirous of saying that I know exactly what occurs in any of these treaters. I do know this, that in the operation of the treaters * * * an emulsion is delivered into the treater, and that a difference of potential is applied to the electrodes, that that difference of potential produces short circuits between these electrodes, that these short circuits could only occur because of the formation of chains of water globules between the electrodes, and that as a result the water is definitely separated from the oil and is drawn off."

Evidently the witness meant that in the process momentary short circuits were produced, but not a total short circuit; for there is no suggestion in his testimony or in any of the evidence that in the appellee's treaters the potential of the charge ever falls so low as to diminish the electric strain between the electrodes to a point where coalescence of the water globules ceases.

The term "short-circuiting" in the appellant's claims, if susceptible of two meanings, should be given that which the specifications show it was intended to have, if that meaning is not repugnant to the plain and clear terms used. Cottrell and Speed were the first to discover

the process of dehydrating oil by electricity. Their invention went into large and extensive use. For a time it was used by the appellee under a license. Prof. Cory states that so far as he knows it is a pioneer invention. It should receive a fairly liberal construction—a construction that will uphold rather than destroy. The construction given the term "short-circuiting" by the court below is, we think, erroneous. What the inventors meant by the term was a total short-circuiting, and not the succession of minute short-circuits snapping from one electrode to another, whereby dehydration is accomplished in both the appellant's and the appellee's process. The claims of the appellant's patent must be read in the light of the invention as disclosed in the specifications. It appears therefrom that the inventors recognized the essential value of the formation of chains between the electrodes and the instantaneous disruption of the chains by electric current, and at the same time the necessity of maintaining the potentiality of the main current, and that it was to express that necessity that they inserted in the claim the caution against such short-circuiting of the current as to interfere with the process. They realized that the momentary passage of short currents between the electrodes would not "short-circuit" their current in the sense in which they used that term in their claims.

[5] But it was not essential that they should either understand or set forth the principle on which their process operated. In Andrews v. Cross (C. C.) 19 Blatchf. 294, 305, 8 Fed. 269, Judge Blatchford said:

"It may be that the inventor did not know what the scientific principle was, or that, knowing it, he omitted, from accident or design, to set it forth. That does not vitiate the patent. He sets forth the process or mode of operation which ends in the result, and the means for working out the process or mode of operation. The principle referred to is only the why and the wherefore. That is not required to be set forth."

In Eames v. Andrews, 122 U. S. 40, 55, 7 Sup. Ct. 1073, 30 L. Ed. 1064, the foregoing language of Judge Blatchford was quoted and approved. Professor Cory admitted his want of definite knowledge as to what occurs in the process. He testified:

"Q. As a matter of fact, aren't these water chains formed in the Cottrell process and immediately disrupted? A. I don't know. Q. In the McNear-Bowles process, is it not a fact that the chains are formed, and then immediately thereafter disrupted? A. I don't know. Q. Is it not a fact that that disruption takes place by the passage of the current through the chains? A. In all probability, but if you ask me to state definitely, I don't know."

He was of the opinion, however, that chains are formed in the appellant's process. He says:

"With the continuation of the electric forces between these particles, due entirely to electrostatic attraction and repulsion, sooner or later there will be many of these chains, and if that voltage is continued sufficiently a complete chain will be formed. Now, when that happens things have changed entirely from that existing at the beginning. A current flow begins to manifest itself."

The witness thus fairly describes the appellant's process, the theory of which is that, if the voltage is sufficiently high, chains are

formed and a current flow instantaneously occurs, which demolishes the chains, whereby the flow is arrested. That a variation in the current does occur in practice is shown in the appellant's specifications, which state that when the proper electromotive force is applied the ammeter will show "irregular variation" in the current, or "occasional momentary variation."

[6, 7] The appellee contends that the extensive use and great utility of the appellant's process is owing to the use of the rotating type of treater disclosed in the Cottrell and Wright patent assigned to the appellant, and not involved in the present suit, and that the inventions disclosed in the patents in suit are not operative. This contention is not sustained by the record. In the first place, the fate of the appellant's process patent is not linked with that of its apparatus patent. Risdon Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899; Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279. Said the court in Buffalo Forge Co. v. City of Buffalo, 255 Fed. 83, —— C. C. A. ——: "No process patent is in theory either helped or harmed by the excellence or worthlessness of the disclosed apparatus by which it is illustrated." Again, the evidence shows that it is not true that the first apparatus was a failure. A "treater" constructed under the apparatus patent in 1909 was in use for several years. The evidence is that it required readjustment, and that it was not perfect in operation, and that some three years later the appellant resorted to the use of treaters with revolving electrodes as disclosed in the Cottrell and Wright patent, and thereby increased the efficiency of the process from 15 to 25 per cent. No defect in the process patent, therefore, can be predicated upon defects in the apparatus patent, and the fact that the first apparatus was defective is no reason for denying protection to either the patented process or the apparatus. Mergenthaler Linotype Co. v. Press Pub. Co. (C. C.) 57 Fed. 502; Von Schmidt v. Bowers, 80 Fed. 121, 25 C. C. A. 323. If, as we have found, the appellee uses the appellant's process it is immaterial that, by improvements in structure of its apparatus, the appellee has so increased the efficiency of its machine that it marks a distinct improvement upon the appellant's apparatus. In Cochrane v. Deener, 94 U. S. 787, 24 L. Ed. 139, Mr. Justice Bradley, speaking of improvements made by the defendants, said:

"But it cannot be seriously denied that Cochrane's invention lies at the bottom of these improvements, is involved in them, and was itself capable of beneficial use, and was put to such use. It had all the elements and circumstances necessary for sustaining the patent, and cannot be appropriated by the defendants, even though supplemented by, and enveloped in, very important and material improvements of their own."

It follows that the appellee has infringed, in the form of treater first used by it, claims 1, 2, 3, 4, and 7 of process patent No. 987,115, and that in its second form of treater, the one now used, it infringes claims 1, 2, 3, and 7, and that in both forms of treaters the appellee has infringed claim 1 of the apparatus patent No. 987,116.

The decree is reversed, and the cause is remanded to the court below, with instructions to enter an injunction in accordance with the foregoing views, and for accounting.

PETROLEUM RECTIFYING CO. OF CALIFORNIA v. REWARD OIL CO.

(District Court, N. D. California, S. D. June, 1918.)

No. 302.

1. PATENTS ⟸157(2)—CONSTRUCTION TO GIVE VALIDITY.
   Every patent should, if it may, be so construed as to secure to the patentee a monopoly of what he actually invented or discovered.
2. EVIDENCE ⟸571(6)—PATENTS — SUIT FOR INFRINGEMENT — EXPERT EVIDENCE.
   On the issue of infringement proof of facts may not be met solely by expert speculation.
3. PATENTS ⟸231, 241—INFRINGEMENT—IDENTITY OF RESULTS.
   Identity of results obtained, irrespective of process or apparatus employed, is not proof of infringement.
4. PATENTS ⟸328—INFRINGEMENT—PROCESS AND APPARATUS FOR DEHYDRATING OIL.
   The Cottrell and Speed patents, No. 987,115 and No. 987,116, for process and apparatus for dehydrating oil, *held* not infringed by an apparatus which operates on a different theory.

In Equity. Suit by the Petroleum Rectifying Company of California against the Reward Oil Company. Decree for defendant.
Decree reversed 260 Fed. 177, — C. C. A. —.

John H. Miller, of San Francisco, Cal., for plaintiff.
William K. White, of San Francisco, Cal., for defendant.

NETERER, District Judge. Complainant seeks to enjoin the use by the defendant of a process and apparatus for dehydrating oil, claiming it to be an infringement of claims 1, 2, 3, 4, and 7 of process patent No. 987,115, and of claim 1 of apparatus patent No. 987,116, owned by complainant.

The defendant denies infringement; denies that the patents are valid; and alleges affirmatively that annihilation of emulsive condition by means of electric current is old in the art.

A claim does not seem to be asserted that the application of electric current to emulsive condition is new in the art. The Davis and Parrett patent of prior issue is an application of electric current to emulsive condition, but for a different purpose.

[1] Every patent should be construed, if it may be, so as to preserve to the patentee the privilege which the law grants to an inventor. Justice Brown, in Topliff v. Topliff, 145 U. S. 156, 171, 12 Sup. Ct. 825, 831 (36 L. Ed. 658), said:

"The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute, or by the application of artificial rules of interpretation."

And mere rigid technicalities are not to be resorted to by courts to avoid inventions. Brush Electric Co. v. Electric Imp. Co. (C. C.) 52 Fed. 965, 974.

[2] In the consideration of a charge of infringement it must not be forgotten that the burden of establishing infringement is upon the party charging infringement. It is a question of fact, and must be established by clear and convincing testimony, and proof of the fact may not be met solely by expert speculation. As was said by Judge Buffington in Fried. Krupp Aktien-Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 591, 112 C. C. A. 194, 197:

"The absence of actual fact proof is not met by the presence of expert speculations, no matter how voluminous."

Nor can a theory which has not been reduced to an operative relation support claim for patent. As was well said by Judge Coxe in Lovell v. Seybold Mach. Co., 169 Fed. 288, 290, 94 C. C. A. 578, 580:

"Claims should cover what the patentee has invented and not what he imagines he has invented."

[3] Nor can infringement be predicated on results obtained irrespective of process or apparatus employed. As was said in Marconi Wireless Telegraph Co. v. Kilbourne & Clark Mfg. Co. (D. C.) 239 Fed. 328, 354:

"The mere fact that the same result is obtained by the operation of an apparatus is not conclusive of infringement. Infringement cannot be predicated on results obtained, irrespective of the apparatus employed. The fact that the apparatus of the plaintiff, by 'broad tuning,' and the apparatus of the defendant in normal operation, secure the same result, does not signify infringement. * * * Results accomplished by mode of operation or function, separate from the means of mechanical devices, do not constitute infringement. * * *"

[4] The issue here is not complicated. The testimony consumed less than a week. The treaters operated under the patents of the respective parties at the several plants were visited by court and counsel, and the operation of the respective treaters observed. The treaters in operation were not identical with the apparatus described in the several patents. The testimony, however, related to the respective treaters in the present condition of operation, and it seemed to me the issue upon the trial was between the process and apparatus as employed. It was apparent upon the trial and there still is a certain mystery which does not seem to have yielded to scientific explanation with relation to just what does take place in the emulsion when the surface tension that keeps the individual particles of water apart is disrupted.

The plaintiff contends that the emulsion is subjected to the action of a powerful electric field, whereby the particles constituting the inner phase of the emulsion are caused to coalesce into larger masses, whereby they are easily separated from the oil. "The action is believed to be electrostatic or thermal." The defendant contends that the surface tension which keeps the individual particles of water apart are disrupted by electrolytic action in the electrostatic field.

The treater of both parties is cylindrical in shape, about nine or ten feet deep, and perhaps three feet in diameter. In the plaintiff's treater, mounted upon a shaft in the center, is a rotating electrode,

designed to prevent short-circuiting between the electrodes, due to the formation of chains of water globules, by agitating or stirring the emulsion, and thereby limit, retard, or break up the formation of the chains of water globules. The electrode in the defendant's treater consists of a number of discs of like size placed in the center of the treater, mounted upon a stationary shaft, which is suspended near the top of the treater upon insulated supports. These supports are immersed within the body of the oil under treatment. These electrodes are nonadjustable; are 19 inches in diameter; the opening of the annular length of the outer electrode is 18 inches in diameter. The distance from one outer electrode to the next is 18 inches. The electrode is so placed as to be one-half the distance, the spacing being uniform between each electrode.

Both treaters use the same high-tension current, apply apparently the same kind of treatment, differing in the mechanical formation of the electrodes. The emulsified material enters the plaintiff's treater at the top, through a pipe, and the downflow of the material operated upon by the rotating electrodes prevents the formation of chains of water globules, preventing short-circuiting between the electrodes; the first action of the emulsion, free from other influences, being the alignment of the water particles without coalescence, and the alignment of these various water particles into a chain makes a path of less resistance, short-circuiting the electric current.

The mode of operation of defendant's apparatus provides for an upward flow of the emulsion through the treater for the purpose of encouraging short-circuiting; a quiet flow, without churning action, being conducive of a coalescence of the water globules in the electrostatic field, inducing electrolytic action.

Much was said in the trial and upon argument as to what is meant by the term "short-circuiting." Without going into an extended discussion, I do not think that there can be any doubt, from the history of the patents, the language employed in the several patents, and the operation of the treaters, that the patentees meant electrolytically conducting chains without regard to the permanency of such chains or of the short circuits formed thereby. There is no doubt in my mind, from the evidence and observation of the several treaters, and the language employed in the patents, that it was the purpose and intent of the patentees of complainant's patents, and considered an essential step, to prevent the formation of complete chains connecting the electrodes, and thereby create a short circuit. In other words, the plaintiff's process was to obviate electrolytic conduction and to maintain the electrostatic field. Electrolytic conduction is incompatible with the maintenance of such field. Every intendment of the language employed in claims 1, 2, 3, and 4 in issue is conclusive, as each concludes with the statement: "At the same time prevent the coalescing globules from forming complete chains, short-circuiting the electrodes." And this is further emphasized by the rotating electrode apparatus provided by patent No. 987,117, and which is now in use on the plaintiff's treater, and was viewed at the time of the trial, in which it is stated:

"The usual processes of settling, and of centrifuging, are not wholly effective, and that of distillation is expensive and not entirely practical; hence the process disclosed in said former application (patent 987,115), which process for the better understanding of the present improvement need only be briefly stated as consisting in subjecting the emulsion to the action of a powerful electric field, by bringing it between highly charged electrodes, whereby the particles constituting the inner phase of the emulsion are caused to coalesce into larger masses, which may then be easily separated out, thus fulfilling a useful purpose in the art. In said former application the importance of preventing the formation of short-circuiting chains of particles was emphasized by pointing out the danger of allowing the active surfaces of the electrodes to emerge from the liquid, or even to come too close to the surface, for in such case there is a tendency for the partially agglomerated water to collect in the surface layers and cause short-circuiting of the electrode; also, by calling attention to the downflow of the material, which course prevents short-circuiting by obviating the danger of an accumulation of water-rich masses; and also by stating that in order to prevent the formation of short circuits within the liquid, due to chains of water globules forming from one electrode to the other, it is necessary to prevent the potential difference between the electrodes from falling too low. Our present improvement has to do with this important feature of preventing short-circuiting between the electrodes due to the formation of chains of water globules, and our invention may be stated to consist in a process of this general nature, wherein the emulsion, while passing through the electric field, is throughout its entire course agitated or stirred, in order to avoid short-circuiting by limiting, retarding, or breaking up the formation of the chains of water globules."

To my mind the conclusion is inevitable that the process of the defendant operates differently from the process of the plaintiff. If English language means anything, then the process of the plaintiff is electrostatic or thermal, without electrolytic action, while that of the defendant is electrolytic in the electrostatic field. There is no substantial identity, because that of the defendant expressly includes that which the plaintiff expressly excludes. I also think the testimony is practically conclusive that the treaters of the plaintiff, constructed pursuant to the specifications of plaintiff's patent in issue, were not of commercial or operative value, with the possible exception of some oils or emulsions. The testimony of the witnesses in support of such contention is strongly supported by the fact that the wetted septum arrangement provided for and disclosed in patent No. 987,114 was installed to take the place of one of the apparatuses in the two patents in issue, and also by the subsequent introduction of the operative rotating electrode apparatus covered by patent No. 987,117.

Claim 7 is limited to passing the material to be treated between the charged electrodes, *substantially as described* (italics ours), preventing the formation of complete chains of water globules, this being essential to the operativeness of the process covered by claim 7, and has the same status as claims 1, 2, 3, and 4. The novelty of claim 1 of apparatus patent No. 987,116 consists in placing the insulated support for the electrodes entirely out of contact with the liquid undergoing treatment, and in the defendant's apparatus the inner electrode is entirely below the surface of the liquid under treatment. Plaintiff has not sustained the burden imposed nor brought itself within the law applicable to the issue.

An order may be taken dismissing complainant's bill.

DAYTON ENGINEERING LABORATORIES CO. v. KENT.

(District Court, E. D. Pennsylvania. August 27, 1919.)

No. 1757, Dec. Sess. 1917.

1. PATENTS ⟸165—CLAIMS—CONSTRUCTION.
Patent claims will be interpreted not only with regard to the inventive merit involved, but also in view of the contribution to the general welfare.

2. PATENTS ⟸328—INFRINGEMENT.
The Kettering patent, No. 1,223,180, for an improved automobile ignition system, *held* not infringed in so far as it provides for a device to save electrical current during "dwells" or stoppages of the engine.

3. PATENTS ⟸185—CLAIMS—CONSTRUCTION.
The doctrine that an inventor is entitled to all which he has accomplished, irrespective of whether he fully grasped the scientific principles involved, must be given a practical application, and, while it protects him against the use of equivalents, it does not give the exclusive right to subsequent devices suggested by the invention.

4. PATENTS ⟸226—"INFRINGEMENT"—WHAT CONSTITUTES.
To constitute patent infringement the mode of operation must be substantially the same; the results must be the same in kind, or the purpose and function must be substantially alike in use.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Infringement.]

5. PATENTS ⟸226—USE OF INVENTIVE IDEA IN ANOTHER ART.
There is no infringement in borrowing an inventive idea from one art and applying it in the construction of a device for use in another art.

6. PATENTS ⟸328—AMENDMENT—NEW MATTER.
Claims of the Kettering patent, No. 1,223,180, for an improved automobile ignition system by regulating the flow of electrical current *held* not invalid upon the ground that this feature was new matter introduced by amending the application without a supporting oath.

7. PATENTS ⟸157(1)—CLAIMS—IRON COIL.
In the Kettering patent, No. 1,223,180, for an improved automobile ignition system, the words "iron coil" in the claims have the special meaning given in the application.

8. PATENTS ⟸328—VALIDITY—DISCLOSURE.
The Kettering patent, No. 1,223,180 for an improved automobile ignition system, in so far as it provides for regulating the flow of electrical current, *held* invalid upon ground there is no sufficient disclosure of how the result is to be accomplished.

9. PATENTS ⟸328—ANTICIPATION.
The Kettering patent, No. 1,223,180, for an improved automobile ignition system, *held* anticipated.

In Equity. Suit by the Dayton Engineering Laboratories Company against A. Atwater Kent, doing business as the Atwater Kent Manufacturing Company, involving patent No. 1,223,180, granted April 17, 1917, to Charles F. Kettering, for improvements in ignition systems. Decree dismissing bill.

Cyrus N. Anderson, of Philadelphia, Pa., and Kerr, Page, Cooper & Hayward, of New York City, for plaintiff.

Blount & Moulton and Cornelius D. Ehret, all of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. From the viewpoint of the plaintiff this case presents the very simple features of a need for an improved ignition system in automobile construction where the current supply is limited; the meeting of that need by the patentee through the contrivance of the device described in the patent application, and its commercial appreciation and acceptance as the supply of that need.

From the viewpoint of the defendants this hardship is felt. The defendants, in the effort which they were making to improve the ignition system which they were supplying, were given by the prior art the thought of introducing a nickel resistance coil, and made use of this as a feature of their improved system. This system had been designed without thought of plaintiff's system, and although it had been put in use for five years after application it was before the patentee's device had been patented or heard of by the defendants. The defendants' device, moreover, was designed and used in ignition systems in which the supply of current is not limited, but is renewed by means of an engine driven generator, and the resistance coil is not introduced for the purpose of stopping the flow of current, nor is a diminished current either desired or brought about in any real sense, as in plaintiff's device. The defendants in consequence protest against the upholding of any claims of the patent so broad as to forbid the use by others of "a tool of the art" as old and well known as "thermal resistance." The plaintiff, of course, repudiates any such claim, but, as the defendants obstruct the path of the patent claims only by the placement of a nickel coil, a finding of validity and infringement carries with it a denial of the right in any one, other than the patentee, to use a coil of any metal which acts as "a high temperature coefficient" resistant. The disclosures of the patent, it is further asserted, are so vague and indefinite, and the claims so broad and general, as to be no more than the statement of a need of the art, and a suggestion of the use of a known property possessed by some metals (named and unnamed) to achieve the desired result, with an invitation to the user to "cut and try" until he has hit upon a combination by which the wished-for result may be accomplished. The reward held out is the gratification of having made a contribution to the exclusive proprietary rights of the patentee, through which he may exact tribute from the users of what is thus found.

From the viewpoint of the public and of the promotion of the policy of the law the case presents, in one of its features, a good illustration of the need of the most thoughtful care in the application of the patent laws, and of the extent to which the finding of patent rights is influenced by considerations of the general good and the particular situation to which the claimed invention applies. The monopoly is not given, but is granted for a price, and there is the same duty not to grant without exacting the price as there is not to withhold the grant if the price has been paid.

The inventive genius who strikes out into a wholly new field of exploration, and brings back a new art, the practice of which is added to the activities of mankind, has acquired rights in what he has discovered which are universally recognized. He is really a creator,

and, if he gets all of what he has created, he has taken nothing from others except only the opportunity to be the like discoverers. Even here there are inequalities which are accepted because unavoidable. He may have happily stumbled upon his discovery or what he found may have been within the easy reach of any one, and yet his reward is as great as that of one who has discovered after years of laborious and painful search. This presents one situation. On the other hand, there is almost always room for improvement (or what is accepted as such) in the practice of any art, or in some of its instrumentalities or accessories. As the art becomes more and more highly developed, the room for improvement is contracted until it becomes true that the introduction of a slight advance costs more in time, effort, and its call upon the inventive faculty than the original invention exacted. It may be also true (and too often is) that a very small improvement in some instrumentality of the art, in the hands of powerful commercial interests, backed by a mastery of the psychology of advertising, if a legal monopoly be given of its use, may be used to dominate the whole art, and result in a monopoly of its whole product. From the standpoint of the inventor of such an accessory, he is as much entitled to all the fruits of his invention as is the creator of the art itself. There is, however, this great difference in the two cases. The grant of a monopoly to the one takes, as has been said, nothing from the public beyond the opportunity of making the same discovery. The grant of a monopoly to the other often takes from the public (in practical effect) the right to practice an established art, or compels the public to pay tribute, measured in amount only by the extent to which the owner of the accessory may be able to use it to dominate the whole art. The public is thus compelled by law to pay for the same invention over and over again, and the time limitation of the legal right to monopolize is defeated.

[1] This has led to the formulation of a doctrine of the patent law which is, in substance, that the claims of a patent application will be read not solely with an eye to the labor or inventive merit involved, but also with the value of its contribution to the general good in view, because this latter consideration is of the very essence of the spirit and purpose of the law. The patentee whose claims we are considering, like a modest, although famous, author, proclaims himself only "the improver of other men's stuff." He is not the creator of a new industry, but only of one of its adjuncts, and what he has done must be appraised with this thought in mind.

[2-5] In order to find a beginning to a line of thought which may lead to a comprehension of the legal principles involved in the present dispute, we begin with the statement that ignition systems in use in the automobile industry employ a firing spark and look to electricity to supply it. This in turn involves a current of electricity and means for closing and opening the circuit. In one system the source of supply is a stored battery. Contact points capable of being brought together and separated close and open the circuit. There is again involved two facts or conditions of operation. One is that the storage battery, although stored when the operation begins, has a limited

storage capacity; the other is that the supply is being exhausted during the time the contact points are together, and conserved when they are separated, and that further conservation is effected to the extent to which the flow of current is retarded during all conditions of operation. It is obvious that this latter saving must not be carried to the point of affecting the efficiency of the spark.

Before the advent of the patented improvement here involved objectionable, and what was believed to be avoidable, depletion of the current supply was experienced. Many minds were at work on the problem of finding a remedy for this undue waste and the inconveniencies which resulted. The contact points are brought together and separated in the engine operation. It might be that the stop was made when there was a juncture. The current would then continue to flow, resulting in pure waste. Remedies had been provided for this through a means for shutting off the current. Some had dependence upon the interposition of informed human effort. If through ignorance or neglect the switch was not thrown and the stoppage was prolonged, the battery was depleted. Others eliminated this undependable human element by means of automatically mechanically operating the cut-out. One now to be had makes use of this principle of thermal resistance to put in operation the mechanism which works the cut-out. The patentee took up this same task of providing a device which would supplant, or at least supplement, the human agency by furnishing a substitute when and if needed. The task was complicated (as the task of those who bring innovations into an established industry always is) by the practical necessity of catering to the preferences, and perhaps the prejudices, of those in the business, and the real need of making as few changes as possible in the established order of things. The patentee claims to have solved the problem by taking advantage through making use of a property or quality which certain metals possess. The property is that when cold they will (relatively well) permit the flow of current through them; when and as they rise in temperature they will (relatively well) retard and prevent such flow. Having a conception of the thought of making use of this property, the next part of the problem was how to do it. There is always some resistance to the flow. This resistance spells friction, and the friction heat, and with the heat comes the higher temperature, which calls in a wire coil, if one is used, for the very conduct in the metal which is meant to be provoked. A wire coil of the selected metal is thus suggested to be introduced in the circuit, and the intended result is claimed to be accomplished. This stoppage of the engine with the contact points in contact is defined by the patentee as a "dwell." There is, of course, more or less of the same dwell whenever the points are in contact. The dwell is of appreciable length at slow speed, and is a miniature dwell even at the highest speed. As a consequence this remedial device is operative when the engine is working as well as when it is stopped. When the engine is stopped, the more effective the prevention of flow the better the device; when the car is in motion, the remedy against waste of current may be so effective as to defeat its main purpose by preventing or retarding

ignition, and thus stall the engine. There might in consequence be the same folly committed which is voiced in the proverbs which excessive parsimony has provoked. The car must run at whatever cost of current, and the saving during running conditions must not be so excessive as to hold back an ample supply of current. If the cost of this is a greater expenditure of current when the car is not running, this cost must be paid. This excess of current loss is not a waste, but a necessary expense to secure good and safe running conditions. This brings into the problem the need of proportioning the elements of construction; the balancing of what will produce sparks when needed, and what will save current when "fat" sparks are not needed, and (so far as is practicable) stop the flow when no sparks are needed; the introduction of what will answer the purposes of "ballast," and also brings into it what has been adverted to as the "cut and try" features of the disclosures of this claimed invention. This presents the substance of the inventive thought which has its physical embodiment essentially in the introduction of a "resistance coil of iron wire, nickel, or other metal having a normally low coefficient of resistance, but the resistance of which will be increased as the heat or temperature thereof increases."

It is doubtless true that this is nothing more than "making use of a well-known tool of the art." It is also true that the device makes no very great call upon the inventive faculty. The invention is admittedly open to the criticism that all its elements are old. The criticism is met by the stock rejoinder that the thing invented is none the less new. The essence of the invention is the use of this resistivity of certain metals. It is of no consequence that the patentee was not the first to discover that iron, nickel, and some other metals possess this property. He surely did not create it, and could not have monopolized its use had he been the first to discover and make it known. The simplicity of the embodied form of the idea does not touch the question. The conclusion cannot be resisted that, although the prior art was rich in the material out of which this improvement might have been made, it was not so made before Kettering unless Delano made it. The emphasis laid upon the Delano device, and the time, effort, and expense given to its production for the purposes of evidence, is persuasive of the fact that what was done was first done by Kettering or by Delano. The thought may seem now to have been within the easy reach of any one, but the fact that the need of such a device was felt, and that this device has received commercial appreciation, argues its advancement upon the prior art. This much must be conceded to the plaintiff on legal principles which reason deduces, and which the cases cited in plaintiff's brief confirm. Westinghouse v. Dayton (C. C.) 106 Fed. 729; Miehle v. Whitlock, 223 Fed. 647, 139 C. C. A. 201; Æolian Co. v. Cunningham (D. C.) 251 Fed. 301.

Viewing the patented device as one limited in function and field of operation wholly to conditions of "dwell," we are met with a branch of the defense which makes inquiry into its patentable merits of no avail because the defendant's device is averred not to infringe.

The practical, because commercial, value of plaintiff's device is confined to those systems in which the supply of current is limited at its source. Its whole purpose, and the reason for its existence, is to conserve this supply by preventing the depletion of the storage battery through the waste of current. The defendant has no such infringing motive, because in its system the supply of current is not limited, and is not so constructed as to prevent a waste of current during "dwells." Defendant has reliance upon an engine driven generator to maintain a supply and a cut-out to shut off waste. The defendant in consequence neither aims nor desires to have its device do what the patentee is seeking to accomplish. The one is indeed the antithesis of the other. The patentee seeks to check the flow of current during slow-speed running conditions, and to shut it off during "dwells." The defendant seeks to have fat sparks at all times, and particularly during slow speeds and at starting. To accomplish this the flow of current increases as speed is reduced and is greatest during "dwells." Infringement, however, is not a matter of motive, but of fact, and plaintiff invokes the doctrine that partial utilization of an invention may constitute infringement just as much as if it was whole and complete; citing Sewall v. Jones, 91 U. S. at page 183, 23 L. Ed. 275; Penfield v. Chambers, 92 Fed. 630, 34 C. C. A. 579; King Ax Co. v. Hubbard, 97 Fed. 795, 38 C. C. A. 423.

The thought presented is somewhat akin to the one later discussed, that an inventor is entitled to all which he has accomplished, whether he has fully grasped the scientific principles which the invention has brought into operation or not, or even if he has not appreciated the full scope and extent of his accomplishment. The doctrine, however, must be given a practical application. It gives to the patentee whatever he has invented, disclosed, and claimed. It protects him against the use of equivalents. It does not, however, give him the exclusive right to what others may invent, even if the stimulus of the second invention was supplied by the success of his own, or even if his own invention suggested the effort which resulted in the second.

To constitute infringement of one device by the use of another, so far as the mode of operation is a factor the one must be such as to substantially embody the other; so far as results are a factor, they must be the same in kind, however they may differ in degree; so far as purpose and function, the application of the principle of construction, are factors, there must be substantial likeness in use. The patent laws do not deal with mere abstractions, but with things. There is no infringement in borrowing an inventive idea from one art and applying it in the construction of a device for use in another art. Use may be made of the same thought, and practically the same use may be made of it, but if the things the exclusive right to make, use, and vend which is granted to the first user are not the same as those made by the second user no conflict of rights arises. The test is not merely whether two things made are built on the same principle, but whether as things they are competitors. If we grant to this patentee the right to take from the common fund of knowledge this property of resistivity, and make use of it in the construction of an ignition

system for automobiles which will of itself serve as a cut-out of current during dwells, and reward him by a patent upon his device, we are not prevented from giving to the defendant the right to make full use of this same property of metals in the construction of another and in kind different device. The action of the metal coil is necessarily the same, but it does not follow that the devices are alike. This patentee proposed to himself to meet the need felt for a better device than those then in use. So far as the prevention of waste of current during dwells (which we are now considering) entered into the problem, the devices in use reduced the loss to practically nothing. His device must preserve this saving. The defect in the old devices was that they (for reasons already stated) were not always put in operation. His device was always in operation, and its results equally beneficial. The claim of merit made in his application that "the flow of current through the circuit is practically reduced to a negligible quantity" must, in view of the problem before him, mean that there was no appreciable loss of current.

Loss of current is of course unavoidable. Just what saving a test of the plaintiff's device would show we are not informed. We have on the one hand the claim of the patentee of what his device will accomplish, and on the other the result of the use of the defendant's device. A test of defendant's device shows a prolongation of the supply of current of from 31 hours 21 minutes to 39 hours 15 minutes. This saving indicates a utilization, as is argued, of some of the advantage which flows from the use of the patented device. This does not, however, prove infringement. The two systems have, it is true, this saving, to the extent indicated, in common, but they are not competitors, nor is the defendant's system a substitute for that of the plaintiff. They have no substantial identity in purpose of accomplishment, and their likeness is more formal than real. To hold that one is an infringement of the other would make it necessary to hold that the defendant could not make use of a "tool of the art" for one purpose because the plaintiff had first made use of it for another purpose, or to hold that a system designed and used for one purpose could not be used because it has something in common with another system designed and used for another purpose. The right given by the law is a monopoly of use and sale, and if there is no trespass upon this field there is no infringement. One practical test is that of commercial rivalry, and no one in search of a system to do what the plaintiff's was designed to do (we are still speaking of the cutting off of the flow of current during "dwells") would think of making use of defendant's. Our finding is, with respect to this branch of the case, against infringement, and this renders it unnecessary to make any finding of validity.

The merits of this invention, however, are asserted to be, and the claims of the patent cover, more than a device to save current during dwells. There is the further thought of so proportioning the parts which enter into the construction of the wire circuit that the flow of current will be regulated during running conditions. It is objected that this merit feature of plaintiff's system is an afterthought, not

claimed in the original application, and was suggested by the defendant's system, or has been framed to lay ground for the claim of infringement. We do not deem this objection to be well founded. The claim is in the application without the amendment, and, even if it were not, the patentee is entitled to all which he has accomplished, whether he has set forth, or, indeed, appreciated, all the utilities of his invention. He is not required to set forth nor to comprehend the scientific principles which operate to bring about the results accomplished, nor, indeed, to know all which he has accomplished. If he has builded better than he knew, all which he has created belongs to him. Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527; Roberts v. Ryer, 91 U. S. 150, 23 L. Ed. 267.

[6] Nor are we in accord with the view advanced by the defendant that the claims of the patent which embrace this feature are of no validity because this feature was interpolated by amendment of the application and is new matter introduced without a supporting oath. We have already found, in effect, that this feature is not new matter, and with this finding the supporting oath is present. Leonard v. Maxwell, 252 Fed. 584, 164 C. C. A. 500, presents the principle of the doctrine invoked.

[7] Nor do we think the defendant can escape the charge of infringement because of the fact that its resistance coil is made of nickel and not of iron. In those claims in which the words "iron coil" or their equivalents are used the word iron has the special meaning attached to it by the definition given in the application.

[8] With respect to the objection that there is no disclosure of how a system can be constructed which will serve the purposes of the thought of regulating the current during running conditions beyond the suggestion of employing this principle of resistivity, it may be said that the objection is as applicable to a system for preventing waste of current during dwells. There is, however, a very substantial and practical difference. The disclosures are directed to those skilled in the art. The thought of the introduction of a coil made of a metal having the stated property is admittedly definite, and the direction to so proportion the parts of the construction that this property will not be called into use during the limited time of point contact during running conditions, and yet will evince its presence during a prolonged dwell, is as definite a direction as can be given, and can be followed as readily as directions to a mechanic to make a construction consisting of two parts, which are to be securely fastened to each other. The purpose for which the construction is to be used being stated, and the strain known or readily to be determined, there is no requirement that the number or size of the nails or other fasteners used to hold the parts together should be set forth. The thought of using a given kind of metal is a thought of value, but plaintiff has no monopoly of the use of this thought until it is incorporated with a physical construction, and then he has not a monopoly of the thought, but of the thing constructed. It may, of course, be said with truth that the plaintiff has such a construction, and the two dwells vary only in length, and

that the reduction to a negligible quantity is the same in each case, what is a negligible quantity being wholly relative; but if this is said, the answer is at hand that the defendant's construction is entirely different in its purpose and in substance in its result. We do not draw the inference which the plaintiff draws of the use and purpose of the presence of a resistance coil of iron or nickel, and that there is a difference in kind, and not merely in degree, between the operation of this and the copper wire of the other parts of the circuit, from the fact that the latter is insulated and the former not. Without following the discussion into which the experts have gone, and which, although highly technical, they have made very interesting, we content ourselves with a statement of the conclusion reached that the disclosures of the application and claims in the respect of running conditions are no more than the suggestion of the thought that certain results can be accomplished by the introduction of a resistance coil made of iron or nickel, but that beyond this thought there is no disclosure of how the result is to be accomplished, but this is left for the prospective user to discover. This brings the claimed invention, within the principle on which were ruled the cases denying patentability, to the mere statement of a problem, and the suggestion of a thought which offers the promise of a solution. Re Incandescent Lamp Patent, 159 U. S. 465, 16 Sup. Ct. 75, 40 L. Ed. 221.

[9] The conclusions already reached and stated take away from the Delano device all importance, but, as otherwise it is of controlling importance, we will make the fact findings for which the future of this litigation may call. The right given by the patent laws involves several fact features, any one of which may affect the claim of right and which should not be confused. There may be real invention in the sense of originality, and yet no patentable invention, because the law gives the patent, not to the inventor, but to the first inventor. The granting or withholding of the patent rests upon the ita lex scripta est doctrine, but the reason the law was so written is that, in case two persons have independently made the same invention, a patent cannot be granted to the second person because it belongs to the first inventor. The other conditions of the grant including prior knowledge or use by others, public use or sale, description in patents or publications, involve the thought of a like denial of novelty, but the law is so written from motives of policy. A fair presumption arises that the applicant has not invented what has been made the subject of public description, and he cannot have been the first inventor of what was in prior use, and, aside from this, an inventor should not be permitted to withhold his claim to a monopoly until the value of his invention has been tested by public use or sale, because if he then gets a monopoly he gets not merely what he has invented, but he gets also an established trade, built up by the enterprise of others. To grant the exclusive right to what has been for a long time in commercial or other public use is an injustice to others who have been thus invited to embark in what is an open trade, even although the applicant has invented what is thus in use. He may well, therefore, be required to file his claim within a limited time, and not be per-

mitted to recall what he has once dedicated to the public. If Delano made the invention now claimed for him, Kettering's ignition system lacks novelty. If the Bishop car was equipped with such a system, there must be a finding of prior use. Brush v. Condit, 132 U. S. 39, 10 Sup. Ct. 1, 33 L. Ed. 251; Macbeth v. General Electric (D. C.) 231 Fed. 183; Mayer v. Mutschler (D. C.) 237 Fed. 657.

We are not impressed by the stress laid upon the injunction of secrecy imposed by Delano upon those to whom he disclosed his invention. If the question were one of dedication by Delano to the public, the kind of use made by him of his invention would have a meaning. The question, however, is wholly different, as it is the one of whether Kettering was first with his invention. The argument addressed to us with the purpose of throwing doubt upon the fact of invention by Delano is forceful, and if the question was whether the witnesses Bishop or Sellek had any appreciation (before this case arose) of what Delano had invented with respect to the features of importance now, the argument would be convincing. We can, however, not justify a finding which ignores what the "box of tricks" discloses. The thing which was made, with the testimony of the man who made it, is persuasive of what was made. We cannot doubt the introduction by Delano of a resistance coil in the ignition circuit, and that it was of iron, and answered to all the purposes of coil 29 in the patented system. It is true that in another litigation involving other issues, and in which the question before us did not arise, Delano and the other witnesses failed to mention, in the descriptions given of what Delano had done, features which are now of the utmost importance. Here, again, if the question were not what Delano had done, but whether there was any clear appreciation of the fact that he had done what Kettering afterwards accomplished, there would at least be such doubt as would deny a finding of anticipation. The very doctrine, however, which had our approval when invoked in Kettering's favor, that he was the inventor of what he had invented, whether he was alive to the full extent of its merits or not, applies as well to the Delano invention. It compels the conclusion that, if Delano contrived a system which was the same as that of Kettering, the latter was not the first inventor, although all which Delano had accomplished was not at the time appreciated. The use made of the Bishop system, and the length of time it was in use, and the changes of ownership through which it passed, forbid a finding that the Delano inventive thought was merely an inchoate undeveloped experiment, abandoned before completion.

Our conclusion is that defendant is entitled to a decree dismissing the bill of complaint for want of equity, and awarding costs, and a decree to this effect may be submitted.

SCHAUM & UHLINGER, Inc., v. COPLEY-PLAZA OPERATING CO.

(District Court, D. Massachusetts. August 8, 1919.)

No. 802.

1. PATENTS ⟸232—INFRINGEMENT—PROCESS.
Where defendant bought a polishing machine which as changed at the suggestion of a salesman, formerly in the employ of complainant's predecessor, adapted the machine for polishing in accordance with the process of complainant's patent, defendant is, if the patent be valid, an infringer.

2. PATENTS ⟸328—VALIDITY—POLISHING PROCESS.
The Uebersax patent, No. 1,063,478, for a process for polishing utensils, particularly culinary silverware, *held* valid, showing invention, and not being anticipated.

3. PATENTS ⟸99—VALIDITY—SPECIFICATIONS—SUFFICIENCY.
An inventor is not required to specify how his process can be most economically used; it is enough that he describe it so that one skilled in the art could use it; hence a patent for a process for polishing culinary utensils, particularly silver, is not invalid because one skilled in the art might, after reading the specifications, need some experiment to determine the method requisite for the successful operation of the process.

4. PATENTS ⟸328—SPECIFICATION—SUFFICIENCY.
The Uebersax patent, No. 1,063,478, for a process for polishing utensils, particularly culinary silverware, which in its original specification provided for the polishing by means of a soapy solution and steel balls, which were revolved in a drum, *held* to sufficiently disclose the process, within Rev. St. § 4888 (Comp. St. § 9432), as to be valid regardless of amendments.

5. PATENTS ⟸109—AMENDMENTS—VERIFICATION.
Where the original specification in a patent sufficiently described the process, it is immaterial that an amended specification was not verified as required by Patent Office rule 48.

In Equity. Suit by Schaum & Uhlinger, Incorporated, against the Copley-Plaza Operating Company. Decree for complainant.

Van Everen, Fish & Hildreth, of Boston, Mass. (Alfred W. Kiddle and Henry T. Hornidge, both of New York City, and Alfred H. Hildreth, of Boston, Mass., of counsel), for plaintiff.

Oliver Mitchell, of Boston, Mass., and Edwin F. Thayer, of Attleboro, Mass., for defendant.

ANDERSON, Circuit Judge. This is an infringement suit brought by the owner of patent No. 1,063,478, dated June 3, 1913, against the Copley-Plaza Operating Company. The title of the patent is "Process for Polishing Utensils." Jean Uebersax, of Switzerland, was the inventor and original applicant. The application was dated April 7, 1911.

The defendant is using in its hotel a polishing machine furnished it by the Smith-Richardson Company of Attleboro, Mass., which is assisting the Copley-Plaza Company in the defense of this suit. The usual defenses are set up in the answer, including noninfringement; but the main reliance of the defense is the alleged invalidity of the patent.

[1] The defense of noninfringement may conveniently and briefly be disposed of as a preliminary matter. The defendant's machine was

sold it by one Young, who now has the exclusive selling agency of the Smith-Richardson machines for the hotel and restaurant trade. From January to October, 1915, Young was employed to sell machines adapted specially to the plaintiff's process, then called the Tahara machine. After his discharge by the Tahara Company, the plaintiff's predecessor in title, and his employment by the Smith-Richardson Company, certain changes were, at his suggestion, made in their machines so as to adapt them commercially for polishing in accordance with the plaintiff's process. It is clear, and I find, that Young became familiar with this process while with the Tahara Company, and later undertook to exploit it for the benefit of his new employer and himself as exclusive agent in the hotel and restaurant trade. The defendant is, as the evidence plainly shows, using a process indistinguishable in any material or legal aspect. If the patent is valid, the plaintiff is entitled to hold the defendant as an infringer.

[2] The material parts of the patent are as follows:

"This invention relates to a process for polishing silver utensils, that is to say, for rendering silver plates and other silver utensils for table and culinary purposes brilliant by polishing. This process consists in placing those silver utensils to be polished which are very liable to get out of shape, such, for example, as teapots, plates, coffeepots, sauceboats, etc., with an aqueous soap solution of 2 to 4 per thousand for example, and with small steel balls and small steel pins, in a rotary drum, and in causing the drum, thus charged and closed as hermetically as possible, to revolve for a certain time in order that, under the combined action of the steel balls and pins and the soapy water upon the silver utensils, the latter may become polished, the steel balls and pins being employed in such quantities that they always completely cover the silver utensils during the rotation of the drum, for the purpose of avoiding almost the radial displacement of the said articles and consequently of preventing them from getting out of shape. Consequently the position of each utensil to be polished relatively to the longitudinal axis of the drum is not changed during the rotation of this latter, the steel balls and pins effecting only a restrained and slow displacement along the surfaces of the utensils to be polished."

Then follows a description of a convenient but unpatented polishing device consisting of a rotary prismatic drum or tumbling barrel, with the requisite operating machinery so arranged as to be open at one side over a trough and sieve in order to separate the polishing mass from the articles polished. The patent then continues:

"During the rotation of the drum the silver utensils, which are liable easily to get out of shape, will remain always fully enveloped by the steel balls and pins, and, as these balls and pins are much more mobile than the said utensils, the latter will never become much displaced in the radial direction within the drum during the rotation of the latter, and will consequently not be subjected to deformation.

"The utensils have such relation to the polishing mass in specific gravity as to be kept approximately central of the drum in its rotation, and will neither fall to the bottom nor rise to the top in the rotation of the drum, and hence are kept from contact with the walls of the drum and prevented from being deformed in any way. The speed of rotation varies according to the character of the article; that is, a perfectly round article would still remain central whether the speed be high or low, but an article having projections, such as a water pitcher or the like, would be dislodged from an absolutely central position, due to the irregular action upon the projecting parts; and hence the rotation is adjusted to a comparatively low speed, which will

not materially dislodge any articles which it is desired to clean from the approximately normal central position during rotation, the drum, besides, being capable of being subdivided by transverse partitions removably adapted to its part *b*, and serving to prevent the lateral displacement of the silver articles which are liable easily to get out of shape.

"What I claim is:

"The method herein described of polishing articles, consisting in subjecting the articles to rotation while suspended within a polishing mass, the relative specific gravity of the articles and polishing mass being such as to maintain the articles approximately central of the polishing medium during rotation, substantially as described."

The plaintiff's expert witness, William A. Johnston, Professor of Theoretical and Applied Mechanics at the Massachusetts Institute of Technology, describes this process as follows:

"The process is one for polishing silver utensils; that is to say, for rendering silver plates and other table utensils for table and culinary purposes brilliant by polishing. The process consists of subjecting the articles to be polished to rotation within a polishing medium, and producing this rotation while the article is suspended in the polishing medium."

"This means the article to be polished is actually rotated within the polishing mass, while suspended in that mass; that is to say, under such conditions that it is not substantially displaced radially from approximately the central position during rotation. Or, in other words, the article is rotated while continuously held approximately central of the mass; and excludes a condition where the article passes in and out of the mass; that is, where the article is sometimes within and sometimes without the mass."

The polishing mass suggested by Uebersax consists of steel balls of various sizes, but all small, and steel pins or "oats," with soapy water enough to cover the mass in the tumbling barrel. Prof. Johnston continues his exposition of the process as follows:

"The inventor suggests as a preferred means the use of a polygonal drum which is subjected to rotation by some driving mechanism, the drum in turn subjecting the polishing mass therein to rotation, and the polishing mass in turn subjecting the article within it to rotation. The inventor discovered that it was possible to suspend the article within the polishing mass by applying certain laws of mechanics. Certain elements enter into this problem of suspending the body within the polishing mass as that expression is used in the patent:

"(a) Speed of rotation of the polishing mass relative to the size and shape of the article to be polished;

"(b) The relative specific gravity of the mass and of the article to be polished;

"(c) The relative quantity of the polishing mass to the size and shape of the article to be polished.

"As pointed out by Uebersax, the speed of rotation is relative to the size and shape of the article; the more irregular the article, the more tendency it has to be displaced radially from a central position, and hence the more irregular the article the more necessity for adjusting the speed.

"With reference to the relative specific gravity of the mass and article to be polished, and using specific gravity in its technical sense, the relation between the weight of the article and the weight of an equal volume of water, it is evident that a certain relation between the specific gravity of the article as it is in the mass, and of the mass, must be found present in order to preserve the suspension of the article within an approximately central position. Uebersax points out that this condition is present in the case of the articles and of the polishing mass with which he is concerned. In regard to the quantity of the polishing mass, in order that the process shall be carried out to

the best advantage, Uebersax states that it should be such that the article is substantially covered by the mass during rotation."

Obviously the gist of the invention is that the article to be polished remains, during the process, suspended in the polishing mass, instead of being thrown in and out of the mass and against the sides of the revolving drum as well as against other articles subjected at the same time to the polishing process. The plaintiff's claim is that by the Uebersax process the article polished is touched only by the polishing mass, consisting of smooth steel balls and pins and soapy water; that therefore awkwardly shaped articles, like coffeepots, ramekin dishes, platters, etc., are never scratched or deformed; and that the plate is not worn off, as in the case of hand or brush polishing—formerly the only methods used in hotels and restaurants for polishing such utensils.

There is no doubt that the patent owners have made a commercial success in selling machinery adapted for this process. The sales of such machines up to October 15, 1918, amounted to nearly $500,000, the installations including many of the large hotels of the country, such as the Biltmore, the Ritz-Carlton, the Waldorf-Astoria in New York City, the Bellevue-Stratford, and other leading Philadelphia hotels. These installations cost from about $2,000 to over $15,000 for each hotel.

The invention, if it be such, has evidently come into pretty general use, and has largely superseded the earlier and less economical and efficient polishing processes. Defendant's counsel concede the utility, but deny the invention. They say in their brief:

"It may be conceded that the plaintiff was the first to apply the steel ball polishing process to plated silverware commercially."

It requires but brief and superficial consideration of the prior art to conclude that the process as above described is a real invention. All of the prior uses, patented and unpatented, were but variations of the long-used method of mass polishing by using tumbling barrels or revolving or oscillating drums. Ashley of the Scoville Manufacturing Company as early as 1901 used steel balls and a hexagonal horizontal barrel for polishing fragile metal articles like collar buttons. But his process was the indiscriminate filling of the drum with buttons and balls and soapy water, so that the actual polishing was by the contact of button with button and of button with drum as well as of button with ball. He filled, or nearly filled, his barrel, and then caused the contents to be churned.

Barton's process, used since 1903, of polishing jewelry, was also mass polishing, using a corrugated drum, so that the jewelry must have been constantly struck by the revolving corrugations in the barrel. This was another churning process.

The Baird machine, 1907, was, in use, nearly filled with steel balls and articles like corset trimmings, buckles, etc. This again was nothing but mass polishing.

When, after Abbott had reduced the cost of steel balls, their use in larger quantities was advocated, in 1910, in the "American Machinist," the process described was still mass burnishing—"the whole

mass of soap, work, and balls is tumbled about, causing the balls to be forced in all directions across all of the work surfaces, thus giving a constant burnishing action." This is very different from the Uebersax process of "avoiding almost the radial displacement of the said articles, and consequently of preventing them from getting out of shape."

In none of these or other earlier uses described in the record can be found the process of suspending the article in the polishing mass so that the polishing mass, and only the polishing mass, was in contact with the articles to be polished. Cf. The Barbed-Wire Patent, 143 U. S. 275, 285, 12 Sup. Ct. 443, 36 L. Ed. 154. None of the old processes were adapted to polishing large, easily deformed articles.

Indeed, careful consideration of the very able brief and argument of defendant's counsel constrains me to the view that their main reliance is, as it must be, upon the alleged legal insufficiency of the patent to cover the new and successful process exploited by the plaintiff and its predecessors in title. The defendant's contentions upon this point fall conveniently under two heads:

[3, 4] (1) That the "written description" in the patent fails to meet the statutory requirement, section 4888, Rev. St. (Comp. St. § 9432), of a statement "in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same." As part of this contention the defendant urges that the claim is void as extending beyond the description (Burroughs Adding Machine Co. v. Felt & Tarrant Mfg. Co., 243 Fed. 869, 156 C. C. A. 373); that the claim inserts an element not described, to wit, rotating the article in the mass; maintaining article central of the mass; also that the claim is void as being nothing but for the function of a machine. American Lava Co. v. Steward, 155 Fed. 731, 84 C. C. A. 157.

(2) That even if the patent, as finally issued, is legally sufficient, it is made so only by an amendment filed April 10, 1913, more than two years after the original filing, drawn by a newly appointed agent for the applicant, and not verified by oath. In support of this contention defendant's counsel refer to the file wrapper and contents. From the file wrapper, page 27, it appears that on April 10, 1913, the original application was amended by inserting as follows:

"The utensils have such relation to the polishing mass in specific gravity as to be kept approximately central of the drum in its rotation, and will neither fall to the bottom nor rise to the top in rotation of the drum, and hence are kept from contact with the walls of the drum and prevented from being deformed in any way. The speed of rotation varies according to the character of the article; that is, a perfectly round article would still remain central whether the speed be high or low, but an article having projections, such as a water pitcher or the like, would be dislodged from an absolutely central position due to the irregular action upon the projecting parts, and hence the rotation is adjusted to a comparatively low speed, which will not materially dislodge any articles which it is desired to clean from the approximately normal central position during rotation."

Also by striking out the two original claims, which covered both the process and the apparatus used therefor, and inserting the following claim:

"The method herein described of polishing articles, consisting in subjecting the articles to rotation while suspended within a polishing mass, the relative specific gravity of the articles and polishing mass being such as to maintain the articles approximately central of the polishing medium during rotation, substantially as described."

These amendments were made after the examiner had, on July 17, 1911, rejected the claim for lack of patentable novelty, the examiner saying:

"The process claimed appears to involve no more than the operation of any rumble in the ordinary manner after the same has been charged with a solvent (soap solution), the objects to be cleaned, and abrading elements of a special form. The quantity of solvent employed and that of the abrading elements (pins and balls), as well as the particular shape of the latter, are held to be matters of choice and not of invention, and not to affect the character of the 'process' as such; nor do they involve any substantial or patentable physical or structural difference over the solvents and abrading elements disclosed in the references."

After this amendment had been made and the case reargued by new counsel, the examiner adhered to his adverse view, holding that the claim had not been amended in substance. Thereupon an appeal was taken to the Board of Examiners in Chief, and there reargued orally and in writing. The Examiners in Chief, on May 3, 1913, sustained the appeal, saying:

"Appellant has invented a new process of polishing silver utensils and other similar articles, although he has used an old apparatus for carrying this process into effect. He employs a barrel not unlike a tumbling barrel, this barrel containing a mass of steel balls and soapy water, in which mass the utensils are submerged. The balls are of steel, and are not new per se as a means for polishing articles of silver or similar metals. They are, however, new in respect to their relative specific gravity, which is such that the utensils remain centrally within the mass of balls and do not come into contact with and become scratched by the inside of the barrel.

"We believe that appellant has used old elements of the art in a new way, with an attendant result which has not been and could not be produced by the patentees, and that he is entitled to a patent.

"The examiner refers to parts of the specification which have been introduced by amendment. He regards these as new matter, but, as appellant states that he will withdraw or cancel the amendments, it would be unnecessary to consider them, even if we had jurisdiction of the question."

The "new matter" refers, not to the amendment above set forth, which was marked "E," but to an amendment "G," filed on April 15, 1913, and referring to a drum of 16 sides, and to the relation of the size or other characteristics of the articles dealt with and the size of the drum, its speed of rotation, and the number of its sides. This proposed amendment "G" was struck out as admittedly new matter. But it does not appear to have occurred either to the examiner or to the Board of Appeal that the amendment now attacked was new matter and as such unwarranted by the original disclosure. It is true, as contended by defendant's counsel, that specific gravity was not mentioned in the original application. Neither is speed of rotation specifically described either in the original or in the amended application. It is also true that the plaintiff's counsel now support their contention by elaborate testimony from their expert, Prof. Johnston, that speed of

rotation and relative specific gravity of the mass and of the article to be polished are both requisite elements in the process of suspending the body to be polished within the polishing mass. It is also a part of the plaintiff's contention that, if the drum be rotated too rapidly, the process will not be performed. Tests were made by Prof. Johnston showing that, when an article having a specific gravity substantially greater than that of the polishing mass, and spherical or nearly so, was inserted in the polishing mass, a higher speed of rotation could be used without destroying the process than when the article sought to be polished is of less specific gravity or nonspherical shape.

The question whether the process now used and described by the plaintiff's expert is sufficiently disclosed in the patent, either with or without the amendment, I regard as fairly close. No dogmatic or entirely confident conclusion have I been able to reach. But, on the whole, I think the weight of argument is in favor of the sufficiency and validity of the patent.

The original application before amendment plainly disclosed that the process described contemplated that "the steel balls and pins" should be—

"employed in such quantities that they always completely cover the silver utensils during rotation of the drum for the purpose of avoiding almost the radial displacement of the said articles and consequently of preventing them from getting out of shape. Consequently the position of each utensil to be polished relatively to the longitudinal axis of the drum is not changed during the rotation of this latter, the steel balls and pins effecting only a restrained and slow displacement along the surfaces of the utensils to be polished."

This language shows that the object sought to be achieved was the prevention, or substantially that, of the "radial displacement of said articles." The gist of the new idea was the use of the steel-ball tumbling process without, so to speak, tumbling the article out of the polishing mass. There was to be "only a restrained and slow displacement along the surfaces of the utensils to be polished." It follows, I think, that the subsequent amendment referring to the relative specific gravity of the polishing mass and of the articles to be polished is to be regarded as merely an amplification or explanation of the fundamental concept contained in the original application. In fact the specific gravity of ordinary silver, such as is used in utensils, all of which are really base metal plated, is greater than the specific gravity of the polishing mass, because of the fact that the interstices between the balls are filled only by soapy water, much lighter of course than the material to be polished. In practical application, therefore, little attention need be paid to the relative specific gravity of the polishing mass and the article.

If a hollow pitcher is to be polished, the operator would naturally submerge it in the polishing mass, so that the pitcher itself would be filled.

The language of the court in Fullerton W. G. Ass'n v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 449, 92 C. C. A. 295, 301, is in point:

"The inventor was not required to specify how the process could be most economically used. It was enough if he so described it that one skilled in the

art could use it. It may be conceded that clearer information would have been afforded if the precise proportions of each solution had been indicated, but we are not prepared to say that for want of such precise information the patent should be held void. A patent for a process is not to be held to the strictness of specification required in a patent for a composition, and the decisions holding void applications for patents of the latter class are not necessarily applicable to process patents. We think that one skilled in the art of bleaching could, from the terms of the specification, without further information, make a compound solution such as would render the process practicable. The specification is not, we think, more indefinite or uncertain than those which were sustained in Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279, and Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968. In the first of these cases Mr. Justice Bradley said:

" 'The mixing of certain substances together, or the heating of a substance to a certain temperature is a process. If the mode of doing it, or the apparatus in or by which it may be done, is sufficiently obvious to suggest itself to a person skilled in the particular art, it is enough, in the patent, to point out the process to be performed, without giving the supererogatory directions as to the apparatus or method to be employed.'

"In the second case Mr. Justice Brown said:

" 'The specification of the patent is not addressed to lawyers, or even to the public generally, but to the manufacturers of steel; and any description which is sufficient to appraise them in the language of the art of the definite feature of the invention, and to serve as a warning to others of what the patent claims as a monopoly, is sufficiently definite to sustain the patent.' "

The original application did not in terms state that the speed of rotation should be varied according to the character or shape of the article; whereas the amendment does set forth that "an article having projections, such as a water pitcher or the like, would be dislodged from an absolutely central position, due to the irregular action upon the projecting parts; and hence the rotation is adjusted to a comparatively low speed, which will not materially dislodge any articles which it is desired to clean from the approximately normal central position during rotation." This, again, is but an explanation or a specification of a method of achieving the result set forth, although somewhat meagerly, when in the original application reference is made to "avoiding almost the radial displacement," and "effecting only a restrained and slow displacement along the surfaces of the utensils to be polished."

Even if some experiment on the part of the operator should be found necessary in order to determine the speed requisite for the successful performance of the process, this would not, under the authorities, invalidate the patent. In the Minerals Separation Case, 242 U. S. 261, 270, 37 Sup. Ct. 82, 86 (61 L. Ed. 286), the court said, as to a similar contention:

"Equally untenable is the claim that the patent is invalid for the reason that the evidence shows that when different ores are treated preliminary tests must be made to determine the amount of oil and the extent of agitation necessary in order to obtain the best results. Such variation of treatment must be within the scope of the claims, and the certainty which the law requires in patents is not greater than is reasonable, having regard to their subject-matter. The composition of ores varies infinitely, each one presenting its special problem, and it is obviously impossible to specify in a patent the precise treatment which would be most successful and economical in each case. The process is one for dealing with a large class of substances, and the range of treatment within the terms of the claims, while leaving something

to the skill of persons applying the invention, is clearly sufficiently definite to guide those skilled in the art to its successful application, as the evidence abundantly shows. This satisfies the law. Mowry v. Whitney, 14 Wall. 620 [20 L. Ed. 860]; Ives v. Hamilton, 92 U. S. 426 [23 L. Ed. 494]; and Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 437 [22 Sup. Ct. 698, 46 L. Ed. 968]."

I conclude, therefore, that the substance of the process was set forth in the original application; that the amendment falls within the scope of permissible amendments, and not of new matter; and that it is therefore immaterial whether it was or was not verified by oath.

The language of the Court of Appeals of the Sixth circuit in the case of General Electric Co. v. Cooper Hewitt Electric Co., 249 Fed. 61, 64, 161 C. C. A. 121, 124, is in point:

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

In Cleveland Foundry Co. v. Detroit Vapor Stove Co., 131 Fed. 853, 68 C. C. A. 233, the court said:

"If an inventor comes to better understand the principles of his invention while his application for a patent is pending, an amendment of his claims to conform thereto does not introduce any original matter nor enlarge his invention, and is within his legal right."

Compare, also, Eagleton Mfg. Co. v. West, etc., Mfg. Co., 111 U. S. 490, 4 Sup. Ct. 593, 28 L. Ed. 493; Steward v. American Lava Co., 215 U. S. 161, 30 Sup. Ct. 46, 54 L. Ed. 139; Mine & Smelter Supply Co. v. Braeckel Concentrator Co. (D. C.) 197 Fed. 897; American Steel Foundries v. Wolff Truck Frame Co. (C. C.) 189 Fed. 601, 602; Hoe et al. v. Kahler (C. C.) 25 Fed. 271, 279; Emerson, Smith & Co. Ltd., v. Lippert (C. C.) 31 Fed. 911; Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 142 C. C. A. 445; Empire Cream Separator Co. v. Sears, Roebuck & Co. (C. C.) 157 Fed. 238, 240; Diamond Rubber Co. v. Consol. Rubber Tire Co., 220 U. S. 428, 434, 31 Sup. Ct. 444, 55 L. Ed. 527; Railroad Supply Co. v. Hart Steel

Co., 222 Fed. 261, 273, 274, 138 C. C. A. 23; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 423, 22 Sup. Ct. 698, 46 L. Ed. 968.

In view of my conclusion upon this point, it is unnecessary for me to undertake to determine whether an alleged infringer is or is not permitted thus collaterally to attack the patent. Compare the Eastern Paper Bag Co. v. Continental Paper Bag Co. (C. C.) 142 Fed. 479, 511; Id., 150 Fed. 741, 80 C. C. A. 407; Id., 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; Western Glass Co. v. Schmertz Wire-Glass Co., 185 Fed. 788, 109 C. C. A. 1.

The patent is at any rate presumptively valid. It makes a prima facie case. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 498, 23 L. Ed. 952; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 274, 138 C. C. A. 23; Consolidated Contract Co. v. Hassam Pav. Co., 227 Fed. 436, 440, 142 C. C. A. 132; Minneapolis, St. P. & S. S. Ry. Co. v. Barnett & Record Co., 257 Fed. 302, 307, — C. C. A. —; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. Ed. 939.

[5] What has been said also disposes of the defendant's claim that under Patent Office rule 48 the amendment of April 10, 1913, should have been verified by oath. That rule provides that when an applicant presents a claim for matter originally shown or described, but not substantially embraced in the statement of invention or claim originally presented, he shall file a supplemental oath to the effect that the subject-matter of the proposed amendment was part of his invention. Such supplemental oath must be attached and must properly identify the proposed amendment.

As already pointed out, I think the present claim does not cover anything "not substantially embraced in the statement of invention or claim originally presented." Consequently it is immaterial that the file-wrapper does not disclose that the amendment of April 10, 1913, was verified by oath. This conclusion makes it unnecessary to determine whether the plaintiff is correct in its contention that this defense is not open because not set up in the answer.

My conclusions on the whole case are that it falls within the principles laid down by the Supreme Court in Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034, and Minerals Separation Co. v. Hyde, 242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. 286, and cases cited and reviewed in these two leading opinions.

See, also, Minneapolis, St. P. & S. S. Ry. Co. v. Barnett & Record Co., 257 Fed. 302, 306, — C. C. A. —, and cases cited.

In the Expanded Metal Co. Case the court said (214 U. S. 381, 29 Sup. Ct. 655, 53 L. Ed. 1034):

"It is suggested that Golding's improvement, while a step forward, is nevertheless only such as a mechanic skilled in the art, with the previous inventions before him, would readily take, and that the invention is devoid of patentable novelty. It is often difficult to determine whether a given improvement is a mere mechanical advance, or the result of the exercise of the creative faculty amounting to a meritorious invention. The fact that the invention seems simple after it is made does not determine the question. If this were the rule, many of the most beneficial patents would be stricken down. It may be safely said that if those skilled in the mechanical arts are working in a given field, and have failed after repeated efforts to discover a certain new and useful improvement, that he who first makes the discovery

has done more than make the obvious improvement which would suggest itself to a mechanic skilled in the art, and is entitled to protection as an inventor. There is nothing in the prior art that suggests the combined operation of the Golding patent in suit. It is perfectly well settled that a new combination of elements, old in themselves, but which produce a new and useful result, entitles the inventor to the protection of a patent. Loom Company v. Higgins, 105 U. S. 580–591 [26 L. Ed. 1177].

"To our minds, Golding's method shows that degree of ingenuity and usefulness which raises it above an improvement obvious to a mechanic skilled in the art, and entitles it to the merit of invention. Others working in the same field had not developed it, and the prior art does not suggest the combination of operations which is the merit of Golding's invention."

In the Minerals Separation Case the court said (242 U. S. 268, 37 Sup. Ct. 85, 61 L. Ed. 286):

"The present invention differs essentially from all previous results. * * *

"It is not necessary for us to go into a detailed examination of the process in suit to distinguish it from the processes of the patents relied on as anticipations, convinced, as we are, that the small amount of oil used makes it clear that the lifting force which separates the metallic particles of the pulp from the other substances of it is not to be found principally in the buoyancy of the oil used, as was the case in prior processes, but that this force is to be found chiefly in the buoyancy of the air bubbles introduced into the mixture by an agitation greater than and different from that which had been resorted to before, and that this advance on the prior art and the resulting froth concentrate so different from the product of other processes make of it a patentable discovery as new and original as it has proved useful and economical."

This Uebersax process has been patented in Switzerland and in Great Britain. It has achieved a commercial success in Europe and in America. Within the principles enunciated in the leading cases, it is a new and useful invention.

There must be a decree for the plaintiff, with costs.

MERRILL v. W. BICKFORD CO.

(District Court, D. Maine. August 6, 1919.)

No. 779.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—METHOD OF MAKING MOCCASIN SHOES.
   The Merrill patent, No. 1,231,183, for a method of making moccasin shoes, was not anticipated and discloses invention; also *held* infringed.
2. PATENTS ⟸172—CONSTRUCTION—SCOPE.
   When a patentee describes an invention or machine, he is understood to claim and does by law cover, not only the precise forms he has described, but all other forms which embody the invention.

In Equity. Suit by Harry E. Merrill against the W. Bickford Company. Decree for complainant.

Woodman & Whitehouse and Solomon W. Bates, all of Portland, Me., for complainant.

McGillicuddy & Morey, of Lewiston, Me., and Elgin C. Verrill, of Portland, Me., for defendant.

HALE, District Judge. This bill in equity alleges infringement of letters patent of the United States, No. 1,231,183, granted June 26, 1917, application filed December 15, 1915, for method of constructing moccasin shoes. The plaintiff alleges infringement of the five claims of the patent. The defendant denies infringement, and says that the patent is invalid, especially by reason of anticipation in the prior unpatented art.

The subject of the controversy is the manner of making a moccasin shoe. Such shoe was first made by the American Indian, substantially as follows: A piece of leather considerably larger than the outline of the foot formed its sole. This piece was applied to the bottom of a last; the edges were turned up around the sides of the last; the tip was then sewed to the upper edge of the turned-up portion of the bottom to form the upper portion. In this old process, the tip fits the top of the last closely; the distance around the outer edge is very much less than the distance around the corresponding edge of the bottom piece. The only way by which the two opposite edges of the tip and the bottom could be sewed together was by puckering the edge of the bottom, so as to contract it in length to fit the outer edge of the top. In making the moccasin, the Indian turned up the forward end of the bottom and tacked it to the last at the central point of the toe. He then began at the rear edge of the tip, at the side of the last, and sewed toward the toe, taking much longer stitches in the edge of the bottom than in the edge of the tip; the result was a puckering of the edge of the bottom and a contraction in its length, to make it equal to the length of the edge of the tip. By continued practice the expert operator was enabled to judge the length of the stitch required in the outer, or bottom, parts, so that, when the center of the toe was reached, there would be no pucker in the bottom part and the stitches would be substantially even; this required time and experience. The plaintiff points out that he sought to avoid the necessity of employing experienced and expensive labor to make the moccasin on the old plan; that he sought to effect an economy of labor by the process which he invented, especially since leather has become expensive. He says that, to form the bottom of the moccasin, according to the old method, a large piece of leather of good quality was required, since the central part of the bottom piece constituted also the sole of the moccasin where the greater part of the wear came; that there was a considerable waste of leather, caused by the puckering in of material where the bottom was united to the tip; all the material constituting puckers being waste material. He points out, further, that it is desirable to have the sole of the moccasin, or central part of the bottom piece, as thick as possible, while that part which is gathered in and sewed to the tip is better, if pliable and flexible, and that these facts were accentuated when it became the practice to apply a rigid outer sole to the bottom of the moccasin; that the present patent has its more particular application to the tip of the moccasin, where there is such outer sole, and where the moccasin system of construction is used for a heavy boot adapted for rough use. He says it is apparent that the sole piece may be made the entire length of the sole of the foot, or it may be limited to the forward part of the foot,

since the peculiarities of the construction relate entirely to the toe and the forward portion of the moccasin.

He points out that, by the process employed in his patent, the bottom of the moccasin, including the portion turned up around the sides of the last, instead of being made of a single piece as heretofore, is made of two pieces, namely, a sole piece, which is preferably the size and shape of the bottom of the foot, and a vamp, so called, which is preferably of a substantially straight strip of leather. One of the edges of the vamp is stitched to the outer edge of the sole piece, following around the toe so that the vamp assumes an upstanding or substantially vertical position around the sole. The last is now introduced, and the vamp, which forms the sides or edges, is fitted around the last; the tip is placed in position on top of the last, and sewed by hand to the upper edge of the vamp, as in the old moccasin. It will be seen, however, that the edge of the vamp, where it joins the edge of the tip, is not much longer than the corresponding edge of the tip, so that, in stitching the two edges together, the edge of the vamp is puckered but very little. This process is continued, and the shoe is completed by building up the rear position of the shoe in any well-known manner of constructing a shoe and by applying an outer sole. He contends that his process, as above substantially described, is new and useful, as well as economical, and that it is the first departure from the old process.

The specification recites the old method of manufacture, and its faults:

"In making the common type of moccasin, the sole and vamp is formed of a single piece of buckskin, or other flexible leather, which is puckered by hand and drawn back over the last, and the upper portion of the moccasin is then secured thereto, so that the resulting moccasin structure is made up, essentially, of the lower continuous sole and the vamp member, extending up around the sides of the moccasin, and the member which forms the top of the moccasin between the upper edges of the sole and vamp member and around the ankle. Such constructions involve using relatively large pieces of leather or buckskin for the sole and vamp member, much larger than corresponds to the actual area of the member in the completed construction, because of the gathering and puckering of this member where sewed to the upper. Moreover, such constructions not only are uneconomical for this reason, but there is considerable loss and waste of small odd pieces of the leather from which the bottom is made. It is furthermore necesary to use the highest grade material for these bottom sole and vamp members, because of the wear that must be withstood by the sole, even though much less wear comes upon the vamp portion; and such structures are uneconomical for this reason also. The present invention relates to a novel and improved method of constructing moccasin shoes, whereby such disadvantages of the old constructions are largely overcome or minimized, and whereby, furthermore, the moccasin can be made with a small amount of time and labor, and whereby, finally, an economy of the leather is effected and waste thereof minimized."

The patentee in his specifications points out further advantages which he claims for his improved method:

"In constructing the novel moccasin of the present invention, the sole and vamp members are separately cut, and need not be of the same material. The upper part of the moccasin is usually made of two members, which can be preliminarily joined together * * * before the upper is secured to the rest of the structure. A flexible member will also in practice * * * extend up

between the front opening of the upper member, being commonly secured also to that member.

"The sole and the vamp are first secured together, by stitching, cementing, or otherwise, so that the end seam of the vamp member comes in the middle of the moccasin, and advantageously also at the inside of the moccasin, where it will be subjected to less wear. This securing of the vamp to the sole can readily be effected by first stitching or fastening one end of the vamp to the sole, and then continuing around the sole with the vamp until the ends of the vamp can be secured together. This attaching of the vamp to the sole eliminates the heel seam, and all other seams except the single seam at or near the middle of the moccasin. Where a two-piece vamp is used, both seams should be near the middle of the moccasin; but by the use of a one-piece vamp, only one seam is necessary.

"It will be noted, also, that the vamp is a narrow strip, and that, by attaching this strip to the sole in the manner indicated, the vamp is caused to turn up into the desired position, so that it forms a substantially right angle with the sole. The shaping of the vamp to the sole is accomplished by springing the vamp to make it conform to the outline of the sole, which, in turn, is trimmed so that it conforms to the last. When the sole has been thus fitted, and the vamp has been made to conform thereto, and has been secured thereto, the last is inserted, and the vamp is fitted and made to conform to the last, thus giving to it the desired shape.

"After the vamp has been thus formed, the upper is secured thereto. This securing of the upper and vamp does not require any appreciable puckering and gathering of the vamp, such as has been the common practice, and in fact necessary, with moccasins as commonly constructed."

[1] The substance of the invention is stated in claim No. 1:

"The method of constructing moccasin shoes which comprises first securing a vamp to a sole, inserting a last, shaping the vamp to the last before an upper is attached, and subsequently attaching the upper to the vamp to complete the moccasin."

It will be seen that the claim involves four elements. First, securing the vamp to the sole; second, putting in the last; third, shaping the vamp to the last before the upper is attached; fourth, attaching the upper to the vamp.

The four other claims are more in detail, but present the same process.

In order to sustain the patent, the court must, of course, find that the patent involves invention, and not merely the skill of the mechanic. In Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177, Mr. Justice Bradley laid down the rule, although not the invariable rule, that if a new combination of known elements produce a new result, never attained before, it is evidence of invention.

In Atlantic Works v. Brady, 107 U. S. 192, 200, 2 Sup. Ct. 225, 231 (27 L. Ed. 438), the same learned Justice had already delivered the opinion of the court, which Mr. Walker says is now a classic. In that opinion he says:

"To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences.

"The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling de-

vice, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures."

In the case at bar, the patentee started with what the Indian, and his successors in the art, had done in making a moccasin shoe; and it does not appear that there had ever been any substantial improvement on the picturesque, but painful, process of the Indian. This patentee was not a pioneer in his art. He did not, perhaps, make a great step in advance; but I think the title of inventor ought not to be denied him. His method cannot be said to be a mere trifling device, which must have spontaneously occurred to any mechanic skilled in the art. By means described in his specifications, and set forth in claim 1 of his patent, he did, I believe, produce a new and beneficial result, which is entitled to take its place among inventions. In a familiar article of simple mechanism he made an improvement, by overcoming difficulties and objections, however slight, that had been present for a long time in the manufacture of the subject of his patent. In Albright v. Langfeld (C. C.) 131 Fed. 473, 475, the District Court for the Eastern District of Pennsylvania has cited a long list of cases containing old and well-known examples of patented inventions which have been upheld by the courts, although they differed very little in form, mechanism, or operation from well-known appliances.

The defendant raises no question of anticipation in the prior patented art. A sharp contention, however, is made, involving anticipation by prior use in the unpatented art. Four different cases of alleged anticipations are presented:

(1) The defendant says that Louis Sarazin, of Lewiston, has for more than 30 years made moccasins in the manner substantially as set forth in the plaintiff's patent. It has already been found that the Indian and his successors in the art made a moccasin by taking for the moccasin's bottom, or sole, a piece of leather considerably larger than the outline of the foot; that they applied this piece to the bottom of the last, turned up the edges around the sides of the last, and sewed a tip to the upper edge of the part turned up to form the upper portion of the moccasin. This, of course, resulted in puckering.

The process employed by the plaintiff was to avoid the puckering by taking two pieces, namely, a sole piece, of the shape of the bottom of the foot, and by stitching the outer edge of this sole piece to a vamp, substantially a straight piece of leather, and then making the edge of the sole piece follow around the toe, so that the vamp assumes an upstanding position around the sole. The last is then introduced, and the vamp is fitted around the last, and the tip is fitted into position around the top of the last, and sewed by hand to the outer edge of the vamp; the edge of the vamp, where it joins the edge of the tip, not being much longer than the upper end of the tip. On examination of the testimony it is clear that Sarazin did precisely what the Indian and his successors did; he made his moccasins from a one-piece solid bottom, like the old-fashioned moccasin. He did not have a two-pieced bottom. He did not escape the pucker. He did not anticipate Merrill.

(2) The defendant charges an anticipation by Francis F. Prince, of Auburn, Me., in 1904, and for several years thereafter. Prince is a traveling salesman, who was in the employ of the defendant company. The first exhibit which he produces clearly follows the method of manufacture of the Indian. The part below the tip is one piece, forming the whole bottom part of the shoe. He says that this sort of shoe, with the one-piece bottom, was made in Monmouth by the Getchell Company for many years. This shoe, with its one-piece bottom, is clearly not an anticipation.

He produces another shoe which he calls an imitation of a moccasin slipper. On examination, the slipper appears to closely resemble the plaintiff's moccasin. Upon turning to the testimony, however, it is found that this moccasin is a turned shoe. It is made of a pliable material, and produces similar result to that produced by the plaintiff. But this patent is not on the completed moccasin; it is on the series of four steps in combination, by which the moccasin was made. The stitching on this shoe of Prince was done by sewing machines, and by no process similar to that of the plaintiff. After the sewing, the shoe was turned. Clearly it is not anticipatory of the patent in suit. Prince puts in another exhibit, a felt slipper, known as the "Comfy Slipper," which, also, is a turned moccasin slipper, and clearly does not anticipate the patent in suit.

(3) It is charged, also, that the Buck Moccasin Company, of Bangor, anticipated the plaintiff's patent by making and putting out moccasins constructed in a manner similar to that set forth in the claims of the plaintiff's patent. Joseph E. Buck, representative of the Buck Company, testified that his concern made what was called their No. 31. His direct testimony indicated that he pursued the method of construction pointed out in the plaintiff's patent; but he later admitted that, instead of lasting upward from the sole to the tip, following the process described by the plaintiff, he lasted his moccasins downward like a shoe. This is the exact opposite of the plaintiff's process. It is therefore of no great consequence to inquire closely when he produced his moccasin. He also presents what he calls his "driving moccasin." This moccasin was clearly made with a one-piece bottom, and cannot be an anticipation.

(4) The defendant presents one case of alleged anticipation which involves a serious question of fact. It is charged that, in 1913, William Bickford, president of the defendant company, constructed a moccasin anticipatory of the plaintiff's patent. The substantial claim is made, therefore, that the defendant made a moccasin by the same method employed by the plaintiff, but prior to the construction of the plaintiff's moccasin, and that, therefore, the defendant's moccasin is an anticipation, and not an infringement. This brings us to a careful consideration of an important question of fact.

Nathaniel C. Small, of Auburn, a shoe manufacturer, testifies that a certain hunting moccasin, introduced in evidence, was made for him by the defendant company in 1913. He described the method of its manufacture as being similar to that employed by the plaintiff. He says that the defendant's shoe offered by the plaintiff as the offending

shoe in the case, and marked Exhibit H, was constructed in the same way. Upon examining the hunting moccasin, however, it is found that the sole of this shoe was a one-piece bottom, like the Indian moccasin. Mr. Bickford testifies that this hunting moccasin was one of two or three pairs made by him as an experiment in 1913, and that it did have a one-piece bottom like the old Indian moccasin, and that it also had an outer sole.

Mr. Bickford also offers in testimony a moccasin shoe bearing the number 40–S, and testifies that this shoe was the same shoe, involving the same method of construction, as the admitted shoe of the defendant, offered by the plaintiff as the offending shoe, and marked and referred to as Exhibit H. Bickford introduces certain order blanks, 10 in number, made out to William Bickford, Auburn, Me. He testifies that they were printed on the defendant company's letter heads, each of which contained orders to the defendant company for moccasin shoes bearing this stock number, 40–S. Substantially all of these orders were from W. G. Verplast, Bar Harbor, Me., an agent of the defendant company; the first one being dated October 22, 1914. Bickford testifies that all of these 10 exhibits were for goods actually shipped by him for the company during some months after October, 1913. He further testifies that this shoe, 40–S, was the same shoe, with the same method of construction, as Exhibit H, the admitted shoe of the defendant. He says that he began to make this shoe in 1913, and that he made it from the stock pattern, 40–S, and that he has made it from that pattern continuously down to the present time. He then describes in detail his patterns for the shoe, particularly the pattern for the filler, which is referred to throughout the testimony as K–1, and the pattern for the vamp, which is referred to as K–2. He finally, after some hesitation, fixes the time when he first got out the patterns K–1 and K–2 as January or February, 1914, and that he let his salesmen have the shoes from that pattern in the spring of 1914, and he thinks that some time in October they were offered to the public; that this shoe was substantially like the shoe to which we have referred as Exhibit H. He has no books with which to confirm his memory. Verplast himself, the defendant's agent, is not introduced; nor are any of the shoes sold on the 10 orders and carrying the stock number 40–S.

Upon this point Mrs. Maude E. Verrill is called as a witness. She is the defendant's bookkeeper. She produces two specimens of a lady's moccasin, which are marked and referred to all through the testimony as Exhibits 10 and 11. One is a light brown, and the other black. She says that in the spring of 1914, while in the defendant's factory, she stitched these moccasins, and that she thinks similar shoes were made in the latter part of 1913 "for our own use." Upon being reminded that Mr. Bickford had said that he began making these shoes, for a sample, not in 1913, but in 1914, the witness said that she would not change her testimony, that she would still insist that she began making the shoes in 1913, and that moccasins were made before the samples were put out. She testifies that both these moccasins were made early in the spring of 1914, although other shoes of similar patterns had been made experimentally in the fall of 1913. She was then asked

to fix the date more definitely when she made the shoes, and says that she knew it was in 1914, because "we made them before we had the zig-zag machine." It is shown further in the testimony that the zig-zag machine was not produced until 1915. The two shoes were shown to the court, and upon examination of one of them—No. 11—by turning back the outer sole and inner sole (or filler, as she terms it), connected with the vamp by a small narrow strip, it becomes evident that the strip is sewed to the edge of the vamp by a row of zig-zag stitching, which appears to have been done on a zag-zag sewing machine, and is precisely like the other zig-zag stitching shown to the court. It therefore appears that No. 11 shoe must have been made after the purchase of the zig-zag machine in 1915. Mrs. Verrill testifies that a lady by the name of Irish, living in Auburn, had worn the shoes, although they had been in the possession of the defendant, and that she was told by Mr. Bickford that he got the shoes from Mrs. Irish. Mrs. Irish has not been called by either party. It appears, too, that a certain Charles W. Skillings had sold the moccasins in question. Mr. Skillings is not produced as a witness.

Testimony is offered in regard to the time when the defendant obtained his patterns K–1 and K–2 for his shoe, H, which was admittedly made by him. Mr. Bickford testifies that he first had paper patterns for his moccasins, and later got metal-bound patterns from William E. Leighton, formerly of Auburn; but he does not know when he first got his metal-bound patterns for the new-style shoe. He says that at the time he went to Leighton to get his new metal-bound patterns he was not informed by him, or by any one, that his patterns were similar to Merrill's pattern, or that Mr. Merrill was going to apply for a patent. He further says that his first metal-bound pattern was the one now marked Exhibit 13 in this case, but that he does not know how long it was, after that, before the K patterns were made, but that it was not long. 13 is a very nearly straight vamp; K is curved a good deal. 13 was discontinued, because he said it cost too much. It turned up more nearly at right angles than his subsequent pattern, K.

William E. Leighton is called by the plaintiff in rebuttal. He testifies that he made the pattern Defendant's No. 13 for Bickford from the paper pattern, which was the first of that type and design that he had ever made, and that, subsequently, two or three months afterward, he made a different one now marked Exhibit K. After making defendant's pattern No. 13, he testifies that he had a talk with Mr. Bickford concerning Mr. Merrill's getting out a similar pattern; that, to the best of his recollection, he said to Mr. Bickford that the patterns, which he was having made, were similar to Mr. Merrill's. He says:

"I told Mr. Bickford that Mr. Merrill's was a pattern which produced a shoe similar to what he was trying to get here, with the toe turned up."

It appears, too, that Buck had told Bickford that Merrill's vamp was a straight piece of leather and that his first pattern 13 was straight, and that after this he changed his pattern 13 to a curved pattern, similar to Exhibit K. Leighton further testifies that Merrill brought him in a paper pattern, similar to plaintiff's introduced here as Exhibit Y, over which he and Merrill worked and made the toe fit the last a little,

and then produced the pattern, plaintiff's Exhibit Z, which he identifies by his handwriting upon it, and that, from this pattern Z, he built a metal-bound pattern for Mr. Merrill. He was then asked:

"Q. Which pattern did you make first, the metal pattern Defendant's Exhibit 13, which you made for Mr. Bickford or the metal pattern which you made for Mr. Merrill from the paper pattern Plaintiff's Z? A. I think it was for Mr. Merrill, the first one.

"Q. How long was it after you made Merrill's that you made Mr. Bickford's? A. It might have been three or four weeks.

"Q. And whether or not, Mr. Leighton, you are positive Mr. Merrill's was the first, and a period of several weeks elapsed before you made Mr. Bickford's Defendant's No. 13? A. Yes, sir."

In cross-examination, he says he thinks it was along the first of the year 1915 that he made defendant's Exhibit No. 13, and that he was sure it was not the last of the year 1914, and that it was several weeks after he made the pattern for Mr. Merrill, which he thinks was in December, 1915, and he leaves it as his final recollection that it was in December, 1915, that he made Merrill's first paper pattern Z, and several weeks after that he made Bickford's first paper pattern No. 13. Mr. Merrill had already testified that he got the metal-bound pattern the last part of 1915, or early part of 1916, rather than the first part of 1915, and fixes the time by the fact that he made application for his patent in November, 1915. Mr. Merrill had further testified that he had got out two or three experimental shoes during the summer before he put in application. In cross-examination Mr. Leighton further says:

"Q. (by Mr. Morey). And now, Mr. Leighton, did you ever see a shoe made from this pattern which you say you made for Mr. Merrill? A. I saw one made from the first one, the first pattern he brought in to me; he came in to my office with a shoe made from this one, of this pattern (indicates).

"Q. Did you ever see a shoe made by Mr. Merrill from plaintiff's Z? A. Yes, sir.

"Q. When? A. In the early part of the year 1915.

"Q. Did you see one before you had this talk with Mr. Bickford? A. Yes, sir; before I made the bound patterns."

It appears, then, that before Leighton had made any bound patterns for Bickford, like Defendant's No. 13, Merrill had brought to him (Leighton) a completed shoe made on the pattern of Z; that two or three months had elapsed between the making for defendant of pattern No. 13 and pattern K; and that the shoes in question were made from K, and not from 13. It seems to me that this testimony tends to show that it was long after the plaintiff had brought in his pattern Z, and made sample shoes from it, and filed his application for the patent, before the defendant Bickford brought in his pattern K from which his shoe H was made, and that it was at least several weeks before Bickford ever brought in his tentative pattern No. 13.

It appears, further, in testimony, that on February 24, 1916, according to the testimony of Mr. Merrill, there was a meeting in the De Witt House, at Lewiston, of moccasin manufacturers, for the purpose of forming an organization for advertising moccasins, and that two weeks before that time, in December, Merrill had filed application

for his patent. There were present at the meeting Mr. Bickford, Mr. Joseph Buck, and Mr. John Bass, of Wilton.

Merrill testifies:

"We had a meeting at the De Witt House of several of the moccasin manufacturers—at the De Witt House in Lewiston on the 24th of February, 1916—for the purpose ostensibly of forming an organization, a moccasin week, gotten up as an advertising scheme to feature moccasins, in one of the advertising magazines known as the 'Shoe Man,' which is published in Boston.

"Q. Now, at that time, as appears by the patent, I believe you had already applied for your patent on this invention? A. Yes, sir.

"Q. Whether or not you had any talk with Mr. Bickford in relation to your having applied for such a patent or such an invention? A. Indirectly; yes.

"Q. Will you state what took place? A. Why, we were assembled there in Mr. Bosworth's room—Mr. Bickford, Mr. Buck, and Mr. Bass.

"Q. Who is Mr. Buck? A. He is a manufacturer in Bangor, Me.

"Q. Who is Mr. Bass? A. Mr. John Bass, of G. H. Bass & Co., who are moccasin manufacturers in Wilton, Me.

"Q Is Mr. Buck a moccasin manufacturer? A. Yes, sir.

"Q. All right; go ahead. A. We were talking at the meeting, and in a general way trying to form an organization to get together, as you would call it, and in the conversation, or during the time after the business was over, we referred— I don't know whether I referred to it, or we got to talking so we brought the matter up of my patent which I had made application for; my application being put in some time in November, I figured I was perfectly safe on it, and I took the matter up and told them—explained to them what I had applied for and what I was working on developing.

"Q. You explained the idea of the invention? A. Yes, to them there, and told them I had applied for a patent, and should manufacture them as soon as I got them developed in proper shape, explained the method and process I had applied for, told them all about it, so that they wouldn't start in on anything of the kind. Mr. Buck made the statement at that time—

"Q. Was Mr. Bickford present? A. I think so.

"By Mr. Morey: Was he present when you made this statement to Mr. Buck? A. Yes; he was.

"By Mr. Whitehouse: I understood him so to state. A. Mr. Bickford was present. Mr. Buck made the statement that he was glad I spoke of it, because he was working on a shoe, on the same thing or similar, but he hadn't made an application; I told him I had applied for a patent, my application was in, and told them for the express purpose so they would keep off, and they understood it so, I am very sure.

"Q. What, if anything, did Mr. Bickford say? A. Mr. Bickford didn't say anything that I remember of about it, but immediately after, within a week or ten days, proceeded to get out a shoe along the lines that I had described to him.

"Q. Where did you find such a shoe? A. Found such a shoe on the market; he put out a shoe along those lines before I put my own out in any quantities."

Bickford testifies that he was present at the meeting, but denies that Merrill made the talk to him (Bickford) about the invention; he admits that Buck told him of the conversation. Buck testifies this:

"Q. Now, then, what did Mr. Merrill say to you gentlemen in that interval? A. He said he had either applied or had a patent to make a moccasin from a straight piece of leather. I asked him if he would describe it, and he said he would, and he described it as a straight piece of leather."

It will be seen that Bickford claims to have begun working on his new vamp in January or February, 1914, and was putting them on the market in October, 1914. He must have been making these shoes from some pattern. The only patterns in testimony—the only patterns any-

where on the horizon—are the patterns to which I have already referred. The testimony seems to me to tend to show that, at the De Witt House meeting, in February, 1916, Bickford learned of Merrill's invention and of his application for the patent, and that he immediately started out to put before the public a moccasin made from patterns which he had procured in imitation of Merrill's pattern. Leighton's best recollection of the time which elapsed between the making of Merrill's pattern and Bickford's pattern was "several weeks," and this might bring the time when Bickford first came in to Leighton with his paper pattern 13 in February, whereas the testimony tends to show that Merrill came in with his pattern Z in December. The burden is upon the defendant to show anticipation in the prior unpatented art. I cannot escape the conclusion that he has not met this burden. The testimony tends, rather, to show the contrary, as I have above indicated. I am drawn to this conclusion by applying the settled law to the subject. In Emerson & Norris v. Simpson Bros. Corporation, 202 Fed. 747, 750, 121 C. C. A. 113, 116, in speaking for the Circuit Court of Appeals, Judge Putnam says:

"It is necessary that the anticipation should be supported, not merely by the testimony of one or numerous witnesses relative to matters many years previous, but by concrete, visible cotemporaneous proofs which speak for themselves."

Judge Putnam further says that evidence of anticipation must, at least, meet the expression in Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, namely, "That the proof must at least establish a clear conviction," and that it must be equal to that which was required in Maxwell Land Grant, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949. He cites Westinghouse v. Stanley Co., 133 Fed. 167, 174, 68 C. C. A. 523, 530, in which case he himself had drawn the opinion upon a like question, and had referred to the forceful language which the Supreme Court had uniformly applied "wherever an alleged infringer undertook to prove by oral proofs prior public use or prior invention. Thus the court to that extent gives to a patentee the practical benefit of the presumption arising from the grant of his patent."

In the case at bar the most of the testimony relied upon by the plaintiff is the unassisted memory of witnesses. In the case of Mrs. Verrill's testimony, to which I have referred, she produces certain shoes; but she presents no visible and contemporaneous proofs which speak for themselves as to the time such shoes were made, and, as I have pointed out, her testimony relating to time is not clear or convincing. So, too, in reference to the 10 orders of Verplast to the defendant company for moccasin shoes bearing the number 40–S. Bickford testifies that this 40–S shoe was the same shoe as Exhibit H, the admitted shoe of the defendant; but he produces no visible, contemporaneous shoe of the 40–S variety. He does not even introduce Verplast to testify about the orders or the shoes themselves. Here, again, evidence falls far short of that clear and convincing proof required to defeat a patent.

Upon the whole matter of anticipation in the prior unpatented art I am forced to the conclusion that the defendant has not produced

sufficient evidence to take away from the patentee the "practical benefit of the presumption arising from the grant of his patent."

Infringement.

The defendant makes a shoe of the moccasin type. Bickford describes the process of making his moccasin substantially as follows: A sole piece and a vamp are first cut, and the inner edge of the vamp is attached to the outer edge of the sole piece by butting the edges together and securing them with a zig-zag stitch. The sole piece does not constitute a full-sized sole, having the size and shape of the bottom of the foot, as shown in the drawing of the patent in suit, and as contained in the plaintiff's shoe; but it consists of the forward portion of such sole, rather narrower than the foot, and extending from the toe to the instep, and having its rear end terminating in a point beneath the instep. The vamp is not a substantial straight piece of leather, as illustrated in the patent in suit, and as shown in the plaintiff's shoe; but it is cut V-shaped, with a wide opening between the ends, in such a manner that, when the pattern is laid down on the stock, it will overlap or interlock the end of one vamp, fitting and nearly filling the hollow space between the ends of the next vamp. In sewing the vamp to the outer edge of the sole piece, the sewing starts at the rear end of the sole piece, and follows around the outer edge and toe, back to the point of beginning. The result of this operation is to cause the vamp to turn up at a considerable angle, but not to stand upright, or at right angles, with respect to the sole piece. An outer sole is now stitched on the under side of the sole piece and vamp, by stitching directly through the outer sole and vamp near the lower or inner edge of the vamp. The last is then introduced; the vamp is shaped up over the sides and toe of the last, and the tip is sewed in as in the Indian moccasin, and also in the Merrill moccasin; that is, the relatively long edge of the vamp is gathered and stitched to the outer edge of the tip.

Mr. Bickford says that the shoe, above described, illustrated by Exhibit H, was given a stock number 40–S by him; that it was put on the market in the fall of 1914, and manufactured and sold by him continuously thereafter.

His principal contention is that his moccasin shoe H, to which the stock number 40–S was given, is an anticipation of the plaintiff's moccasin, and that such anticipation renders the plaintiff's patent invalid. A great part of the testimony in this case has been directed to this issue. The defendant's contention upon this point, with the testimony adduced by him, tends to the conclusion that, if his moccasin shoe H was not an anticipation of the patent in suit, it is an infringement of that patent.

It is, however, necessary to examine further the defense urged by the defendant on the ground of infringement. The defendant contends that there is no infringement, because the piece employed in the defendant's shoe as the starting point is not a "sole," in the language of the patent in suit, but is merely a filler, and does not have the function of the sole, employed by the plaintiff, as set forth in claim 1; in other words, that the defendant does not "secure a vamp to a sole."

The defendant urges, also, that its shoe does not show a vamp which meets the description of the plaintiff's vamp; that the vamp of the plaintiff is straight and of one piece; that the defendant's is V-shaped, and not substantially straight like the plaintiff's; that when it is attached to the sole it does not spring upward in the same way that the plaintiff's does.

Now, when we look at the so-called filler, we find that it does not extend the whole length of the foot. It is the equivalent of the forward end of the sole shown in patent. It is not the ordinary filler found in the shoe art, to which nothing is attached, and which cuts no figure in the construction of the shoe, or as a means of strengthening it. The so-called filler in the defendant's moccasin holds the lower edge of the vamp in place; it is sewn to the vamp; it constitutes the tread or actual bottom of the moccasin and the bearing for the foot. By whatever name it is called, the so-called filler in the defendant's shoe is, in its use, substantially the sole described in the plaintiff's specifications and claims and employed in the plaintiff's moccasin.

[2] With reference to the vamp, the proofs disclose that the vamp of the defendant is substantially the vamp of the plaintiff. The defendant cannot escape infringement by having its vamp in two pieces, for, although the vamp described by the plaintiff in its specifications is in one piece, the specifications themselves refer to a two-piece vamp. The defendant also lays stress upon the fact that, instead of employing a straight piece for a vamp, its vamp is curved or V-shaped, and that it does not turn up to any extent from the horizontal to meet the tip, and to avoid puckering. I think the expert, Mr. Bates, is correct in saying that, in forming the defendant's shoe H, according to the pattern as produced, the vamp must necessarily turn up and achieve substantially the same result, in escaping the puckering, which the plaintiff achieves by his patent. The fact that the curved vamp of the defendant does not get the full advantage from the plaintiff's invention does not prevent it from infringing the patent. An infringer cannot evade liability by diminishing the utility of a device. Penfield v. Chambers Bros. Co., 92 Fed. 630, 34 C. C. A. 579 (Judge Taft). To the extent that the vamp turns up and decreases the puckering it infringes, and attains the benefit of the plaintiff's inventive thought. The defendant's vamp, to be sure, is not straight, like that in the drawing of the patent; but the patentee is not limited to a straight vamp, or to a vamp substantially straight, or to the one-piece vamp, or to the vamp shown in his drawings, so long as he has disclosed it in his patent. The defendant's vamp clearly effects the same result by the same means as the vamp of the plaintiff. The plaintiff's description in his specification clearly covers all that the defendant does in the art; for, when a patentee describes an invention or a machine, he is understood to claim, and does by law cover, not only the precise forms he has described, but all other forms which embody the invention. He may have the whole advantage of his inventive thought, as disclosed by his whole patent. Winans v. Denmead, 15 How. 330, 342, 14 L. Ed. 717; Ives v. Hamilton, 92 U. S. 426, 430, 431, 23 L. Ed. 494; Walker on Patents, §§ 363, 365.

Conclusion.

I am satisfied that the defendant's method of making its admitted shoe was, step by step, the four elements of the invention set out in claim 1 of the patent in suit. It produces, at least in part, the advantages of the patent in suit, by eliminating the puckering to which attention has been called. It produces, also, the advantages of economy claimed by the plaintiff under his method. It is clearly an infringement of claim 1 of the patent.

The conclusion is, then, that Harry E. Merrill, patentee, was the first and original inventor of the method of constructing moccasin shoes described in his patent and claimed in his five several claims; that the plaintiff's patent in suit is a valid patent; that the defendant has infringed claim 1 of that patent; that the decree must be for the plaintiff. A decree may be entered for an injunction and an accounting.

A decree, consistent with this opinion, may be presented.

The plaintiff recovers costs.

STROMBERG MOTOR DEVICES CO. v. HOLLEY BROS. CO. et al.

(District Court, E. D. Michigan, S. D. July 16, 1919.)

No. 275.

1. EQUITY ⟸363—PLEADING—MOTION TO DISMISS.
   Under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), all well-pleaded allegations of fact in a bill are admitted on motion to dismiss, and hence grounds for dismissal based on allegations of fact contradictory to positive averments in the bill cannot be considered.
2. PATENTS ⟸287—INFRINGEMENT—PERSONS LIABLE—CORPORATE OFFICERS.
   The mere fact that the only acts of the individual defendants in manufacturing, selling, or using infringing devices were performed by them as officers or directors of the defendant corporation, does not necessarily relieve them from liability for infringement of the patent.
3. PATENTS ⟸283(2)—INFRINGEMENT—INJUNCTION—DEFENSE — DISCONTINUANCE OF INFRINGEMENT.
   The fact that a defendant who has been guilty of infringement of a patent has later ceased such infringement does not deprive the owner of such patent of the right to an injunction against the infringement.
4. PATENTS ⟸283(2)—INFRINGEMENT SUIT—EXPIRATION OF PATENT.
   If at the date of the filing of a bill charging infringement of a patent there is sufficient time, under the rules of practice of the court in which such bill has been filed, to obtain temporary injunction thereon before expiration of such patent, the court secures the necessary jurisdiction to grant whatever equitable relief may be proper, and it may retain such jurisdiction, even after expiration of the patent, notwithstanding the fact that no temporary injunction was actually issued or separately asked, and despite the contention that the law affords an adequate relief by an action for damages.
5. PATENTS ⟸313—INFRINGEMENT SUIT—MOTION TO DISMISS.
   A bill charging infringement of a patent will not be dismissed on the ground that the mere examination of the patent showed that it was void on its face, except in cases where the patent seems so clearly invalid that the taking of testimony thereon is manifestly useless.

In Equity. Bill by the Stromberg Motor Devices Company against Holley Bros. Company and others. On motion to dismiss. Motion denied.

Brown, Hanson & Boettcher, of Chicago, Ill., for plaintiff.
Whittemore, Hulbert & Whittemore, Paul B. Moody, and Angell, Bodman & Turner, all of Detroit, Mich., for defendants.

TUTTLE, District Judge. This is a motion to dismiss the bill of complaint herein. The bill charges infringement by the defendant of two patents on automobile carburetor improvements owned by plaintiff, and prays for the usual temporary and permanent injunctions and accounting against all of the defendants. No separate application, however, for a temporary injunction was made, and no such injunction was issued. The bill was brought against defendant corporation and certain individual defendants, and it charges that the defendants last mentioned are and have been stockholders of, and have in the past owned, controlled, directed, supervised, and managed, the defendant corporation, and that they now continue so to do, and that said defendant corporation and the other defendants, both as individuals and as stockholders as aforesaid, have infringed the patents in suit, and are continuing, preparing, and threatening to do so in the future, and are preparing, aiding, and encouraging others so to do.

The motion to dismiss is based upon grounds which may be grouped as follows: (1) That the defendant corporation was dissolved in accordance with the statutes of the state of Michigan prior to the filing of the bill herein; (2) that such corporation has not, since the end of the year 1917, manufactured, sold, or used carburetors of any kind; (3) that the individual defendants were connected with the manufacture, sale, and use of carburetors prior to the end of 1917 only as managers and supervisors of said defendant corporation, and not as individuals; (4) that since the time when the defendant corporation ceased, as already alleged, to manufacture, sell, or use carburetors, the individual defendants have not, as officers, stockholders, or directors of said corporation, or as individuals, made, used, or sold carburetors; (5) that at no time prior to the filing of the bill herein has any one notified any of the defendants of any claims of infringement under either of the patents in suit; (6) that one of said patents, the so-called Ahara patent, expired by limitation on October 15, 1918, 17 days after the date of the filing of such bill; (7) that the other of said patents, the so-called Mingst patent, is void on its face for lack of novelty and of invention. These contentions will be discussed in the order named.

[1] (1–5) It is clear that the first five of the objections to the sufficiency of the bill, as just stated, cannot be passed upon or considered upon this motion to dismiss the bill, as they are all based on allegations of facts contradictory to positive averments in such bill. It is elementary that on such a motion the allegations of material facts which are well pleaded in the bill must be accepted as true for the purposes of the motion, and that only defenses in point of law aris-

ing upon the face of the bill may be raised in this manner and called up and disposed of by the court before final hearing. Equity Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi); Tompkins v. International Paper Co., 183 Fed. 773, 106 C. C. A. 529; Krouse v. Brevard Tannin Co., 249 Fed. 538, 161 C. C. A. 464; Edwards v. Bodkin, 249 Fed. 562, 161 C. C. A. 488.

[2] In this connection, however, it may not be amiss to point out that the mere fact, if it be a fact, that the only acts of the individual defendants in manufacturing, selling, or using infringing devices were performed by them as officers or directors of the defendant corporation, does not necessarily relieve them from liability as infringers in this suit. Graham v. Earl, 92 Fed. 155, 34 C. C. A. 267; National Cash Register Co. v. Leland, 94 Fed. 502, 37 C. C. A. 372; Harrington v. Atlantic & Pacific Telegraph Co. (C. C.) 143 Fed. 329; Saxlehner v. Eisner, 147 Fed. 189, 77 C. C. A. 417; Brennan & Co. v. Dowagiac Mfg. Co., 162 Fed. 472, 89 C. C. A. 392; Steber Machine Co. v. Randon Milling Co. (D. C.) 217 Fed. 796; Reed v. Cropp Concrete Machinery Co., 225 Fed. 764, 141 C. C. A. 90.

[3] Nor does the fact that a defendant who has been guilty of infringement of a patent has later ceased such infringement deprive the owner of such patent of the right to an injunction against the infringer, since if the latter act in good faith the injunction can do him no harm, while the former should not be compelled to rely for his protection upon the mere promise of one who has already infringed the patent not to do so again. Sawyer Spindle Co. v. Turner (C. C.) 55 Fed. 979; Matthews & Willard Mfg. Co. v. National Brass & Iron Works (C. C.) 71 Fed. 518; General Electric Co. v. New England Electric Mfg. Co., 128 Fed. 738, 63 C. C. A. 448.

[4] (6) It is urged that the life of the Ahara patent in suit expired by limitation 17 days after the date of the filing of the bill, and that as no relief had been granted before that time, and it then became impossible for the court to grant the equitable relief prayed so far as the Ahara patent was concerned, the nature of the suit, so far, at least, as regards this patent, was thus converted into that of an ordinary action to recover damages, for which plaintiff had an adequate remedy at law.

While the decisions of the courts on this question are not entirely in accord, I am satisfied that the correct rule is now established to the effect that if at the date of the filing of a bill charging infringement of a patent there is sufficient time, under the rules of practice of the court in which such bill has been filed, to obtain a temporary injunction thereon before the expiration of such patent, the court acquires the necessary jurisdiction to grant whatever equitable relief may be proper, and it may retain such jurisdiction even after the expiration of the patent, notwithstanding the fact that no temporary injunction has been actually issued or separately asked. Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392; Adams v. Bridgewater Iron Co. (C. C.) 26 Fed. 324; Kittle v. De Graaf (C. C.) 30 Fed. 689; Bradner Adjustable Hanger Co. v. Waterbury Button

Co. (C. C.) 106 Fed. 735; W. W. Sly Mfg. Co. v. Central Iron Works, 201 Fed. 683, 120 C. C. A. 264.

As there was ample time, according to the rules of this court, after the filing of the bill in the present case, to obtain a temporary injunction if a motion therefor had been made, I have no doubt that this court has acquired jurisdiction over the subject-matter of the suit, and that it ought to now retain such jurisdiction, and make such disposition of the case after the final hearing as the facts and the law shall require.

[5] (7) Defendants contend that the Mingst patent is invalid upon its face for alleged lack of novelty and of invention. I have carefully considered this contention, and the arguments in support thereof, but I am not prepared to hold that the questions of novelty and invention here involved are so free from doubt upon a mere examination of the patent that such patent should be adjudged void without the allowance to plaintiff of an opportunity to present its testimony on such questions. I am impressed with the wisdom and justice of the rule that a court should not exercise its power to hold a patent void on its face for want of patentability, except in cases where the patent seems so clearly invalid that the taking of testimony thereon appears to be manifestly useless. Western Electric Co. v. North. Electric Co., 135 Fed. 79, 67 C. C. A. 553; Stillwell v. McPherson, 183 Fed. 586, 106 C. C. A. 354; Gilbert Mfg. Co. v. Post & Lester Co. (C. C.) 189 Fed. 81; American Safety Device Co. v. Liebel-Binney Construction Co., 243 Fed. 575, 156 C. C. A. 273.

Without expressing any opinion upon the merits of the Mingst patent, I am satisfied that such patent should not be held void upon its face.

For the reasons stated the motion to dismiss the bill must be denied, and an order will be entered in conformity with the terms of this opinion.

THOMSON SPOT WELDER CO. v. NATIONAL ELECTRIC WELDER CO. et al.

(District Court, N. D. Ohio, E. D. August 1, 1917.)

No. 431.

1. PATENTS ⇐211(1)—INJUNCTION AGAINST VIOLATION OF LICENSE CONTRACT GRANTED.

The owner of a patent for a welding process, which, after validity of the patent had been adjudicated entered into a contract granting a license thereunder during its term, by which the licensee agreed not to question or contest the validity of the patent, *held* entitled to a preliminary injunction to restrain the licensee and its officers from violating the contract, and requiring them to observe it in good faith until their respective rights could be adjudicated.

2. PATENTS ⇐212(1)—LICENSEE CAN SELL ITS BUSINESS IN GOOD FAITH.

A licensee under a patent, not obligated to continue in business or to make and sell any minimum number of machines, is free to sell its property and business, where the sale is in good faith, and not merely colorable, to avoid the obligations of the contract.

In Equity. Suit by the Thomson Spot Welder Company against the National Electric Welder Company and others. On application for preliminary injunction. Granted.

William L. Day and Ernest Angell, both of Cleveland, Ohio, for plaintiff.

Luther Day, of Cleveland, Ohio, Melville Church and A. S. Pattison, both of Washington, D. C., and Thomas F. Turner, of Canton, Ohio, for defendants.

WESTENHAVER, District Judge. This application for preliminary injunction was heard and submitted for decision on the verified bill and exhibits, verified answers, and affidavits filed on behalf of both parties. In disposing of this application, I deem it sufficient to state merely the conclusions to which I have come.

[1] Complainant's patent, No. 1,046,066, issued to Johann Harmatta, has been adjudicated to be valid by the United States Circuit Court of Appeals of the First Circuit. This adjudication became final in July, 1916. Thereafter complainant entered into a license agreement with the defendant, the National Electric Welder Company, granting it permission to use the Harmatta and other patents owned by complainant until the expiration of the Harmatta patent. This agreement, in addition to other terms, contains a clause whereby the National Electric Welder Company admits the validity of the Harmatta patent, and of all patents relating to spot or point welding machines now owned by complainant, and agreed not to question or contest, during the life of said Harmatta patent, the validity or terms thereof, or the application thereof to the process of spot or point welding machines utilized therefor. Substantially all other makers of machines for the utilization of this process, it is alleged, have entered into similar license agreements.

This adjudication of validity and this license agreement with the National Electric Welder Company, and also with other makers of machines, for utilizing this process, create, in my opinion, a business status between complainant and defendant, which complainant is entitled to have preserved in its entire integrity until a hearing of this cause may be had upon the merits, and that complainant is entitled to a preliminary injunction for that purpose.

The two defenses urged upon me—(1) that these license agreements create a combination in restraint of trade, which is in violation of the United States Anti-Trust Law and the Ohio Anti-Trust Law; and (2) that the Harmatta patent is in fact invalid, and that a good defense and adequate evidence to support this contention is in existence, but was not brought forward nor considered by the United States Circuit Court of Appeals of the First Circuit—are not, in my opinion, sufficient to justify me in refusing to protect by injunction this existing business status from demoralization and disintegration until a final hearing on the merits can be had. These two defenses cannot properly be tried and finally determined on a preliminary application, but ought only to be decided after a full hearing and carried into a final decree.

The evidence, in my opinion, also shows that the National Electric Welder Company and its officers are not keeping, and have not in good faith kept and performed, all the terms and conditions of its license agreement with complainant, and, further, that their attitude, as disclosed by their answers and affidavits, not to mention complainant's affidavits, raises more than a suspicion of their intention to keep and observe in good faith the provisions of this license agreement.

The conduct, in particular, of Fred P. McBerty, active manager of the National Electric Welder Company, shows a course of conduct directly inconsistent with a past purpose or with a sincere intention to observe in good faith that part of the agreement binding the National Electric Welder Company not to question or contest the validity of the Harmatta patent. His co-operation with other defendants over a long period, in procuring evidence, making experiments, and planning for an attack on the Harmatta patent, is not justified by the excuses put forward in his behalf, namely, that evidence of prior use in his possession may be forced from him by legal process. It is undoubtedly true that, when called as a witness he should testify to any facts in his knowledge, and that one is not justified in destroying evidence relating to a pending or threatened litigation; but it is also true that, when a controversy touching the validity of a patent has been settled by judicial decision or compromise or agreement, and one with knowledge thereof enters into a license agreement of the kind and character now under consideration, he should observe an attitude of good faith and loyalty towards the licensor, and the business in which the licensor and licensee are jointly interested, so long as the license agreement remains in force.

Complainant, in my opinion, is entitled, on the prima facie showing made, to a preliminary injunction, enjoining and restraining the defendants, the National Electric Welder Company, Fred P. McBerty, and N. A. Walcott, and all other officers and employés of the National Electric Welder Company, from violating directly or indirectly, or from refusing or failing directly or indirectly to observe, each and all of the terms and conditions of the license agreement in question, and also enjoining and restraining the other defendants, and each of them, from inducing, aiding, or encouraging the National Electric Welder Company directly or indirectly so to do.

[2] The injunction order should be so limited as not to enjoin or restrain the making or carrying out of any contract of sale by the National Electric Welder Company of all or any part of its assets, made or entered into in good faith, and with a bona fide purpose and intent to sell and dispose of the same. In order to avoid possible misunderstanding, some observations should be made touching the proposed sale by the National Electric Welder Company to Henry C. Milligan of all its property and assets, other than its license contracts and agreements and cash in bank and accounts receivable.

This license agreement does not oblige the National Electric Welder Company to manufacture and sell any minimum number of machines, nor to continue in business during any specified period. It does not oblige the defendant to devote its plant and assets in good faith to

the continuous manufacture and sale of machines for utilizing the Harmatta process. The National Electric Welder Company may therefore, notwithstanding the terms of said license agreement and this injunction, sell and dispose of any or all of its assets, and may cease to do business. It cannot be restricted in its power of alienation merely because it knows that the purchaser intends to use the same in manufacturing and selling in opposition to the Harmatta patent. The contemplated sale must, however, be an actual bona fide sale, and not a sham or subterfuge, whereby, through the use of the corporate form, the present officers and stockholders of the National Electric Welder Company may continue directly or indirectly in business, and avoid the obligations of this license agreement.

The defendants, other than the National Electric Welder Company and its officers and stockholders, are free to contest the validity of the Harmatta patent. They may, if acting in good faith and under an honest belief in the invalidity of the Harmatta patent, do all the things shown by their affidavits and exhibits to have been done by them. The legitimate exercise of these rights will not be interfered with by injunction. It is proper, however, to require of them to respect the business status created between the plaintiff and the National Electric Welder Company by this license agreement, with the same good faith and to the same extent as the licensee and its officers are required to observe and respect it. They may not, directly or indirectly, induce, aid, or encourage the breaking or violation of that license agreement, at least not until a final hearing can be had. The right to participate in the purchase of assets from the National Electric Welder Company is as large, and no larger, than the rights of the National Electrict Welder Company to sell, as has already been stated herein.

A decree will be entered in conformity to this memorandum, awarding a preliminary injunction, limited in the manner above indicated. A bond in penalty of $10,000 will be required.

AGASSIZ v. TREFRY, Tax Com'r, et al. (two cases).

(District Court, D. Massachusetts. July 14, 1919.)

Nos. 879, 892.

1. TAXATION ⇐93—DOMICILE OF PROPERTY OWNER—CHANGE.

A plaintiff, on the facts shown, *held* not to have changed his legal domicile from Massachusetts, where he owned two residences and where was the principal headquarters of his business, to Newport, R. I., where he owned an interest in a residence to which he notified the taxing authorities of both states he had removed and where he voted and was taxed; it appearing that during five years succeeding there had been no actual change of residence of himself or family, who continued to occupy his Massachusetts dwellings with brief visits to Newport.

2. DOMICILE ⇐8—CHANGE OF DOMICILE—PRESUMPTION AND BURDEN OF PROOF.

A domicile once acquired is presumed to continue until it is shown to have been changed, and the burden of proof rests upon a party alleging

a change of domicile to establish by reasonably satisfactory evidence both the fact of residence in the new locality and the intention to remain there.

In Equity. Two Suits by Rodolphe L. Agassiz against William D. T. Trefry and others. Decree for defendants.

Putnam, Putnam & Bell, Stoughton Bell, Coleman Silbert, and Julian Codman, all of Boston, Mass., for plaintiff.

Wm. Harold Hitchcock, Asst. Atty. Gen. of Massachusetts, and Henry C. Attwill, Atty. Gen. of Massachusetts, for defendants.

ANDERSON, Circuit Judge. These are two bills in equity brought to restrain the tax commissioner of Massachusetts from assessing upon and collecting taxes from the plaintiff for the years 1917 and 1918 under the Massachusetts Income Tax Act of 1916, c. 269.

The plaintiff alleges that he was domiciled in the city of Newport, R. I., during both of those years, and therefore not subject to personal or income taxes in the commonwealth of Massachusetts. Motions to dismiss were denied, thus determining in the plaintiff's favor all questions except that of the plaintiff's domicile.

That the plaintiff is entitled to relief if legally domiciled in Rhode Island is now, in effect, conceded by the Attorney General of the commonwealth.

Compare Dunn v. Trefry, 260 Fed. 147, — C. C. A. —, decided by the Court of Appeals for the First Circuit May 26, 1919; Smyth v. Ames, 169 U. S. 466, 517, 18 Sup. Ct. 418, 42 L. Ed. 819; Union Pacific v. County Commissioners, 247 U. S. 282, 38 Sup. Ct. 510, 62 L. Ed. 1110; Nevada-California Power Co. v. Hamilton (D. C.) 235 Fed. 317, 339; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

As it is admitted that the plaintiff was domiciled in Hamilton, Mass., until the fall of 1914 or spring of 1915, the sole question remaining to be determined is whether he has effectually changed his domicile from Hamilton to Newport. The salient facts are as follows:

The plaintiff's father died in 1910 domiciled in Newport. He left a large estate, part of which was a homestead in Newport assessed for about $175,000. The plaintiff had spent much of his youth in Newport. In this homestead, after his father's death, were furniture, pictures, and other property having both money and sentimental value to the plaintiff, in which he had a one-third interest. Under the father's will his three sons were trustees. The plaintiff's two brothers have long been domiciled in Newport. The father's estate was settled in Newport. One of his brothers is a bachelor; the other brother has no children. This homestead, subject to some sort of a contingent interest in Harvard College, passed under the father's will to the three sons. Prior to the plaintiff's attempt to change his domiciliary status, it was the practice each summer to have this homestead opened in the spring and equipped with the servants of the bachelor brother; the expenses being shared by the three brothers. During the winter the place was kept heated, to avoid dampness, and was in

charge of a caretaker and his wife. After it was opened for the summer, each of the three brothers or some member of the family of the two married brothers was accustomed to go to the Newport house and spend some part of each summer or fall season there. The plaintiff and his family spent all or a large part of the summers of 1910 and 1911 in the Newport homestead. Neither the plaintiff nor his family has spent a summer there since 1911.

The plaintiff owns, and has for many years owned, a substantial estate in Hamilton, Mass., assessed for $35,000 to $40,000; also, a house in Boston assessed for $60,000 to $70,000. His family, now consisting of his wife and one unmarried daughter (he also has one married daughter), have habitually spent their winters in Boston and their summers in Hamilton. The Hamilton place has not ordinarily been kept open or heated during the winter, although horses in charge of a caretaker are kept on the estate.

The plaintiff is president of the Calumet & Hecla Mining Company, and president or high official of various other mining companies whose properties are mainly located in Michigan. The home office of these companies is in Boston; the directors' meetings are held in Boston; but most or all of the companies also have offices in New York. The plaintiff's chief place of business is therefore Boston, but increasingly of recent years he is in New York. He also spends no inconsiderable time in Michigan. In New York he has for some years maintained an apartment. It thus appears that, prior to his attempted change of domicile, the plaintiff had four residences or places fit and convenient for a dwelling place; one in Hamilton, one in Boston, one in Newport, and one in New York.

In November, 1914, the plaintiff, under the advice of counsel, undertook to change his domicile from Hamilton, Mass., to Newport, R. I. In that month he notified the tax assessors of Newport that thereafter he should claim his residence in Newport. The assessors acted on this as a sufficient notice, and have since that time assessed the plaintiff as domiciled in Newport. He has paid personal taxes there for four years. The tax authorities also increased the assessment upon the father's trust estate, which had previously been assessed on the basis of two only of the three trustees being domiciled in Rhode Island. About the same time, the plaintiff and his two brothers purchased the contingent interest of Harvard College in the Newport homestead. He also bought a small lot of land in order that as a separate landowner he might have certain voting rights accruing under the laws of Rhode Island to landowners. He registered in Newport as a voter and has voted there since the spring of 1915. He also opened in Newport a bank account to which he has been accustomed to transfer from his main bank account kept in Boston funds enough to cover bills accruing in and about Newport. He also transferred his securities from a safe deposit box in Boston to one in Providence, R. I. In March, 1915, the plaintiff notified the assessors of Hamilton that he had changed his domicile to Newport. The Hamilton tax authorities accepted this notice as sufficient, and since that time have assessed no personal tax upon him in Hamilton. No per-

sonal tax had been assessed on him in Massachusetts since that notice until the defendant tax commissioner undertook to collect the state income tax for 1917 and 1918. When the plaintiff gave his notice to the tax authorities of Newport and of Hamilton, he was either in New York or Boston; probably in Boston. His family at that time was not in Newport.

Under the advice of counsel, on April 1, 1915, and probably on the same date in 1916, 1917, and 1918, so-called "tax days," the plaintiff was in Newport, but not at the homestead in Newport. The only other time, when during the year 1915 he or his family were in Newport, was during three weeks in September. At that time servants were sent down to Newport from the Hamilton place, but the Hamilton house was not closed. During the year 1916, the plaintiff's family was not in Newport at all. He was there only a day or two to cover "tax day." In 1917, the plaintiff sent some of his servants down for a week in August, and he or some of his family, or both, were there for about a week. In 1918, except for his presence on tax day, neither he nor his family was in Newport at all.

[1] It thus appears that since the attempted change of domicile the living and business habits of the plaintiff and his family have not been changed. The actual dwelling is in Hamilton and Boston, with considerable periods of time spent in Michigan, except that during the war period the plaintiff has in war work spent considerable time in Washington, D. C. The plaintiff testifies that, except for war conditions and war work in which he and some of his family were engaged, more time would have been spent in Newport. But the evidence does not warrant a finding that Newport is or was intended to be by the plaintiff or his family the real abiding place of himself or his family. It is not their "home" within the ordinary meaning of that word. Compare Thayer v. Boston, 124 Mass. 132, 144, 26 Am. Rep. 650.

[2] On these facts, has the plaintiff legally changed his domicile from Hamilton, Mass., to Newport, R. I.? The question is obviously close and not free from doubt. Difficult and important questions of domicile are increasingly before the courts. They arise not merely in tax cases like the present, but in will cases, bankruptcy cases, pauper settlement cases, and when jurisdiction depends upon diversity of citizenship. I find it impossible to reconcile the numerous decisions. This is apparently the view of the Supreme Court of Massachusetts. In Phillips v. Boston, 183 Mass. 314, at 315, 67 N. E. 250, Mr. Justice Braley said:

"While no exact and full definition to cover all cases can be given of the word 'domicile,' it was said in Lyman v. Fiske, 17 Pick. 231, 234 [28 Am. Dec. 293], that 'in general terms, one may be designated as an inhabitant of that place which constitutes the principal seat of his residence, of his business, pursuits, connections, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place, with the intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct.' It is the settled policy of the law that for the purpose of pauper relief the domicile of origin continues until another has been acquired, and it must now be taken to be too well settled to admit of doubt that to reside or have

a place of residence in a city or town means not merely physical presence therein, but being there with the deliberate intention and purpose of choosing it as a home; or, in other words, making it a domicile. Greenfield v. Buckland, 159 Mass. 491 [34 N. E. 952]; Thayer v. Boston, 124 Mass. 132 [26 Am. Rep. 650]; Pickering v. Cambridge, 144 Mass. 244 [10 N. E. 827]; Stoughton v. Cambridge, 165 Mass. 251 [43 N. E. 106], and cases cited; Palmer v. Hampden, 182 Mass. 511 [65 N. E. 817]."

The general rules seem clear and, theoretically, easy of application; when, however, they are actually applied to varying states which arise under the modern changing and complicated conditions of business and family life, they are found, practically, to be very far from clear and to be exceedingly difficult of application. The general principles are laid down by Mr. Justice Swayne in Mitchell v. United States, 21 Wall. 350, 22 L. Ed. 584, as follows:

"A domicile once acquired is presumed to continue until it is shown to have been changed. Where a change of domicile is alleged, the burden of proving it rests upon the person making the allegation. To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except facto et animo. Both are alike necessary. Either without the other is insufficient."

The questions of difficulty are to determine whether what the plaintiff in this case did constituted that concurrence of fact and intent requisite to change his domicile from Hamilton to Newport. If desire be the main or controlling element in the intent which the law requires, the plaintiff intended to change his domicile from Hamilton to Newport. But if the requisite intent be a purpose to make Newport and not Hamilton the real dwelling place of himself and his family, then his case fails for lack of the requisite intent. If the "residence in the new locality" means living, dwelling, residing, staying for substantial periods of time in the new locality, then the plaintiff has not resided and does not reside in Newport. But if "residence" means only comfortable or luxurious facilities for living, used only on rare and casual occasions, then the plaintiff may reside in Newport.

Brief consideration of a few cases may assist in reaching a conclusion.

In Barron v. Boston, 187 Mass. 168, 72 N. E. 951, the full court of Massachusetts reversed the decision of the superior court, which held that the plaintiff had not changed his domicile from Boston to Cohasset. The plaintiff in that case had a fully equipped residence in both places. While dwelling in Cohasset in the fall of 1900, he formed the intention then and there of becoming domiciled in Cohasset. He thereupon gave notice to the assessors of Boston that he was a resident of Cohasset. But he did not before the next May tax day notify the assessors of Cohasset that he had become a resident and potential taxpayer of that town; nor was his family actually living in Cohasset on May 1, 1901. The full court, reversing the superior court, held that, as he was actually dwelling in Cohasset at the time when he formed his intention, this was effective to change his domicile at that time. The decision of the full court apparently

turned upon the fact that, while actually dwelling in Cohasset in the fall of 1900, the plaintiff then and there determined to make that his home or domicile. The plaintiff's domicile thus became fixed in Cohasset in 1900. And the full court therefore held immaterial that which the superior court regarded as of controlling importance, to wit, that on May 1, 1901, as of which day the tax in controversy was levied, neither the plaintiff nor his family was living in Cohasset, and that the plaintiff had not, prior to that date, notified the Cohasset tax authorities that he was there domiciled. Otherwise stated, the full court held that in the fall of 1900 there was the concurrence of residence and intent to continue that residence as the domicile of the plaintiff which made it then and there a domicile not thereafter lost because of absence on the so-called tax day.

Compare Whately v. Hatfield, 196 Mass. 393, 82 N. E. 48, 13 Ann. Cas. 690; Borland v. Boston, 132 Mass. 89, 100, 42 Am. Rep. 424; Harvard College v. Gore, 5 Pick. (Mass.) 370; Jennison v. Hapgood, 10 Pick. (Mass.) 77; Viles v. Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311.

In Huntly v. Gaskell (1906) A. C. 56, 66, it is pointed out by Earl Halsbury that change of domicile is not lightly to be inferred; that the burden of proof rests upon the party who alleges a change of domicile to show by reasonably satisfactory evidence concurrence of the requisite fact and intent—both.

There is a considerable discussion of the authorities and cases relative to domicile in Delaware, etc., Co. v. Petrowsky, 250 Fed. 554, 558, et seq., 162 C. C. A. 570.

In Gilman v. Gilman, 52 Me. 165, 83 Am. Dec. 502, a will case, many of the earlier authorities are cited and reviewed. In that case, the court, on evidence close and doubtful, reached the conclusion that Gilman's original domicile in Waterville, Me., had not been lost. The court pointed out the impossibility of reconciling the various definitions of domicile and states of fact requisite to work a change of domicile, dealing particularly with cases of persons having various residences or spending much of their lives in travel, concluding:

"If any general rule can be applied to such cases, we think it is this; that the domicile of origin, or the previous domicile, shall prevail. This is in accordance with the general doctrine, that the forum origines remains until a new one is acquired."

In this circuit the latest decision dealing with the question of domicile is Dunn v. Trefry, supra, decided by the Court of Appeals on May 26, 1919. Manifestly, that case, if in point, should be followed by this court. The ground upon which the decision turned, reversing the District Court, is not entirely clear. The question there was whether the plaintiff, Mrs. Dunn, had changed her domicile from Newport, R. I., to Boston, Mass. Like the case at bar, therefore, it involved the problem of the legal requisites of a change of domicile. The opinion leaves it somewhat uncertain as to whether the decision reversing the District Court turns upon the facts or upon points of law. But the fact that no reference is made to the evidence upon which the District Court found that Mrs. Dunn was domiciled

in Boston fairly grounds the conclusion that the error corrected was one of law and not of fact.

The controlling facts in that case are as follows: The plaintiff was born and had long lived in Newport. She purchased in 1913 a house in Boston which she occupied with her husband and son who was domiciled in Boston. In 1916 her husband died in Boston. She and her husband had come to Boston in order that the father might have the medical attendance of the son but with an intention of returning to the Newport home. The house in Newport, with some furnishings, remained in the occupancy of the plaintiff's sister. The plaintiff was accustomed periodically to visit her sister for a short time each fall and spring. She also contributed to the expense of maintenance of the old home.

She desired to retain her Newport domicile. But she testified in effect (evidence not adverted to in the opinion of the Court of Appeals) that she intended to continue living with her son and daughter, both unmarried, and both domiciled in Boston, unless her son should marry—a contingency not then contemplated. On this evidence, this court found that the plaintiff was dwelling in Boston with her son and daughter, and intended to continue so to dwell, subject to a remote contingency; and therefore ruled that her domicile was in Boston. The Court of Appeals held,

"The facts as to her mode of living do not outweigh her expressed intent to retain her Rhode Island domicile."

Manifestly, this language as to "expressed intent" means that the plaintiff's "desire" to retain her Newport domicile, buttressed by her retention of facilities in her old home, is the legal intent required by the law, notwithstanding her expressed "purpose" to make her real dwelling place with her son and daughter in Boston. This decision thus lays emphasis upon desire as a main or controlling element in intent. But the opinion also lays emphasis upon the presumption that a domicile once obtained is presumed to continue until the burden of overcoming this presumption is sustained. In this aspect, it makes against the plaintiff's contention in the present case. It is in this respect somewhat like Gilman v. Gilman, supra.

On facts legally indistinguishable, the result reached by the Court of Appeals in Dunn v. Trefry is the exact reverse of that reached by the Supreme Court of Massachusetts in Whitney v. Sherborn, 12 Allen, 111.

Whitney was domiciled in Ashland. Mrs. Dunn was domiciled in Newport. Whitney leased his farm in Ashland, leaving some of his cattle and furniture there and moving some to Sherborn, whither he took his family and most of his furniture for the purpose of overseeing men there employed by him. Mrs. Dunn's course was analogous. In his agreement for leasing his Ashland farm, it was provided that, if he should at any time be obliged to leave Sherborn, he should move back to his house in Ashland and the tenant should leave it. Mrs. Dunn intended to return to Newport to live if her son should marry. Whitney desired, as Mrs. Dunn did, to retain his old domicile. Sherborn taxed him. On a suit to recover the tax, the superior court

instructed the jury in substance that to effect a change of domicile there must be a removal from the old home unaccompanied by the purpose to return there. The full court of Massachusetts held this instruction to be error, saying:

"The proper instruction would have been, that if the plaintiff was residing in Sherborn on May 1, 1862, with an intention to remain there for an indefinite period of time, and without a fixed purpose to return to Ashland as soon as his work in Sherborn was completed, or if the latter purpose was uncertain or doubtful, then his legal domicile would be in Sherborn. The plaintiff must have a domicile somewhere. It could not be in Ashland, if he had gone to reside elsewhere, having no intention to return to his old home, or if his purpose was unformed or indeterminate, either as to the length of his residence in Sherborn, or as to his eventual return to Ashland. If such was the state of the case, there could be no concurrence of fact and intent, which would be necessary in order to create a legal domicile in the latter place."

This decision, reversing the superior court, makes the actual dwelling place of the man and his family the fact of controlling importance. A doubtful or merely contingent purpose, such as Mrs. Dunn had, to return to her old home, was held not enough to prevent the domicile from attaching to the new place in which there was a purpose of remaining indefinitely as the home or dwelling place. Clearly in this decision of the Massachusetts court, desire, as distinguished from intent, to live or dwell, is regarded as of no legal importance. The intent held requisite is intent to continue to live in the locality indefinitely. The hope, or expectation, or desire, of returning to the former place is held of no significance.

These reverse results, reached by two appellate courts on facts indistinguishable as to their legal significance, are a striking illustration of the difficulty of applying the general rules in any certain or uniform way.

Another case in this district in which the legally significant facts are closely analogous to the facts in the case at bar is In re Sedgwick (D. C.) 223 Fed. 655, a decision by Judge Morton.

That was a bankruptcy case. Sedgwick in 1908 was domiciled in Newport, R. I. In March, 1910, he went to Lenox, Mass, and had himself registered as a voter there. He belonged to a family known as a Stockbridge or Lenox family. The court found that he "intended in entire good faith and with no ulterior motive whatever to establish his domicile there in 1910." He had visited Lenox "most of the years" since 1910, staying either with relatives or at the hotel. But his visits were, like the visits of the plaintiff and his family to Newport, "casual and of short duration." Unless the fact that the plaintiff in this case owns a substantial property in Newport differentiates this case from the Sedgwick Case—and I do not think it does—the material facts in the two cases are indistinguishable.

Judge Morton held that Sedgwick had no domicile in Lenox, saying:

"If domicile were only a matter of intent, I should have no hesitation in agreeing with the learned referee that domicile in Lenox was proved. But domicile is more than a mere matter of intention. It is a man's permanent home, as distinguished from transitory residences. Mitchell v. U. S., 21 Wall. 350, 352, 22 L. Ed. 584. A person cannot, simply by choosing and intending in

good faith to make a certain place his domicile, effect that result. The intent to change domicile is ineffective, unless supported by adequate facts; there must be an actual removal animo manendi. 'The change cannot be made, except facto et animo. Both alike are necessary. Either without the other is insufficient.' White, J., Sun Printing Co. v. Edwards, 194 U. S. 383, 24 Sup. Ct. 696, 48 L. Ed. 1027. Citizenship as between the various states depends upon domicile; and there are many decisions holding with some strictness that a bona fide intention to become a citizen of another state failed because the facts were not sufficient to carry it out. See Simpson v. Phillipsdale Co. (D. C. Mass. Jan. 5, 1915), 223 Fed. 661."

I think this statement of the law accords with sound principle and with the great weight of the authorities.

Concurring in these views, I am constrained to hold that the plaintiff in this case had not, at the times in question, changed his domicile from Hamilton, Mass., to Newport, R. I.

The bills must be dismissed, with costs.

In re LOUIS J. BERGDOLL MOTOR CO.

(District Court, E. D. Pennsylvania. July 1, 1919.)

No. 4742.

BANKRUPTCY ⊂=250(1)—CORPORATIONS—ASSESSMENT OF STOCKHOLDERS—UNPAID STOCK SUBSCRIPTIONS.

A subscriber for practically all the stock issued by a bankrupt Pennsylvania corporation under a statute requiring payment of the subscription in money *held* not to have discharged his liability by turning over to bankrupt the assets of a New Jersey corporation, which he also owned, which were worth less than half the amount of the subscription, and to be liable to assessment for the difference.

In Bankruptcy. In the matter of the Louis J. Bergdoll Motor Company, bankrupt. On petition by Louis J. Bergdoll for review of order of referee. Confirmed.

See, also, 230 Fed. 248.

Harry E. Keller, of Philadelphia, Pa., for petitioner.

Joseph W. Catharine, of Philadelphia, Pa., for trustee.

DICKINSON, District Judge. Since the filing of the opinion in this case under date of March 15, 1919, the submission of the brief then invited to be submitted has just now come to hand. As before observed, a preliminary difficulty seems to be presented in determining just what questions are sought to be presented by this petition for review, beyond the procedure questions, of which we have already disposed. In the effort to secure a concord of views as to what the substantial questions raised are, they were listed in the opinion already filed, and these at least do appear to be in the cause.

In the brief submitted, counsel for the petitioner has raised and discussed additional questions, which we deem to have been disposed of and to be now out of the way. The first of the suggested

questions, that of the order of assessment made by the referee, being purely administrative, we understand to be also out of the way by the concessions of counsel made in view of Stipp v. O'Malley, 221 Fed. 372, 137 C. C. A. 180.

The second question, of whether a stockholder is subject to the summary jurisdiction of the referee, is of no practical importance, because it is submerged in the third suggested question, of whether he submitted himself to such jurisdiction. The finding of the referee is that he did, and this finding is approved, and we concur in the views of the referee with respect to this question.

This brings us to the one real question in the cause, which is the propriety of the assessment in respect to the liability of the stockholders upon whom the order was made. The general question embraces the propriety of the assessment in respect to its necessity and extent. These features of the question have been disposed of by the referee, and the disposition made of them has the approval of the court.

An inquiry into the real and only subject of investigation presented by this record begins with the proposition that subscribers to the capital stock of a corporation assume, as a general proposition, only the obligation to pay into the treasury of the corporation the amounts of their respective subscriptions to its capital stock. This means the general proposition that stockholders are not liable for the debts of the corporation. When such liability exists, it is exceptional, and created by statute or otherwise. In determining questions of this kind, the formation and organization of corporations is frequently so carelessly done that questions of liability of stockholders, which should be simple and easy of answer, often become complex and difficult. Corporations are purely creatures of the law, and the law of their creation and of their continued existence and regulation is whatever the statutes may decree it to be.

The general scheme of the creation of corporations for profit under the statutes of Pennsylvania is that the amount of the capital of a proposed corporation shall be stated, and the subscriptions of stockholders thereto shall be set forth with identifying precision. The number of the subscribers thus set forth in the application for the charter may be enlarged by the entry among them of other stockholders, who enter into a contract with the corporation, or with the corporation and each other, to pay into the treasury of the corporation contributions toward its capital. The obligation which this contract of subscription imposes is (unless payment is otherwise authorized) to pay the amount subscribed in lawful money whenever called upon by the board of directors so to do. This function of the board of directors may be exercised by lawful authority, if such payment is required to discharge the debts of the corporation. Under a further provision of the corporation law of Pennsylvania a part of the contributions to its capital may be authorized to be made in property other than money. If no such authorization is made, a stockholder can discharge himself of liability only by making payment in money. It is too obvious to call even for its statement that he cannot rid

himself of liability, or meet his obligation of payment, by a pretended and sham contribution to the stock of the company.

In the present case, it seems that a corporation was formed under the laws of New Jersey on February 1, 1910, to bear the name of the Louis J. Bergdoll Motor Company. It had an authorized capital of $500,000, divided into 5,000 shares, of the par value of $100 each. Louis J. Bergdoll subscribed for 18 shares, and F. R. Hansell and John McPeak each 1 share. Between the date of its organization and March 12, 1910, Bergdoll contributed in actual money $300,000 to the capital stock of this corporation. No certificates of stock, however, appear to have been actually issued, except certificates for the 20 shares above mentioned. This corporation had a brief career, and on March 12, 1912, the bankrupt corporation was chartered under the laws of Pennsylvania. We have not been furnished with a copy of the application for the charter of this corporation, but we understand and assume that it was incorporated for the purposes which its name implies, and that certificates for its stock were to be issued only for money paid into its treasury. The amount of its capital and the number and value of its shares is the same as that of the New Jersey corporation. Of the capital Louis J. Bergdoll subscribed for 2,998 shares, and E. Lawrence Webster and Frank J. Fanning 1 share each. This subscription visited upon Louis J. Bergdoll the obligation to pay $299,800 into the treasury of the corporation whenever duly called upon so to do. It is averred on behalf of the petitioner for review that the purpose and intent of himself and his associates in applying for this charter was to have a Pennsylvania corporation in place of the New Jersey one, and that the charter of the second company was taken out for the purpose of taking over all the assets and business of the first corporation.

On May 31, 1912, the financial condition of the New Jersey corporation was such that the net value of all its assets and property and other possessions did not exceed the sum of $144,428.03. On that date, the New Jersey corporation transferred to the Pennsylvania corporation all of its possessions and property, the latter company assuming all the debts and liabilities of the former, and thereafter the business was conducted by the latter company. Certificates for 3,000 shares of the stock of the Pennsylvania company were issued to the same persons above mentioned, who had subscribed for that number of shares of stock. It is an admitted fact that no consideration for the issue of these shares was received by the Pennsylvania corporation, other than the above-mentioned assets of the New Jersey corporation. How the 10 per cent. requirement of the Pennsylvania statute was met does not appear.

The act of bankruptcy was the payment of moneys to an officer of the corporation at a time when it was admittedly insolvent. The adjudication was on April 11, 1913. The total sum of the proved claims against the bankrupt estate is $302,068.44. This was inclusive of the claim filed on behalf of the present petitioner of $52,500, of which there was a conditional allowance, and includes also a preferred claim of $10,187.32. Something less than $50,000 has been

distributed to general creditors, leaving still due them, exclusive of the Bergdoll claim of indebtedness, $193,730.63. The entire assets of the bankrupt estate, aside from the stock assessment, have a value of $2,806.29. The finding is made, and the fact does not seem to be in dispute, that the company has been insolvent since December, 1912.

The fact situation thus presented is that the Pennsylvania corporation, when incorporated, had a capital represented by $300,000 of the stock subscriptions above mentioned, and $200,000 of unsubscribed stock, commonly called treasury stock. Louis J. Bergdoll and his associate subscribers owned 3,000 shares of the stock of the New Jersey company, being all the stock which had been issued by that company. The net value of everything which the company, whose stock they thus owned, possessed, has been found to have been something less than the sum of $145,000. For this they received certificates for 3,000 shares, of the par value of $300,000, from the Pennsylvania corporation.

We have not been able to discover from this record any fact finding, or anything other than presumptions, upon which a fact finding could be made, of whether the 2,000 shares, which we have called treasury stock, formed part of the 3,000 shares issued or not. This might be of some importance, because, if it were the fact that the treasury stock was issued in part purchase of the New Jersey corporation, then it would be clear that there were 2,000 shares which had been subscribed by Bergdoll and his associates still remaining to be issued. The real fact doubtless is that the stock which was issued was issued without regard to whether it was subscribed stock or treasury stock. There is further no specific fact finding, and nothing definite which we have been able to discover from which the finding could be made, of whether the taking over the property of the New Jersey corporation and the issuing of the 3,000 shares of the Pennsylvania company therefor took the form of an issue of the stock for the property received, or took the form of a money transaction.

This feature of the case also may be of some importance, not as decisive of the question of Louis J. Bergdoll's liability, but as making clear the grounds either of his liability or nonliability, because, as there was no authority in the corporation to issue stock for property, stock subscriptions could only be discharged by making payment. The situation of Louis J. Bergdoll would, under the above fact conditions, seem to be this:

He had agreed to pay the Pennsylvania corporation $299,800. Admittedly he has paid no part of this. His liability to make payment when properly called upon would seem to follow. If he attempted to escape responsibility by the statement that the assets of the New Jersey corporation had been transferred and received by the Pennsylvania corporation, this answer to the call for payment could be met first by setting up the technical absence of authority in the Pennsylvania corporation to accept property in payment of a stock subscription; second, by the absence of any proofs, or even evidence, that the corporation had accepted this property in payment of the stock subscription; and, third, the finding of the referee of what seems to

be the admitted fact, that the property received by the corporation had a fair value of no more than $145,000, and that its valuation of $300,000 was fraudulent as against creditors who would be affected by the excess in valuation. As a consequence, no matter what view is taken of this transaction, it would seem that there was a liability on the part of Bergdoll to pay $300,000 upon one basis, $200,000 upon another, or $155,000 upon another, and, as the order made by the referee upon him does not exceed the minimum, the order should be approved.

Over and above and beyond any purely legal view which can be taken of the whole situation as presented, and looking at it through the eyes of common sense, seeking to get a true view of it, it resolves itself into this: Bergdoll had contributed $300,000 to the capital of the New Jersey corporation. The real value of what he had in this corporation had shrunk to something less than $145,000. He was instrumental in having formed the bankrupt corporation. He turned over all he had in the New Jersey corporation to the Pennsylvania corporation. As against creditors he dealt with the corporation upon the faith of his agreed contribution to its capital stock. If what he thus turned in had an actual value not exceeding $145,000, the fact that he had contributed $300,000 to the capital of the New Jersey corporation would not affect the rights of creditors. He could not throw upon their shoulders a loss which properly should be borne by him.

The learned counsel for the petitioner for review presents as obstacles in the way of reaching the conclusions above indicated the proposition, first, that there had been a domestication, as it is called, of the New Jersey company. Just what is meant by this, or how it affects the legal rights of creditors, or the legal obligations of Bergdoll, is not clear, beyond its being merely the statement of the fact that the Pennsylvania corporation succeeded to the business of the New Jersey corporation, receiving its assets and assuming its debts.

We are unable to accept the statement of counsel that the present creditors of the bankrupt company are unaffected by what was done, if Bergdoll is permitted to take the same status in the Pennsylvania company which he had before held in the New Jersey corporation. In the New Jersey corporation (as we understand the fact to be, although of this there is no finding and no evidence, and the real fact may be otherwise) Bergdoll had the status of a stockholder who had subscribed for and actually fully paid for all the stock for which he had subscribed. In the Pennsylvania corporation his status was that of a subscriber to stock who had thereby assumed a liability to the creditors of the Pennsylvania corporation which he could only discharge by the payment of real money. To permit him to substitute for this obligation an entirely different one, by giving him the right to discharge this obligation by turning over to the creditors in payment of it his depleted holdings in the New Jersey corporation, clearly does affect creditors vitally and very practically.

There is, in making this answer to the claim of creditors, the frank admission by counsel that the provisions of the acts of assembly,

by compliance with which a subscribing stockholder can alone meet his obligation of payment, had not been complied with, and the argument presented to us that, if they had been complied with, the creditors would be in no better position than they are to-day, is short in convincing power, and is answered by the simple statement of two admitted facts. One is that the stockholder did not in fact meet his obligation of payment, and the other is that it is not true that the creditors have not suffered thereby. The other fact, that Bergdoll had in good faith intended and purposed nothing more than to exchange one corporation for the other, is also of little help in the disposal of the case. Whatever Bergdoll's intentions were, and whatever his motive and purpose in doing what he did, if he assumed an obligation to contribute $300,000 (as he undoubtedly did) to the capital of the corporation, he must discharge that obligation as the law requires. He cannot escape liability by stating that he in good faith did not intend to assume liability, nor that he did not anticipate that any one would be the loser by what he did.

The criticisms directed to the findings of the referee upon the subject of the value of the assets of the New Jersey corporation fall short of the accomplishment of their purpose. In the first place, they are the findings of that tribunal to which the finding of facts is committed, and the findings were further made upon the admission of Bergdoll himself, or its clear equivalent, and the obligation of Bergdoll to pay having been made to appear, the burden was not upon the creditors to show that he had not paid, but the burden was upon him to show that he had paid.

There is certainly in this record nothing from which any one would be justified in finding that, if the assets of the New Jersey corporation are accepted in discharge of Bergdoll's subscription contract, the value exceeded the value which the referee has found it to have been. We say the finding was made upon the admission of Bergdoll himself, because the entries in the books of the corporation were accepted at their face value, and the New Jersey corporation, as also the Pennsylvania corporation, was Bergdoll's corporation, bore his individual name, and was nothing else than Bergdoll incorporated as a motor company.

Nor are the findings of the referee affected by what is discussed under the heading of res adjudicata. Bergdoll presented a claim against the bankrupt estate for $395,860 for moneys which he had advanced to the New Jersey company. The answer made to the claim was that $300,000 of what he had advanced was his contribution to the capital stock, and that the balance of the claim was for payments out of which an obligation of debt did not arise, for reasons then set forth.

The finding of the referee was that $300,000 of the moneys advanced was a contribution to the capital stock of the New Jersey company. He further found that the assets of the New Jersey company had been transferred to the Pennsylvania company as before stated, and that the Pennsylvania company had assumed the debts of the New Jersey company. Among these was a debt of $10,000, pay-

able to Bergdoll. This claim was allowed by the referee. There is the further finding that the Pennsylvania corporation issued to Bergdoll certificates for full-paid stock to the amount of $300,000.

We are unable to say that these findings in any way affect the present question, except to the extent that there is a finding of the two facts, one that Bergdoll owned $300,000 stock of the New Jersey company, and the other that there had been issued to him certificates for $300,000 of the Pennsylvania company. The question of whether he was responsible to creditors of the Pennsylvania company for any further stock contributions was neither raised, discussed, nor passed upon.

The criticism that the finding of the referee is inconsistent with the findings now under review is not a well-founded criticism. There is no inconsistency. What the referee found then he finds now, that Bergdoll held certificates for 3,000 shares of the New Jersey company, which he turned over to the Pennsylvania company, and that he received certificates for a like number of shares in the Pennsylvania company. He finds now that Bergdoll is responsible for something above $155,000 as a further contribution to the capital of the Pennsylvania company. He made no finding upon this latter question before, because the question was not presented to him.

The res adjudicata doctrine is in no respect applicable. Indeed, it would seem that the charge of inconsistency might be retorted upon the petitioner. He claimed then that this $300,000 was a loan to the New Jersey corporation, and the debt of the Pennsylvania corporation, because assumed by it. He claims now that the $300,000 was a stock contribution to the New Jersey corporation, and by the transfer of its assets was in discharge of his stock subscription to the Pennsylvania corporation.

The question is not before us, nor do we wish to be understood as holding that, if Bergdoll had stood upon his rights, the referee would have been justified in making more than an administrative finding, which would have formed the basis of a cause of action on the part of the trustee for the amount of the assessment levied. This would have settled merely the question of the propriety and amount of the assessment. It would have left open all other questions bearing upon Bergdoll's liability—whether he was a subscriber to the stock, for what amount he had subscribed, whether the subscription had been met in whole or part by payment, and all other questions which could arise in the action which might have been brought against him.

We do not decide that this was not his right, and if he had claimed it, and insisted upon it, and the referee had proceeded by summary process against him, and had made an order upon him for payment, and if the order had been one not asked for by the trustee, and the making of it was beyond the scope of the petition, which was limited to an administrative order, the present petitioner for review would have been in a strong position to ask for the reversal of any such order.

The finding of the referee, however, is, and it is abundantly justified by the proceedings before him, that, so far from standing upon any such right, the present petitioner made answer to the petition in which he raised and submitted to the referee all the questions involved, not merely those bearing upon the administrative order, but those bearing upon the question of liability. He followed this up by the introduction of evidence, and by himself testifying upon all features of the case. By doing this he consented to the exercise of summary jurisdiction by the referee, and submitted himself to that jurisdiction, as did also the trustee. Had the findings of the referee been otherwise than they were, and favorable to Bergdoll, the trustee would have been concluded thereby, and Bergdoll would have received the fruits of his victory. Having accepted the chance of a decision in his favor, and having asked the referee to constitute himself a court to pass upon matters presented by the petitioner, he cannot now be permitted to deny to the referee the powers which he asked the referee to exercise in his favor. The distinction between summary and plenary jurisdiction is clear and important, and has always been recognized by the courts, and the rights of all parties concerned protected and preserved. In re Flanigan (D. C.) 228 Fed. 339.

The petition for review is denied, the findings of the referee are approved, and the order made by him is affirmed and confirmed.

THE JOHN D. DAILEY.

THE PORT JOHNSON NO. 7.

(District Court, E. D. New York. July 30, 1919.)

1. COLLISION ⊂=105—BARGES—EVIDENCE.
   Evidence regarding libelant barge's collision with another barge in New York Bay *held* to establish that libelant's tug was solely at fault in failing to keep between the shore and the other barge.
2. ADMIRALTY ⊂=91—OPENING DEFAULT.
   The fact that libelant, after securing a default against a tug, shifted its position so as to charge another tug with fault for the collision, does not authorize the court to open the default, in absence of a request to do so and a proper showing.
3. ADMIRALTY ⊂=91—LIBEL—OPENING DEFAULT.
   Where a libelant secured a default against a tug, such default will not be opened unless the tug explains why it did not defend the action, and shows that it was not a party to proceedings by which another tug was forced to defend the libel.

In Admiralty. Libel by Clarence L. Bleakley against the steam tug John D. Dailey, with the steam tug Port Johnson No. 7 impleaded, etc. Decree for libelant against the first-named tug, unless an application be made and granted to set aside a default.

Macklin, Brown, Purdy & Van Wyck, of New York City, for libelant.

Park & Mattison, of New York City, for claimant.

CHATFIELD, District Judge. This action is brought to recover for damages to the barge Upper Hudson No. 54 from collision with a car float in tow of the tug Port Johnson No. 7 in New York Bay at a point several hundred feet from the float bridges at St. George, Staten Island, on a line between the ferry slip and the Robins Reef Light. The collision occurred on Sunday morning, January 30, 1916, at about 1:30 a. m. The John D. Dailey had taken the barge in tow on a hawser between 50 and 60 feet long near Elizabethport, Staten Island, and was bound up through the Kills and up New York Bay to Canal street, North River. On the way up through the Kill and out into the Bay the tug was following the shore line and proceeding directly into a strong flood tide. The Port Johnson No. 7 had come out from the float bridges at St. George, Staten Island, drawing a car float loaded with several cars. When reaching a point several hundred feet from shore the tow line was cast off, the tug dropped back alongside the car float, and remained in that position, drifting with the tide, for some 10 minutes, while the men upon the tug and the car float were making the lines fast, so as to tow the car float alongside the tug. The men making the car float fast did not follow the direction of the tug captain, and some delay resulted while they were changing these lines and arranging them at the orders of the captain. During this time the car float and the tug were drifting to the west—that is, toward the Kill—with the flood tide. The Dailey was observed coming through the Kill towards the Bay and at such a distance from the shore that she would pass inshore of the car float and of the tug, which was then lying upon the starboard side of the car float. The Dailey blew a one-whistle signal, and the captain of the Port Johnson No. 7 paid no further attention to the Dailey until an alarm was sounded, followed immediately by a collision between the port forward corner of the barge Upper Hudson No. 54 and the port side of the car float near the after corner.

Upon the trial the captain of the Dailey testified that he saw the car float lying still some distance to the north of his course when he blew the one-whistle signal and that thereafter the tug Port Johnson No. 7 commenced to back, thus bringing the car float into collision with the barge. He testified that the Port Johnson No. 7 did not stop backing until the alarm was sounded by the Dailey. The Dailey then reversed, so as to attempt to bring the blow against his hawser, instead of against the barge, but did not succeed in so doing, and the collision resulted.

In his statement made to the United States local inspectors the captain of the Dailey, upon the day following the collision, stated that the "after starboard corner of the car float touched the forward port corner of the scow Upper Hudson No. 54"; but the testimony of all the witnesses at the trial shows that this was evidently a mistake, and that the blow was received by the car float on her port side just a few feet forward of the after corner.

The testimony of the captain of the Port Johnson No. 7 and of his engineer is so clear and definite that it must be found as a fact that the engines of the Port Johnson No. 7 were not working astern at any

time before the collision. The car float and the Port Johnson No. 7 could have had no sternway, and could not have been carried by the tide toward the shore, so that the apparent motion of the two boats together must have been caused by the course pursued by the Dailey, which was evidently attempting to save as much distance as possible in bucking the tide, and was intending to pass close around the stern of the car float, so as to reach a point where the Dailey could turn up the bay on the shortest course possible.

[1] No fault is shown on these findings against the Port Johnson No. 7, and the entire responsibility for the collision must rest upon the Dailey, which had initiated the navigation by her one-whistle signal, and which was bound under those circumstances to keep out of the way of the car float. There was sufficient room between the car float and the shore for the Dailey to pass safely, and as the Port Johnson No. 7 was lying still at the time she was under no duty to do anything except remain in that position until the Dailey had passed by.

[2, 3] The action was originally brought by the owners of the scow Upper Hudson No. 54 against the Dailey. The Dailey brought in the Port Johnson No. 7 by petition, alleging that the fault was entirely that of the Port Johnson No. 7, and this petition was answered by the Port Johnson No. 7, alleging in turn that the fault for the collision rested upon the Dailey. When the case was called for trial, the Dailey defaulted and did not appear. The Port Johnson No. 7 thereupon applied to the court for a dismissal of the libel and the petition so far as it was concerned. This application was opposed by the libelant, who then moved to amend its libel by alleging that both the Dailey and the Port Johnson No. 7 were at fault. This motion was conditionally granted, inasmuch as the libelant refused to act upon the default of the Dailey and to allow the petition of the Port Johnson No. 7 to be dismissed. Question was reserved as to the terms upon which the motion of the libelant to amend should be granted.

Upon the finding that responsibility for the collision rested upon the Dailey, decree may be entered dismissing the libel, and also the petition against the Port Johnson No. 7, with costs to the Port Johnson No. 7 against the Dailey, and also against the libelant. Inasmuch as the libelant insisted upon waiving the default of the Dailey at the trial to the extent of asking to amend the libel and to proceed against both, the Dailey was in a position at any time up to the entry of a decree in the case to move to be relieved from its default, and to take such action as it might be advised; but no such application has been made. The Dailey has allowed the default to stand. The libelant, while seeking to prove liability against the Port Johnson No. 7, not only produced no witnesses against the Dailey, but actually called the captain of the Dailey as the only witness on behalf of the libelant against the Port Johnson No. 7. While doing this the libelant, however, amended the libel in such shape that fault was alleged against the Dailey and also against the Port Johnson No. 7, and then proceeded to contradict the allegation of fault against the Dailey by presenting to the court the testimony of the captain of the Dailey as a true statement of the occurrence as between the libelant and the Dailey.

The libelant should not be allowed to thus blow hot and cold; but as the Dailey has made no effort to change the situation, and has apparently allowed the libelant to shift his position as occasion might suggest, there is no reason for the court to open the Dailey's default, or to direct a decree in favor of the libelant against the Dailey. The findings that the libelant's barge was damaged through the fault of the Dailey must stand. If the Dailey persists in its attitude of offering no defense to the action, the libelant will be entitled to a decree against the Dailey upon proper notice of application for such decree. If the Dailey seeks now to open its default, it not only must explain why it took no part in defending the action, but must also show that it has not been a party to the proceedings, by which the libelant has been enabled to force the Port Johnson No. 7 to defend the action, and at the same time has allowed the libelant to apparently waive or ignore his cause of action against the Dailey, but leaving the case in such a situation that he could enter a decree against the Dailey.

This matter will be disposed of upon the application of the libelant for a decree, of which application the Dailey must have notice. No costs will be allowed to the libelant.

CONSOLIDATED GAS CO. OF NEW YORK v. NEWTON, Atty. Gen., et al.

(District Court,. S. D. New York. June 10, 1919.)

1. INJUNCTION ⇐123 — ISSUES — RESTRAINING THREATENED PROSECUTION—SOURCE OF FUNDS FOR DEFENSE.

In a suit in a federal court to enjoin the Attorney General of New York and the district attorney of New York county from bringing threatened prosecutions, the court cannot consider collaterally the question whether the authorities of the city intend to appropriate money unlawfully to aid in the defense of the district attorney.

2. MUNICIPAL CORPORATIONS ⇐169—CORPORATION COUNSEL—AUTHORITY AND DUTIES.

Under Greater New York Charter, § 256, as amended by Laws 1917, c. 602, authorizing the corporation counsel in his discretion, when requested, to appear in any action brought against an officer or employé of the city or county by reason of any act done or omitted while in performance of his duty, the corporation counsel may appear in behalf of the district attorney of the county in a suit brought to enjoin him from performing a statutory duty.

In Equity. Suit by the Consolidated Gas Company of New York against Charles D. Newton, Attorney General, and others. On motion by complainant to set aside an order substituting the Corporation Counsel of the City of New York in place of Robert C. Taylor, as solicitor for defendant Edward Swann, as District Attorney. Motion denied.

See, also, 256 Fed. 238.

Shearman & Sterling, of New York City (E. Henry Lacombe and John A. Garver, both of New York City, of counsel), for the motion.

William P. Burr, Corp. Counsel, and Edward Swann, Dist. Atty.,

both of New York City, Robert P. Beyer, Deputy Atty. Gen., and Godfrey Goldmark, of New York City, counsel to Public Service Commission (John P. O'Brien, Judson Hyatt, and Robert S. Johnstone, all of New York City, of counsel), opposed.

MAYER, District Judge. The district attorney of the county of New York is a necessary party defendant to this suit, and, having been made such, he is obligated to defend in such manner and to such extent as may be commensurate with the discharge of his duty. He has requested the corporation counsel to appear as his solicitor, and the corporation counsel has consented so to do.

It is contended (1) that the corporation counsel cannot lawfully act as solicitor for the district attorney, and is prohibited from so doing by virtue of section 256 of the charter of the city of New York, as amended by Laws 1917, c. 602; and (2) that it is the intention of the officials of the city of New York and of the corporation counsel to employ city funds, contrary to law, to aid the district attorney in his defense.

[1] (a) Disposing of the second contention first, it may be observed that this court cannot consider collaterally in this suit allegations which amount, in effect, to assertions that the board of estimate and apportionment of the city of New York intends to appropriate funds unlawfully or wastefully. There can be no doubt, as appears from the affidavit of the district attorney, that his office is not equipped to undertake the defense of a suit of this character. The office of district attorney of the county of New York is concerned primarily with the prosecution of criminal offenses, and the district attorney is a necessary defendant in this suit, largely because of what might be called a statutory accident. Consolidated Gas Co. v. Newton (D. C.) 256 Fed. 238.

In such circumstances, the district attorney has the legal right to apply to the board of estimate and apportionment to furnish him with such funds as that body, in its discretion, may deem proper and necessary for an appropriate defense by him in this litigation. Any complaint that the action or intended action of the board of estimate and apportionment is or will be contrary to law is not cognizable in this suit.

[2] (b) In respect of the authority and duties of the corporation counsel, section 256 of the Greater New York Charter provides:

"Neither the corporation counsel nor any of his assistants shall appear as attorney or counsel in any action or litigation except in the discharge of his official duties, nor accept an appointment as referee or receiver in any action or proceeding, but the corporation counsel may in his discretion appear or direct any of his assistants so to do in any action or proceeding, criminal or civil, brought against any officer, subordinate or employé in the service of the city of New York, or of any of the counties embraced therein, by reason of any acts done or omitted while in the performance of his duty by such officer, subordinate or employé, whenever said appearance is requested by the head of the department, office or bureau in which said officer, subordinate or employé is employed."

The right to appear as solicitor is apparently susceptible of direct attack (Donahue v. Keeshan, 91 App. Div. 602, 87 N. Y. Supp. 144),

and such attack may be by a motion such as that here made (Bonnifield v. Thorp [D. C.] 71 Fed. 924).

The first part of section 256 refers, in effect, to the prohibition against the corporation counsel from acting in any respect other than in the discharge of his official duties. The additional power to appear "in any action or proceeding, criminal or civil, brought against any officer," et seq., was doubtless conferred to remedy situations of the character presented in Donahue v. Keeshan, supra, Briggs v. Lahey, 101 App. Div. 136, 91 N. Y. Supp. 576, and Tracy v. Pendleton, 134 App. Div. 940, 118 N. Y. Supp. 1146; but, when the Legislature conferred this power, it did so in language of the most comprehensive character.

The right to appear on request, or direct assistants so to do, is "in the discretion" of the corporation counsel, and the Appellate Division of the Second Department, in Briggs v. Lahey, supra, has held:

> The provisions of this section authorizing the corporation counsel to appear in an action brought against an officer or employé of the city by reason of an act done while in the performance of his duty, whenever said appearance is requested by the head of department in which the officer is employed, vests the head of the department with an absolute discretion to determine whether the action is prima facie one instituted by reason of an act done by the officer or employé in the performance of his duty, and the determination of such head of a department to that effect, followed by a request to the corporation counsel to appear and defend the action, is final and conclusive, and is not subject to judicial review.

Further, the appearance may be in a civil or criminal action or proceeding, and may be, inter alios, for a city or county officer, and the district attorney is a county officer.

There is nothing in section 256 which confines the right of the corporation counsel to appear to cases of subordinate officers. On the contrary, he may appear, when properly requested, for any officer, whether the head of an office or department, or a subordinate officer. His appearance, however, is limited to those instances where the action or proceeding is brought against the officer, subordinate, or employé "by reason of any act done or omitted while in the performance of his duty by such officer. * * *"

This provision excludes appearance to defend in any action or proceeding where the act done or omitted was not in the performance of duty. No doubt there are acts or omissions close to the line between private conduct and public duty, and the Legislature, of course, desired to prevent the corporation counsel from acting professionally in cases where an act done or omitted was in a private capacity, as distinguished from an act done or omitted while in the performance of the officer's or employé's duty.

The language of the statute is so broad as to indicate that the corporation counsel might appear in his discretion, when requested as provided, in any case of commission or omission, so long as the act or omission occurred while in the performance of duty. The theory upon which this suit is brought is that the defendant officers will do their duty and that the district attorney, among others, will

endeavor to proceed according to law, and, because this is expected, it is sought to enjoin him.

The fact that the district attorney has a duty to perform implies in law a threat to do that duty, and such status constitutes the "act done" as referred to in section 256. But such refinements are not necessary, because, in my opinion, the legislative intent was broadly, among other things, to empower the corporation counsel (when requested by the head of an office) to appear in any case where the officer concerned was engaged in the performance of a public duty cast upon him, as distinguished from the performance of some act done in his personal or private capacity.

As Mr. Burr, the corporation counsel, is a solicitor duly admitted to practice in this court, the motion, for the reasons outlined, is denied.

Settle order on two days' notice.

THE SUTHERLAND.

(District Court, D. Maine. May 19, 1919.)

No. 524.

1. SEAMEN ⊂⊃24—RIGHTS OF FOREIGN SEAMEN TO WAGES—STATUTE.
   Rev. St. § 4530 (Comp. St. § 8322), entitling a seaman to receive on demand from the master of his vessel half the wages he shall have earned at every port where the vessel, after commencement of voyage, shall load or deliver cargo, applies to seamen engaged on foreign vessels while in the ports of the United States.
2. SEAMEN ⊂⊃24—RIGHT OF SEAMEN TO WAGES—STATUTE.
   Under Rev. St. § 4530 (Comp. St. § 8322), when a vessel arrives at a port of the United States, a seaman thereof is entitled to be paid one-half of the wages he has earned up to the time, and against such half there must be charged all prior payments which he has received.
3. SEAMEN ⊂⊃24—RIGHT OF SEAMEN TO WAGES—STATUTORY TIME.
   Under Rev. St. § 4530 (Comp. St. § 8322), seamen on vessels coming into the jurisdiction of the United States are entitled to receive half their wages earned up to the time of demand in a port of the United States, if they have been on board or in the employ of the ship for at least five days, and it is not necessary that a foreign vessel be in an American port five days before demand can be made.
4. SEAMEN ⊂⊃24—RIGHT OF SEAMEN TO WAGES—STATUTORY RELEASE FROM CONTRACT.
   Under Rev. St. § 4530 (Comp. St. § 8322), seamen of a foreign vessel coming into a port of the United States, whose demand for half their wages was refused by the master on the ground they had shipped for a 12 months' voyage, were released from their contracts, and became entitled to full payment of wages earned.

In Admiralty. Libel by John Philips and others against the steamship Sutherland. Decree for libelants.

Nathan W. Thompson and Emery G. Wilson, both of Portland, Me., for libelants.

William H. Gulliver, of Portland, Me., for respondent.

Geo. F. Gould, of Portland, Me., for claimant.

HALE, District Judge. The libelants, Philips and Desmond, are British subjects; Carlson is a Swedish subject. On February 5, 1919, they were shipped, in Wales, for a term of 12 months, on the steamship Sutherland, a British vessel—Philips and Carlson as able seamen, and Desmond as steward. The ship set out on a voyage from England for foreign ports. On April 6th she arrived at the Grand Trunk wharf in Portland. Until that day the libelants remained in the service of the ship. After her arrival in port, they went to the captain and demanded one-half of the money earned by them upon the voyage, less the amount which had been already paid them. The proofs indicate that such demand was made by Philips and Carlson on April 8th, and by Desmond on April 9th. The captain refused to pay them, declaring, in substance, that they had signed for a 12 months' voyage; and that he would pay them nothing. The libelants then brought their libel to recover all the wages due them up to the date of demand.

The claimant defends on the ground that the statute under which the suit is brought does not apply to seamen who are subjects of foreign governments on foreign vessels; and that in any event these seamen were not entitled to make a demand for their pay, or bring suit, until the ship had been in port for at least five days. The claimant also urges that the seamen in this case had not made such peremptory demands, or received such distinct refusal, as to entitle them to bring this libel.

[1, 2] Section 4530, Revised Statutes of the United States, as amended (Comp. St. § 8322), provides:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than, once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. * * * Provided further, that this section shall apply to seamen on foreign vessels *while in harbors of the United States;* and the courts of the United States shall be open to such seamen for its enforcement."

By its express provision, this act applies to seamen engaged on foreign vessels while in the ports of the United States. The prevailing construction of the statute by the federal courts is to the effect that, when a vessel arrives at a port, the seaman is entitled to be paid one-half of the wages he has earned up to that time, and that against such one-half there must be charged all prior payments which he has received. In The London, 241 Fed. 863, 865, 154 C. C. A. 565, 567, in speaking for the Circuit Court of Appeals for the Third Circuit, Judge Buffington said:

"In adopting half payment to the seaman during the voyage and half retention by the ship until the voyage was over, Congress gave a substantial portion of earned wages to the seaman while he was earning them, and retained a substantial portion of the earned wages in the hands of the master as security that the seaman would stick by the ship until the voyage, for which both ship and seaman had contracted, was ended. This half and half division of

wages earned to any time when payment is to be made is workable, is equitable, and is clearly stated in the act, and to our mind was what Congress had in view in the statute."

See, also, The Talus, 248 Fed. 670, 673, 160 C. C. A. 570, and Sandberg v. McDonald, 248 U. S. 185, 195, 39 Sup. Ct. 84, 63 L. Ed. 200; The Exchange, 7 Cranch, 116, 3 L. Ed. 287; Patterson v. Bark Eudora, 190 U. S. 169, 179, 23 Sup. Ct. 821, 47 L. Ed. 1002; Wildenhus' Case, 120 U. S. 1, 19, 7 Sup. Ct. 383, 30 L. Ed. 565; The Ixion (D. C.) 237 Fed. 142, 144; Neilson v. Rhine Shipping Co., 248 U. S. 205, 39 Sup. Ct. 89, 63 L. Ed. 208.

The theory of the courts appears to be that, under the statute, all vessels coming into the jurisdiction of the country come under the laws and regulations of the United States, and that it is competent for Congress to prescribe conditions of entry, and of clearance, for foreign vessels, since it may exclude them altogether. Under the construction given this statute by the federal courts, I must conclude that the statute is applicable to these libelants, although they were foreign seamen on a foreign vessel.

[3] The section of the statute governing the time for making the demand is:

"Such demand shall not be made before the expiration of, nor oftener than, once in five days."

The prevailing construction given by the federal courts has been that the first payment shall not be made until the seaman has been on board, or in the employ, of the ship, for at least five days; and that it would be unreasonable to hold that a foreign vessel must be in an American port five days before the demand can be made. The Delagoa (D. C.) 244 Fed. 835, 836; The Pinna (D. C.) 252 Fed. 203, 205. In The Strathearn, 239 Fed. 583, 586, the District Court of the Northern District of Florida held otherwise.[1]

[4] In the case at bar the ship had been in port for at least two days before the demand was made. There is sharp contest as to whether the testimony shows such demand on the part of the libelants and such refusal on the part of the ship as will entitle the libelants to bring this libel. There is no need of stating the testimony upon this point. I am satisfied that a sufficient demand has been proved, and that there was a clear and distinct refusal on the part of the ship. The proofs show that the captain did not ask for further time to get the money; he refused to give the men their wages, saying that they had shipped for a 12 months' voyage. Under the express language of the statute:

"Failure on the part of the master to comply with this demand shall release the seaman from his contract, and he shall be entitled to full payment of wages earned."

Under the plain reading of the law, I think the libelants are clearly within their rights.

[1] But see The Strathearn, 256 Fed. 631, — C. C. A. —, and The Baltic, 256 Fed. 95, — C. C. A. —. See, also, The Italier, 257 Fed. 712, — C. C. A. —.

The evidence before me is to the effect that the amount due to each libelant is as set forth in the libel.

A decree may be presented allowing John Philips the sum of $98.74; Carl H. Carlson, the sum of $106.72; Harry Desmond, the sum of $148.95. The libelants recover costs.

The libelants may present a draft decree on May 24, 1919; claimant to present corrections on or before May 29, 1919; decree to be settled Monday, June 2, 1919, at 10 o'clock a. m.

THE JOSEPH PEENE, SR.

(District Court, E. D. New York. July 29, 1919.)

COLLISION ⇐125—EXTENT OF DAMAGES—EVIDENCE.

Evidence that the port side of libelant barge struck a pier, and that its starboard side brought up against the port side of respondent tug, etc., *held* not to establish that certain damage to the starboard side of the barge was caused by the collision.

In Admiralty. Libel by Thomas McAndrews, Jr., against the steam tug Joseph Peene, Sr.; the Ben Franklin Transportation Company, claimant. Decree for libelant.

Macklin, Brown, Purdy & Van Wyck, of New York City, for libelant.

Park & Mattison, of New York City, for claimant.

CHATFIELD, District Judge. This suit has been brought for injuries received by the barge Thomas McAndrews upon the 5th day of March, 1918. The McAndrews was at that time in tow of a tug the Joseph Peene, Sr., which attempted to land the barge at Pier 46, Brooklyn. The destination was Hoboken, but the Peene took the McAndrews into Pier 46, intending to moor her there while going into the Erie Basin to get another boat. As they were rounding to at the end of the pier, the strength of the flood tide and the headway of the tow forced the port side of the barge, a little aft of amidships, against the corner of the pier. The tug had the barge upon her own port side, and as the barge came in contact with the pier the starboard side of the barge brought up against the port side of the tug, and it is alleged that one of the tug fenders also caused damage to the starboard side of the barge.

Several hearings have been had at different times in this case, with a view to obtain exact information as to the breaks which appear in the top rails of the barge, in order to ascertain whether these breaks were so situated and were of such a nature that they could have been caused by the blow in question. The deck of this barge is supported by crossbeams some 10 or 12 feet apart. On the port side the top rail extends back some 55 feet from the bow, where it laps the after top rail with a long beveled joint or scarf. The break was in the after port log, just back or aft of the joint in question. One of the

crossbeams of the deck is located just forward of this joint. On the starboard side the forward top log was found cracked through the beveled portion at the after end of that top log, and opposite the forward beveled end of the top log running aft. This joint upon the starboard side of the boat was forward, however, of the cross deck beams above referred to.

The libelant alleges that the forces opposed to each other between the corner of the pier and the fender of the tug resulted in a twisting squeeze, causing the break in question. It is evident that, as the top logs were bolted together at these beveled joints, force exerted against the port side would drive in the port top log, and thus carry with it the cross deck beams, and this in turn would tend to carry out the starboard top log.

But the libelant argues that, if the starboard top log were thrust outward by this blow, the pressure of the boat fender against the joint in the top log on the starboard side would cause a break, which from the viewpoint of the entire top log as a whole, might seem to have been bent in. The respondent contends that, if the cross deck beam forced the starboard top log out, any obstruction, such as the fender of the boat, would hold the forward top log, and, if the top log broke aft of this obstruction, that the break must have been outward.

It is apparent that the existence of the breaks on both sides of the boat would not settle by their mere presence the issue as to which of these theories is correct. If it were satisfactorily shown that both top logs were in good condition before the blow, and if the break was found upon both sides, the court would have to be compelled to reach the conclusion that in some way or other the blow had caused both breaks, even though the explanation of the defendant as to the probable result of such a blow in forcing the starboard top log out is the more natural to expect. The surveyors for both sides are reputable men, whose statements must be believed, and we have therefore an expression by the surveyor for the libelant that the break on the starboard side showed that the top log had been driven in. The impression received by the surveyor for the claimant was that this top log had been driven out, but both surveyors agreed that the crack or break upon the starboard side was darker in color, and one surveyor for the claimant is positive that this dark color showed immediately after the break, indicating that the crack or break was old, and merely presented a weak point in the top log on the starboard side, allowing it to be displaced by the force of the blow against the corner of the dock.

The claimant's testimony is further borne out by the evidence of the witnesses for the tug, who testify that the tug was nowhere in contact with the side of the barge in the neighborhood of the break upon the starboard side, and that no fender was anywhere near this point. It is apparent that if the tug was fastened forward of this point, and thereby exerted some twisting force when the port side of the barge came in contact with the corner of the dock, the damages resulting from the blow must be limited to the break upon the

top logs upon the port side, and to such damage as resulted from the driving of the cross deck beams against the top rail upon the starboard side; but the break in the starboard rail itself, and the expense of renewing the top rail, should not be charged against the tug.

Upon all of the testimony it would seem that the libelant has not shown that the damage to the top log upon the starboard side of the boat was entirely caused at the time of the accident. The boat has not been repaired. It is an old boat, and the breaks are such that the boat has continued to be used without repairs. This would bear out the theory that an injury to the top log upon the starboard side might have been allowed to remain without repair from some previous blow, which did not necessitate immediate attention.

The libelant may have a decree for the damages inflicted upon the port side of the boat, for any damage to the deck beam, and for such damages upon the starboard side of the boat as are necessitated by the renewal of the rail and the preparation work incident to undertaking the repairs. The libelant will not be allowed to recover for the actual cost of the new top log upon the starboard side, nor for the immediate work necessary to taking out the broken top log and putting the new one in place.

THE BESSIE L. MORSE.

(District Court, D. Maine. May 12, 1919.)

No. 507.

SALVAGE ⊂=31—RIGHT OF CAPTAIN AND CREW—RESCUE FROM FIRE.

Where the captain and crew of a gasoline boat, on seeing smoke coming from an auxiliary gasoline schooner, whose flag was displayed, union down, as a call for help, went to her assistance, and towed her through rough water and some wind to the lee of an island, where the fire was extinguished, thus incurring some danger, they were entitled to $500 salvage; the value of the schooner being from $2,800 to $5,000 or $6,000, and the value of their boat being from $5,000 to $6,000.

In Admiralty. Libel by Edward F. Brackett and another against the schooner Bessie L. Morse. Decree for libelants, in accordance with the opinion.

Nathan W. Thompson and Emery G. Wilson, both of Portland, Me., for libelant.

Gerry L. Brooks, of Portland, Me., for claimant.

HALE, District Judge. On the morning of November 30, 1918, the schooner Bessie L. Morse left Boothbay Harbor, Me., for Grand Manan, N. B., her home port. She is a two-masted schooner, with two gasoline engines. She is 76 feet long, 18½ feet beam, 6 feet deep, with a tonnage of 35 tons. She carried three men, Capt. Grosvenor C. Wells, Engineer Franklin, and a cook. When about a mile and a half east of Ram Island Light, and approximately one mile to the south of Inner Heron Island, fire broke out in her cabin. Capt. Wells gave

the alarm; salt was thrown on the fire; water was bailed up in buckets and used, with the effect of somewhat deadening the fire. Engineer Franklin went into the cabin, shut off the gasoline on the port side, got the flag, and put it in the rigging as a call for help. On account of the nearness of the fire to the wheel, the vessel had to be steered by the use of a 10-foot pole. The schooner was put on a northerly course up the Damariscotta river in an attempt to reach a beach. The wind was estimated to be 15 to 25 miles an hour. Shortly after, motorboats came along and offered assistance; Capt. Wells replied that he was going to beach the schooner on Heron Island. Shortly after that the Monhegan came alongside, a line was thrown to her, and the Morse was taken in tow.

The Monhegan is a gasoline boat 50 feet long, 10 feet beam, 7 feet deep, of a burden of 20 tons, owned by the two libelants. Shortly after 9 o'clock on the morning of November 30th she left New Harbor, Me., for Boothbay Harbor. When nearly across to Thumbcap, Capt. Brackett sighted the Morse about 3 miles distant and off the island known as the Hypocrites. He called the attention of his son to the great volume of smoke coming out of the aft part of the Morse. He shortly saw the mainsail of the schooner drop, flames shooting out from around her house, and later the flag, run up in the main rigging, union down. Capt. Brackett immediately speeded up his boat and steered for the Morse. In about 15 minutes he arrived within hailing distance; he saw three men standing in the forward part of the vessel, and flames shooting up out of the cabin window and companion way; the mainsail was lashed against the starboard rigging; the foresail and two jibs still up. The sea was running high. A towline was thrown from the schooner to the Monhegan. There were no beaches in that locality, except up the Damariscotta river, a distance of 3 or 4 miles. The testimony tends to show that the Morse, on the arrival of the Monhegan, was 300 to 400 yards to the windward of dangerous ledges, "and was making about the same leeway as headway"; that there was a choppy sea, and a ground swell heaving in. The Monhegan then towed the Morse to a point on the lee side of Inner Heron Island, where the fire was extinguished, and the schooner was then towed to Boothbay Harbor.

The testimony leads to the conclusion that the captain of the Morse was in apprehension of the loss of the vessel; that before the arrival of the Monhegan he was advised to leave her, and had some idea of doing so. In order to render the necessary assistance, the libelants were compelled to expose their boat to some peril, by bringing her alongside a burning gasoline schooner, it being evident that there was gasoline aboard, and that there was danger of loss to any boat coming in contact with the burning vessel. The value of the Morse is variously estimated from $2,800 to $5,000 or $6,000. The value of the Monhegan was from $5,000 to $6,000.

The claimant urges that only a short time was consumed in rendering the salvage services, and that such services should be regarded, not in the nature of salvage, but merely as towage.

On examination of the proofs, it is clear that the services rendered

by the Monhegan were voluntary, performed with promptness and efficiency, and under circumstances which seemed to require prompt service. Danger was apparent from the evident existence of gasoline tanks aboard the Morse, and the knowledge that such tanks were liable at any time to explode. The services were clearly in the nature of salvage; they were not performed merely to "expedite the voyage" of the Morse. The Ann C. Stuart (D. C.) 245 Fed. 679, 680; The Rebecca Shepherd (D. C.) 148 Fed. 727. In the Lottie E. Hopkins (D. C.) 133 Fed. 405, 408, this court had occasion to cite Baker v. Hemenway, 2 Low. 501, Fed. Cas. No. 770, in which case Judge Lowell held that the intent of Congress was clearly to give to tugs sufficient gratuity to induce prompt and even eager assistance, and that the award should be enhanced slightly by a great value at risk, "though in no important or definite proportion to value." In the case at bar it is not important to consider the diverse testimony as to the value of the Morse. The award must be given, as was said in The Lyman M. Law (D. C.) 122 Fed. 816, not upon any mere arbitrary judgment, but under the principles of the law of salvage, which fixes the different elements, stated in that case, which go to make up a salvage award. It is not necessary, however, to consider in detail precisely what elements enter into an award. Clearly an award should be given sufficient to encourage tugs to expose themselves to some danger in rendering service to a vessel in distress. Under the proofs, I cannot allow the full sum asked for by the libelants; but I think it reasonable to give an award of $500. This is to be in full to the libelants for all participating in the salvage service. The libelants recover costs.

A decree may be presented in accordance with this opinion.

SPRINGFIELD LIGHT, HEAT & POWER CO. v. NORFOLK & W. RY. CO.

(District Court, S. D. Ohio, W. D. June 11, 1919.)

No. 20.

1. CARRIERS ⟸43, 91—RIGHT OF PRECEDENCE OVER COMMERCIAL BUYERS ON CONTRACTS FOR FUEL.

   A railroad company, having a contract with a coal company to furnish coal for its engines, on which the coal company was delinquent, after notice of such intention, *held* to have the right to refuse to accept for transportation cars of coal consigned to a commercial buyer, and to appropriate such coal to its own use under the contract, where it was necessary to enable it to operate its trains.

2. CARRIERS ⟸158(1)—CONTRACT FIXING MEASURE OF DAMAGES FOR LOSS OR DAMAGE TO COAL SHIPPER VALID.

   Where, under the filed and published tariffs of an interstate railroad company, the rate on coal was based on its value at the mines where shipment was made, a provision of such tariffs, which became a part of its contracts of carriage, that the amount of any loss or damage for which the company was liable should be computed on the value of the property at the time and place of shipment, as applied to a coal shipment is valid and enforceable.

At Law. Action by the Springfield Light, Heat & Power Company against the Norfolk & Western Railway Company. On demurrer to two paragraphs of answer. Overruled.

Hagan & Hagan, of Springfield, Ohio, for plaintiff.

Hollister & Hollister and Joseph Wilby, all of Cincinnati, Ohio, F. Markoe Rivinus, of Philadelphia, Pa., Lucian H. Cocke, of Roanoke, Va., and Theodore W. Reath, of Philadelphia, Pa., for defendant.

HOLLISTER, District Judge. Heard on demurrer to the second and third defenses. The petition alleges, in substance:

[1] Plaintiff is a corporation of Ohio, doing business at Springfield, in that state. The defendant is a corporation of Virginia, and is a common carrier, operating a railroad from Chatteroy, W. Va., to Portsmouth, Ohio, and from Portsmouth to Columbus, and from Portsmouth to Cincinnati. It operates its spur track from Chatteroy in a westerly direction about two miles, to the mine of the Buffalo Coal (Collieries?) Company. Plaintiff, April 1, 1916, contracted with the coal company for certain coal, to be delivered during the year beginning April 1, 1916, "by the terms of which contract said coal was to belong to the plaintiff when put on board cars at said mine." The coal company delivered to defendant at the mine, in cars of the defendant, coal for shipment by the defendant to the plaintiff at Springfield, 39 carloads between October 27, 1916, and February 26, 1917, both inclusive, aggregating 1,891.6 tons, and 400 tons after February 26th. The coal was consigned and shipped over the defendant's rails to Glen Jean, Ohio, and thence to Springfield via the Detroit, Toledo & Ironton Railway. The defendant, although well knowing that the coal belonged to the plaintiff, hauled the cars on the spur track to Chatteroy, thence over its lines to points unknown to plaintiff, and converted the same to its own use, by using it as fuel for its engines, the market value of which coal, at Springfield, at the time of its conversion, was $7.25 a ton, and the freight rate $1.25 a ton. Judgment is prayed for $13,749.60, the measure of damage claimed being at $6 a ton for 2,291.61 tons.

The amended answer, after some admissions with which we need not concern ourselves now, makes denial, as a first defense, of all of the allegations of the petition except those specifically admitted. The allegation that the coal was to belong to the plaintiff, and that the coal company delivered to defendant at the mine the coal for shipment to the plaintiff, were included in the general denial. By way of second defense the amended answer says:

"The mining company (the shipper), at the tipple at the mines, tacks a card or tag to the side of the car, which indicates to the agents of the railway company who are to move the car that the car is to go to the designated scales (East Portsmouth) for weighing. In some instances the car is tagged to the shipper or his sales agent at scales, and in others the ultimate consignee, destination, and route beyond scales are shown on the tag. When the car reaches the scales it is weighed and a waybill issued for further transportation of the car, showing the ultimate consignee, destination, and route, information derived from the shipper or sales agent at scales or from the mine tag. From scales report is made to the shipper of the weight of the car and that

the car is in transit to destination as directed. At all times stated in the petition the Buffalo Collieries Company had notice of this custom and method of handling carload shipments of coal.

"On February 10, 1916, the Buffalo Collieries Company entered into two contracts with the defendant, Norfolk & Western Railroad Company, to sell the railway company coal for one year from April 1, 1916; one contract was for delivery of run of mine coal for a period of one year from April 1, 1916, in minimum amount of 7,800 tons and maximum amount of 11,700 tons, according to the requisitions of the railway company, but in general at a uniform monthly rate of about 650 tons minimum and 975 tons maximum; the other contract was for delivery of stoker coal for the period of one year from April 1, 1916, in minimum amount of 12,000 tons and maximum amount of 24,000 tons, according to the requisitions of the railway company, but in general at a uniform monthly rate of about 1,000 tons minimum and 2,000 tons maximum. The ton referred to in these contracts was therein stipulated to mean the long ton of 2,240 pounds. During all of the time set forth in the petition, the Buffalo Collieries Company was delinquent in the amount of coal requisitioned by the railway company and contracted to be delivered in accordance with the terms of the contract. During all of the time set forth in the petition, the defendant railway company needed this particular coal to operate its railroad.

"The first six cars enumerated in the petition were tagged in accordance with the above-described custom from the mine of the Buffalo Collieries Company. The coal was tagged to scales at East Portsmouth, and the tags indicated the date when tagged, the grade of the coal, the car initial and number, the consignee as the Springfield Light, Heat & Power Company, the destination as Springfield, Ohio, and the route Detroit, Toledo & Ironton. Because the Buffalo Collieries Company was delinquent under its fuel contracts with the railway company, and because of the railway company's need of the coal for its railway operation when the cars arrived at East Portsmouth, the said coal was taken for this purpose and applied to the delinquency of the said fuel contracts, and the said Buffalo Collieries Company was so notified. No waybill was issued for the said coal at scales.

"All the other cars of coal set forth in plaintiff's petition were tagged as described herein by the Buffalo Collieries Company as shipper, and at the time the said cars were tagged the Buffalo Collieries Company was delinquent in its said fuel contracts with the railway company. In accordance with previous notification to the Buffalo Collieries Company the railway company declined to accept the said cars so tagged for commercial shipment to the plaintiff, but in accordance with previous notice to the Buffalo Collieries Company indicated its declination to accept said coal for commercial consignment by changing the tags tacked to the cars by the Buffalo Collieries Company, so as to show the Norfolk & Western Railway Company as consignee in place of the plaintiff, the Springfield Light, Heat & Power Company, and the said coal was thereby received by the railway company only as in performance of the obligation of the Buffalo Collieries Company upon its fuel contracts with the railway company. The said coal was used by the railway company for the necessary operation of its railway. No waybill was issued for the said coal.

"The railway company further avers that it has paid the Buffalo Collieries Company for the coal so applied in the month of October, 1916, to the performance of its said fuel contracts with the Buffalo Collieries Company at the prices agreed upon in the said contracts, and that the Buffalo Collieries Company has accepted such payments for said coal; and the railway company avers that it has offered to pay and is now ready to pay to the Buffalo Collieries Company for the remaining coal so applied the prices agreed upon in said contracts."

And for a third defense:

"The defendant, Norfolk & Western Railway Company, was at all times mentioned in the plaintiff's petition and is a common carrier of freight, operating lines of steam railroad through the states of West Virginia, Ohio, and other states. In the operation of said railway the defendant was at the times mentioned and is a common carrier of freight in interstate commerce and as

such subject to the act of Congress of February 4, 1887, known as the 'Act to Regulate Commerce,' and the acts amendatory thereof. And before the times above mentioned the defendant had filed with the Interstate Commerce Commission and had published, as required by the said act to regulate commerce, as amended, tariffs of charges publishing commodity rates for the carriage of coal, which tariffs contain rules and regulations affecting the value of the carrier service so offered. By the published terms of its said coal tariffs in effect during all of the times mentioned in the plaintiff's petition, the carriage of the coal specified in the plaintiff's petition was subject to the following rule or regulation: 'The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment.'

"The defendant accordingly avers that if the plaintiff suffered any damage, which is denied, the measure of such damages is as above prescribed by the published coal tariff, a measure from which the defendant may not lawfully depart. The defendant finally avers that the value of the coal at the time and place of shipment was materially less than the alleged market value of the coal at Springfield, Ohio, $7.25 per ton, as averred in the plaintiff's petition."

Plaintiff contends that inasmuch as the second defense does not specifically deny the petition's allegations of ownership in the plaintiff and that the coal was delivered to the defendant for shipment to plaintiff, that, notwithstanding the denial of these allegations in the first defense, they must be considered as admitted when the facts averred in the second defense are considered. Therefore plaintiff says that, it necessarily appearing that plaintiff was the owner of the coal delivered to the defendant for shipment and appropriated by defendant for its own use, a clear case of conversion is made out.

The case, however, is not so simple as that, for it is clear enough that in the second defense the defendant intended by the special circumstances averred to deny, in addition to its general denial in the first defense, that the plaintiff was the owner of the coal, or that it had ever received the coal for shipment to the plaintiff. Of course, every defense stands by itself, and it would be better (though not decided to be necessary) to incorporate in the second defense a specific denial of these important allegations. That might be done by a short interlineation, and the case will be considered as if that were made.

The second defense makes no distinction between the first six carloads and those following, constituting the great bulk of the coal in question. There is a marked distinction, it would seem, for the reason that the very substance of the defense is that under the circumstances the defendant never received the coal for delivery to plaintiff; that the defendant, as between the Collieries Company and itself, was the owner of the coal the Collieries Company had contracted to deliver to it, and as between itself and the plaintiff that it had precedence over the plaintiff in the delivery to it of coal, because the coal contracted to it was for fuel purposes, without which it could not operate its railroad at all, either for patrons of the mine or for the public generally.

The six cars tagged by the Collieries Company for the plaintiff and hauled to East Portsmouth for weighing had been in fact and according to custom delivered to defendant, and received by it for delivery to plaintiff. Assuming, but not deciding, that defendant's necessity morally justified its taking the six cars in order to keep its railroad

running, the court can see no reason why the defendant should not pay the plaintiff for them. The Collieries Company having thus offered the coal for shipment to the plaintiff, and the defendant having received it for shipping to plaintiff, an absolute duty was imposed on the defendant, as a common carrier, to deliver the coal at the designated destination, for it was plaintiff's coal, not only through plaintiff's contract with the Collieries Company, but because of defendant's relation as common carrier to the consignee.

The rights of the parties to the balance of the coal, however, are not so easily determined. The Collieries Company had, it is true, after filling cars with coal at the mines, tagged them for transportation to the plaintiff at Springfield; but the cars were not moved in pursuance of that designation, but the defendant removed the tags and tagged the cars to itself as consignee, indicating its intention thereby not to receive the coal for shipment to plaintiff, and having theretofore notified the Collieries Company that it had appropriated the six cars under its fuel contract to supply its fuel needs.

Plaintiff's claim is that the Collieries Company actually did deliver to defendant, for shipment to plaintiff, and thereby title passed to plaintiff; that the coal being tendered for carriage to the plaintiff, the defendant "was bound to receive it and carry it for that purpose, or to reject it altogether and take such legal consequences as might follow the rejection," and cites Atlantic, etc., Co. v. Vulcanite, etc., Co., 203 N. Y. 133, 96 N. E. 370, 36 L. R. A. (N. S.) 622, to the proposition that:

"A bailee for hire to transport and store material for the bailor, who contracts to purchase a quantity of such material from the bailor, cannot fill the order from material in his possession, without the consent of the bailor, and his attempt to do so will justify termination of the bailment."

But defendant, while admitting that as a general rule a common carrier is bound to accept goods tendered to it for shipment, avers that under the circumstances of this case it was not bound to accept shipment. An analysis of its position would seem to indicate that there are two reasons which excused it, both involving the fact that the coal was necessary for the actual operation of its railroad.

One reason is that the coal was, in substantial effect, as against the plaintiff, its own coal, which the Collieries Company had agreed to deliver, but was delinquent, and that, being necessary fuel coal, it took precedence over the plaintiff as contractee for commercial coal.

The other reason is that the tender by the Collieries Company to it was of the Collieries Company's own wrongdoing, after notice of defendant's insistence on the receipt of its fuel coal under the contract, and that plaintiff cannot take advantage of the wrongdoing of the Collieries Company, and thereby force on defendant the relation of common carrier, and thus give it, as purchaser of commercial coal, an advantage over the defendant as purchaser of the very fuel coal necessary in its operations.

On the case as it stands, if the coal were plaintiff's coal, and the defendant bound to transport it, it could not do so, because it would not have the coal necessary to fire its engines, and the plaintiff's coal

would remain at the mines, of no benefit either to the plaintiff, or to the defendant, or to the Collieries Company. It would not seem necessary to cite authorities to the proposition that a railroad cannot be operated without fuel for its engines; but the Interstate Commerce Commission, in working out problems before it, has so said, in Traer v. Railroad, 13 Interst. Com. Comn. R. 451. In Royal Coal & Coke Co. v. Southern Ry. Co., 13 Interst. Com. Comn. R. 440, 447, it was said:

"The railroads must have fuel; they are entitled, and indeed required by law, to take all proper and just measures to assure the regularity and certainty of their fuel supply. * * *"

The appropriation of this coal by defendant would not be the exercise of any paramount right by which the property of the plaintiff was taken without compensation. It merely amounts to postponing plaintiff's delivery until defendant may have the coal to operate its railroad and then serve plaintiff.

It would seem that, in the nature of things, the mine owner having contracts to deliver commercial coal, and having contracts with the railroad company, operating to and from its mine, for the railroad company's necessary fuel coal, that it is the duty of the mine owner to supply the fuel coal before supplying the commercial coal. Indeed, one would think that the contractor for commercial coal would be bound by the implication that the mine owner with whom he had contracted would, if the mine owner had also a contemporaneous contract with a railroad company for fuel coal, necessarily fill its contract with the railroad company first, at least to the extent of sufficient coal to enable it to carry commercial coal to the end of its line.

The Interstate Commerce Commission had somewhat the same question, arising in a different way, in Royal Coal & Coke Co. v. Southern Ry. Co., 13 Interst. Com. Comn. R. 440. One of the questions there went to the relative rights of contractors for commercial coal and railroads contracting for fuel coal at the same mine, with respect to the distribution of cars in times of car shortage. In the opinion (Commissioner Cockrell) it was said (page 448):

"The carrier must be free to contract for the total output of a mine, if it so desires; or it may contract for any part of a mine's output less than the whole, and it is entitled to get its fuel coal first, for without fuel it cannot haul even commercial coal to its destination, to say nothing of complying with its obligations to the public at large; but in all its acts it must deal even-handed justice in the matter of car distribution as in the matter of rates. If a mine contracts to furnish only a part of its output to the railroad for fuel, and if the filling of its contract with the railroad calls for its full pro rata of cars, or more, then it should not receive other cars for commercial shipments, If such a mine in filling its contract to supply fuel coal to the railroad does not exhaust its equitable pro rata of cars, then cars should be given it for commercial shipments sufficient to complete its full pro rata share of all available cars."

This is a distinct recognition of the undeniable fact that, in the nature of things, the carrier, in order to carry from a mine any commercial coal at all, must have that mine owner fulfill its fuel contract with the railroad. When, therefore, this coal was placed on the de-

fendant's cars, and the defendant, without moving it, and after notice, asserted the right of precedence which necessity gave it, the plaintiff had no right to complain of mere postponement of delivery to it under its contract with the Collieries Company.

The rule that a common carrier is bound to receive goods tendered for carriage is not hard and fast. There are reported cases showing exceptions. In The Idaho, 93 U. S. 575, 23 L. Ed. 978, it was held that a common carrier may show, as an excuse for nondelivery pursuant to his bill of lading, that he has delivered the goods upon the demand of the true owner.

In Valentine v. Long Island R. R. Co., 187 N. Y. 121, 79 N. E. 849, it appearing that the railroad company, having received certain rails for shipment over its lines, without knowledge that the rails were its property, and afterwards discovered that they were, had the right to appropriate the rails. In both of these cases the tender, the acceptance, the delivery were without question.

In the case here the Railroad Company notified the Collieries Company that it would not accept for shipment the commercial coal, and laid claim to the coal as its own. The Collieries Company could not force it into the relation of a common carrier, when it, without fault on its part, was unable to perform what would ordinarily be the duty of a common carrier, when it had given notice of its inability to perform the service due and demanded of it as a common carrier. The Supreme Court of the United States say so in Eastern Railway v. Littlefield, 237 U. S. 145, 35 Sup. Ct. 491, 59 L. Ed. 878, in so many words:

"But where, without fault on its part, a carrier is unable to perform a service due and demanded, it must promptly notify the shipper of its inability; otherwise, the reception of goods without such notice will estop the carrier from setting up what would otherwise have been a sufficient excuse for refusing to accept the goods, or for delay in shipment after they had been received."

That case also had to do with car shortage which made it impossible for a carrier to furnish a reasonable number of cars for an accepted shipment, and it was held that the carrier, though not responsible for the car shortage, could not avoid liability, since it had given no notice to the shipper. Plaintiff's counsel say that the statement quoted is a dictum only. If it is, it has, nevertheless, coming as it does from the Supreme Court, a very persuasive influence.

The case here is stronger than that, for shipment was not accepted, and the notice said it would not be accepted. The wrongdoing of the Collieries Company in tagging the cars for the plaintiff contrary to the notice could not, as heretofore said, compel the defendant into a relation it expressly declined, for justifiable reasons, to assume. This particular coal, as between defendant and plaintiff, belonged to defendant, and it owed the plaintiff no duty with respect thereto.

Since the demurrer goes to the whole defense, and the defense being good as to the cars other than the first six cars, the demurrer must be overruled.

The question raised by the demurrer to the third defense is whether or not, for those six cars, the defendant must pay their value at the

time and place of delivery or their value at destination; the former value being alleged to be less than the latter.

[2] This demurrer will be overruled, also, for the reason that the published terms of defendant's coal tariffs in effect at the time, filed with the Interstate Commerce Commission and published according to law, fix the measure of damage for loss or damage on the basis of the value of the property at the place and time of shipment. Of course, the tariff rates are measured by the value of the service. The published rate is on the basis of the value of the coal at the mine. A greater value than that would call for a higher rate than the published rate. To permit the plaintiff to recover for a greater value than at the mine, while paying the same rate as other shippers, would be a discrimination in favor of the plaintiff.

The subject was dealt with in Shaffer v. Railway Co., 21 Interst. Com. Comn. R. 8. In that case the bill of lading contained an agreement the effect of which was substantially the same with respect to the amount of loss or damage, and fixing it as of the value of the property at the place and time of shipment. In the report of the commission in that case it was said:

"The contract complained of admittedly changes the common-law rule which makes the carrier liable for the value of the property at the place of destination."

It was held also that the contract did not attempt to relieve the carrier from the payment of the full value of the property, but only determined the time, place, and manner in which that value should be definitely ascertained, and a number of cases are cited to the point that such an agreement is not at all a limitation of the carrier's liability and is reasonable. See, also, Rogan v. Railway Co., 51 Mo. App. 665; Grubbs v. Railroad Co., 101 S. C. 210, 85 S. E. 405. It is true that a bill of lading (both a contract and a receipt; Pollard v. Vinton, 105 U. S. 7, 8, 26 L. Ed. 998) was involved in that case, and there is none here; but the plaintiff is claiming, and it is here held as to the six cars, that a contract of carriage had been entered into.

The quoted provision of the regulations fixing the damage was a part of the law of that contract, and was carried into it and becomes as much a part of it as if written into a bill of lading. Apparently, the ordinary rule permitting an election to sue for breach of contract or for the tort does not obtain in cases such as these. It was said by Mr. Justice Hughes, in Georgia, etc., Railway Co. v. Blish Milling Co., 241 U. S. 190, 197, 36 Sup. Ct. 541, 544 (60 L. Ed. 948):

"It is urged, however, that the carrier in making the misdelivery converted the flour, and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms, which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

An order may be taken overruling the demurrers.

GULF & S. I. R. CO. v. GULF REFINING CO. et al.

(District Court, S. D. Mississippi, Jackson Division. September 4, 1919.)

No. 94.

1. REMOVAL OF CAUSES ⊂=49(3)—WHAT CONSTITUTES SEPARABLE CONTROVERSY AUTHORIZING REMOVAL.
While a defendant has no right to say that an action shall be several which plaintiff elects to make joint, yet if the complaint in a joint action of tort by a resident plaintiff against a resident and nonresident defendant fails to allege facts showing a joint cause of action, or alleges facts showing separate causes, or fails to allege facts showing any cause of action against the resident defendant, there is a separable controversy, which entitles the nonresident defendant to remove the cause.
2. CONTRIBUTION ⊂=5—WRONGDOER RESPONDING IN DAMAGES CANNOT OBTAIN CONTRIBUTION FROM ANOTHER WRONGDOER.
Where wrongdoers are equally culpable, one who has been made to respond in damages for the injury cannot maintain an action for contribution against another.

In Equity. Suit by the Gulf & Ship Island Railroad Company, a corporation organized under the laws of Mississippi, against the Gulf Refining Company, a corporation organized under the laws of Pennsylvania, and J. L. Carr and Mrs. May Blackwell, citizens of Mississippi, which was begun in the chancery court of Smith county, Miss., but was removed by the named nonresident defendant to the federal court. On motion to remand. Motion denied.

T. J. Wills, of Raleigh, Miss., for plaintiff.
Hirsh, Dent & Landau, of Vicksburg, Miss., for defendants.

HOLMES, District Judge. This is a motion by the plaintiff to remand the cause to the state court. The suit was filed by the Gulf & Ship Island Railroad Company, a Mississippi corporation, seeking indemnity or contribution from the defendants, the Gulf Refining Company, a Pennsylvania corporation, and J. L. Carr and Mrs. May Blackwell, individual citizens of Mississippi, alleged to be joint tort-feasors with the plaintiff in the commission of an injury which has been fully satisfied solely by the plaintiff.

In the absence of a showing that the resident defendants were fraudulently joined for the purpose of preventing a removal, the facts as stated in the plaintiff's pleading are decisive of the nature of the controversy. Chicago & Alton R. R. Co. v. McWhirt, 243 U. S. 422, 37 Sup. Ct. 392, 61 L. Ed. 826. Accordingly on this motion we must look to these facts to ascertain whether the case stated is one of joint liability against all of the defendants, or whether the facts reveal a separable controversy wholly between the plaintiff and the nonresident defendant.

The Gulf Refining Company extracts, manufactures, and sells at wholesale and retail kerosene, gasoline, and other petroleum products. Pursuant to orders previously given to one of its traveling salesmen,

the Gulf Refining Company intended to ship to J. L. Carr, a retail country merchant, a drum of kerosene, and to E. Burnham three drums of gasoline. The drums were of iron, and were designated by stock numbers indented into the metal. The drum of kerosene intended for J. L. Carr carried the stock number 23937, and one of the drums of gasoline intended for E. Burnham bore the number 9770; the other numbers of the gasoline drums being immaterial. The bills of lading, waybills, and freight bills were made out correctly, and showed that Carr was to get the properly numbered drum of kerosene and Burnham the properly numbered three drums of gasoline. Both consignments were destined to stations on the line of the Gulf & Ship Island Railroad Company, the last of two connecting carriers over which the shipments were routed. In addition to being identified by stock numbers indented in the iron drums, which corresponded with the numbers on the bills of lading, waybills, and freight bills, shipping tags were prepared by the consignor's clerk; a cream-colored tag bearing the address, "J. L. Carr, Taylorville, Miss.," to be attached to the drum of kerosene, and three red tags for the gasoline drums, with the inscription, "E. Burnham, Magee, Miss."

And here is where the initial error occurred. Through the negligence of the nonresident and removing defendant's employé, the cream-colored tag was attached to drum numbered 9770, containing gasoline, and one of the red tags was attached to drum numbered 23937, containing kerosene. With this conflict between the addresses on the tags and the stock numbers on the drums and shipping bills, the three drums of gasoline and one of kerosene were delivered to the Mississippi Central Railroad Company, the initial carrier, and by it delivered to the plaintiff, the last carrier, which did not notice, or neglected to regard, the said conflict, and, in accordance with the addresses on the tags, delivered the drum of gasoline numbered 9770 to Carr, at Taylorville, and the drum of kerosene numbered 23937 and two drums of gasoline to Burnham, at Magee.

The resident defendant J. L. Carr thereafter carried the drum so delivered to his store, and, with the assistance of his clerk, the other resident defendant, Mrs. May Blackwell, poured its contents into a kerosene tank used for retailing, and, as alleged in the bill of complaint:

"With the information from the defendant oil company, charging them with notice of the likelihood of the said oil company's having made a mistake in the shipment, sold the said oil as kerosene, and wrongfully and unlawfully represented the said oil to be kerosene, when by the use of ordinary care and caution they could and should have known that it was gasoline."

But it is not alleged what the information, "charging them with notice of the likelihood of the oil company's having made a mistake," consisted of, nor how by "the use of ordinary care and caution they could and should have known that it was gasoline." These are mere conclusions of the pleader, who should state the facts from which he makes these deductions.

Among the purchasers at Carr's store of this gasoline for kerosene was Archie Yelverton, to whom the resident defendant, Mrs. May

Blackwell, sold a gallon of supposed kerosene, which, while being used in his home as kerosene for illuminating purposes, because of its highly volatile and inflammable characteristics, exploded and burned to death two of his daughters.

Suits for the wrongful deaths were instituted against the Gulf Refining Company and J. L. Carr. The nonresident and removing defendant induced the plaintiffs in these suits to dismiss them and file other suits against the Gulf & Ship Island Railroad Company as sole defendant in each. These suits resulted in judgments against the railroad company for sums aggregating $50,000, which were satisfied in full by the payment of $17,500 in settlement of both judgments, and $2,500 in payment of court costs and reasonable attorney's fees.

The railroad company, by suit in equity, is now demanding indemnity in the sum of $20,000, the amount actually paid in satisfaction, upon the theory that its negligence, in not having detected the error of the oil company in mislabeling the drums and thereby preventing the sale by the other two defendants of gasoline for kerosene, was slight and secondary to the negligence of the defendants, who were primarily liable for the injuries for which the plaintiff has been compelled to pay damages.

The record and voluminous briefs bristle with many interesting questions of remote and proximate cause, joint and several tort-feasors, and contribution and indemnity between wrongdoers; but for the purpose of this motion it is only necessary to determine whether there is a separable controversy between the plaintiff and nonresident defendant which will warrant a removal.

[1] It has been repeatedly held that the cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings. While it is true that a defendant has no right to say that an action shall be several which a plaintiff elects to make joint, yet if the complaint fails to allege facts showing a joint cause of action, or alleges facts showing separate causes, or fails to allege facts showing any cause of action against the resident defendant, then there is a separable controversy which entitles the nonresident defendant to remove.

In reversing the case of McAllister v. Chesapeake & Ohio Railroad Co. (D. C.) 198 Fed. 660, the Supreme Court, in 243 U. S. at page 302, 37 Sup. Ct. 274, 61 L. Ed. 735, examines first the liability of the resident defendant, and having reached the conclusion that the complaint stated a case against the resident defendant, said:

"There remains only the question whether the amended petition states a cause of action against the lessor" (nonresident and removing defendant).

And, having come to the conclusion that the lessor was also liable, it was said:

"Since the amended petition states a joint cause of action against the Kentucky company and the Virginia company, the claim that there is a separable controversy in the case, justifying removal by the latter company, must fail; and since no facts are alleged in support of the charge that the joinder of the two companies is fraudulent, except that it was made for the purpose of preventing removal to the federal court, this claimed reason for removal must

also fail (Illinois Central R. R. Co. v. Sheegog [126 Ky. 252, 103 S. W. 323, affirmed 215 U. S. 308, 30 Sup. Ct. 101, 54 L. Ed. 208], and C. & O. Ry. Co. v. Cockrall [232 U. S. 146, 34 Sup. Ct. 278, 58 L. Ed. 544]), supra, and therefore the decision of the District Court is reversed, and the case must be remanded to the state court."

The McAllister Case (D. C.) in 198 Fed. 660, therefore, was reversed, on the ground that the complaint stated a joint cause of action against both defendants, and the inference is strong that, but for that fact, the decision of the lower court would have been affirmed, holding that a cause is removable by the nonresident defendant, where the petition fails to state a cause of action against the resident defendant.

[2] Let us, therefore, see whether a cause of action is here stated against the resident defendants. Where a party wronged has compelled any one of the parties chargeable with the act to compensate him for the injury, the general rule is that the person thus singled out and compelled to bear the loss cannot recover against the others equally liable; but in many instances cases have been taken out of this general rule, and it has been held inoperative, in order that the ultimate loss may be brought home to the principal wrongdoer, who is made to respond for all the damages, and one less culpable, although legally liable to third persons, may be relieved of the damages assessed against him by visiting the entire loss upon the primary and principal offender.

In these cases, which may be called exceptions to the general rule, the principle is well recognized that, where there is no moral turpitude, the law will inquire into the real delinquency of the parties, and place the ultimate liability upon him whose fault has been the primary cause of the injury; but where the negligence of the parties has been of the same character no indemnity or contribution will be allowed.

In this case the negligence of the railroad company consisted in failing to detect the error of the oil company, as it might have done by a proper inspection and comparison of its records, drum numbers, and tags, and as a consequence thereof in delivering gasoline for kerosene. The negligence of the resident defendants (if any is shown by proper averments) consisted in failing to detect the same error of the oil company, and as a consequence thereof in selling gasoline for kerosene. Their wrong was subsequent in time, of the same character, and not more culpable in degree, than that of the railroad company, which because of its fault has been held liable, and as to the resident defendants does not come within that exceptional class which permits it to recover indemnity or contribution. Union Stockyards Co. v. C., B. & Q. Railroad Co., 196 U. S. 217, 25 Sup. Ct. 226, 49 L. Ed. 453, 2 Ann. Cas. 525.

In Washington Gas Co. v. District of Columbia, 161 U. S. at page 329, 16 Sup. Ct. at page 569, 40 L. Ed. 712, it is stated:

"As a deduction from the recognized right to recover over, it is settled that, where one having such right is sued, the judgment rendered against him is conclusive upon the person liable over, provided notice be given to the latter, and full opportunity be afforded him to defend the action."

The allegation that the oil company, being in possession of all the facts and knowing that it was primarily liable for these deaths be-

cause of its initial and real delinquency, had its attorney procure dismissal of the original suits against it and Carr, and by new suits obtain judgments against the railroad company, can have no other legal effect than to obviate the necessity by the railroad company of giving such notice to the oil company and an opportunity to defend said suits. There is no allegation that the resident defendants, or any one authorized by them, took part in this phase of the transaction, or that they had any notice of the pendency of the suits against the railroad company, or opportunity to defend them.

The facts as alleged fail to show that the plaintiff has any cause of action against the resident defendants, and of course it has no joint cause of action against them. Therefore it follows that its claim for indemnity against the nonresident and removing defendant is a controversy which is "wholly between citizens of different states, and which can be fully determined as between them," within the meaning of section 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [Comp. St. § 1010]).

The motion to remand should be overruled; and it is so ordered.

SOLINSKY v. NEW YORK STOCK EXCHANGE et al.
In re WILSON et al.

(District Court, S. D. New York. August 27, 1919.)

BANKRUPTCY ⊂=143(4)—STOCK EXCHANGE MEMBERSHIP.

A bankruptcy trustee is not entitled to proceeds derived from selling the bankrupt's membership in the New York Stock Exchange until the bankrupt's dues to and debts within, the Exchange have been determined by the Exchange's committee and deducted.

In Bankruptcy. Action by Frank J. Solinsky, as trustee in bankruptcy of J. C. Wilson and others, against the New York Stock Exchange and another. Decree dismissing complaint without prejudice.

The complicated affairs of J. C. Wilson & Co. and some of the questions arising therefrom were discussed in 252 Fed. 631. Wilson was a member of the New York Stock Exchange and was a general partner of the firm of J. C. Wilson & Co. When the firm became insolvent in 1914, Wilson was suspended from membership in the Exchange. Before the period allowed to Wilson by the constitution of the Stock Exchange within which to settle with his creditors had expired, Wilson died, and the committee on admissions of the Stock Exchange thereupon disposed of his membership. The proceeds of the membership amounted to $68,500, out of which dues to the Exchange aggregating $294.37 were paid. The balance remaining was deposited by the Exchange with a trust company, and this sum, with accrued interest, is still held by the Exchange.

Harris, Winthrop & Co. is a partnership, some of whose general partners are members of the Exchange. On January 11, 1915 (i. e., after the insolvency of Wilson, but before the transfer of his membership), Harris, Winthrop & Co. filed a claim against the membership of Wilson with the committee on admissions of the New York Stock Exchange. The following is an extract of the substantial features of the claim:

"This firm had an account with J. C. Wilson & Co., of San Francisco, in which we bought and sold securities on the credit of J. C. Wilson & Co., up

to the closing of the Stock Exchange on July 30, 1914. J. C. Wilson & Co. then announced their suspension to the Stock Exchange. Thereafter * * * the partners of J. C. Wilson & Co., individually and as copartners, were adjudicated bankrupts. On the opening of the Stock Exchange this firm closed all outstanding contracts between it and Wilson & Co. under and according to the rules of the Stock Exchange. The result of the closing of said transactions was that the debit balance of J. C. Wilson & Co. to this firm was paid in full, and we hold for the account of J. C. Wilson & Co., or the trustee in bankruptcy of Wilson & Co., $11,999.80 in cash and the securities set forth in schedule A hereto annexed.

"Before we closed the account of Wilson & Co., various customers of Wilson & Co., with whom this firm had no dealings, made claims against us for the securities set forth in schedule B hereto annexed. * * * Since then, and on or about December 24, 1914, an action was begun by Louis Rosenthal against this firm, the New York Stock Exchange, and the president and officers of the New York Stock Exchange, to recover specific securities, or the proceeds thereof, amounting to $43,795. Various other customers of Wilson & Co. have made claims against this firm for the securities set forth in schedule C hereto annexed, on the ground that they are respectively entitled to the delivery of said securities on paying various amounts in cash. * * * If the various claimants against this firm are successful, the credit balance of J. C. Wilson & Co. with this firm would change to a considerable debit balance, the amount of which we cannot accurately state, on account of the facts above set forth. We are also subject to the risk of being obliged to deliver the cash and securities in our hands to the receiver of Wilson & Co. in bankruptcy, which would leave this firm without any protection against the claims of the customers of Wilson & Co., and compel us to look to the proceeds of the seat of J. C. Wilson & Co. for reimbursement in part or in whole.

"On account of the foregoing facts we hereby file a claim against the seat of J. C. Wilson & Co. and the proceeds thereof for an unnamed amount."

In due course, Frank J. Solinsky became the trustee in bankruptcy of Wilson et al., and in 1916 he notified the Exchange to pay over to him the proceeds of the membership of Wilson. Mr. Winthrop, of Harris, Winthrop & Co., appeared before the committee on admissions, and, in substance, repeated the statements contained in the letter of his firm, and stated that he was unwilling to withdraw his claim against the proceeds of the membership of Wilson, and desired that the matter should stand over until his claim was in a position to be passed upon.

The plaintiff has brought this suit against the New York Stock Exchange and the members of Harris, Winthrop & Co. to recover the above-mentioned proceeds of the transfer of the membership in the Exchange formerly belonging to Wilson.

The constitution of the Exchange provides that a member of the Exchange may transfer his membership voluntarily, with the approval of two-thirds of the committee on admissions, and that when a member dies his membership may be disposed of by the committee on admissions. Likewise, when he is expelled or becomes ineligible for reinstatement, his membership shall be similarly disposed of. The constitution further provides that upon any transfer of a membership the proceeds thereof shall be applied to the following purposes and in the following order, namely:

"First. The payment of all * * * charges of the Exchange * * * against a member whose membership is transferred.

"Second. The payment of creditors, members of the Exchange, * * * of all filed claims arising from contracts subject to the rules of the Exchange, if, and to the extent that, the same shall be allowed by the committee on admissions. If said proceeds shall be insufficient to pay said claims, as so allowed, in full, the same shall be applied to the payment thereof pro rata.

"Third. The surplus, if any, of said proceeds, shall be paid to the person whose membership is transferred, or to his legal representatives, upon the execution by him or them of a release or releases satisfactory to the committee on admissions.

"The committee on admissions shall have power, by rule or otherwise, to secure the observance of the provisions of this article."

When a member of the Exchange becomes insolvent, he is at once suspended. If he fails to settle with his creditors and apply for reinstatement within one year, his membership is disposed of by the committee on admissions, unless the governing committee extends the time allowed to him for settlement of his creditors.

Contracts subject to the rules of the Exchange are defined by article XXII of the constitution as follows:

"All contracts of a member of the Exchange, or of a firm having a member of the Exchange as a general partner, with any other member of the Exchange, or with any other firm having a member of the Exchange as a general partner, for the purchase, sale, borrowing, loaning, or hypothecation of securities, or for the borrowing, loaning, or payment of money, whether occurring upon the floor of the Exchange or elsewhere, are contracts subject to the rules of the Exchange."

Harold Remington, of New York City, for trustee.

Carter, Ledyard & Milburn, of New York City (Walter F. Taylor, of New York City, of counsel), for defendant New York Stock Exchange.

Gifford, Hobbs & Beard, of New York City, for defendant Harris, Winthrop & Co.

MAYER, District Judge (after stating the facts as above). On the testimony in the case it is clear beyond question that the position which has been taken by Harris, Winthrop & Co. has been so taken in absolute good faith as a protective measure against claims which might be asserted prior to the expiration of the statute of limitations, which will be about August, 1920. While no claims have latterly been asserted, yet there is no assurance that some claim may not be made and pursued, and it was said in argument (and it is quite possible) that in a situation of this kind there is always at least a possibility of a last hour claim which might subject Harris, Winthrop & Co. to loss, and therefore they insist, as matter of right, that they should not be placed in any such situation by the payment over at this time to the trustee in bankrupcy of the proceeds of the Wilson membership.

The testimony in the case establishes that the uniform practice of the committee on admissions of the New York Stock Exchange has been to entertain claims filed against the proceeds of memberships by members of the Exchange based upon the liability of the claimants to respond to claims made against them by outsiders for securities received from the member whose membership has been transferred, or based on other matters of a similar kind. Each case, of course, has its own facts, and there is, therefore, the opportunity for counsel to draw some fine distinctions. But for all substantial purposes and in substantial respects the committee on admissions has pursued the uniform practice of postponing the consideration of the claim against the proceeds so long as the question of the liability of the claimants to the outsider remains open.

So far as this record shows, the trustee in bankruptcy has never made any application to the committee on admissions of the New York Stock Exchange to bring the claim of Harris, Winthrop & Co., on for

a hearing, nor have there been presented to the committee any facts showing or tending to show that the claims against Harris, Winthrop & Co., either have been extinguished or have been disposed of by a court of competent jurisdiction.

On the evidence it is entirely plain that the action in this case of the New York Stock Exchange, acting through its committee on admissions, is in strict accordance with its constitution and the practical construction thereof, as shown by uniform practice. It is vital that an association such as the New York Stock Exchange should exercise the most scrupulous care in the observance of its constitution and rules, for the members of the Stock Exchange necessarily rely upon the faithful adherence to such constitution and rules for protection in just such a situation as the facts here present. The suggestion that the action of the committee on admissions is arbitrary or without justification is wholly without merit. As stated by counsel for the New York Stock Exchange in his brief:

"The presumption is that, whenever the plaintiff is prepared to show the committee that there is no foundation for the claims of which Harris, Winthrop & Co. are apprehensive, or that claimants against them are estopped from the further assertion of their claims, or have elected inconsistent remedies, or that their claims are barred by the statute of limitations, or other similar facts, the committee on admissions will adjudicate adversely upon the claim of Harris, Winthrop & Co. and pay over the proceeds of the Wilson membership to the trustee in bankruptcy."

It is unquestionably the law that, when a member of the New York Stock Exchange has become bankrupt and his membership is transferred, his trustee in bankruptcy is not entitled to the proceeds of the transfer, but only is entitled to have paid to him the surplus remaining after the payment therefrom of his dues to the Exchange and his debts within the Exchange, as allowed by the committee on admissions. Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264; Belton v. Hatch, 109 N. Y. 596, 17 N. E. 225, 4 Am. St. Rep. 495.

It is also well settled that the action of the committee on admissions upon claims filed with it is necessary to the ascertainment of the amount of the surplus to be paid to the representatives of the former member, and is a condition precedent to any claim by such representatives against the Stock Exchange for such surplus. Stonebridge v. Smith, 55 N. Y. Super. Ct. 295; Hutchinson v. Otis, 115 Fed. 937, 53 C. C. A. 419; Id., 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179.

Much of what has been set forth supra, could have been omitted, in view of the controlling authority of In re Currie, 185 Fed. 264, affirmed on opinion below in 185 Fed. 265, 107 C. C. A. 369; but, in view of the earnestness with which plaintiff has pressed his contention, it has seemed desirable to consider the subject-matter somewhat fully. I have not failed to consider the various other arguments urged by plaintiff; but, when all is said, it seems to me that the Currie Case, supra, disposes of the suit at bar. I realize that the result will be that the ultimate winding up of the estate in bankruptcy will be postponed for a while, but that temporary inconvenience must give way to the rights of these defendants.

The complaint will be dismissed, with costs, without prejudice, however, to the right of plaintiff to bring such suit or action as he may be advised for the balance of the proceeds of the Wilson membership that remain in the hands of the New York Stock Exchange after the claim of Harris, Winthrop & Co. has been liquidated and has been passed on by the committee on admissions, and any amount allowed on such claim paid out of the proceeds of the Wilson membership. The suggestion that a decree in accordance herewith will indefinitely postpone the disposition of the fund is without merit, for the reason that undoubtedly the whole subject-matter must be disposed of at or prior to the end of August, 1920.

Submit decree on five days' notice.

TWIN FALLS SALMON RIVER LAND & WATER CO. v. ALEXANDER et al.

(District Court, D. Idaho, S. D. January 3, 1919.)

No. 587.

1. WATERS AND WATER COURSES ⊂=222—RECLAMATION—CAREY ACT—APPLICATION FOR PATENT.

   Bill by construction contractor for a Carey Act project, complaining of board representing a state in such projects, because not applying for patent for all lands included in the project, though there is water available only for part, *held* without equity.

2. COURTS ⊂=303(2)—FEDERAL COURTS—SUIT AGAINST STATE.

   Bill by contractor for Carey Act project, complaining of board representing state in such projects, because of it not applying for patent for all lands included in project, but only for amount for which it deems there is water available, *held* within Const. Amend. 11, withdrawing from jurisdiction of federal courts suits by individuals against a state.

3. WATERS AND WATER COURSES ⊂=222—CAREY ACT PROJECT—ADEQUACY OF WATER SUPPLY—RELIANCE OF CONTRACTOR ON STATE ENGINEER'S REPORT.

   A construction contractor for a Carey Act project in Idaho can claim no protection or advantage, on it developing that there was not water available for all the lands of the project, because the state engineer, in approving the original proposal, reported the sources of water to be ample; neither he nor the state or its land board taking the initiative or making representations to a promoter, and the engineer's report being only for the benefit of the board.

4. EVIDENCE ⊂=474(1)—OPINION—RELIANCE ON REPORT.

   Testimony of a witness, who was never an officer or representative of a corporation, that it placed reliance on a report, is incompetent to establish the fact, being nothing but his present personal opinion.

5. WATERS AND WATER COURSES ⊂=222—CAREY ACT PROJECT—PERFORMANCE OF CONTRACT—DETERMINATION.

   It is for the Idaho state land board in the first instance to determine in what particulars contract work on a Carey Act project is unfinished, and to consider whether, in view of the developed fact of insufficient sources of water, anything further will be required, and, till the contractor has taken proper steps to have this done, it cannot maintain suit against the board for a determination of the questions.

In Equity. Suit by the Twin Falls Salmon River Land & Water Company against M. Alexander and others, as members of the State Board of Land Commissioners of Idaho, and the Salmon River Canal Company, Limited. Dismissed conditionally.

Richards & Haga and McKeen F. Morrow, all of Boise, Idaho, for plaintiff.

T. A. Walters, Atty. Gen., and A. C. Hindman, Asst. Atty. Gen., for defendants.

DIETRICH, District Judge. The plaintiff, a Carey Act corporation, and its assignors, promoted, and, under a contract with the state, constructed, the Salmon River Carey Act project. The law governing projects of this character is to be found in the United States statutes (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 372, 422 [Comp. St. § 4685]; Act June 11, 1896, c. 420, § 4, 29 Stat. 413, 434; Act March 3, 1901, c. 853, § 3, 31 Stat. 1133, 1188 [Comp. St. § 4687]; Resolution May 25, 1908, No. 28, 35 Stat. 577 [Comp. St. § 4688]; and Act May 27, 1908, c. 200, 35 Stat. 317, 347), and in the laws of Idaho (Const. art. 9, § 7) and the Idaho Revised Codes (sections 149, 150, 1558, and sections 1613 to 1634, inclusive). The defendants are respectively the Governor, the attorney general, the secretary of state, the auditor, and the superintendent of public instruction of the state, who ex officio constitute the state board of land commissioners. As such board they represent the state in all public matters affecting Carey Act projects. With considerable detail the bill charges that, although the plaintiff has substantially completed the project and has performed its contract in so far as is practicable, the defendants arbitrarily neglect to approve the work or accept the system, and, upon the other hand, without reason defer all action in the premises, and harass and injure the plaintiff by threatening litigation and encouraging the settlers to refuse payments under their contracts for water rights.

In a supplemental complaint it is further charged that, in violation of the plaintiff's rights and greatly to its prejudice, the defendants intend to make application for patent for only about 35,000 acres of land included in the project, and threaten to relinquish approximately 20,000 acres for which plaintiff has sold water rights, and upon which it claims liens to secure the payment of the purchase price thereof. The prayer is somewhat voluminous, but in substance it is that it be decreed that the plaintiff has completed the irrigation system in compliance with the plans and specifications, "in so far as the same are applicable to the conditions now existing under said project, and in so far as" the plaintiff ought under the circumstances to be required to construct the same; further, that, if it be held that the system is unfinished, the deficiencies may be pointed out, to the end that the plaintiff may be able to complete performance; and, further, that it be decreed that the system be turned over to the Salmon River Canal Company, the company organized for the purpose of maintaining and operating the system, and that the plaintiff be relieved from all further liability under its agreement for the construction of the system; and,

further, that the defendants be enjoined from bringing any suit to cancel or annul the agreement, and from taking any steps in any way to impair the plaintiff's lien upon the lands embraced in the project, and particularly from relinquishing to the United States any of such lands.

It is unnecessary to detail the numerous issues formally raised by the answers to these pleadings, for the reason that upon final analysis of the record there appear to be but two or three controlling questions, and they can be understood without an elaborate statement of fact. (The project was also involved in Twin Falls Salmon River Land & Water Co. v. Caldwell et al., 242 Fed. 177, 155 C. C. A. 17; and State v. Twin Falls Salmon River Land & Water Co., 30 Idaho, 63, 166 Pac. 220, to which resort may be had for additional information.) Admittedly the enterprise was improvident, in that it contemplated the reclamation of an area greatly in excess of any possible water supply. The original proposal of the plaintiff's assignors to the land board was for the reclamation of about 150,000 acres, and the segregation was for approximately that amount. At a comparatively early date, however, the plaintiff seems to have concluded that the area was excessive, and the system was constructed, so the plaintiff alleges, with a capacity sufficient for only 100,000 acres. But even this capacity was in excess of the available water supply, and hence, it is further averred in the complaint, with the consent of all parties concerned, the acreage was reduced from time to time until, when the suit was commenced water contracts were outstanding for a little more than 60,000 acres. The plaintiff does not here expressly affirm that the supply is sufficient for even that acreage, and, upon the other hand, the defendants, apparently with the support of the Land Department of the United States, contend that there is water enough for only about 35,000 acres.

In view of the plaintiff's admission that the water supply is grossly inadequate for the enterprise as originally projected, and its failure to tender an issue as to the amount of water actually available, and the further obvious, if not admitted, fact that the acts and omissions of the state board, of which it here complains, are in the main referable to the contention consistently made by it of the inadequacy of the water supply, we must assume for the purposes of the case that there is sufficient water for only about 35,000 acres, or at least that the defendants reasonably and in good faith so believe. With water right contracts, all apparently of equal dignity, out for 60,000 acres, and with a water supply for only 35,000 acres, with the system incomplete, according to the original plans, and wasteful of water and unnecessarily expensive to maintain by reason of the oversize of the principal conduits for a tract of 35,000 acres, or even 60,000 acres, what was the plain duty of the land board? The plaintiff says: Approve of and accept the system so constructed, authorize its transfer to the settlers, thus relieving it from further responsibility, and apply for a patent for the entire 60,000 acres. The board, upon the other hand, has maintained that the excess of outstanding water contracts is a matter in respect to which both it and the plaintiff have some obligation, and has apparently been seeking a basis of equitable adjustment.

[1, 2] At the threshold we are confronted with the question whether or not the case should be deemed to be a suit against the state, and for that reason withdrawn from our jurisdiction by the Eleventh Amendment to the federal Constitution. The precise question was submitted upon a motion to dismiss the bill, but the view was then taken that, while our jurisdiction is so restricted by this constitutional provision that at most we could grant but a little relief, some of the averments of misconduct are so unqualified and sweeping as necessarily to imply arbitrary, if not wanton, inaction on the part of the defendants, and, if true, would warrant a small measure of relief. Akin to this question of the jurisdiction of federal courts is the broader question of the jurisdiction of any court of equity to grant the relief prayed for; indeed, so closely related are the two questions that no attempt is made in the discussion which follows to distinguish or state separately the considerations which apply to one and not to the other. By reason of the peculiar nature of a Carey Act project and the anomalous relation thereto of the state land board, the federal question is not free from great difficulty, and upon it the decided cases defining the scope of the constitutional provision throw no very certain light. A measure of assistance may be gathered from the following cases: State v. Twin Falls Salmon R. L. & W. Co., 30 Idaho, 41, 166 Pac. 220, opinion on rehearing, page 232; Davis v. Gray, 83 U. S. (16 Wall.) 203, 21 L. Ed. 447; Board v. McComb, 92 U. S. 531, 23 L. Ed. 623; Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448; Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805; Rolston v. Crittenden, 120 U. S. 390, 7 Sup. Ct. 599, 30 L. Ed. 721; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842; Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Scully v. Bird, 209 U. S. 481, 28 Sup. Ct. 597, 52 L. Ed. 899; Lankford v. Platte Iron Works, 235 U. S. 461, 35 Sup. Ct. 173, 59 L. Ed. 316; Tanner v. Little, 240 U. S. 369, 36 Sup. Ct. 379, 60 L. Ed. 691; Carolina Glass Co. v. Murray, 240 U. S. 305, 36 Sup. Ct. 293, 60 L. Ed. 658; Johnson v. Lankford, 245 U. S. 541, 38 Sup. Ct. 203, 62 L. Ed. 460; Martin v. Lankford, 245 U. S. 547, 38 Sup. Ct. 205, 62 L. Ed. 464; Morenci Copper Co. v. Freer (C. C.) 127 Fed. 199; Magruder v. Belle Fourche, etc., 219 Fed. 72, 135 C. C. A. 524; Weiland v. Pioneer Irr. Co., 238 Fed. 519, 151 C. C. A. 455.

Now, bearing in mind the constitutional provision and the general principle that the jurisdiction of courts of equity cannot be invoked to interfere with administrative officers, while exercising a discretion with which they are clothed by law, we pass to consider the specific contention made by the plaintiff.

First, the supplemental bill: It appears that in the fall of 1917, after a joint investigation by the defendants and a representative of the General Land Office, the Commissioner of the General Land Office, having found that there was water available for only 35,000 acres,

recommended to the land board that the project be contracted to that area, and the defendants, concurring in this view, passed a resolution in harmony therewith, and formally entered an order that the application for patent should cover only an area which, when added to the lands already patented and state lands already sold and desert entries remaining in the project, would amount to 35,000 acres. As to the future disposition in the Land Office of the residue of the 60,000 acres covered by outstanding contracts no affirmative action has been taken, so far as the record discloses. True, in the answer defendants admit that they propose to relinquish some of the lands covered by contracts, but it nowhere appears when or under what conditions. They deny that they are now selecting or preparing to relinquish such lands, and it is not shown that they purpose taking any action to that end without giving plaintiff an opportunity to be heard and to protect such interest as it may have. There is no room for the contention that in entering the order the defendants acted wantonly or arbitrarily, or with an intent to do the plaintiff wrong, nor is there any suggestion that, if the project is to be contracted, a better or more equitable plan can be devised than that recommended by the commissioner or than that which the board may adopt. Such is not the nature of plaintiff's complaint. Its opposition apparently rests exclusively upon the assumption that it is the legal duty of the board to apply for, and of the Secretary of the Interior to issue, patent for the 60,000 acres, not because there is water enough to irrigate that area, but because the lands were included in the project with the assent of both the state and federal authorities, and because, further, the plaintiff has contracted with entrymen to furnish water therefor.

The contention that the General Land Office is bound to issue patent for unreclaimed and irreclaimable desert lands, merely because, upon the ex parte representations of the promoters of the project and the state engineer and the state land board, such lands have been segregated for the purpose of reclamation, is thought to be wholly devoid of merit. It would be quite as reasonable to hold that when, under the terms of the Desert Land Act, the Land Office accepts the citizen's application to enter desert lands, the government is estopped from requiring as a condition precedent to the issuance of patent proof that the entryman is possessed of a water right sufficient in fact for the irrigation and reclamation of the land, merely because, under the regulations, there is attached to the application a map showing the source of the water supply and the proposed plan of irrigation. The primary purpose of the Carey Act was, not to enable the government to divest itself of title to its desert lands, but to secure their irrigation and reclamation; reclamation is the only consideration for the donation or grant, and is a condition precedent to the exercise of the power to grant. The authority conferred upon the Secretary of the Interior to convey is expressly limited to desert lands, which the state shall have caused to be—

"irrigated, reclaimed, occupied, and not less than twenty acres of each hundred and sixty acre tract cultivated by actual settlers * * * as thoroughly as is required of citizens who may enter under the [said] desert land law."

The act prescribes a procedure (similar to that required in the case of a desert land entry) for the temporary withdrawal of the lands from private entry, but the preliminary approval of the project by the Secretary in no wise imposes upon him or implies an obligation to patent. The only purpose of the preliminary showing is to inform him whether the plan is of sufficient apparent merit to warrant a temporary withdrawal of the lands from other forms of entry. Under the act as it originally stood, the Secretary was authorized to issue patents to the state or its assigns for such lands only as were shown by proof to have been actually irrigated, reclaimed, and settled. Act August 18, 1894, 28 Stat. 372, 422. By the amendment of June 11, 1896, it is true, the rigor of this requirement was in a measure relaxed; but under the new provision patent was authorized only for land for the reclamation of which "an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs"; settlement and cultivation no longer being required. By the same amendment liens were "authorized to be created by the state * * * and by no other authority whatever," and when created they were declared to be valid "on and against the separate legal subdivisions of land reclaimed for the actual cost of reclamation," etc. Under these provisions, clearly liens attach only to reclaimed land, and patents may issue only for such lands as have been provided with an ample supply of water.

"The existence of this lien depends primarily upon the completion of the construction works and the delivery of water through the works by the construction company, as stipulated in its contracts with both the state and the entryman." Adams v. Twin Falls Oakley Land & Water Co., 29 Idaho, 371, 161 Pac. 325.

Again, by the amendment of March 3, 1901 (31 Stat. 1133, 1188), it is provided that, if the state fails within ten years after segregation to cause the whole or any part of the segregated tract to be irrigated and reclaimed, the Secretary may, in his discretion, extend the time for a period of not exceeding five years, or restore such reclaimed land to the public domain. The contract prescribed by the Interior Department, and presumably entered into in this case between the Secretary of the Interior and the state, is in strict accord with these requirements, and binds the Secretary to issue patents only when "an ample supply of water is actually furnished" for the tract for which patent is sought. It must be manifest, therefore, that the land board here could not hope to succeed in an application for a patent for the 60,000 acres without representing that an ample supply of water has actually been furnished for that area, and if the view they entertain of the facts is correct such a representation would be false and fraudulent. The plaintiff's interest in the land consists of the liens it claims to hold upon the several tracts to cover the purchase price of water rights which it has sold. But the authority of the state, and hence the plaintiff's authority to create a lien, is expressly limited to "reclaimed" lands. In the absence of such a restriction the government might, by the simple process of creating such liens upon desert lands and foreclosing them, be divested of the title to large tracts of the public do-

main, without any assurance of reclamation or of other reciprocal benefit.

What ground for complaint, then, has the plaintiff touching the proposed action of the state land board? If it has a lien only for the aggregate acreage for which it has supplied ample water, and if, as is apparently admitted, it can suggest no better plan for contracting the project than that adopted by the board, there remains only the question whether the board is in error in assuming that the water supply is adequate for only 35,000 acres. But, as already suggested, the plaintiff does not here tender an issue upon that point, and besides, in so far as it is involved in the patent proceedings, it is a question which is exclusively for the United States Land Department and not for the courts. Twin Falls Salmon River Land & Water Co. v. Caldwell, 242 Fed. 177, 155 C. C. A. 17. If the plaintiff believes that it can show a larger acreage entitled to patent, it should seek to intervene in the Land Office and make its showing. There is no suggestion that it has sought such privilege and been refused. The defendants, apparently acting in good faith, made the application for as large an acreage as they thought the facts warrant, and there is no reason to assume that they would object to the intervention, or that leave would be withheld by the Land Office.

In view of these considerations, I am inclined to think that the supplemental bill is not only without equity, but that the relief sought by it is within the inhibition of the Eleventh Amendment to the federal Constitution. Perhaps to avoid the possibility of misunderstanding it should be expressly stated that in reaching this conclusion I do not pass upon the question of the power of the state board or of the Secretary of the Interior, over the objection of settlers upon the excluded lands, to reduce the area of the project in the manner proposed. To such an issue the settlers would be indispensable parties. I hold only that upon the record here the plaintiff is not in a position to complain. Suppose that all the excluded settlers were to assent to the plan, what grievance would the plaintiff have? If, as we have determined, its lien is limited to the acreage for which it can furnish an ample supply of water, the proposed adjustment would be most favorable to it, for admittedly under no other plan could the available water be made to serve so large an area.

Turning now, to the original bill: While it is to be conceded that there have been great delays, the circumstances do not warrant the charge of arbitrary or willful inaction. It is to be noted that a majority of the defendants came into office in January, 1917, and, as I understand, the plaintiff does not contend that any applications it has made since that time have failed of reasonably prompt attention. Nor can it be held that the defendants have acted in any spirit of ill will toward the plaintiff, or have shown a disposition to disregard its rights. The outstanding fact of the whole business is that the shortage of water has given rise to problems seemingly insoluble. From proceedings taken in this court, and from published reports of proceedings had in the state courts, notice is taken of the fact that numerous questions have arisen of the most perplexing character, some of which, notwith-

standing long-continued litigation, still fail of final determination. One of the principal difficulties is that apparently there is no tribunal having complete and exclusive jurisdiction. Federal statutes interlace with state statutes. In some of its phases the controversy is for the state courts, in others for federal jurisdiction, and in still others it must be referred to the United States Land Department.

There are strong equities in favor of the settlers, and strong equities in favor of the holders of securities. Any plan to contract the irrigable area so that it will be commensurate with the actual water supply involves hardships to some of the settlers, and to any basis of classification serious objection may be raised. The improved tracts are scattered over the project, some of them isolated, with the result that, if only such lands are retained, the distribution of water will be attended with great loss from seepage and evaporation. If precedence be accorded the water contracts in the order in which they were negotiated, the holdings will be scattered, and some of the improved tracts excluded. If a comparatively compact body of land be retained, some of the first rights sold and some of the highly improved tracts must be abandoned. Besides, the extent of the irrigation service which may be reasonably expected from the system has not yet been authoritatively determined. And here again there is the question of a competent tribunal. Doubtless for certain purposes a court of competent jurisdiction may adjudicate the question, but will such an adjudication be binding upon the Land Department? That department must necessarily determine the question in disposing of patent applications, but is such determination binding upon the courts in the litigation of controversies not directly affecting title to the lands? Beset with the conflicting appeals of opposing interests, and confronted with such a maze of uncertainty, the board may very well have hesitated and deferred decisive action, with the hope that time would bring a solution.

The plaintiff complains of inconsistency on the part of the board, in that, while contending that the water supply was inadequate for outstanding contracts, it instituted legal proceedings in the state courts to compel the plaintiff to sell additional rights for state lands. But it was not improper for it to seek a judicial determination of the rights of the state, whose interests they as state officers were bound to protect. There were large tracts of state land in the project, which it had been agreed would receive water, and in view of the shortage of water the status of these lands involved, not only debatable, but extremely close, questions of law, and in presenting them to the Supreme Court of the state in appropriate proceedings the defendants were clearly in the line of official duty, although they at the same time believed and were taking the position that the contracts outstanding were greatly in excess of the water supply.

[3, 4] The charge that defendants are encouraging the settlers to violate their contract obligations rests upon an incident thought to be too trivial to require serious consideration. Apparently the plaintiff assumes (although its position in that respect is not clearly defined) that its rights are enlarged, or the power of the defendants is restrict-

ed, by reason of the fact that the state engineer, in approving the original proposal, reported that the sources of water supply were ample. There is an averment, supported by testimony, to the effect that, in undertaking the project plaintiff relied upon this report. The proposal signed by George F. Sprague and three others bears date August 12, 1907, the engineer's report was made upon the same day, as was also the order of the state land board accepting the proposal. Eight months later the contract in question was entered into between the state, acting through the land board, and the plaintiff. In it there is a recital to the effect that the plaintiff had succeeded to the rights of Sprague and his associates, which rights, it is stated, are evidenced by the proposal hereinbefore mentioned, together with the approval thereof by the land board on August 12, 1907; and the plaintiff agreed that it would perform the obligations of the accepted proposal.

To support the contention that it relied upon the state engineer's report it produces the deposition of one witness who in terms testifies that "full reliance was placed upon the report"; but manifestly such testimony is incompetent to establish the fact. While the witness had some relation (not clearly defined) to the promotion of the project, so far as appears he was never an officer or other representative of the plaintiff, and no corporate records or files were produced disclosing the action of the board of directors or their reasons therefor. How could he know the mental operations of the plaintiff's officers? Plainly in such testimony we have nothing more than the present personal opinion of the witness, the correctness of which, it may be added, is highly improbable. If for a moment we consider the magnitude of the proposed investment, and the fact that its return was necessarily conditioned upon the success of the enterprise, it would be a strain upon our credulity to believe that it was made upon the strength of a brief report of the state engineer in general terms to the effect that the project was feasible. But, if a contrary view were taken, could the fact that such report was relied upon avail the plaintiff anything in the present proceeding? If so, upon what theory of law and to what extent? It must be borne in mind that, under the Carey Act statutes of the state, neither the state nor its land board or engineer takes the initiative. The state does not make representations to promoters or capitalists to induce them to undertake a Carey Act project. The initiative is taken by the promoter, and the representations are made by and not to him.

In the instant case Sprague and his associates presented a written proposal to the land board, in which they represented that they had for some time been engaged in making surveys and estimates upon the project under consideration, and expressed their desire to "construct irrigation works which will cover and irrigate and render fit for farming and the growing of crops adapted to the climate" an area of approximately 150,000 acres. They requested the board to have the lands segregated from the public domain, and represented that if the application met with approval they would cause a corporation to be organized for the purpose of undertaking the work. As was their duty under the law, the land board referred the proposal to the

state engineer for his opinion. The engineer's report is not required, and is not intended to be, for the benefit of the promoter, but for the information of the land board. Sprague and his associates were not dependent upon the state engineer for information; they had been making their own surveys and their own estimates, and upon such investigation they first made representations as to the feasibility of the project. Upon the acceptance of their proposal they became bound to carry out their offer; the proposal and the acceptance constituted the substance of a contract. Before the formal contract was executed, they assigned their rights to the plaintiff, and as assignee it stands in their shoes. It cannot claim any protection or advantage because of the existence of a report which was made to and for the benefit of the state board, and became functus officio upon the acceptance of the offer of Sprague and his associates.

[5] One other matter: Independently of the controversies growing out of the shortage of water, plaintiff is entitled to have an authoritative determination of the question whether anything further is to be required of it in the nature of construction work. Action in this respect has been deferred longer than was reasonably necessary, and additional delay may be greatly to the plaintiff's prejudice. I would be inclined to grant a measure of relief upon this aspect of the case, but for the fact that apparently the plaintiff has made no serious effort during the term of office of the present land board to secure the desired action. The last communication or application I find was in December, 1916, just before the termination of the term of the defendants' predecessors in office. In fairness to the defendants, therefore, it cannot be held that they have willfully or unreasonably declined to act. Perhaps it should be added that, in view of certain features of the record, the only relief which it would be practicable to grant would be to require the state board to take action upon the subject, without prescribing the precise nature of the action to be taken. In its complaint the plaintiff expressly pleads that the system has not been fully completed according to specifications; but it further avers that, in view of the limited water supply, additional work would be useless, and would simply entail a waste of money. From admissions made by counsel for defendants at the hearing it is to be concluded that such substantially are the facts. It is therefore for the land board, and not for the courts in the first instance, to determine in just what particulars the contract work is unfinished, and to consider whether anything further will be required. With the data at hand no reason is apparent why the matter could not be promptly disposed of.

Having in mind the great delays which have already intervened both before the land board and here, and taking notice that the defendants' term of office is about to expire, I have concluded to withhold the entry of a decree dismissing the bill in its entirety and to grant leave to plaintiff, after the expiration of 75 days from the date hereof, to take the necessary steps to have the defendants' successors in office substituted and to file a second supplemental bill, exhibiting the proceedings which it may have taken in the meantime to procure a determina-

tion of the status of the constructed work and the action or the inaction, as the case may be, of the land board in connection therewith. The time is limited to 75 days upon the assumption that the plaintiff will without delay present its application to the new board, and will furnish it with such reasonable data as it may desire. It will, of course, be understood that any action which the board may take in approving the constructed system and in waiving the performance of work which could serve no useful purpose shall in no wise affect the question of the sufficiency of the water supply or prejudice any existing right, claim, or defense which the land board or any interested party may have, in so far as the same is based upon or grows out of the inadequacy of the system in respect to water resources, and plaintiff's application should be so conditioned.

If the plaintiff desires an order or interlocutory decree in harmony with this suggestion, it should promptly prepare and present it for signature; otherwise, it should present a decree of dismissal.

NASH v. SOUTHERN PAC. CO.

(District Court, N. D. California, N. D. August 13, 1919.)

No. 51.

1. RAILROADS ⟸5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—AUTHORITY OF PRESIDENT—ACTION AGAINST CARRIER.
   General Order No. 50 of the Director General of Railroads, in requiring all actions and suits on claims for death or injury to person, or loss or damage to property, growing out of the possession, use, control, or operation of any railroad by the Director General of Railroads, which might but for federal control have been brought against the carrier company, to be brought against the Director General, is within the authority lawfully conferred on the President by Federal Control Act March 21, 1918 (Comp. St. 1918, §§ 3115¾a–3115¾p), and is not inconsistent with section 10 of said act.
2. RAILROADS ⟸5½, New, vol. 6A Key-No. Series—ACTIONS AGAINST—PARTIES—OPERATION UNDER FEDERAL CONTROL.
   Under General Order No. 50 of the Director General of Railroads, in an action against a railroad company for an injury alleged to have been caused by negligent operation while the road was under federal control, the Director General will, on his motion, be substituted as defendant, and the company be dismissed therefrom.

At Law. Action by George H. Nash against Southern Pacific Company. On motion for substitution of defendants. Granted.

W. T. Belieu, of Willows, Cal., for plaintiff.
Devlin & Devlin, of Sacramento, Cal., for defendant.

VAN FLEET, District Judge. The question presented is one of proper parties, arising from the taking over by the government of the control and operation of the railroads and their connected systems of transportation as a war measure, and its solution is to be found in

the construction and effect to be given the legislation by Congress to that end and the powers granted to and exercised by the President thereunder. After the resolutions by Congress declaring a state of war to exist between the United States and the two Central Empires respectively—which need not be recited—Congress, in the "Act making appropriations for the support of the army for the fiscal year ending June 30, 1917," approved August 29, 1916 (39 Stat. 645, c. 418 [Comp. St. 1918, § 1974a]) declared (section 1):

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Thereafter, on December 26, 1917, the President issued his proclamation wherein, referring to such resolutions, and the act of Congress aforesaid, and the necessity for the exercise by him of the powers thereby conferred, it is, among other provisions not here material, declared:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary of War, take possession and assume control at 12 o'clock noon on the twenty-eighth day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, * * * and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail-and-water systems of transportation, to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion so far as may be necessary of all other traffic thereon, and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

"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."

The proclamation further provides:

"Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine." Comp. St. 1918, § 1974a.

Thereafter Congress passed the act commonly designated the "Federal Control Act," approved March 21, 1918 (40 Stat. 451, c. 25 [Comp. St. 1918, §§ 3115¾a to 3115¾p]), whereby an elaborate system is prescribed for the possession, operation, and management under the President of the transportation systems thus authorized to be taken.

So far as here pertinent, it authorized the President, through contract with the owners, to provide for their just compensation for the use of the properties so taken and that any income derived from their operation in excess of such just compensation "shall remain the property of the United States," for the adjustment and payment as between the government and the owners of all taxes assessed against the property while so operated, for the right of the President to make betterments, extensions, and additions to any system, and the manner of financing the same, and for taking care of renewals, maintenance, repairs, and depreciation thereon, with authority in the President to prescribe "all other reasonable provisions," not inconsistent with the legislative authority conferred upon him, "that he may deem necessary or proper for such federal control or for the determination of the mutual rights and obligations of the parties." It empowers the President to initiate rates of fares, freights, and charges, and to fix the compensation of all persons employed in carrying on the operation of such transportation systems under federal control, and it appropriates the sum of $500,000,000, "together with any funds available from any operating income," to be used by the President "as a revolving fund for the purpose of paying the expenses of the federal control" and other purposes connected therewith. It provides:

Section 8: "That the President may execute any of the powers herein * * * granted him with relation to federal control through such agencies as he may determine."

Section 9: That the provisions of the act of 1917, first above mentioned, "shall remain in force and effect except as expressly modified and restricted by this act; and the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

Section 10: "That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. * * * But no process, mesne or final, shall be levied against any property under such federal control."

Section 12: "That moneys and other property derived from the operation of the carriers during federal control are hereby declared to be the property of the United States."

And finally (section 16) it is provided:

"That this act is expressly declared to be emergency legislation enacted to meet conditions growing out of war."

After the passage of this act, the President, on March 29, 1918, issued his further proclamation wherein, referring thereto, he declares:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers and authority so vested in me by said act and of all other powers me hereto enabling, do hereby authorize the said William G. McAdoo, Director General of Railroads as aforesaid, either personally or * * * in the name of the President to" exercise all the powers conferred by

the act upon the President, "and to issue any and all orders which may in any way be found necessary and expedient in connection with the federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular all acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform."

Thereafter, on October 28, 1918 (Comp. St. 1918, § 3115¾h), the Director General, in the administration of such federal control, issued his "General Order No. 50," whereby, so far as here pertinent, it was provided:

"Whereas, the act of Congress, called the Federal Control Act, approved March 21, 1918, provided that 'carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control, or with any order of the President'; and

"Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising under federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits, and proceedings hereinafter referred to, based on causes of action arising during or out of federal control should be brought directly against the said Director General of Railroads and not against said corporation:

"It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise: Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures. * * *

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

The present action was commenced in January, 1919, and seeks damages from the defendant, a railroad corporation, for an act of negligence alleged to have been committed by it on July 8, 1918, through which plaintiff suffered injury to person and property, the theory of recovery, as disclosed by the averments, being that the defendant was at the time in the possession, control and operation of its railroad system and its accompanying facilities of transportation, and that it was through its tortious act in the management of one of its trains that the injury was inflicted.

[1, 2] A motion has been interposed by Walker D. Hines (the successor in office of Wm. G. McAdoo), as Director General of Railroads, joined in by the defendant, that he be substituted as the defendant herein and that the action be dismissed as to the present defendant, upon the

ground, duly made to appear by proper showing, that the latter was not at the time of the alleged injury, and has not been since the proclamation of the President first above referred to, in the possession, control, or operation of the particular line involved, or any of its lines of road or other transportation facilities pertaining to its system, but that the same were at the time of plaintiff's alleged injuries, and since at all times have been, in the exclusive possession and control and operated by the United States Railroad Administration under said Director General and his predecessor in office. The motion refers to the provisions of General Order No. 50, and proceeds upon the theory that such substitution is warranted by the terms of that order.

In response to the motion, the plaintiff, notwithstanding the averment of his complaint to the contrary, does not controvert the fact that defendant's entire railroad and transportation system was taken over at the date indicated in the moving papers, and has since been operated exclusively under federal control; but he challenges the validity of General Order No. 50 as an attempted exertion of power outside the legitimate limits of the authority intended to be vested in the executive by the legislation in question, and indeed as being beyond the power of Congress to so delegate, for the reason, as he asserts, that it involves a purely legislative function of prescribing rules of practice and procedure in legal actions and proceedings, a thing exclusively within the power of Congress; and, moreover, that the order is in direct conflict with section 10 of the Federal Control Act, which he asserts expressly authorizes the maintenance of the action against the present defendant.

It will readily appear, I think, that this contention of the plaintiff proceeds from a failure to apprehend fully the character and scope of the Federal Control Act, and more particularly the purpose to be subserved by section 10. In the first place, the act, as expressly declared, is an emergency measure, to meet extraordinary conditions growing out of an actual state of war, and calling for an exertion of the most extreme and drastic powers of government to meet those conditions. It is accordingly to be construed, not with that meticulous nicety which might be dictated by other circumstances, but in a broad spirit of liberality, in keeping with the purpose intended to be accomplished and having in view its emergency character.

As the terms of the act at once disclose, it was the purpose and intent of Congress that the possession and control of the systems of transportation taken over in whole or in part by the President was to be an exclusive one, to no extent shared in by the owners. If the latter or their officers were retained as operators, they were to act merely as servants and under pay of the government; and while the owners were to be compensated for the use of their properties, everything earned or accruing from their operation in excess of such compensation was to be the property of the government. Such a taking involved in no sense the element of agency by the government for the owners. Agency implies a consentual or contractual relation, but this was not such. It was more nearly analogous or akin to a taking by the sovereign in the right of eminent domain; and the result of

such a taking was necessarily to relieve the owners of systems so taken from any legal responsibility to the public arising out of their operation, and quite as necessarily an assumption of such responsibility by the government. And this, as is clearly shown by the whole framework of the act, was what Congress desired to accomplish. The conditions to be met in the emergency presented were deemed such that the administration of this vital instrumentality for successfully carrying on the war was to be freed for the time from any hazard arising through a divided control or responsibility. And as Congress could not in the nature of things foresee the many exigencies and necessities that might arise for prompt, free, and unrestrained action by the executive, in the practical administration of this great trust, the President was clothed with the broadest and most plenary powers and authority to deal with the problems as they might arise and in such manner as his judgment should dictate; and this not only as between the government and the owners, but as between the government and the general public, with express power to make all orders and regulations essential to carrying out the purpose of Congress.

This being the effect of the act, and I can see room for no other construction, the provisions of General Order No. 50 were quite in harmony with a correct interpretation of such purpose. While perhaps in a limited and technical sense the particular exertion of power embodied in the order may be said to involve the legislative function, it was not such in a sense that would render its delegation to the executive an excess of the power of Congress. It is not every such delegation of power that will be held to transgress the provisions of the Constitution defining the limitations between the legislative and executive departments of the government; and this act, I think, for the reasons suggested, should be held to present one of the exceptions. In many instances Congress, after clearly defining the purpose to be accomplished by its enactment, has given executive officers power to make such needful and proper rules and regulations for carrying out the purpose as their judgment and the necessities should dictate, and such regulations have been uniformly held to have the force and effect of legislation. Congress has gone so far as to provide that a violation of rules and regulations so made shall constitute a criminal offense. These principles are to be found in United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; Field v. Clark, 143 U. S. 649, 694, 12 Sup. Ct. 495, 36 L. Ed. 294; Arver v. United States, 245 U. S. 366, 389, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856; and many other cases to like effect. In Field v. Clark, it is said:

"The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation."

And in Arver v. United States (Selective Draft cases), where very extended powers were conferred upon the executive, the court, answering a similar objection say:

"We think that the contention that the statute is void, because vesting administrative officers with legislative discretion, has been so completely adversely settled as to require reference only to some of the decided cases. Field v. Clark, 143 U. S. 649 [12 Sup. Ct. 495, 36 L. Ed. 294]; Buttfield v. Stranahan, 192 U. S. 470 [24 Sup. Ct. 349, 48 L. Ed. 525]; Intermountain Rate Cases, 234 U. S. 476 [34 Sup. Ct. 986, 58 L. Ed. 1408]; First National Bank v. Union Trust Co., 244 U. S. 416 [37 Sup. Ct. 734, 61 L. Ed. 1233, L. R. A. 1918C, 283, Ann. Cas. 1918D, 1169]."

The instant legislation, I think, falls clearly within the principles of these cases, and I am therefore of opinion that this order was well within the power of the Director General as the representative of the President. And certainly it was both a wise and expedient thing, and in the interest of the proper and orderly administration of justice, to direct that the defense in actions and proceedings for causes arising under government administration and for which the latter, as we shall see, was alone answerable, should be in the name and under the direction and control of the government's representative. Indeed, it is doubtful if any judgment binding upon the government could be obtained, in an action so arising, to which its representative was not made a party.

Nor does the order in question contravene in any respect the provisions of section 10. It may readily be shown, I think, that the latter was not intended to apply to the class of cases provided for in that order. This is sufficiently manifest, perhaps, from the limitations of the section itself. The owners are to remain subject to all laws and liabilities as carriers *"except in so far as may be inconsistent with the provisions of this act * * * or with any order of the President."* (Italics volunteered.) It would seem obviously and at once "inconsistent" with the provisions of the act that liability should remain to the carriers for causes of action arising out of transactions with which they had nothing whatsoever to do and over which they had no control; and this language very clearly implies that Congress foresaw that such causes of action would necessarily arise under government operation for which the owners should not and indeed could not be made to respond; and as it could not anticipate and provide for the instances which might arise, it wisely left it to the President to regulate the manner in which such actions should be maintained.

But over and above this consideration, the situation presented is this: What was authorized by this legislation to be taken under federal control was specific property—that is, solely the transportation systems of the country—and that was all the proclamations of the President assumed to take into his control. The corporations owning these properties were not taken; they were left untouched and free to continue their functions as such in all respects other than in the operation of their carrier systems. Moreover, the legislation does not require the taking of every system nor all of any one system, but only to the extent deemed necessary for war purposes. This being the

case, Congress was bound to know that in the business transactions of these corporations, in activities as to which they were left in control, many obligations would be created and causes of actions arise in their dealings with the public, wholly unconnected with the operation and control of their transportation systems by the government and with which the latter would therefore have no concern as a party; it was bound to know, moreover, and doubtless had in mind, that many thousands of actions against these corporations would be pending in the courts throughout the country and many causes of action accrued, but not yet in suit, at the time federal control would be assumed, all arising prior to such taking and with which the government was not concerned.

With this situation in mind, Congress enacted the provision to be found in section 10, and it was not only a wise, but a necessary, provision for the protection of the rights of those dealing with these corporations, and to avoid what otherwise would have resulted in great confusion and uncertainty. But that it was intended as the purpose of section 10, as urged by plaintiff, to authorize suits against the owners of these properties in causes of action arising out of transactions had with the Federal Railroad Administration, or through torts committed by its agents while under its control—things for which, we repeat, the owners could be in no way responsible—may not for a moment be indulged; such a construction would clearly render the provision obnoxious to the objection of authorizing the taking of property without due process of law, a purpose which may not be imputed to Congress.

For these reasons I think the motion for substitution a proper one, and that it should be granted. It is so ordered.

ACTIESELSKABET DAMPSK. THORBJORN v. HARRISON & CO., Inc., et al.

(District Court, S. D. New York. April 15, 1918.)

1. SHIPPING ⟸49(5)—CHARTER HIRE—LIEN ON CARGO.
When charter hire is payable at a designated place at a fixed time, there is not any lien against the cargo, unless the charter party expressly so provides.
2. SHIPPING ⟸49(5)—CHARTER—LIEN FOR CHARTER HIRE.
A provision in a time charter party giving a lien for charter hire on all cargoes and subfreights *held* not to entitle the owner to a lien on a cargo owned by a subcharterer, which had paid the hire under its charter to the original charterer.
3. SHIPPING ⟸49(5)—CHARTERS—LIEN FOR CHARTER HIRE.
Where a time charterer uses the vessel to carry his own cargo, there is no freight money due the vessel, which can be subjected to a lien reserved in the charter.

In Admiralty. Suit by the Actieselskabet Dampsk. Thorbjorn, as owner of the Norwegian steamship, Thorbjorn, against Harrison &

Co., Incorporated, and a cargo of nitrates on board said steamship, W. R. Grace & Co., claimant, and against certain subcharter hire payable from W. R. Grace & Co. to Harrison & Co., Incorporated. On exceptions to libel. Exceptions sustained.

Haight, Sandford & Smith, of New York City (Wharton Poor, of New York City, of counsel), for libelant.

Kirlin, Woolsey & Hickox, of New York City (John M. Woolsey, of New York City, of counsel), for claimant.

MAYER, District Judge. The claimant, W. R. Grace & Co., has excepted to the libel on the ground that it—

"does not state facts sufficient to constitute a cause of action against the said cargo, for the reason that it does not state that any freight is due or payable by the said cargo on account of its transportation and delivery by the said steamship Thorbjorn."

The libel and a stipulation disclose the facts. On December 8, 1916, libelant, as owner of the Thorbjorn, chartered her for a period of "about six months" (with an option subsequently exercised of one month additional, making seven months in all) from the time of her delivery to Harrison & Co., Incorporated, a corporation. The charter party is in the well-known "time charter government form approved by the New York Produce Exchange."

The charter party provided for payment at the rate of $34,000 per calendar month, if the vessel was delivered at Balboa, where delivery was subsequently made. Payment of hire was to be made in New York semimonthly in advance. The charter party provided, inter alia:

"18. That the owners shall have a lien upon all cargoes, and all subfreights for any amounts due under this charter. * * *"

The date of the steamer's delivery was January 15, 1917. On March 26, 1917, Harrison & Co., subchartered the Thorbjorn to W. R. Grace & Co., a corporation, for two round trips from the United States to the west coast of South America. This charter was also upon the Produce Exchange form, and its provisions were the same as those in the charter between the owners and Harrison & Co., except with regard to the rate of hire, which was fixed at $40,000 per month, payable half-monthly in advance during the period of hiring. In the charter to Grace & Co., Harrison & Co. was described as the chartered owner, and it is alleged in the libel that—

"W. R. Grace & Co. in fact at all times knew that Harrison & Co., Incorporated, was the time charterer of said steamship, and not its owner, and knew, or should have known, the terms of the said original charter party."

Delivery under the charter between Harrison & Co. and Grace & Co., was made at Wilmington, N. C., on April 28, 1917. Two round trips from the United States to the west coast of South America could not be made before about August 15th, which was the date on which the charter party between Harrison & Co. and the owner expired, but that fact is immaterial to the controversy upon this motion.

Redelivery under both charters was to be made at a port in the United States north of Hatteras.

The Thorbjorn and her owner duly performed all the obligations resting upon them. On August 19, 1917, the Thorbjorn sailed from the west coast of South America loaded with a cargo of nitrates belonging to Grace & Co., the charterer from Harrison & Co., which Grace & Co. were carrying for themselves and brought to New York. The Thorbjorn arrived in New York on September 9, 1917, and was redelivered to her owner on September 12, 1917.

Bills of lading were issued for the cargo shipped by Grace & Co. These bills of lading were issued, however, only for insurance and custom house purposes, and in order to enable Grace & Co. to sell the cargo, if so desired, while afloat. There was a clause stamped upon each bill of lading, "Freight as per agreement"; but there was no "agreement." On the other hand, if Grace & Co. had sold the cargo (which they did not), they would have charged the purchaser with freight. It was practically conceded at the oral argument by both sides (and it must follow, whether conceded or not) that these bills of lading do not affect the rights of the parties. They need not, therefore, be further considered.

Grace & Co., instead of paying its hire to Harrison & Co. semimonthly in advance, as it had the right to do under clause 5 of the subcharter, actually paid a full month's hire in advance on July 28, 1917, and this payment was made before Grace & Co. had any notice of any claim by libelant against Harrison & Co.

On August 2, 1917, libelant notified Grace & Co. that hire was due to it from Harrison & Co., and that libelant claimed a lien to the extent of $37,000 on all sums due from Grace & Co. to Harrison & Co. Later, on September 24, 1917, Grace & Co. were further notified by libelant that additional hire due from Harrison & Co. to libelant had not been paid, and that libelant claimed a lien on any amounts due from Grace & Co. on the subcharter in the total sum of $54,000.

The amount actually claimed by libelant was $47,083.44 (plus $78 for overtime), for which it brought its libel against Harrison & Co. in personam and against the cargo of nitrates, the subfreight thereon, and the subcharter hire due from Grace & Co. to Harrison & Co. This amount was made up as follows: (1) $13,083.44 claimed by libelant to have been wrongfully deducted by Harrison & Co. from the hire due libelant; (2) $17,000 for semimonthly hire due August 15th; (3) $17,000 due August 31st.

After receiving the notice of August 2d from libelant, Grace & Co. did not pay any further hire to Harrison & Co., but on September 23d at the request of Harrison & Co., Grace & Co. paid to the proctors for libelant, for account of libelant, the balance of hire due from Grace & Co. to Harrison & Co. under the subcharter.

Thus Grace & Co. have fully paid all hire due under the subcharter, and there is not any question involved as to a balance of subcharter hire due from subcharterer to original charterer. It also appears that there was not any freight paid or payable on delivery of the cargo of

nitrates at New York for which Harrison & Co. or the master of the vessel could have asserted a lien at New York.

The fact that Harrison & Co. is in bankruptcy is the explanation for the effort to hold the nitrate cargo of Grace & Co. for the defaulted hire due from Harrison & Co. to libelant. The question is whether the libelant is entitled to a lien upon the cargo belonging to Grace & Co. for unpaid hire.

Libelant contends for (1) the right to a lien upon the cargo, and, in the alternative, (2) the right to hold the cargo to the extent of a reasonable freight for the carriage of the nitrates from Chile to New York. Claimant meets these contentions on grounds considered infra.

[1] 1. When hire or freight is payable at a designated place at a fixed time, there is not any lien against the cargo, unless the charter party expressly so provides. Such must be the construction of cases like Raymond v. Tyson, 17 How. 53, 15 L. Ed. 47, and The Moringen (D. C.) 98 Fed. 996. While these cases held there was no lien, it is plain that, had the parties expressed themselves as in the charter between libelant and Harrison & Co. in the case at bar, there would have been a lien. See Raymond v. Tyson, supra, 17 How. at page 68, 15 L. Ed. 47.

[2] The test is always the intent of the parties as gathered from the whole contract. Where, as here, payment was to be in New York at fixed times, but a lien was also provided for, it must be concluded that the lien was an additional safeguard. But there was not any privity of contract between libelant and W. R. Grace & Co. (The Banes, 221 Fed. 416, 137 C. C. A. 214), and therefore W. R. Grace & Co., so far as concerns lien on cargo, were in no different position than would have been an independent shipper, who had paid full freight in advance without notice of the owner's claim against Harrison & Co. The Albert Dumois (D. C.) 54 Fed. 529; Turner v. Taji Goolam, [1904] App. Cas. 826; American Steel Barge Co. v. Chesapeake & C. Coal Agency Co., 115 Fed. 669, 53 C. C. A. 301.

Assuming, for illustration, that W. R. Grace & Co., instead of carrying their own cargo, had carried the cargo of some other shipper, could it be said that such shipper's cargo was subject to a lien for the defaulted charter hire? And yet, because of lack of privity, W. R. Grace & Co. were in no different position. To hold otherwise would be to strike a blow at the orderly and business like conduct of shipping, and would place upon the independent shipper and the subcharterer a risk not contemplated by the parties, nor justified by the reasoning of cases passed on by courts of high authority. W. R. Grace & Co. did not stand in the shoes of Harrison & Co., as is well illustrated by analogy in The Santona (C. C.) 152 Fed. 516, and the lien against the cargo for the charter hire cannot be asserted.

The claim that there is a lien on cargo for time charter hire, where the hire is not contingent on the delivery of any cargo, is opposed to basic and historic principles of the maritime law. The broad general proposition here applicable is thus epitomized in the recent opinion of Judge Hough in The Saturnus (decided April 10, 1918) 250 Fed. 407, 162 C. C. A. 477:

"In respect of carriage of goods in particular, every public benefit has for centuries been deemed obtained when goods were liable for freight, and ship for safe and sound delivery of goods, the mutuality of relation thus growing out of the act of transport, not the making of a contract for transportation. Anything more than this multiplies secret liens and hampers instead of advances ease and freedom of commerce. Merchant and mariner alike subject their property to the municipal law of every country into which their venture comes, but a maritime lien is as near an approach to jus gentium as can be found in private jurisprudence, and any extension thereof not internationally well founded is to be opposed as jealously as is a denial of its accepted extent."

Whatever rights, if any, would have been available to libelant, if charter hire were still due from Grace & Co., to Harrison & Co., or if the money for transported freights were payable to Grace & Co., the facts in this case are that no hire was due and there were no freights.

Grace & Co. could have permitted the vessel to lie idle, or have carried prepaid freights, or, indeed, have made any arrangement it pleased for itself or with independent shippers. In any event, the cargo owner must owe the ship freight when the lien is exercised.

[3] 2. The claim for a reasonable freight is ingenious, and sought to be sustained by analogy with those cases (such as limitations of liability) where a reasonable freight is allowed under certain circumstances; but the same principles apply as are noted supra. But, in addition, Grace & Co. had a perfect right to carry its own cargo. It was not obligated to create freight moneys, and a lien could not spring into existence unless the cargo was bound to the vessel in the sense that the cargo owed the vessel freight money on freight delivery at the port of destination.

Any other conclusion, to repeat, would subject a subcharterer such as this to obligations never contemplated, and would introduce a commercial risk not intended when libelant made its time charter and placed Harrison & Co. in the position of freely contracting, as it did, when it made its subcharter to Grace & Co.

Exceptions sustained.

UNITED STATES ex rel. WILLIAMS, Captain, Quartermaster Reserve Corps, United States Army, v. BARRY, Major General, United States Army.

(District Court, S. D. New York. July 9, 1919.)

1. ARMY AND NAVY ⟸44(2)—COURTS-MARTIAL NOT DEPRIVED OF JURISDICTION BY CRIMINAL CODE.

Act Oct. 23, 1918, amending Criminal Code, § 35, while relating to the same subject-matter as article 94 of Articles of War (Comp. St. § 2308a [94]), and applying to both civilians and persons in the military or naval service, does not amend or repeal such article, nor deprive courts-martial of jurisdiction in respect to persons in the military and naval service.

2. SEARCHES AND SEIZURES ⟸7—SEIZURE OF DOCUMENTS OB ARMY OFFICER NOT UNLAWFUL.

The seizure of documents, belonging to an army officer charged with an offense, from his desk, to which he voluntarily turned over the key, *held*

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

not a violation of his constitutional rights, whether or not the documents were used on his trial by court-martial.

3. ARMY AND NAVY ⊂=47—ARTICLES OF WAR AS TO CONFINEMENT OF PRISONER NOT APPLICABLE TO CONFINEMENT AFTER CONVICTION.
The provisions of article 70, Articles of War (Comp. St. § 2308a[70]), limiting the time of confinement of persons placed under arrest, relate to the time before trial, and have no application to confinement after trial and while awaiting execution of sentence.

4. HABEAS CORPUS ⊂=70—JURISDICTION OF COURT-MARTIAL BEFORE PROMULGATION OF SENTENCE NOT AFFECTED BY HABEAS CORPUS PROCEEDING.
The suing out and service of a writ of habeas corpus by an army officer after his trial by court-martial, but before the service upon him of the order promulgating the sentence, *held* not to oust the court-martial of jurisdiction, nor to affect the validity of the order subsequently served.

Habeas Corpus. Petition by Frederick R. Williams, Captain, Quartermaster Reserve Corps, United States Army, against Maj. Gen. Thomas H. Barry. Writ discharged.

Ignatius A. Scannell, of New York City, for petitioner.

Francis G. Caffey, U. S. Atty., of New York City (William F. Kelly, Major Judge Advocate U. S. A., and Peter B. Olney, Jr., Asst. U. S. Atty., of New York City, of counsel), for respondent.

MAYER, District Judge. At a general court-martial convened pursuant to Special Order No. 234, Headquarters Eastern Department, on December 6, 1918, Williams was arraigned and tried on certain charges and specifications under the ninety-fourth, ninety-third, and ninety-sixth Articles of War (Comp. St. § 2308a). He was found not guilty of the ninety-third Article of War, but guilty of some specifications under both the ninety-sixth and ninety-fourth Articles of War.

Before the findings and sentence of the court-martial were promulgated, petitioner sued out a writ of habeas corpus in this court, to which a return was made, and this return was traversed by Williams. After the service of the writ, findings and sentence were promulgated, and Williams was dismissed from the service and sentenced to confinement at hard labor for five years. He now asserts that his constitutional rights were violated in the following respects:

(1) That all the charges and specifications made under the ninety-fourth Article of War related to the alleged commission of offenses prior to October 23, 1918, the date when a new statute was enacted (40 Stat. 1015, c. 194), which amended section 35 of the United States Criminal Code, and thereby altered the situation of petitioner to his disadvantage, and was thus ex post facto as to him.

(2) That the proceedings at the court-martial were void and in violation of the rights of petitioner under the fourth and fifth Amendments, in that the commander of the Department of the East, who appointed the general court-martial to try petitioner, was his accuser and prosecuter, in violation of the eighth Article of War and in that petitioner's papers and effects were seized by the commander before trial and retained by him, although they were material and necessary for the proper defense of petitioner, and also in that, although demand

was duly made for the return of the papers, both of the commander and of the court-martial which tried petitioner, such demand was refused by both the commander and the court-martial.

(3) That in violation of the Fifth Amendment, petitioner is being held in custody without due process of law, in violation of the Seventieth Article of War, in that he has been in close confinement for over 40 days after a copy of the charges had been served upon him.

(4) That the attempted promulgation of the findings and sentence of the court-martial was null and void, as in violation of the Fifth Amendment, in that it was an order published by the commander of the Department of the East after this writ of habeas corpus had been served upon petitioner, and petitioner was therefore not in the custody of the commander, but in the custody of this court, and therefore that the sentence, involving dismissal from the army, was void and in violation of petitioner's rights under the Fifth Amendment, because without confirmation of the President of the United States.

The contentions will be taken up in order.

[1] 1. The alleged ex post facto operation of the act of October 23, 1918.

Act April 10, 1806, c. 20, 2 Stat. 359, was the first legislation "establishing rules and articles for the government of the armies of the United States." This statute contained 101 articles, none of which, however, dealt with the subject-matter of the present article 94 of the Articles of War.

The next legislation was Act March 2, 1863, c. 67, 12 Stat. 696, entitled "An act to prevent and punish frauds upon the government of the United States." This act applied, in section 1 thereof, exclusively to "any person in the land or naval forces of the United States, or in the militia in active service of the United States," and also provided in section 1, in respect of offenses against the act:

"And every person so offending may be arrested and held for trial by a court-martial, and if found guilty shall be punished by fine and imprisonment, or such other punishment as the court-martial may adjudge, save the punishment of death."

Section 2 was, in effect, the same, applying, however, to persons who received discharge or dismissal from the service subsequent to committing a violation of the act. Section 3, however, dealt with civilians, and the treatment provided for in section 3 was quite different from that in sections 1 and 2. Under section 3, after providing for forfeiture and payment to the United States of amounts therein named, it was further provided:

"And such forfeiture and damages shall be sued for in the same suit, and every such person shall in addition thereto, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one, nor more than five years, or by fine of not less than one thousand dollars, and not more than five thousand dollars."

Section 1342 of the United States Revised Statutes (Comp. St. § 2308a) provided:

"The armies of the United States shall be governed by the following rules and articles. * * *"

This is the first section of chapter 5, which is entitled "Articles of War." The sixtieth Article of War, contained in chapter 5, is the same as sections 1 and 2 of the act of March 2, 1863. Chapter 5 of title LXX in U. S. Revised Statutes is entitled "Crimes against the Operations of the Government," and section 5438 (Comp. St. 10199) substantially re-enacted section 3 of the act of March 2, 1863.

The difference, however, between section 3 of the act of March 2, 1863, and section 5438 of the Revised Statutes, is as follows: Section 3 refers "to any person not in the military or naval forces of the United States, nor in the militia," etc., while section 5438 refers to "every person. * * *"

Substantially to the same effect, although differing in some detail, is the act of May 30, 1908 (35 Stat. at Large, 555, c. 235). Section 5438 of the Revised Statutes is now section 35 of the United States Criminal Code (Comp. St. § 10199). By the act of August 29, 1916 (39 Stat. at Large, 650, c. 418), the Articles of War were again revised, and former Article of War 60 became Article 94. It will thus be seen that up to this point Congress had two series of statutes, one designed to deal solely with those in the military and naval services, and the other designed to deal with any person whether in civilian life, or in the military or naval service. There were doubtless many reasons for the necessity of these two different systems. It is sufficient to point out that, where an offense of the character denounced is committed by both a civilian and a member of the military or naval service, it may be highly important to try both accused before the same tribunal at the same time. As a civilian could not be tried before a court-martial, the only course left open to Congress was to provide that members of the military and naval forces could be tried before civil courts of competent jurisdiction.

Under the ninety-fourth Article of War, the punishment is as follows:

> "Shall * * * be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any and all of said penalties."

Act Oct. 23, 1918, c. 194, 40 Stat. 1015, amended section 35 of the Criminal Code of the United States. The subject-matter is the same as that set forth in the ninety-fourth Article of War. The punishment however, is different from that in the ninety-fourth Article of War, the act of October 23, 1918, providing that the convicted person "shall be fined no more than ten thousand dollars or imprisoned not more than ten years or both." The act applied to "whoever" shall do the things prohibited; i. e., to any person.

It is entirely plain from the foregoing that Act Oct. 23, 1918, does not in any manner refer to or amend or repeal the ninety-fourth Article of War, and does not deprive courts-martial of their jurisdiction in respect of persons in the military and naval services. This Act Oct. 23, 1918, is merely the latest legislation logically carrying down to date statutes which have permitted the trial of civilians and/or members of the military and naval forces in the civil courts, and does

not in any manner interfere with a trial by court-martial as provided in the Articles of War.

It follows, from the foregoing, that petitioner has not, on this ground, any cause of complaint.

[2] 2. There is no merit in the contention that the commander, who appointed the general court-martial, was the accuser and prosecutor of petitioner. The record is to the contrary. Such contention is therefore not sustained.

In view of the record made by the petitioner, the amended return, and the traverse, testimony was taken in respect of the alleged illegal seizure of writings belonging to petitioner. Briefly stated, what happened was that Capt. Busby, of the military intelligence branch of the army, had an interview with petitioner, and petitioner, in order to satisfy Capt. Busby that he was wrongly accused and could make satisfactory explanation, gave Capt. Busby the keys to his desk or safe-deposit box at the military camp at Allentown, Pa. Thereafter Capt. Busby and Mr. Richards, a civilian volunteer, together went to the Camp at Allentown, Pa., and, after conforming with certain military routine, obtained various papers belonging to the petitioner from the drawer or box in which petitioner had kept them.

Capt. Busby, prior to entering the army, had been a police officer in the New York police department, devoting most of his official service to detective work. I was fully impressed with the truth of Capt. Busby's testimony. He is an experienced detective, and apparently an efficient man, and there is no reason to doubt any of the substantial matters to which he testified.

In the details as to search he was corroborated by Mr. Richards, who also impressed me as an honorable man who rendered service to the government during the war. The petitioner contradicted the testimony of Capt. Busby in regard to some details; but, on the substantial point as to whether the keys were voluntarily delivered by petitioner to Capt. Busby, petitioner, in effect, corroborated Capt. Busby.

The result is that the case falls well within the principle of Perlman v. United States, 247 U. S. 7, 38 Sup. Ct. 417, 62 L. Ed. 950, and does not in any sense disclose acts in violation of petitioner's constitutional rights. Further, it appears from the record that not a single paper or writing obtained by Capt. Busby in the manner above indicated was offered or received in evidence at the trial before the court-martial, nor does it affirmatively appear that the information obtained from said papers was used before the court-martial, although, had such information been used, there would not have been error, in view of the doctrine of the Perlman Case, supra.

The prosecution asked some questions leading up presumably to an intended offer in evidence of a stub check; but, after discussion, the question was withdrawn. The evidence on this point was independently obtained by the government, and, in any event, this stub check incident was well within the doctrine of Fitter v. United States, 258 Fed. 567, —— C. C. A. ——, recently decided by the Circuit Court of Appeals for the Second Circuit.

[3] 3. The provisions of article 70 of the Articles of War refer to arrest and custody before and not after trial. As petitioner has been tried and convicted and is merely being held for execution of sentence until after the determination of this application, there is not, as against him, any violation of article 70.

4. Under this contention, by petitioner, supra, (a) it was argued that the order directing the sentence, which extended to dismissal from the army, must be approved by the President because, at the time that the order was promulgated, a state of war did not exist. This contention needs only the comment that it is without merit because a state of war did exist.

[4] (b) It was further argued that, because the order promulgating the sentence was served upon petitioner after the issuance of the writ, such order was void. The order merely promulgated a sentence which had theretofore been approved, and the fact that petitioner sued out a writ in this court before a copy of the order was served upon him did not in any manner oust the military authorities of their jurisdiction. All that has happened is that petitioner has been produced before this court and is in the custody of this court, but such procedure and result do not in any manner prevent the making by the military authorities or the issuance by them, or the subsequent service by them, of an order promulgating the sentence.

It would, indeed, be subversive of the orderly administration of justice by courts-martial, if a writ of habeas corpus could, in such circumstances, oust courts-martial of jurisdiction.

Writ dismissed and petitioner remanded.

SELECT PICTURES CORPORATION v. AUSTRALASIAN FILMS, Limited.

(District Court, S. D. New York. June 23, 1919.)

1. CONTRACTS ⟸10(1)—VALIDITY—MUTUALITY.
   In a contract by which plaintiff granted to defendant for a stated term the exclusive right to distribute, exploit, lease, and exhibit in Australasia all motion pictures designated by defendant from among those released by plaintiff, and defendant agreed to designate and accept not less than a specified number, certain conditions inserted for the protection of one or other of the parties *held* not to destroy the mutuality of the contract.

2. CONTRACTS ⟸337(1)—ACTION FOR BREACH—SUFFICIENCY OF COMPLAINT
   A complaint *held* to state a cause of action for anticipatory breach of a contract.

At Law. Action by the Select Pictures Corporation against the Australasian Films, Limited. On demurrer to complaint and motion by defendant for judgment on the pleadings. Demurrer overruled, and motion denied.

The parties entered into a written agreement dated December 19, 1918. By said agreement, Select Company granted to Australasian Films the sole and exclusive right to distribute, exploit, lease, and exhibit, in Australasia, for

periods of three years each from and after the respective dates of delivery thereof to defendant, all motion pictures designated by defendant in accordance with the terms of said agreement from among motion pictures released by plaintiff prior to March 31, 1920, and defendant agreed to designate and accept from the plaintiff for distribution as aforesaid at least one motion picture per week during each and every week for the period from April 1, 1919, to March 31, 1920 (subject to the proviso that, if there should be available for selection so few motion pictures that one motion picture per week would amount to more than 80 per cent. of the motion pictures so available, defendant's obligation to take one picture per week should be accordingly reduced), and to pay the plaintiff upon delivery of each picture, for the rights of distribution and exploitation with respect thereto, $4,500, and defendant agreed to and did pay $18,000 in payment for the rights to the last four motion pictures deliverable under the contract. The agreement further provides, in section 1, that performance by defendant of its obligation to take at least one picture per week shall be a condition of the contract.

The complaint alleges that defendant has neglected and refused to designate or accept any motion picture under the contract as required by its provisions, although requested by plaintiff so to do; that plaintiff was at all times ready, able, and willing to perform each and every term, covenant, and condition of the contract on its part to be performed, and to deliver to defendant motion pictures selected by defendant in accordance with its provisions, and would have done so had it not been prevented by defendant's neglect and refusal.

The complaint further alleges that defendant notified plaintiff in writing on April 19, 1919, that defendant would not designate or accept any motion pictures under the contract, and that it repudiated the contract; and that on April 23, 1919, plaintiff notified defendant in writing that it elected to regard said repudiation of the contract by defendant as an anticipatory breach of said contract, and of the whole thereof, and to treat said contract as abandoned by reason of such breach.

The complaint then alleges the inability of plaintiff to dispose of the rights of distribution of the motion pictures mentioned in the contract for the territory therein specified to any one other than the defendant, and that by reason of the premises plaintiff has been damaged in the sum of $216,000 over and above the sum of $18,000 paid by defendant to plaintiff under the contract, and demands judgment accordingly in the sum of $216,000, with interest.

Konta, Kirchwey, France & Michael, of New York City (Karl W. Kirchwey, of New York City, of counsel), for plaintiff.

Joseph P. Bickerton, Jr., and Philip Wittenberg, both of New York City, for defendant.

MAYER, District Judge (after stating the facts as above). The main grounds of demurrer are that (a) the agreement lacks mutuality; and (b) under the decisions of the New York courts the plaintiff cannot recover as for an anticipatory breach.

[1] 1. *Lack of Mutuality.* Defendant practically concedes that if plaintiff's obligation was the grant to defendant of the sole and exclusive right to distribute, etc., all motion pictures for the period agreed upon, then the contract, as drawn, would be supported by mutual considerations. In this regard the contract would not be different in principle from that class of contracts where the manufacturer agrees to sell, and the customer to buy, all of a designated product which the manufacturer will produce during an agreed period, nor different from the converse type of contract where the customer agrees to buy, and the seller to sell, all the goods of a designated kind

required by the buyer in the operation of a particular plant, factory, or mine. Ramey Lumber Co. v. John Schroeder Lumber Co., 237 Fed. 39, 150 C. C. A. 241; Burgess Sulphite Fibre Co. v. Broomfield, 180 Mass. 283, 62 N. E. 367; City of New York v. Delli Paoli, 202 N. Y. 18, 94 N. E. 1077; Golden Cycle Mining Co. v. Rapson Coal Mining Co. et al., 188 Fed. 179, 112 C. C. A. 95; Lima Locomotive & Mach. Co. v. Nat. Steel Castings Co., 155 Fed. 77, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713; Manhattan Oil Co. v. Richardson Lubricating Co., 113 Fed. 923, 51 C. C. A. 553; Secor v. Ardsley Ice Co., 133 App. Div. 136, 117 N. Y. Supp. 414, affirmed 201 N. Y. 603, 95 N. E. 1139; W. P. Fuller & Co. v. Schrenk, 58 App. Div. 222, 68 N. Y. Supp. 781, affirmed 171 N. Y. 671, 64 N. E. 1126; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696.

But it is contended that the "grant," so called, by plaintiff is indefinite, and fixes no obligation on plaintiff because of the provisions in the agreement, as follows:

(1) "The foregoing grant shall relate only to such pictures as to which Select Company shall have exclusive rights of distribution in said territory during said period."

(2) "It is understood and agreed, however, that the Select Company assumes no responsibility for the protection or validity of the rights of distribution and exploitation hereby granted under or by virtue of the laws of any of the countries within the territories aforesaid, but the distributor shall and may, at its own expense, take such steps as it may deem necessary to protect such rights under said laws and assume the entire responsibility therefor."

(3) "It is the intention of this agreement that the distributor shall take, in the order of their release in the United States, not less than eighty per cent. (80%) of the motion pictures which the distributor is entitled to designate for delivery hereunder, provided said eighty per cent. (80%) is not greater than fifty-two (52) pictures; but it shall not be required to take more than fifty-two (52) of such motion pictures, in any event, if fifty-two (52) shall be less than eighty per cent. (80%) of those designated. It may take, however, at its option, a greater number than fifty-two (52) if available. In the event that there shall be available for selection motion pictures so few in number so that as a result of performance of distributor's obligation to take at least one (1) motion picture per week, it would be required to take more than eighty per cent. (80%) of such motion pictures, its obligation to take one motion picture per week shall be accordingly reduced."

Obviously, (1), supra, was as much for the protection of defendant as for some business expediency of plaintiff. The obligation upon defendant to designate and accept at least one motion picture each week, if unqualified would have compelled it to take pictures which might come in competition with other distributors. The book, play, or scenario on which a motion picture was constructed might be such as to give rights to others in the Australasian territory, and it is plain that the parties intended that the right of defendant was to be "the sole and exclusive right to distribute," etc., in the territory named. Such measure or clause of protection cannot now be availed of by defendant as an argument that the grant was indefinite. The effect of this clause was merely to reduce, in accordance with other clauses of the contract, the number of pictures which defendant was obligated to take, and to protect it for the reasons stated.

As to (2), it is plain that the "grant," so called, was in the nature of a conveyance of all right, title, and interest, and not a warranty that the picture could be distributed or exploited under the laws of the foreign territory. It might very well be that in such territory there might be laws preventing distribution or exploitation for one reason or another. Plaintiff merely declined to assume responsibility in that regard, and defendant assumed the burden of determining its rights under the laws of the countries where it might desire to exhibit the pictures. Such a provision in no manner rendered the contract indefinite, for a reasonable construction of the contract would undoubtedly justify the defendant in refusing to take any and all pictures, where the right exclusively to distribute or exploit such picture or pictures was destroyed or impaired by virtue of the laws of the territory where they were to be distributed and exploited.

As to (3), supra, it is plain that this provision must be tested by the relevant context of the whole contract. This was a protective provision in favor of defendant, so that defendant would not be called upon to take one motion picture per week, if so doing would work out to be more than 80 per cent.

Plaintiff was obligated throughout to grant to defendant the sole and exclusive right to distribute, etc., in Australasia, etc. The mutual considerations moving between the parties are well within the principle of the Ramey Case, supra. Doubtless argument may be advanced seeking to differentiate the facts which appear in the various cases cited, supra, but the principle of law is clearly set forth in one form or another in each of them. In the Ramey and some of the other cases, the fact that the seller might have nothing to sell, or that the buyer might not buy at all, did not destroy mutuality, in view of other covenants or agreements in the contracts considered in these various cases. In the case at bar the three clauses above discussed do not in any manner affect the fundamental structure of the contract, but are merely provisions of caution. (1) and (3) to protect defendant, and (2) to protect plaintiff, in respect of subject-matter against which both parties might reasonably wish to be safeguarded.

In Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., supra, one of the tests of validity in the so-called will, wish, or want contracts is whether "the quantity is ascertainable otherwise with reasonable certainty." In the case at bar it was the clear intent of the parties that plaintiff should be obligated to submit for designation by defendant the motion pictures "heretofore and hereafter released by" plaintiff. The motion pictures "heretofore" released were certainly capable of ascertainment. While the motion pictures "hereafter" released were not capable of mathematical ascertainment, it is clear that this part of the contract referred as much to the product of plaintiff as if the plaintiff were selling ordinary merchandise.

I am of opinion, therefore, that the contract was valid and enforceable, and not void for lack of mutuality.

[2] 2. *The Breach.* The complaint in paragraph fifth sets forth that plaintiff notified defendant in writing that it elected to regard

defendant's repudiation of the contract as an anticipatory breach. In paragraph fourth the complaint alleges, inter alia:

"Plaintiff was at all times ready, able, and willing to perform each and every term, covenant, and condition of said contract of December 19, 1918, on its part to be performed, and to deliver to defendant motion pictures selected by defendant in accordance with its provisions, and would have done so had it not been prevented by defendant's neglect and refusal aforesaid."

In paragraph seventh plaintiff alleges "by reason of the premises plaintiff has been damaged in the sum of $216,000. * * *"

It is difficult to determine from the pleadings whether the breach is to be regarded as anticipatory or actual. Ordinarily, "an anticipatory breach precedes the time prescribed for its performance, or at least the time when tender of performance has been proffered." Wester v. Casein Co. of America, 206 N. Y. 506, 514, 100 N. E. 488, Ann. Cas. 1914B, 377.

The theory of the contract is that the first step shall be the release by plaintiff of motion pictures. Obviously, before defendant was called upon to select and designate, plaintiff was required to release the subject-matter of the selection. Thus the second step under the contract, viz., the selection and designation by defendant, was to be taken only when, and not until, plaintiff has released motion pictures.

Nowhere in the complaint is there a clear allegation of such release prior to April 19, 1919, the date of repudiation by defendant.

Allegation "fourth" sets forth that plaintiff was ready, able, and willing to perform its part, but does not set forth that it did anything up to April 19, 1919, although under the contract it was clearly contemplated that releases could begin on April 1, 1919, and that from that date defendant could designate and accept at least one motion picture per week from those available. The same allegation also sets forth that plaintiff "would have" delivered pictures if it had not been prevented by defendant. This allegation, together with allegation "fifth," clearly indicates that the complaint is drawn on the theory of an anticipatory breach and not of an actual breach.

The fact that defendant paid plaintiff $18,000 for the rights in the last four pictures does not change the character of the breach, because that arrangement was part and parcel of the written contract, and cannot be regarded as a part performance of the prospective features of the contract.

If, therefore, as plaintiff now contends, the breach was actual, then the complaint must be amended to set forth clearly the facts from which it shall appear on the face of the complaint that the breach was actual and not anticipatory; for defendant is entitled to know what it is called upon to meet, in view of the fact that it may very well be that a different kind of proof may be necessary to prove damages as for an actual breach from the proof necessary to prove damages in a case of anticipatory breach. Indeed, it might well happen that the damage in a case of actual breach might in one case be more, and in another case be less, than in a case of anticipatory breach.

Assuming, then, for the purposes of this complaint, that the breach is anticipatory, the first question is whether the law applicable to this

case is that laid down by the New York courts or the United States courts. In the absence of agreement to the contrary, this court would follow the rule of the United States courts to determine whether a cause of action arose from the breach.

If the New York rule were to be applied, it is questionable whether plaintiff has a cause of action, because of the limitations which it is contended are placed by the New York courts upon actions for damages for anticipatory breaches. Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661; Adenaw v. Piffard, 202 N. Y. 122, 129, 95 N. E. 555; GaNun v. Palmer, 202 N. Y. 483, 96 N. E. 99, 36 L. R. A. (N. S.) 922.

But it is unnecessary to speculate whether or how far these cases limit the classes of cases where a cause of action arises out of an anticipatory breach, because the clause of the contract upon which defendant relies does not permit defendant to invoke the law of the New York jurisdiction in this regard.

Paragraph "eighth" of the contract provides:

"It is understood and agreed by and between the parties hereto that all questions arising hereunder shall be interpreted and governed under and by the laws of the state of New York."

This clause must be construed as applying only to the interpretation of the contract. It cannot be assumed to operate in respect of the rights of the parties in the event of a breach. In such event, the law of the forum controls.

If this be so, then the principle of Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, applies, and that principle has consistently prevailed in the United States courts.

It is true that the rule is otherwise in some jurisdictions, and that some learned authors have criticized and questioned it; but it is not only authoritative in this court, but, in the progress of business enterprise, it has developed as a sound and sensible rule, and it has always been difficult to understand why in principle there should not be a cause of action in any case because of anticipatory breach.

Finally, it is contended that the agreement amounts to a license or lease, and therefore that an action for anticipatory breach will not lie.

In motion picture contracts the languge of real estate seems to be somewhat the vogue. Leases, grants, and the like are very often misnomers. In the case at bar, what the contract does is to sell or dispose of certain rights, with certain safeguards and restrictions necessitated by the peculiar requirements attendant upon the production and exploitation of the merchandise of this business, i. e. motion pictures; and when a man agrees to sell and another man to buy these rights, a cause of action for redress for a breach need not be mystified by importing into the case the law which might be applicable to real estate leases.

It is concluded, therefore, that the complaint sets forth a cause of action for anticipatory breach, and is not demurrable.

The demurrer is overruled, and the motion to dismiss denied, without costs, and defendant may have 15 days within which to serve its answer.

If, however, plaintiff desires to amend the complaint so as to stand on actual breach, it may do so without costs, within 15 days, provided it notifies defendant accordingly within 10 days.

SPIEGELBERG v. GARVAN, Alien Property Custodian (two cases).

(District Court, S. D. New York. July 10, 1919.)

WAR ⇐10(2)—TRADING WITH THE ENEMY ACT—SUIT BY CLAIMANT OF PROPERTY—PARTIES.

Under Trading with the Enemy Act, § 9 (Comp. St. 1918, § 3115½e), providing that any person not an enemy claiming an interest in money or property in the hands of the alien property custodian may bring suit in equity therefor in a federal District Court, making the custodian a party, the enemy owner, if a nonresident alien, is not a necessary party to such suit.

In Equity. Suits by Isaac N. Spiegelberg against Francis P. Garvan, as Alien Property Custodian. On motions to dismiss bills. Denied.

Motion by defendant to dismiss each bill.

The grounds urged are (a) that the enemy, the alleged debtor, should be made a party defendant, and (b) that it does not appear that at the time of the filing of the bill any property of the enemy was held by the Alien Property Custodian.

From the complaints herein the following facts appear:

By the will of Solomon J. Spiegelberg, probated in the New York surrogate's court on April 28, 1898, plaintiff and Frederick Spiegelberg were appointed trustees for certain funds in which one Emma Spiegelberg, who resides in Vienna, Austria, in the one case, and one Bertha Elias, who resides in Hamburg, Germany, in the other case, were the life beneficiaries. Prior to the entry of the United States into the war, plaintiff in his individual capacity advanced to each of the beneficiaries the sum of $10,650, upon the understanding that he should reimburse himself for such advances from the installments of income from the trust fund as such installments became due, for the ensuing 18 months. He did so reimburse himself to the extent of $6,400, leaving $4,250 in each case still due and unpaid.

As the income accumulated from the trust fund, plaintiff demanded from his cotrustee the payment of this amount. The cotrustee reported to the Alien Property Custodian the amount of accumulated income on hand, and also the claim of plaintiff, but thereafter deposited the whole amount of such income with the Alien Property Custodian.

On January 29, 1919, plaintiff, in compliance with section 9 of the Trading with the Enemy Act (Act Oct. 6, 1917, c. 106, 40 Stat. 419 [Comp. St. 1918, § 3115½e]), filed his claim with the Alien Property Custodian, who refused to pay the same; and thereafter, to wit, on March 18, 1919, these suits were brought.

Section 9 of the Trading with the Enemy Act (herewith quoted for convenience) is as follows:

"Sec. 9. That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said Custodian a notice of his claim under oath and in such form and containing such particu-

lars as the said Custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: Provided, that no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the District Court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution or subject to any order or decree of any court."

Francis G. Caffey, U. S. Atty., of New York City (Earl B. Barnes, Asst. U. S. Atty., of New York City, of counsel), for the motion.

Wise & Seligsberg, of New York City (Edmond E. Wise, of New York City, of counsel), opposed.

MAYER, District Judge (after stating the facts as above). 1. The first ground upon which defendant has moved to dismiss the bills is that the aliens in each case are necessary party defendants. This contention calls for the construction in this regard of section 9 of the Trading with the Enemy Act. An analysis of that section shows that where the property of an enemy has come into the custody of the Alien Property Custodian, section 9 affords any person not an enemy or ally of enemy claiming against such property, in whole or in part, one of two methods of pursuing the claim. One method is by executive action, and the other through court proceedings. If the President acted, it was necessary for him to obtain the assent inter alios of the owner of the property.

The reason for this provision seems explainable upon the ground that the executive, when thus acting, can at best ordinarily only conduct an investigation, and there is not the opportunity, in such circumstances, for a real judicial proceeding. Hence, in the opinion of Congress, it was but fair that the executive could act only upon the assent of the owner.

The legislation in this regard may have contemplated the possibility during the war, on the one hand, of communication with the enemy in the discretion of the President through intermediate diplomatic channels; and, on the other hand, alien enemies, under section 2 (c) of the act (Comp. St. 1918, § 3115½aa), might be in the United States, and might, for one reason or another, wish to give assent. In any event, it will be noted that section 9 contemplates action within six months after the end of the war, during which period executive action could be taken with the assent of one who had been an alien enemy during the war.

Where, however, presidential action was not asked or availed of, then a nonenemy was authorized to institute a suit in equity, in the appropriate District Court of the United States. It will be noted that there is no provision as to the assent of the owner in the event of the institution of an equity suit.

It is true that section 9 provides:

"To which suit the Alien Property Custodian or the Treasurer of the United States as the case may be, shall be made a party defendant."

The reason for the insertion of this provision was in all probability to remove any doubt that the Alien Property Custodian should be made a party to such suits in equity as section 9 contemplated. If this provision had been omitted, there might readily have been some difference of opinion as to whether the Alien Property Custodian was or was not a necessary party defendant.

It is significant, however, that section 9 does not contain any provision requiring that the alien enemy should be made a party defendant. If Congress had so intended, the insertion of the necessary language would have been simple.

It seems to be clear that the legislative intent was to leave questions of jurisdiction and procedure normally in the same situation as jurisdiction would be had and procedure followed in any equity suit in the United States District Courts.

In other words, Congress, in effect, said to a claimant that it conferred upon him all of the rights and remedies which would obtain in any equity suit, but that, in addition, claimant must join the Alien Property Custodian as a party defendant. If Congress had intended to increase or diminish the jurisdiction of courts of equity in regard to claims arising under section 9, it must be assumed that such intent would have been plainly manifested. What Congress sought to accomplish, inter alia, was the establishment of a uniform method of litigation in cases of this character. Therefore, for instance, Congress took away from claimants the right to sue in state courts, and thus to obtain jurisdiction by attachment or other similar remedy.

In the case at bar plaintiff, prior to the enactment of the Trading with the Enemy Act (Comp. St. 1918, §§ 3115½a–3115½j), could have begun in the state court, an appropriate suit or action against the nonresident alien enemies, could have attached funds in the hands of the trustees, and could have obtained jurisdiction through the medium of an order of publication. If the nonresident defendants failed to ap-

pear, the state court would, nevertheless, have acquired jurisdiction and could have rendered its appropriate judgment or decree.

When, however, a claimant such as plaintiff was remitted to the remedy under section 9, he lost the opportunity to begin his suit or action in a court where jurisdiction of the absent defendant could be obtained. When plaintiff was thus compelled by virtue of section 9 to bring his suit in this court, he at once found himself in a position where jurisdiction could not be obtained; for the reason that the United States courts, at common law and in equity, cannot obtain jurisdiction by means of either attachment or publication over a defendant who is without the jurisdiction. Big Vein Coal Co. v. Read, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053; Judicial Code, § 50 (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. § 1032]).

There is not any process nor order by which this court can bring in the nonresident alien enemy as a party defendant.

Under section 50 of the Judicial Code and Equity Rule 39 (198 Fed. xxix, 115 C. C. A. xxix), the rights of such absent defendant are safeguarded; but both section 50, supra, and equity rule 39 make clear that the court may proceed in the absence of a person who is a proper party to the suit.

In a proceeding in the state court before the act, defendants would have been necessary parties to the suits; but by requiring plaintiff to go into one of the United States District Courts, and providing that the Alien Property Custodian should be a party defendant, it is quite plain that Congress intended that the Alien Property Custodian was the only necessary party defendant, because it must be assumed that Congress would not legislate in a futile way so as to require a person to be a party defendant over whom the United States courts could not acquire jurisdiction.

In view of the foregoing, it may be repeated that, if Congress had intended that the alien enemy should be made a party defendant, it would have so stated in clear language, in view of the fact that such language would be necessary in order (if it had the power so to do) to confer jurisdiction over an absent defendant, where no such jurisdiction had ever been conferred before.

Under the Trading with the Enemy Act, it is provided in section 2 thereof as follows:

"Sec. 2. That the word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this act—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory. * * *

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy.'"

By virtue of subdivision (c) of section 2, supra, it is plain that the President could, by proclamation, include within the term named persons who were resident within the jurisdiction, so that an enemy might be within the jurisdiction or without the jurisdiction, and in one case could be served with process and in another case could not.

Congress must be presumed to have understood that in some situations the District Court could obtain jurisdiction, while in other situations it could not. Thus it left flexible the practical acquisition of jurisdiction, to be determined by the status and location of the alien enemy concerned.

It is unnecessary for me to determine whether an alien enemy, under section 2, subdivision (c), if within the district, is a necessary party defendant; but it is certain that a nonresident alien enemy is not. To the contention of the government that the alien enemy is an indispensable party may be opposed the suggestion that the contention begs the question. Congress had ample power, in dealing with this particular subject-matter, to determine whether or not the alien enemy should be a party defendant, and if the statute did not so require, then, of course, the alien enemy was not an indispensable party.

The Senate and House committees which had in charge the framing of the act did not overlook the question here involved. In the Senate report to accompany the Trading with the Enemy Act it is stated, at page 8:

"Discussing section 9: Protects American citizens who have any claim or interest, right, or title in or to any money or property which has been paid or conveyed to the Alien Property Custodian. This section is necessary to preserve and protect innocent claimants notwithstanding the enforced absence of the parties in interest."

The House report, at page 12, is still more emphatic:

"Innocent claimants of property rights and titles held by the Custodian may litigate against the Custodian as effectually as against the enemy or ally of an enemy (section 9, pp. 10, 11). Thus the preservation and protection of property and property rights are afforded innocent claimants notwithstanding the enforced absence of enemy parties in interest."

In the foregoing extracts from the committee reports is to be found strong confirmation of the construction of the statute here arrived at.

It is suggested by counsel for defendant that the failure to make the alien enemy a party defendant may lead in some cases to fraud and collusion. This is, of course, a possibility in any lawsuit; but, as it is the duty of the Alien Property Custodian to put a plaintiff to his proof, it must be assumed that the usual safeguards of court proceedings will protect against possible wrongdoing.

There is nothing in Watts & Co., Ltd., v. Unione Austriaca di Navigazione, 248 U. S. 9, 39 S. Ct. 1, 63 L. Ed. 100, decided November 4, 1918, nor in the Kaiser Wilhelm Second, 246 Fed. 786, 159 C. C. A. 88, L. R. A. 1918C, 795, contrary to the above conclusion. In both of the cases supra, the court had acquired jurisdiction, and both decisions held, in effect, that the rights of an absent alien would be protected in the manner and in the circumstances to which these cases refer. In neither of these cases, however, was there any question, such as is

here presented, as to who are necessary parties defendant under the particular act here under consideration.

With the same sense of justice and fairness exhibited by these two decisions, it is in the power of the trial court to postpone the trial of any cause, or to take testimony and then determine whether some appropriate effort should be made to notify an absent defendant. This power a court of equity undoubtedly has, as matter of discretion, but, in addition, the act has confided to the District Courts of the United States a large measure of discretion in this and other situations. Section 17 provides:

"Sec. 17. That the District Courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court. * * *" Comp. St. 1918, § 3115½i.

It may very well be that in one case the facts may be entirely clear, and that there may be available to the Alien Property Custodian all of the facts which could possibly be adduced. On the other hand, in another case, there may be doubt or lack of proof, or unsatisfactory proof, which will move the trial judge to postpone his determination to such later time, and with such conditions as he may deem proper, and with such notice as he may deem practicable.

The point is that it must be assumed that the District Courts will so proceed in an equity suit as to assure the highest measure of fairness and justice to the absent defendant. What may be proper, just, or desirable in any particular equity suit must be determined by the court trying that suit; but in the case at bar the question is solely one of jurisdiction, and it certainly never could have been the legislative intent to compel a plaintiff to bring in as a necessary party defendant a person over whom the court, at the plaintiff's instance, in any event, could not obtain jurisdiction, except by voluntary appearance.

If the contention of the Alien Property Custodian were sustained, the result would be to make section 9 practically useless in those cases where a claimant sought his remedy against a nonresident enemy by a suit in equity in a District Court of the United States. It would manifestly defeat the purpose of the act, and be most unfair to an American citizen, to deprive him of the simple remedy which Congress has constructed, and compel him to resort to the uncertainties of some international or other new tribunal which may hereafter be erected.

2. The second ground of demurrer rests on the proposition that it must be presumed that the proper party defendant is the Treasurer of the United States.

Subsection (c) of section 7 of the act as amended November 4, 1918, provides:

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this act, and in the event

of sale or other disposition of such property by the Alien Property Custodian shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

Section 9 (eliminating language not material to this case) provides:

"That any person, * * * claiming any interest, * * * in any money or other property which may have been conveyed * * * or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, * * * whose property * * * shall have been conveyed * * * or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said Custodian a notice of his claim under oath, * * * and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment * * * or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States. * * * If the President shall not so order * * * or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may * * * institute a suit in equity in the District Court of the United States * * * (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy * * * shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, * * * by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the Court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated."

Section 12 of the act provides:

"That all moneys (including checks and drafts payable on demand) paid to or received by the Alien Property Custodian pursuant to this act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities. * * *" Comp. St. 1918, § 3115½ff.

It is, of course, presumed that public officers do their duty, and no doubt the Custodian was obligated to deposit the money forthwith in the Treasury of the United States. "Forthwith," however, is an elastic expression, and it is conceivable that the Alien Property Custodian may be doing his full duty, and yet for some proper reason may not immediately deposit the money with the Treasurer. On the bill as framed, the money is in the custody of defendant. If, in point of fact, it is not in his custody, then that fact should be alleged in the answer and set up by way of defense. It is unnecessary to determine at this time whether such a defense would be good.

For the reasons outlined (and more could be added) the motions to dismiss are denied.

FILER v. McCORNICK.

(District Court, N. D. California, Second Division. July 28, 1919.)

No. 16188.

1. PROCESS ⇐115—EXEMPTION FROM SERVICE—PERSON ENGAGED IN PUBLIC SERVICE.
The president of a national bank, which was a stockholder in a federal reserve bank, who at the urgent request of the governor of such bank attended a conference at the city where it was located, in another state, to consider means of selling government treasury certificates for war purposes, *held* engaged in a public service, and privileged from service of process in such state, not only during the conference, but during the next few days, while he was prevented by illness from returning home.
2. PROCESS ⇐115—PRIVILEGE—EMPLOYMENT IN PUBLIC SERVICE.
The extension of the privilege or immunity from arrest or service of civil process to include, in addition to parties and witnesses attending court, persons engaged in performance of a public service, is not wholly statutory, but is based on the same considerations of public policy that originally led to the judicial exemption.

At Law. Action by Walter G. Filer against William S. McCornick. On motion to quash service of process. Motion sustained.

Howat, Marshall, MacMillan & Nebeker, of Salt Lake City, Utah, and Garret W. McEnerney, F. W. Henshaw, and Henshaw, Black & Goldberg, all of San Francisco, Cal., for plaintiff.

Harry G. McKannay, of San Francisco, Cal., and Frank J. Gustin and M. E. Wilson, both of Salt Lake City, Utah, for defendant.

VAN FLEET, District Judge. [1] This is a motion to quash service of process. The parties are both citizens, the plaintiff a resident of this state, and the defendant of the state of Utah. The action was filed on August 14, 1918, in the superior court of the state at San Francisco, and service of the summons was made on defendant the same date at that place. Thereafter the cause was duly removed here for diversity of citizenship, and the defendant, appearing specially for the purpose, has since interposed the present motion on the ground that he was not legally subject to service in this district.

As to the circumstances under which the action was commenced and the service had in this district there is little serious controversy—none as to the occasion which brought defendant into the state, the only disputed question of fact being whether he was necessarily detained here at the date service was made upon him. In that regard the affidavits in behalf of defendant tend to show, in substance, that defendant, a man over 80 years of age, has lived in Salt Lake City, engaged in the banking business, since 1873, and is the president of a bank at that place, which was at the time in question, and for some time previously, a member of the Federal Reserve Bank for the Twelfth Federal Reserve District; that in and prior to the month of August, 1918, the federal government was earnestly engaged, through its financial agencies, in selling certificates of indebtedness issued by the Secretary of

the Treasury, under the authority of Congress, for the purpose of raising funds for the carrying on of the war against the Central Powers of Europe, then in active progress, and on the first of that month there was a large deficiency in the quota of subscriptions for such certificates assigned for sale to said district, totaling approximately some $23,000,000; that in this situation it was considered urgently necessary that a conference be had of the representatives of the banks comprising the membership of the Federal Reserve Bank in the district for the purpose of devising ways and means for facilitating and accelerating the disposition of such certificates to make up this deficiency, and thus aid in financing the successful prosecution of the war; that thereupon such conference was called by James K. Lynch, then governor of said Federal Reserve Bank, to be held at San Francisco, the headquarters of the bank, on August 9, 1918; that by reason of his position in his bank, and his high standing and wide experience in important banking and financial matters, it was deemed by the officers of the Federal Reserve Bank as of great importance that the defendant should attend such conference, and to that end Mr. Lynch, the governor, sent him this telegram:

"San Francisco, California, 11:48 a. m., Aug. 5, 1918.

"W. S. McCornick, Pres., W. S. McCornick & Co., Bankers, Salt Lake City, Utah: You are invited and urgently requested to attend a very important one-day conference in Fairmont Hotel, San Francisco, at ten o'clock Friday morning, August ninth, of representative bankers from each state in Twelfth District, to determine best ways and means of selling United States certificates of indebtedness and to discuss general relation of banks to government war finance. Delegates will be entitled to reimbursement for transportation and hotel expenses. Please wire acceptance, and we will then engage your accommodations at Fairmont unless otherwise requested.

"James K. Lynch, Governor Federal Reserve Bank."

That defendant regarded and treated this request of the governor of the bank, under the circumstances, as equivalent to a command, and that it was solely in obedience thereto, and not to subserve any personal end or interest, or that of his bank, that he came to San Francisco; that, as stated in his affidavit, "I believed that under present conditions it was my duty to attend upon such conference as requested, and that my attendance thereupon would be in the performance of a public service in aid of the administration of governmental affairs," in which statement defendant is fully corroborated by Mr. Cook, the director of sales for the state of Utah of such treasury certificates, who had personally urged upon defendant the necessity of his attendance in order "that his advice and experience might be availed of for the benefit of the government"; that defendant arrived in San Francisco in time to attend the conference, which convened at 10 o'clock a. m. of August 9th, and lasted until 7:30 p. m. of that date; that while in attendance thereon he was stricken with severe abdominal or intestinal cramps, followed by dysentery, which rendered him so ill and weak that he was physically unable to return at once to his home, as he had contemplated, and, feeling that he was incapacitated for undertaking the return journey to Salt Lake for several days, on the following day, August 10th, with the advice of his wife, he went to the home of a brother in Santa Cruz

(a distance of 75 to 80 miles by rail) to recuperate, where he remained until August 13th, when he started to return to San Francisco to go home; that his weakness was yet such as to necessitate his leaving the train at San Mateo and remaining overnight, but he was able to continue on to San Francisco on the following morning, the 14th, and upon his arrival at the hotel, while arranging to leave for his home the next day, he was served with the summons in this case; that upon being served he got in communication with his attorneys in Salt Lake, and on their advice remained in San Francisco until August 20th to arrange for the removal of the cause to this court, and for no other purpose.

The statements of defendant as to his illness and physical suffering while in San Francisco are corroborated by the affidavit of Mr. Badger, a banker of Salt Lake, also in attendance at the conference, who had been intimately acquainted with defendant for 20 years, who noted his physical suffering at the conference, and his having to absent himself for a time, and who states that his appearance was such that he advised him that he was in no condition to make the return trip to his home without rest and recuperation; and by that of Mr. Raborg, likewise an intimate acquaintance in San Francisco at the time, who states that he saw defendant several times and that his appearance was such as to excite his anxiety for his welfare, and that he did not seem to improve while in San Francisco. The defendant's affidavit further shows that, prior to the institution of the present action, suit had been brought in the United States District Court for the District of Utah by the plaintiff against this defendant upon the same cause of action as that sued on in this case, which action was still pending at the time the present suit was brought and the summons therein served.

As intimated, the counter showing affects only defendant's physical condition while in the state as bearing on the question whether he was necessarily or reasonably detained here after the adjournment of the conference until the date of service; but as a whole it is of a meager and inconclusive character. It consists of several affidavits and some oral testimony. An affidavit by the process server, who had never before met the defendant, and was consequently wholly unacquainted with his usual appearance, is to the effect that when making the service he talked with the defendant, sitting in the hotel lobby, for "about a half hour," and got the "impression" that despite his advanced years he "then was in a remarkable state of good health and vitality," and appeared to him "as a man of the old pioneer stock who never grows old"; that he "marveled at his vigor and general excellence of good health"; and that he got the "impression" from his conversation that he and his wife "had come to California on a pleasure trip." Oral testimony by Mr. Wilson, an officer of one of the banks in San Francisco, is to the effect that he had known the defendant for some 29 years; that he saw defendant twice while he was in the city, the first time at the conference, and the last the day before he was finally returning to his home in Salt Lake; when asked as to his apparent condition of health, he said, "It appeared to me usual, very fair for a man of his age"—which he stated was 82 years; that he did not remem-

ber defendant making any complaint of illness, and, asked if he seemed "physically able to make the trip from San Francisco to Salt Lake City," answered, "He appeared to be; I know he was going the next day to Salt Lake City." The witness did not state how intimate his acquaintance with defendant had been, nor how frequently he had met him during the years he had known him, nor how recently prior to the occasion of his last visit to San Francisco he had seen him. There were also oral statements by two employés of the hotel at which defendant stopped in San Francisco: The first, by the hotel manager, to the effect that he had seen defendant twice in the hotel lobby during his stay; conversed with him the first time, but on the second occasion just saw him sitting there, but did not address him; asked, "What seemed to be his general condition of health at that time?" he answered, "I thought considering his age that it was very good;" that defendant did not complain to him of the condition of his health. So far as appears this witness had never met the defendant prior to the visit in question. The second, the assistant manager, states that he had known defendant some seven years; had seen him a number of times on previous visits to the hotel; asked as to his apparent condition of health, he answered, "All right, so far as I know;" that he had seen him in the lobby several times during his stay; that he did not recall defendant "making any complaint about his health"; that there was a house physician at the hotel, but there was no record of his having been called to attend the defendant. An affidavit of the plaintiff is to the effect that while, as stated in defendant's affidavit, there was at the date of commencing this suit an action previously brought by him against the defendant pending in the District Court of the United States for the District of Utah, in all respects identical with the present, such former action had, after the bringing of the present action, been dismissed and is no longer pending; that the present suit was not instituted for the purpose of harassing the defendant, but solely to enable plaintiff, for his own convenience, to prosecute it in the district of his residence.

The entire counter showing, it will be observed, was purely negative in character, possessing little, if any, probative value. The somewhat enthusiastic and picturesque "impressions" received by the individual serving the summons, in his brief interview, as to defendant's robust and vigorous appearance, and those of the hotel people in their casual, passing observations as to the apparent state of health of the defendant, may be dismissed as of no material value, and that of Mr. Wilson as of little weight. While the latter states that he had known defendant for 29 years, they were, it appears, at the time the statement was made, living at a long distance from each other, and there is nothing to indicate how often he had met him during that period, or that he had ever had any such intimacy with him as to render his judgment as to his apparent state of health of any weight. One may "know" another for an indefinite period without any such opportunity for observing his physical peculiarities as enables him to form an intelligent judgment of his state of health in a passing observation—a thing frequently beyond the ability of the

skillful physician. That defendant did not complain of being ill either to the hotel employés or to Mr. Wilson is equally of no moment. The disposition of aged men is rather to conceal than expose their ailments and infirmities—especially to strangers or mere casual acquaintances. Nor is it significant, if such be the fact, that defendant may not have called for attention by a physician. His suffering was from a cause which, while painful and weakening, most people of mature years can alleviate by their own care and attention, and defendant doubtless had as well the care and attention of his aged wife, who accompanied him. Some stress is laid on the fact that defendant, while claiming to be too weak to return home, was able to go to the home of a brother in Santa Cruz. But I cannot regard it as in any material respect tending to overcome the positive evidence of his illness and suffering. The distance was insignificant as compared with that to Salt Lake, and it was but natural, if his condition did not in his judgment admit of the long journey home, to seek the quiet and seclusion of a relative's home for rest and recuperation, rather than remain in the noise and bustle of a large and busy hotel.

Taking all the facts and circumstances presented into consideration, I have no difficulty in reaching the conclusion that they fully sustain the claim that defendant's physical condition afforded reasonable ground for his detention in the state, and that his remaining within the jurisdiction for that reason did not waive any right arising out of the circumstances which brought him here. Miner v. Markham (C. C.) 28 Fed. 387, and cases there cited. Indeed, in view of the advanced age of the defendant, a court might well hesitate, without the showing of any unusual physical condition of weakness, to hold that the brief period of rest taken by him before undertaking the return journey was so unreasonable as to deprive him of any right he might otherwise have.

This leaves but one question for consideration, but that the crux of the case: Whether the facts bring the defendant within the rule of immunity which he invokes.

The contention of the defendant is, in brief, that under well-settled principles of public policy one who temporarily enters a state or district other than that of his domicile, solely for the performance of a duty of a public nature, or to which a public interest attaches, is privileged from interference either by arrest under or service upon him of civil process, for a reasonable time in going to, returning from, and attendance upon the performance of such duty, and that the facts of this case clothe him with that privilege. The contention of plaintiff, on the other hand, is, in substance, that except as extended by legislative enactment to other departments or functionaries, the privilege claimed is purely a "judicial" one, and attaches only to those who in some capacity, such as party or witness, are in necessary attendance upon a court or judicial proceeding; but that it has no application, in either aspect, to one engaged in the performance of a service such as that here involved.

The doctrine contended for had its origin at the common law, and undoubtedly in its inception, as administered by the courts of England,

had relation only to judicial proceedings, in which aspect it was in no way dependent upon statute, but was the outgrowth of the efforts of the civil courts to protect the administration of justice from interference with suitors, witnesses, and perhaps others, through civil process from other courts of a nature found to derogate from orderly proceedings and jeopardize the ascertainment of truth. Originally it was asserted solely as the privilege of the court for the protection of its own jurisdiction, but later as that of the person concerned as well. Bacon's Abr. tit. "Privilege." What the precise limits of the right were in its earlier history, or those to whom extended, it is not very material to here inquire. The question is left in some doubt through divergent statements as to its scope, not only from judges, but from early commentators on the subject. See the interesting opinion of Judge Lobingier in Berlet v. Weary, 67 Neb. 75, 93 N. W. 238, 60 L. R. A. 609, 108 Am. St. Rep. 616, 2 Ann. Cas. 610. It is sufficient for present purposes to say that the doctrine in its different aspects has been a growth, rather limited in its scope, and somewhat jealously regarded in its earlier history, but gradually gaining favor, and broadening in its field of application as its essential value became better appreciated, until its enforcement has in later times come to be recognized not only as a substantive right of the individual concerned, but as a matter of established public policy, resting upon sound principles of justice and right. It is now very generally recognized as extending not only to immunity from arrest, but from service of process as well. And while it is quite true that the right has most frequently arisen and been applied in connection with parties and witnesses in judicial proceedings, its extension in the process of time to those engaged in other departments of the public service has been more largely by analogous application by the courts than as a result of legislation. These principles may be gathered from the large number of cases cited with approval in Stewart v. Ramsay, 242 U. S. 128, 37 Sup. Ct. 44, 61 L. Ed. 192, the latest expression on the subject from the Supreme Court, and from those hereinafter referred to. These authorities further show that while a few of the state courts, as in Berlet v. Weary, supra, are still inclined to apply the doctrine with somewhat archaic strictness, the greater number, as do the federal courts, take an enlarged and liberal view of its application. The fundamental basis of the doctrine in its judicial aspects is very clearly stated in Stewart v. Ramsay, as embracing the right of the courts "to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them"; that the citizen in asserting his legal rights shall be free to approach the courts, "not only without subjecting himself to evil, but even free from the fear of molestation or hindrance"; and that he shall enjoy the correlative and essential right "to procure without difficulty the attendance of all such persons as are necessary to manifest his rights." And emphasizing the importance in attaining these purposes, that the litigant and his witnesses be protected from molestation, it is said:

"Now, this great object in the administration of justice would in a variety of ways be obstructed if parties and witnesses were liable to be served with process while actually attending the court. It is often matter of great im-

portance to the citizen to prevent the institution and prosecution of a suit in any court at a distance from his home and his means of defense; and the fear that a suit may be commenced there by summons will as effectually prevent his approach as if capias might be served upon him. This is especially the case with citizens of neighboring states, to whom the power which the court possesses of compelling attendance cannot reach."

It is these considerations which have actuated the courts in extending the protection of the rule, so limited in the beginning, until it has come to embrace practically every one who may be called to a strange jurisdiction in connection with a cause, and every proceeding or step in the action, either heard before the court or any of its officers, and to appearances before legislative committees and kindred investigations as well. Alderson, Judicial Writs and Process, § 121. And an examination of the authorities will disclose, I think, that it is upon quite cognate principles that the doctrine has been given application beyond the domain of judicial proceedings to embrace other departments of the public service.

[2] The plaintiff contends that in its latter aspect, which he denominates the "governmental" privilege, the right is a distinct and separate thing and wholly the creature of statute; excepting only as to the immemorial privilege enjoyed by members of Parliament, which it is claimed went no further than immunity from arrest. But the authorities do not, I think, bear out this view. It is true that as to the extent of the immunity enjoyed by members of Parliament the authorities are not in harmony and the question is left in some doubt. Berlet v. Weary, supra, seems to support plaintiff's contention; but Juneau Bank v. McSpedan, 5 Biss. 64, Fed. Cas. No. 7582 and Miner v. Markham are opposed to it. In Juneau v. McSpedan, Judge Miller states that "in England the privilege from arrest has always been construed to include the service of a summons"; and this view is sustained in Miner v. Markham. But the question is somewhat immaterial, except as to its historical value, since the cases in this country show a number of instances in which the so-called "governmental" privilege has, in the absence of specific legislative provision, been recognized and applied; and this apparently for the same underlying reason, and inspired by the same public policy, as that which dictates the application of the doctrine in judicial proceedings, to the end that the public service may not be interfered with or interrupted, and the interest of the people in an efficient administration of the laws thereby jeopardized. Thus in Doty v. Strong, 1 Pin. (Wis.) 84, the Supreme Court of the then territory held that the immunity from arrest guaranteed to members of Congress by the Constitution (section 6, art. 1) must be construed as including exemption from service of process as well, and also as extending to delegates from territories, though not covered by its terms; and in its reasoning the court says:

"A liberal construction must be given to these words upon principle and reason. It is just as necessary for the protection of the rights of the people that their representative should be relieved from absenting himself from his public duties during the session of Congress, for the purpose of defending his private suits in court, as to be exempt from imprisonment on execution. If the people elect an indebted person to represent them, this construction of

the Constitution must also be made to protect his rights and interests, although it may operate to the prejudice of his creditors; but the claims of the people upon his personal attendance are paramount to those of individuals, and they must submit."

In Anderson v. Rountree, 1 Pin. (Wis.) 115, the same court gave like construction to the territorial statute exempting members of the Legislature from arrest, holding that it included immunity from service.

In Miner v. Markham, supra, the provision of the Constitution considered in Doty v. Strong was for similar reasons held to include the exemption of a member of Congress from service of process while in progress from his home to the seat of government to attend a session.

In Bolton v. Martin, 1 Dall. (Pa.) 296, 1 L. Ed. 144, it was held as early as 1788, by the court of common pleas of Philadelphia, that a member of a state convention called to consider the Constitution of the United States was privileged from service of civil process while in attendance upon the convention.

In Geyer v. Irwin, 4 Dall. (Pa.) 107, 1 L. Ed. 762, the Supreme Court of Pennsylvania, in the course of its opinion (rendered in 1790), states that "a member of the General Assembly is, undoubtedly, privileged from arrest, summons, citation, or other civil process during his attendance on the public business confided to him." It is claimed that this expression was mere dicta; but, if this be true, it is nevertheless of value as indicating the trend of judicial thought on the question in this country.

In Land v. Rambo, 174 Pa. 566, 34 Atl. 207, the same court, as late as 1896, held, in the absence of a statute, but in pursuance of what was deemed established public policy, that members of the national guard, holding an encampment under authorization of the Governor, were exempted from service of process while on duty, and in going to and returning therefrom.

And in a discussion of the whole subject in his work on Federal Practice, Mr. Foster, upon a review of the authorities, states it as his opinion that "a similar exemption would probably be applied to any person while temporarily within the district in the discharge of a public duty." Foster Fed. Prac. (5th Ed.) § 167.

These cases are strongly criticised by counsel for plaintiff as being based upon an entire misconception of the history of the doctrine; but I find myself unable to coincide with that view. I think, to the contrary, that while in a measure one or two of them may have involved a misapprehension of the then state of the law in England, they nevertheless disclose the distinct tendency of the courts of this country to give a broader and more comprehensive application of the doctrine than that obtaining in the English courts—springing perhaps from the strong tendency of the former to jealously protect and regard the rights of the people, and in obedience to what was regarded as a well-defined public policy.

As a result of these principles, while the present case may be said to be somewhat novel in its circumstances, and not precisely on all fours with any instance heretofore presenting itself for adjudication,

I am, nevertheless, constrained to the view that it falls quite clearly within the reason and analogy of the rule as contended for by defendant. It is argued that defendant was not an officer of the government, and did not come into the district in any official character. It is true, if that be material, that he was not an "officer," perhaps, in the strict, popular sense of the term; but by reason of his position in his bank, and the relation of the latter to the Federal Reserve Bank, I do not think it may be said in any absolute sense that, in acting upon the request of the president of the latter to participate in a conference or convention which the latter unquestionably had the authority to convoke, and upon a matter of such vital interest to the government, his attendance was not pro hac vice in an official capacity. It is not, and certainly may not be, claimed that in attending that conference he was not performing a public service of the greatest moment to the government and of interest to the country. One cannot readily conceive of a higher duty to their country—except it be on the battle front—than was being performed by the members of that conference, when we consider the urgent and absolute necessities of the government for means with which to finance the gigantic struggle in which we were then engaged; money at such a time may be said to be the lifeblood of a nation. But it is said defendant was not "compelled" to attend; that there was no power in the president of the Reserve Bank to require his presence; that therefore he must be regarded as coming of his own volition, and hence is not in a position to invoke this privilege. As to that, neither is a nonresident witness, nor a party, for that matter, "required" to attend a trial. If they come they do so of their own volition, and for the furtherance, in any particular instance, of merely private interests. It would be a singularly inconsistent public policy that dictated the protection of such a class, and denied it to those engaged in serving solely the public good. Such a policy would very probably have deprived the country during the critical period through which we have just passed of services of the highest value, gratuitously rendered, by the large number of patriotic citizens who, like the defendant, dropped their private interests, and betook themselves far from their homes to render aid to the administration of a character which could not have been coerced. It is at least doubtful if those citizens would have given the same ready response to the dictates of their patriotic sense of duty had they been advised that the law was powerless to afford them protection against liability to harassing litigation to which they might be subjected by private suitors in strange and remote jurisdictions.

Lastly, however, it is urged that the service rendered by defendant in attending this bankers' conference was "completely *extra legal,* not recognized nor provided for by law." But obviously if the president of the Reserve Bank had the authority to call the conference, which is not seriously questioned, when so called it certainly was a governmental function, and not a private one, and those who attended in obedience to his request were clearly in the performance of a "public service"; and that it was a public service within the scope and application of the doctrine under consideration I entertain no doubt.

Surely, as it seems to me, a public policy which declares that the administration of justice will be advanced and promoted by the character of protection afforded by the immunity claimed should not stop short of extending like protection to a service essential to the preservation of the country itself.

This conclusion is reached with less reluctance in that, while avoiding great inconvenience and harassment to the defendant, it works no great hardship upon the plaintiff; no essential right being lost to him. His cause of action may readily be reasserted in the jurisdiction originally resorted to, as to which no such question can arise, and where his rights may be as fully and completely adjudicated and protected as in this; and, moreover, should he desire to seek a review of the pending question, it may readily be accomplished (Stewart v. Ramsay, supra) well within the life of the obligation sued on.

The motion to quash the service will therefore be granted.

UNITED STATES v. FOLK et al.

(District Court, E. D. Oklahoma. June 26, 1919.)

No. 2131.

APPEAL AND ERROR ⊂=482—BOND—POWER TO VACATE—"FINAL DETERMINATION."

Where an interlocutory order appointing a receiver and granting an injunction was ordered stayed by Circuit Court of Appeals, on defendants giving a bond to pay all costs and damages that might be adjudged on "final determination" of matter, a bond given pursuant to such order cannot be discharged by the District Court pending an appeal from its judgment on the merits.

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

In Equity. Suit by the United States against Minnie Folk, Charles Page, and others. On motion by defendant Charles Page to have a bond discharged. Motion denied.

Stuart, Cruce & Cruce, of Oklahoma City, Okl., for movant.

D. H. Linebaugh, Sp. Asst. Atty. Gen., and Alvin F. Molony, Asst. U. S. Dist. Atty., of Muskogee, Okl., for the United States.

Malcolm E. Rosser, of Muskogee, Okl., and J. M. Hill, of Ft. Smith, Ark., for other defendants.

WILLIAMS, District Judge. In Folk v. U. S., 233 Fed. at page 193, 147 C. C. A. 199, Sanborn, Circuit Judge, for the court, said:

"However, *this litigation presents claims of some of the parties which have not been material to the decision of the question whether or not the receiver was rightly appointed and the injunction rightly issued* [italics mine], the defendants have offered to give a sufficient bond to protect all parties in interest during the pendency of this suit, and the court is of the opinion that it is wise and equitable to accept and require such a bond. The order of the court will accordingly be that, upon the filing in this court within 60 days of the date of

the filing of this opinion of a bond with surety approved by the judge of the court below in such an amount as shall be fixed by this court on 10 days' notice to be given by Page and Josey to the complainants and the other defendants herein, conditioned to account for and pay over to those parties to this suit who shall be finally adjudged to be entitled thereto the profits that have been and shall be derived by them from the land in controversy between March 8, 1915, the date when the receiver was appointed, and the final determination of this suit, to file with the clerk of the court below a verified account of the operation of the property showing generally the expense, the proceeds, and the profit thereof between March 8, 1915, and May 1, 1916, on or before August 1, 1916, to file on or before the 25th of each month, commencing on June 25, 1916, such an account of the operation thereof during the preceding month, to pay to the parties ultimately adjudged entitled thereto any damages resulting to them from the negligence or mismanagement of the property, and to abide by and perform the further orders of this court and of the court below in the premises, the order of the court below, dated March 8, 1915, appointing the receiver, directing the defendants to deliver the possession of the land, improvements, and property to him, and enjoining the defendants from operating or interfering with it, shall be in all things reversed and set aside, and this case shall be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion. * * *"

On June 24, 1916, the following order was entered by the United States Circuit Court of Appeals, Eighth Circuit, to wit:

"This matter came on to be heard on the 24th day of March, A. D. 1915, before the Honorable Walter H. Sanborn and the Honorable Elmer B. Adams, judges of the above-entitled court, upon the application of the appellants, Minnie E. Folk, Harry B. Folk, Edward C. Hanford, the Gem Oil Company, a corporation, Charles Page, and R. A. Josey, for an order allowing a supersedeas to the order heretofore made in the District Court of the United States for the Eastern District of Oklahoma, appointing a receiver and granting an injunction enjoining said appellants from certain acts and things—the appellants appearing by their solicitors, Rice & Lyons and Edward C. Hanford, and J. D. Johnson and Loomis C. Johnson, of counsel; the appellees appearing by W. P. Z. German, Special Assistant to the United States Attorney for the Eastern District of Oklahoma, and R. C. Allen, Esq., attorney for the Creek Nation of Indians; and it appearing to the court that on the 8th day of March, 1915, an order was made and entered in said cause in the District Court of the United States for the Eastern District of Oklahoma by the judge of said court, appointing a receiver and granting an injunction, from which said order the appellants on the 19th day of March, 1915, appealed to this court, which said appeal was allowed and security for costs given, and a citation issued to said appellees citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Eighth Circuit, to be holden at St. Louis, in the state of Missouri, within thirty days from the date of said order appointing a receiver, that is, before the 8th day of April, 1915, next.

"And the matter having been fully considered by the court, it is considered that a supersedeas and stay from said order appointing a receiver should be and hereby is allowed upon the following conditions, to wit: That said appellants execute and file in this court a bond in the sum of two hundred thousand ($200,000) dollars, running to the United States of America as obligee, with good and sufficient security, the sureties to be approved by the District Judge of the Eastern District of Oklahoma, conditioned to pay all costs and damages that may be adjudged against them on account of said appeal, and to account for on the final determination of this matter, to whomsoever shall be adjudged to be entitled thereto, all proceeds derived from the sale of oil and gas produced upon the property in controversy, and to do and perform all things provided, and abide the orders of this court.

"It is further ordered that said appellants Page & Josey shall diligently develop and improve the lands in controversy, so as to preserve the same and

protect them against loss and damage from drainage; that they shall keep a complete and accurate account of all oil and gas produced upon said premises, and of all sales of oil and gas made by them, the price obtained for the same, and the amounts received therefor, and that the appellee, the United States of America, by its duly constituted officers, shall at all reasonable times have access to the books and accounts of appellants, showing the production of oil and gas on said lands, and the sales made and receipts therefor, the expenditures made or expenses incurred, and all matters pertaining to the operation and development of said property, and that said appellee shall have the privilege at all reasonable times of entering upon said property to examine the operations being carried on by the appellants, and the quantities of oil and gas being produced by them, and that upon the final determination of this matter said appellants shall quit and surrender up said property to whomsoever shall be adjudged to be entitled thereto, free and clear of all incumbrances not arising incident to the operation and development of the same.

"It is further ordered that J. W. McLoud, receiver herein, shall turn over to appellants Page & Josey, all oil and property, of whatsoever kind and wheresoever situated, taken or received and held by him under and by virtue of said order appointing a receiver, and that he shall render to said appellants an account of all production of oil and gas on said lamds, and of all sales made by him and proceeds received therefrom during the time that he has held possession of said property, and he shall pay to the appellants Page & Josey all sums of money received by him from the sale of oil and gas from said property, less such part thereof as he shall have expended as necessary expenses in connection with the performance of his duties as receiver during said time, and any bills or accounts incurred by him incident to the operation and development of said property during said time, and which have not been paid shall be taken care of by the appellants, and should it be that said receiver has actually expended moneys in the performance of his duties aforesaid for which he has not been reimbursed, the amounts thereof shall be paid to said receiver by the said appellants from sales of oil or gas from said property.

"It is further ordered that any one of the Circuit Judges of this circuit may, from time to time, require of the appellants an additional bond or bonds, such as in his judgment may be necessary and proper, and approve the same."

The condition of said bond is as follows:

"Whereas, the above-named Charles Page * * * have prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the interlocutory order and decree appointing a receiver and granting an injunction made and entered in the above-entitled cause by the judge of the District Court of the United States in and for the Eastern District of Oklahoma on the 8th day of March, 1915, which said appeal was allowed on the 19th day of March, 1915, and security for costs given, and a citation having issued to said appellees, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Eighth Circuit to be holden at St. Louis, in the state of Missouri, within thirty days from and after the date of said order; that is, before the 8th day of April, 1915, next: Now, therefore, the conditions of this obligation are such that if the above-named principal obligors shall prosecute said appeal to effect and answer all damages and costs, if they shall fail to make good their plea, and shall pay all costs and damages that may be adjudged against them on account of said appeal, and shall account for, on the final determination of this matter, to whomsoever shall be adjudged to be entitled thereto, all proceeds derived from the sale of oil and gas produced upon the property in controversy, and shall do and perform all things provided by the order of this court allowing this supersedeas to the order appealed from, and shall abide the orders of this court, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue."

It is essential to determine what is meant by the term "on final determination of this matter," as used in said bond. In Ex parte Rus-

sell, 80 U. S. (13 Wall.) 664, 20 L. Ed. 622, the Supreme Court with reference to a certain act of Congress said:

"It authorizes the Court of Claims, on behalf of the United States, at any time while a suit is pending before, or on appeal from, said court, or within two years next after the final disposition of such suit, to grant a new trial upon such evidence as shall satisfy the court that the government has been defrauded or wronged. The question is: What is meant by the final disposition of the suit from which the two years of limitation is to date? And it seems to us there is hardly room for a doubt. Looking at the words in their collocation with the previous words, it seems evident that the final determination of the suit has reference to its final determination on appeal (if an appeal is taken),or, if none is taken, then to its final determination in the Court of Claims. The natural meaning of the words leads to the same conclusion. The final determination of a suit is the end of litigation therein. This cannot be said to have arrived as long as an appeal is pending."

In Bellinger v. Thompson et al., 26 Or. 320, 37 Pac. 714, 40 Pac. 229, the court said:

"After a bond has been given, the heir, legatee, or creditor of an estate acquires and has a vested interest in it, and the power of the county court over it ceases, except in a proceeding authorized by law. * * * After the bond has been given, the power of the county court over it ceases, and the heirs, legatees, or creditors for whose security it is given have a vested interest therein, of which they can only be deprived by some proceeding known to the law."

It has been held that the court appointing a trustee has no inherent power, on the giving of a new bond, to discharge the sureties on the old bond. Commonwealth v. Risdon, 4 Brewst. (Pa.) 165; Richter v. Leiby, 101 Wis. 434, 77 N. W. 745.

Fidelity & Deposit Co. of Maryland v. Callahan Bros., Inc., 98 Kan. 547, 158 Pac. 658, involved an action brought for premiums upon a surety bond; it being contended that same were not due, because the bond had been canceled and surety released by the commissioners of the drainage district. In the opinion it is said:

"The attempt to cancel the bond and release the surety was through an arrangement between the drainage district and the defendant, to which the plaintiff was not a party. The contract rights of plaintiff could not be destroyed or affected by the adoption of the resolution, nor by any subsequent agreement entered into without its consent, by defendant and the drainage board. The second reason is that the drainage district was without authority to take any action looking to the release of the bond. The statute which required the giving of the performance bonds reads as follows: 'Every contractor shall be required to give a bond to the board of directors in a sum sufficient to secure the proper execution of his contract and conditioned to pay all damages which shall result to the landholders of the district from failure to perform their contracts or by reason of negligence in the performance of the same.' * * * The statute * * * conferred no power upon it to cancel the bond, or to release the surety before the completion of the contract. * * * If the board could have canceled this bond on the ground that only one-fourth of the work remained to be completed, it could have released it at any time after the bond had been executed. * * * Until the work was finally completed it could not be ascertained whether the landholders of the district would have claims against the contractor for damages. The bond is not for the sole benefit of the drainage district as a corporation, but its purpose is also to secure landholders of the district against damages. Notwithstanding the attempted cancellation and release, the plaintiff's liability

as surety on the bond continued until the completion of the contract, and the release would not have furnished the plaintiff a defense to an action brought by a landholder."

On the 29th day of May, 1918, in this court judgment on the merits of the case was rendered in favor of the defendant Minnie Folk, née Atkins, as against all defendants and complainant in said cause, subject only to the right, title, and interest of the defendants Page and Hanford, claiming by, through, and under her, and forever quieted as against the complainant and all the other defendants in said cause and all those claiming under them—title in favor of the said Minnie Folk, and said Charles Page and Edward C. Hanford, claiming under her. Appeal is being prosecuted from this judgment to the Eighth Circuit Court of Appeals.

The petitioner Page represents to this court that the $900,000 bond was made by a surety company, and the premium thereon is $10,000 per year, and is an unjust burden upon him and the property and royalties owned by him and his associates, and alleges that there is no necessity for a receiver and no legal grounds for the appointment of one in said case, but that the bond was voluntarily made, and has long since served its purpose, and should not further be held and enforced against him and his associates; that he is developing the land for oil and gas, and is solvent, and has been solvent since the beginning of the litigation. He asks that he and the surety be discharged from any further liability on said bond, except as to obligations theretofore incurred.

This bond in its obligations carries within its scope all liabilities that may arise in the final determination of said case. In this proceeding, in view of the terms of the order and conditions of the bond, this court has not power to decrease or limit its obligation. Pending an appeal a receiver may be appointed, or a receivership denied, or a prior receivership vacated in rendering a final judgment by the trial court, as the facts in the case may justify. The obligations of this bond vested with its execution, and can be discharged only by a final determination of the matter. That means after the appeal has been determined.

The motion must be denied.

MICHIGAN RY. CO. v. CITY OF LANSING et al.

(District Court, E. D. Michigan, S. D. May 24, 1919.)

No. 283.

1. EQUITY ⟸363—MOTION TO DISMISS—EFFECT.
   On motion to dismiss a bill in equity, the truth of allegations of fact in the bill is admitted.
2. COURTS ⟸282(1)—FEDERAL COURTS—JURISDICTION.
   The federal court has jurisdition of a bill by a street railway company to restrain a city from enforcing the terms of a franchise ordinance fixing the rates of fare to be charged, where relief was sought on the ground of alleged substantial rights arising under the federal Constitution.

3. CARRIERS ⟸12(9)—RATES—PROVISIONS OF FRANCHISE.
Where a street railway company accepted a franchise, the terms of which fixed the rate of fare to be charged, the company is not entitled to have the municipality enjoined from enforcing the franchise rate on the theory that increased operating costs rendered the rate confiscatory, and that to require it to operate its cars at such rate would deprive it of its property without due process of law, deny it the equal protection of the laws, and force it into financial ruin.

4. CONSTITUTIONAL LAW ⟸135—OBLIGATIONS OF—FRANCHISE—RATES OF FARE—"CONTRACT."
A franchise fixing the rates of fare to be charged, which was duly accepted by a street railway company, is a "contract," and neither the state nor any of its agencies may impair the obligations thereof.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract.]

5. CARRIERS ⟸12(9)—FRANCHISES—RATES OF FARE.
Under Comp. Laws Mich. 1915, § 8551, under which the predecessor of plaintiff street railway company was organized, and which provides that the rates of fare shall be established by agreement between the company and the corporate authorities of the city where the road is located, and shall not be increased without the consent of such authorities, after a city had granted a franchise fixing rates, and adopted a charter under the so-called Home Rule Act which provides that no public utility franchise can be granted, renewed, altered, or amended without the same having been submitted to the electors of the city, *held*, that the city council was without authority to approve even a temporary increase in fares.

6. CARRIERS ⟸12(9)—FRANCHISES—RATES OF FARE.
As Comp. Laws Mich. 1915, § 8551, under which the predecessor of plaintiff street railway company was organized, prohibits the increase of fares without the consent of the corporate authorities, the provision in a charter adopted under the Home Rule Act by a city which had granted a franchise that no charter of any public utility should be amended, altered, or extended without submission of the matter to the electors, did not deprive plaintiff of any rights which it had under the former franchise and statute.

7. CARRIERS ⟸12(9)—FRANCHISES—RATES OF FARE.
Where the council of a city authorized a street railway company to temporarily increase its fares, but the consent was merely a conditional consent, and expressly subject to ratification at any time, it might be revoked by the council, and is no authority for charging increased fares, where such consent was in excess of the powers of the council.

In Equity. Bill by the Michigan Railway Company against the City of Lansing and others. On motion to dismiss the bill. Motion granted.

Warren, Cady, Ladd & Hill, of Detroit, Mich., for plaintiff.
Rhoads & Reynolds, of Lansing, Mich., for defendants.

TUTTLE, District Judge. This cause is before the court on a motion by the defendants to dismiss the bill of complaint for lack of jurisdiction and for lack of equity. The bill was filed by the Michigan Railway Company, a Michigan corporation, which operates, under a franchise from the city of Lansing, Mich., a street railway system in said city, to restrain the latter from enforcing those terms of such franchise which fix the rate of fare to be charged by the plaintiff

on its said street railway system, and for the purpose of obtaining from this court the right to charge a higher rate of fare than that fixed in said franchise.

In 1905 the city of Lansing granted to the predecessor in title of the plaintiff the franchise in question. This franchise provided for a definite rate of fare. At the time of the granting of this franchise, section 20 of the act under which the plaintiff's predecessor was organized, being section 8551, Michigan Compiled Laws of 1915, provided as follows:

"The rates of toll or fare which any street railway company may charge for the transportation of persons or passengers ever their road, shall be established by agreement between such company, and the corporate authorities of the city or village where the road is located, and shall not be increased without consent of such authorities."

In 1909 the Legislature of the state of Michigan provided in the so-called Home Rule Law, that cities such as Lansing might revise or amend their charters. Pub. Acts 1909, No. 279. In 1912 the said city adopted, under said act, a new charter, wherein it is provided that no public utility franchise can be granted, renewed, extended, altered, or amended without the same having been first submitted to the electors of the city and adopted by a three-fifths vote of the voters voting thereon, at a regular or special election.

During the summer of 1918 the plaintiff petitioned the common council of said city for the right to charge an increased rate of fare, for the reason that the war had caused such an increase in the cost of labor and materials as to make it impossible for it to much longer continue to operate its cars at the rate of fare fixed in the aforesaid franchise. Thereupon the said common council approved a temporary increase in such rate of fare, expressly reserving the right to revoke such approval at any time, and further stating that such approval was not to be construed as affecting the rights of the city or of the company in the franchise in question. On November 18, 1918, the city council passed a resolution, rescinding and revoking said approval.

Shortly thereafter plaintiff filed this bill, alleging that if it should be compelled to operate its street cars under the rate of fare fixed in its franchise, it would be deprived of its property without due process of law, as such rate was, under the then existing conditions affecting the cost of labor and material necessary to the operation of its cars, confiscatory and unreasonable, and it would therefore be deprived of its property without due process of law, and it would be denied the equal protection of the laws, contrary to the United States Constitution, and that it would thereby suffer irreparable loss and damage. It alleged that it must have relief from the unreasonable and confiscatory rates prescribed in its franchise, or else face financial ruin. As already stated, the defendants have filed their motion to dismiss such bill.

[1] Admitting, as the court must on this motion, the truth of allegations of facts in the bill to the effect that, owing to the extraordinary financial conditions existing at the time of the filing of the bill,

to hold the plaintiff to the terms of its franchise would be a severe hardship upon it and even cause it financial disaster, is the plaintiff entitled to have its rights under such franchise modified by this court herein, so as to virtually change the terms of its franchise, against the objection of the defendant city?

[2] The contention of the defendants that the court is without jurisdiction in the premises is clearly untenable, and must be overruled, as the plaintiff bases its claim to relief upon alleged substantial rights arising under the United States Constitution, and under a similar situation the same contention was made and overruled in the case of Columbus Railway Power & Light Co. v. City of Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669, decided by the Supreme Court of the United States April 14, 1919.

[3] Nor is it necessary to discuss the interesting question, so ably argued, as to the right of plaintiff to the relief sought under the circumstances set forth in its bill, for the reason that the same question has just been definitely decided by the United States Supreme Court in the case last above cited. In that case the material facts were substantially the same as those in the present case, and the same contention was made by the public utility company against the city as is made by the plaintiff against the defendants herein. The District Court held in favor of the plaintiff, granting the relief prayed. On appeal, however, to the United States Supreme Court, the latter reversed the decree of the lower court, and overruled the contention advanced by the plaintiff here.

That case is applicable and controlling here, and renders it unnecessary and profitless for me to discuss the subject further.

[4] Plaintiff lays considerable stress upon the power of the state through its proper officials to fix reasonable rates for public utilities from time to time, and cites numerous cases in support of its argument along that line. Such argument and cases, however, are inapplicable to the present case, for the reason that here no showing is made that the state, through any of its agencies, has attempted to fix or regulate such rates. Furthermore, the franchise involved here is a contract, and it is elementary that neither the state nor any of its agencies may, by constitutional provisions or by other laws, impair the obligations of such a contract. New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Detroit United Railway v. Michigan, 242 U. S. 238, 37 Sup. Ct. 87, 61 L. Ed. 268; Lansing v. Michigan Power Co., 183 Mich. 400, 150 N. W. 250.

[5-7] One further consideration may be mentioned. It is urged by plaintiff that, as the act under which this franchise was granted contains the provision already quoted prohibiting any increase in the rate of fare without the consent of the "corporate authorities of the city or village where the road is located," and as the common council of Lansing approved a temporary increase in the rate of fare on the plaintiff's street railway system, therefore said council was without authority to revoke such approval, apparently on the ground that such revocation was an attempt to change the terms of the agreement be-

tween itself and the defendant city as modified by the change in fare made in the summer of 1918 with the consent of both parties. I am satisfied that this contention is without merit for two reasons:

In the first place, it seems plain that under the provision of the revised charter previously alluded to, prohibiting the grant, renewal, extension, alteration, or amendment of any public utility franchise, unless adopted by the voters of the city in the manner prescribed in said provision, the common council, after the adoption of such charter, was without power to amend the franchise in question, even temporarily in the manner in which it attempted to do, by what it called its "approval" to a temporary change therein. I fail to see wherein this provision of the revised charter impairs the obligation of any contract then existing. It merely changed the method of renewing, extending, altering or amending public utility franchises, like that involved herein.

I am unable to perceive wherein any rights granted to plaintiff by the statute relied on by it, prohibiting the increase of rates of fare without consent of the "corporate authorities," are taken away by the section of the charter just quoted. The statute was not an enlargement of, but rather a limitation upon, the rights of companies like the plaintiff. It prevented such a company from increasing its rates without the consent of such authorities. The precise mode of giving such consent and the officials having authority in the premises were obviously not within the contemplation of the Legislature. The section of the charter referred to does not in any way purport to amend or abrogate such statute, but merely prescribes the mode in which, and the authorities by whom, such consent shall be given.

Aside, however, from the foregoing consideration, the consent of the common council obtained by the plaintiff to the temporary increase of its fares was, on its face, merely a conditional consent, and expressly subject to revocation at any time. So far, therefore, as plaintiff invokes such consent, it invokes merely a conditional consent, revocable at will, and cannot complain of the revocation, the right to which was expressly attached, by the common council, to such conditional consent.

The motion to dismiss the bill on the ground that upon its face it shows want of equity must be granted, and a decree will be entered to that effect.

STANDARD TRANSP. CO. v. GREAT LAKES TOWING CO.

(District Court, W. D. New York. September 9, 1919.)

1. TOWAGE ⟸11(1)—IN ABSENCE OF GUARANTY ONLY ORDINARY CARE REQUIRED.
   In the absence of insurance or guaranty of safe delivery in the contract, the tug is required to exercise only ordinary care in the prosecution of the voyage, and to provide the essential equipment to that end.
2. TOWAGE ⟸11(9)—TUG NOT REQUIRED TO BE ABLE TO WITHSTAND EVERY PERIL.
   It is sufficient if a tug is of sufficient power and is built and equipped to perform the service in normal weather conditions, and she is not required to be able to withstand every peril, nor to be capable of rescuing her tow in all weather.
3. TOWAGE ⟸11(9)—TUG NOT IN FAULT IN LEAVING TOW AT ANCHOR IN UNPRECEDENTED GALE.
   A tug *held* not in fault for injury to a barge, which she was towing down Lake Ontario and cast loose and left at anchor during an unprecedented gale, which threatened to put out her fires and wholly disable her.

In Admiralty. Suit by the Standard Transportation Company against the Great Lakes Towing Company. Decree for respondent.

Duncan & Mount, of New York City, and E. H. Gidley, of Buffalo, N. Y. (O. D. Duncan, of Cleveland, Ohio, and Courtland Palmer and Martin Carey, both of New York City, of counsel), for libelant.

Kelley & Cottrell, of Cleveland, Ohio, for respondent.

HAZEL, District Judge. On November 19, 1916, the steam tug T. C. Lutz, in agreement with the respondent owner of the barge S. T. Co. No. 82, towed the latter from Cleveland, Ohio, to Montreal, Canada, but on Lake Ontario a mishap occurred which is the subject of this controversy. It appears that after passing through the Welland Canal and arriving at Port Dalhousie the tug and barge proceeded out on the lake in fair weather, with a light wind from the south and no sea running. No storm signal was displayed, the weather report stating, "Moderate to fresh easterly winds tomorrow," which did not indicate a change of weather of such character as to require the tug, in the exercise of ordinary care, to halt and remain in shelter. The Frederick E. Ives (D. C.) 25 Fed. 447.

On the following day thick weather and approaching darkness caused the master of the tug to anchor the tow for the night on the north side of Main Duck Island in Lake Ontario. He left the anchorage at 7 o'clock on the morning of November 24th for the channel at the head of the St. Lawrence river. The wind was freshening from the southwest, veering to west-southwest, and at 8:30 o'clock was blowing gradually westward with increasing velocity to a gale of approximately 70 miles an hour. The sea was rising, the swell increasing so that it was difficult to keep the barge, which was running light, in the wake of the towing tug. She sheered continuously on the starboard quarter of the tug, and drew her down at times to the

level of the water, making it necessary for the tug to come around in the wind to avoid capsizing. The waves now and then dashed over the tug, causing her to labor heavily in the sea, and water found its way through the doors into the engine room.

Although the tug worked earnestly to keep the barge from making leeway and from drifting astern and toward Grenadier Island, she did not succeed. As she was proceeding ahead on Grenadier Island, the wind increased in velocity, changing to westward, and the swell of the sea became higher and more menacing, so that her master decided to alter the course of the tow under a shifting wind from southwest to west, and to make for shelter in the St. Lawrence river, with all possible speed. To accomplish this, however, it was necessary to head the tug northeast with the wind abeam—a maneuver that caused the tow to fall off even more to leeward. The master of the barge became anxious, and from soundings taken by him ascertained that the barge was dangerously close to the shoal off Grenadier Island. The tug labored hard in the gale for nearly two hours after leaving Main Duck Island, and when she passed the breakers at Grenadier Island, her master believed she was no longer dependable, that he could not reach the St. Lawrence river with the tow, and that the safety of the tug and crew required abandoning the barge. He thereupon signaled her to drop anchor. The barge coded a distress signal, but he nevertheless released the hawser, and the barge cast anchor, drifted a little on her anchor chains, and brought up over the breakers, where she rode heavily on the waves and pounded the bottom, with the result that her anchor chains broke and she drifted and stranded in a sheltering cove nearby. Afterwards, on November 29th, in calm weather, she was brought into deep water by the respondent tug, which had reached shelter in safety, and without further mishap was delivered at her destination.

The libel alleges negligence in the following respects: That the tow was not skillfully navigated; that the barge was allowed to drift toward the lee shore, when she should have been taken to a safe anchorage; that the tug should not have cast her off, and should have stood by; while the answer asserts in defense that the severe gale alone was responsible for the disaster, the main excuse for the abandonment of the barge being that the water came into the engine room and wet the coal, seriously interfering with keeping up steam; that the tug could not have returned to give assistance to the barge after the latter anchored, because of her inability to go close enough to take the barge's hawser; that in the opinion of the master of the tug the barge was in a reasonably safe position after she cast anchor; and, furthermore, that in all things good judgment was exercised.

[1] 1. The first contention by libelant is that the towage agreement was to tow the barge safely to Montreal; but I do not find any evidence of a special agreement guaranteeing safe towage. There was nothing in the agreement or surrounding circumstances to indicate that the respondent company obligated itself to insure the safe arrival of the barge at her port of destination. In the absence of such an insurance or guaranty, the respondent was required to exercise or-

dinary care only in the prosecution of the voyage, and to provide the essential equipment to that end. The use of the words "special tug," in the letter in evidence proposing the agreement, implied merely a towing service by the tug for the barge; and, since libelant acquiesced in the use of the new tug Lutz, the presumption is warranted that she was regarded as seaworthy and amply equipped for the undertaking in ordinary weather.

[2] 2. The evidence shows that the new Lutz was of sufficient power, and was built and equipped to perform under normal weather conditions the task assigned to her. The doors to the tughouse, true enough, were not water-tight; they were not double, nor did they contain gaskets; but they were of the usual construction in tugs of her type in use on the Great Lakes and tributary waters. In view of the severity of the weather and the strain on her doors, it is not surprising that they did not wholly resist the flow of waters against them. The tug was not required to withstand every peril, nor to be capable of rescuing her tow in all weather. The Allie & Evie (D. C.) 24 Fed. 749.

3. It is claimed that the coal remaining in the tug's bunkers was insufficient for completing the trip, and that on that account the tug quitted the barge; but this claim is not sustained. The established weather conditions and the evidence of Capt. Ryan show that there existed just grounds for fearing that the water in the fire hold would prevent the fireman from clearing the fires and keeping up steam in the boilers.

[3] 4. It was not practicable for the tug with tow to return to Port Dalhousie, since the wind did not portend danger until after she had left the anchorage of Main Duck Island, and had she then ventured to turn back she would have had to go against the wind, a hazardous expedient, while in continuing on her course she was going away from it. Hence it is not believed that fault is attributable to the tug for her failure to turn back, or for continuing on her course away from Main Duck Island.

5. There was conflicting testimony as to whether the tug failed to allow sufficiently for leeway in view of the storm; but the testimony of both Capt. Ryan of the tug and Capt. Sohrensen of the barge is in apparent accord with regard to the proper heading of the tug directly on Grenadier Island (and not farther south on Fox Island) soon after leaving Main Duck Island, and continuing until she changed her course, which brought the wind slightly over her port quarter. The witness Henderson, who was plowing on the south shore of Grenadier Island, testified that he observed that the tug was heading in the direction of Fox Island (out of her course); but I think he was mistaken, and did not correctly perceive her direction.

6. The tug could not safely seek refuge at Sackett's Harbor, as libelant contended that she should have done, because of the increasing velocity of the wind, which came nearly astern right after the tow left Main Duck Island.

There is abundant evidence to show that the situation owing to the severity of the storm, was fraught with peril to both vessels, and

that no blame can justly be attributed to the master of the tug for leaving the barge after signaling her to drop anchor in what he considered was a reasonably safe place. He was a competent pilot, and, even though under the circumstances he erred in leaving the vessel in his charge, his reasons for doing so, according to the proof, were based on substantial grounds, and the propriety of his action, as said in The James P. Donaldson (D. C.) 19 Fed. 264, must not be determined by the result. That the gale at the time the tow was abandoned was regarded as unprecedented was testified to, not only by witnesses who participated in the enterprise, but also by disinterested observers of weather conditions at Cape Vincent, not far distant (about 8 miles) from where the barge was left. The various allegations of negligence have been carefully examined by me, but in my opinion the evidence as to each and every one preponderatingly exonerates the tug and her master from fault for the mishap.

The libel is dismissed, with costs.

MANCOURT-WINTERS COAL CO. v. ST. CLAIR PAPER CO.

(District Court, E. D. Michigan, S. D. February 24, 1919.)

No. 230.

1. CORPORATIONS ⟸472—BONDS—ISSUANCE—CONDITION PRECEDENT—NONPERFORMANCE.

   Where a paper company delivered its bonds to a coal company, either as payment or as collateral security for part of its open account for coal, on condition and in consideration of the coal company's promise that the account should be increased by a reasonable amount, the carrying out of such arrangement by the coal company by shipping further coal was a condition precedent to its right to retain the bonds as payment or security, and, the condition not having been fulfilled, the coal company is not entitled to the bonds or their value.

2. CORPORATIONS ⟸474—BONDS—TOTAL FAILURE OF CONSIDERATION—FAILURE IN FACT PARTIAL.

   Where a paper company gave its bonds to a coal company as payment or collateral security for a portion of its open account for coal, on consideration that the account should be increased and further coal shipped to a reasonable amount, though such agreement was only part consideration for the delivery of the bonds, the other part having been the past indebtedness, the failure of the coal company to perform the condition and deliver further coal operated in law as a total failure of consideration; the portion of the consideration unperformed going to a vital part of the contract and affecting its substance.

3. EQUITY ⟸71(1)—LACHES—MERE DELAY.

   Delay alone, even if unreasonable, does not constitute laches.

In Equity. Suit by the Mancourt-Winters Coal Company against the St. Clair Paper Company. On exceptions to the report of the master, disallowing plaintiff's claim against the receiver and bondholders of defendant company. Exceptions overruled, and order directed confirming the master's report.

Walters & Hicks, of Detroit, Mich., for claimant.

Lewis & Kelsey, of New York City, for respondent.

TUTTLE, District Judge. This matter comes before the court on exceptions to the report of the standing master in chancery, disallowing the claim of the Mancourt-Winters Coal Company against the receiver and bondholders of the St. Clair Paper Company for the proceeds of certain bonds of the St. Clair Paper Company delivered to the claimant under circumstances in dispute between the parties. The master found that claimant was not entitled to the proceeds of these bonds, and the latter has filed exceptions to the master's report.

Findings of fact are set forth in said report, and need not be set out in detail here. In a general way they may be summarized, as so found, as follows: The St. Clair Paper Company, before it went into the hands of the receiver herein, was in dire need of coal with which to operate its plant. It owed claimant over $13,000 for coal previously purchased by it from the latter. It desired to purchase from claimant additional coal on time, and was anxious to obtain a further line of credit for that purpose. Claimant refused to increase the amount of its open account with the paper company unless a payment or a satisfactory arrangement was made concerning the account already existing. The paper company had in its hands $6,500 worth of bonds, duly executed and delivered by it to a trustee, and available for use in meeting its obligations. The paper company, through its general manager, one Andrews, offered to deliver these bonds to the claimant, through its president, one Winters, as collateral security for the entire account, if the claimant would increase the indebtedness then existing and would ship more coal upon this account as thus increased. It was arranged that the bonds were to be sent to claimant, and if the latter found that it could use these bonds as part payment or security, it would do so and would increase the account by shipping more coal on credit. Under this oral agreement the bonds were sent by mail to claimant. Immediately on receipt of the bonds claimant notified the paper company that banks apparently did not consider them of any value, and that it could not then see its "way clear to increase" its account. At the same time claimant shipped some coal with bill of lading attached, but never thereafter shipped any coal on credit. It retained, however, the bonds, and seeks to recover the amount thereof in this proceeding.

Claimant strenuously criticizes the findings and conclusions of the master, and insists that these bonds were not delivered upon any such condition as that just mentioned, but were unconditionally delivered as collateral security for the past-due indebtedness only, and that no agreement was made that further shipments of coal were to be made on credit or the amount of this open account increased. The master did not find that the bonds were delivered as collateral security only for a future account and for coal to be delivered after the transaction in question, as counsel for claimant seems to contend, but found that the delivery of the bonds was as security for the entire account, and then only if it should be increased as stated. Without discussing or considering the question as to the conclusiveness or effect of findings of fact of a master under such circumstances, I deem it sufficient to state that, after a careful examination of the record and of the care-

ful and able arguments of counsel, I find no reason to disturb the findings of the master in the present case.

[1] The transaction on which this claim is based amounted legally to a contract whereby the paper company delivered to the claimant these bonds, either as payment or as collateral security for a portion of its open account with the latter, on condition, and in consideration of the promise, that such account should be increased by at least a reasonable amount, so that the paper company could obtain the coal which it so badly needed, but for which it was unable to pay in cash. Considering the financial condition of the company and its pressing need for coal, it seems clear that the object of the delivery of these bonds was as I have pointed out. It therefore follows that the carrying out of this arrangement by the claimant was a condition precedent to the right of claimant to retain the bonds as payment or collateral security, and that, such condition not having been fulfilled, the latter is not entitled to such bonds or the value thereof here. Pugh v. Fairmount Gold & Silver Mining Co., 112 U. S. 238, 5 Sup. Ct. 131, 28 L. Ed. 684; World's Fair Mining Co. v. Powers, 224 U. S. 173, 32 Sup. Ct. 453, 56 L. Ed. 717; Burpee v. Guggenheim (D. C.) 226 Fed. 214; 13 Corpus Juris, 564.

[2] It is further urged by claimant that, conceding that it was agreed at the time of the delivery of these bonds that the claimant would extend credit and ship this needed coal on open account, such an agreement was only a part of the consideration for the contract under which the delivery was made, the other part of such consideration being the past indebtedness for which such bonds were to be collateral security, and that therefore any failure of consideration was partial only, and does not constitute grounds for rescinding this contract. The consideration under a contract may, of course, consist of several different elements. If, however, the failure of even a portion of the consideration of a contract goes to a vital part thereof and affects the substance of the consideration it may operate in law as a total failure of consideration. Kauffman v. Raeder, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; Oscar Barnett Foundry Co. v. Crowe, 219 Fed. 450, 135 C. C. A. 162; Elliott on Contracts, vol. 3, § 2049. As, therefore, the breach of this contract was in a matter vital to its object, and the essential part of its consideration failed, it falls within the rule just referred to, and the arguments and authorities cited by counsel for claimant are, in my opinion, not applicable.

[3] Claimant also contends that the paper company and its receiver were guilty of such delay in demanding the return of these bonds as to deprive them of the right to now contest its claim to such bonds or the proceeds thereof. Here, again, I find nothing in the record which would justify me in disturbing the findings of the master, which explained this delay and showed the absence of prejudice to claimant resulting therefrom. It is, of course, elementary that delay alone, even if unreasonable, does not constitute laches. I am satisfied that, under all the circumstances, claimant cannot complain of the delay on the part of the paper company and its receiver in asserting, earlier than they did, their rights in this connection.

After a careful examination and consideration of the exceptions and arguments presented by the claimant, I have reached the conclusion that all of such exceptions should be overruled, and an order will be entered confirming the report of the master.

UNITED STATES v. ÆTNA LIFE INS. CO.

(District Court, D. Connecticut. August 13, 1919.)

INTERNAL REVENUE ⟸9—EXCISE TAX ON CORPORATIONS—DEDUCTIONS FROM GROSS INCOME—TAXES PAID.

Under Corporation Excise Tax Act, § 38 (4), a corporation which, as stockholder, receives dividends from another corporation, is not entitled to deduct from its gross income taxes paid on its stock in its behalf by the latter corporation, where it did not include the amount of such taxes in its return of gross income.

At Law. Action by the United States against the Ætna Life Insurance Company. Judgment for the United States.

Allan K. Smith, Asst. U. S. Atty., of Hartford, Conn.

Lewis Sperry and Lucius F. Robinson, both of Hartford, Conn., for defendant.

GARVIN, District Judge. This action is submitted to the court for determination upon an agreed state of facts. It appears that the defendant, an insurance company incorporated under the laws of the state of Connecticut, was subject to pay annually during the years 1909, 1910, and 1911, with respect to the carrying on and doing of its business, the excise tax imposed by section 38 of the Act of Congress approved August 5, 1909 (36 Stat. 111, c. 6), and was subject in all respects to the provisions of that section.

On or before March 1st in each of these years the defendant duly made its return to the collector of internal revenue in the proper district in the form prescribed by the Commissioner of Internal Revenue, as required by said section, which returns showed that the net income of the defendant for each of these three years exceeded $5,000. On or about June 1st of the years 1910, 1911, and 1912 an excise tax under said act was duly assessed against the defendant for the years ending December 31, 1909, 1910, and 1911 respectively; said tax being 1 per cent. on the net income of the defendant. The tax was in each case paid as assessed.

When the defendant filed its return, showing its net income for the year ending December 31, 1909, it deducted $479,625 as "Taxes paid during the year ending December 31, 1909, imposed under authority of the United States or states and territories thereof." Of this sum, it is conceded that $409,967.36 was lawfully deducted. It is claimed by the plaintiff that defendant should also have paid a tax of 1 per cent. on the remainder, $69,657.64; i. e., $696.56. Of the latter sum defendant admits liability to the extent of $227.62, leav-

ing $468.96 in dispute. The amount admitted for 1910 is $343.17; $413.41 being in dispute. For 1911, $543.28 is admitted; $527.60 being in dispute. These sums in dispute represent taxes paid by various corporations upon shares of their stock owned by defendant, which taxes were imposed during the several years 1909, 1910, and 1911 by the state of Connecticut under chapter 54 of the Public Acts of 1905.

The deductions allowed a corporation by the act of August 5, 1909, include "all sums paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein." The taxes in question were not paid by the defendant, but in its behalf by other corporations.

While it is true that "a statute providing for the imposition of taxes is to be strictly construed, and all reasonable doubts in respect thereto resolved against the government and in favor of the citizen" (Mutual Benefit Life Ins. Co. v. Herold [D. C.] 198 Fed. 199, and cases therein cited), no doubtful meaning is here involved. The language of the act is clear and explicit. The allowable deductions in the case of a domestic corporation are plainly set forth:

"Deductions Allowed from Gross Income in the Case of a Domestic Corporation.

"Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources:

"First, all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property;

"Second, all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds;

"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, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits;

"Fourth, all sums paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof, or imposed by the government of any foreign country as a condition to carry on business therein;

"Fifth, all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed."

If it had been the intention to permit such a deduction as defendant urges, the act would have provided that there be included "all sums paid by it or in its behalf within the year. * * *"

Defendant relies upon a decision by the Treasury Department rendered March 24, 1916, reading in part:

"You are advised that, when a corporation pays taxes for its stockholders, such payments represent a portion of the earnings of the corporation, which, instead of being distributed to the stockholders in the form of dividends, is used in payment of taxes which the stockholders individually owe. Should you, instead of paying the taxes, pay over this sum to the stockholders, the stockholders would be required to return the amount as income received, and would then be entitled to deduct the same under the item of taxes paid during the year. Under the Excise Tax Law a stockholder which is a corporation is entitled to deduct from gross income all dividends received from another corporation subject to tax, and therefore is entitled to deduct as a dividend that portion of the earnings of the corporation in which it owns stock, which is represented by the stockholder's tax. For the years 1909 to 1912, inclusive, therefore, the corporation which is a stockholder will be entitled to an additional deduction on account of the taxes paid for it by the corporation issuing the stock, for the reason that it produces the same result as if the corporation owning the stock was required to return as income for these years the full amount of the dividend, including that portion of the dividend diverted to pay tax, and then took credit as a deduction for this entire amount under the item of dividends received from other corporations, and also took credit for the amount of taxes paid under that item. Under the Income Tax Law, however, a corporation is not entitled to deduct from gross income dividends received from other corporations. Consequently, if it claims the benefit of deducting from gross income taxes paid for it by another corporation, it must include such amount in income, as the deduction counterbalances the receipt. As you, the stockholder in this case, did not return as income the amount in question, you are not entitled under the income tax law to deduct the same. The claim on account of the tax assessed for the year 1913 is accordingly rejected, and you will find inclosed notice of demand for payment of this tax.

"The claim for the abatement of the additional tax assessed for 1912 has received favorable consideration for the reason above stated."

This decision points out that a corporation, making a claim such as is advanced by defendant, must have included in its return as income the taxes which were paid in its behalf by other corporations. No such return was made by defendant herein; therefore the decision is not in point, even if it were controlling on the court.

There was no refusal nor neglect to make a return within the meaning of the act, and therefore no penalty will be allowed.

Judgment for plaintiff for $2,524.04, with interest from June 9, 1915

CHALONER v. NEW YORK EVENING POST CO.

(District Court, S. D. New York. April 28, 1919.)

1. INSANE PERSONS ⟸26—CAPACITY TO SUE—ADJUDICATION OF INCOMPETENCY.

Under Code Civ. Proc. N. Y. § 55, providing that a party may prosecute or defend a civil action, "unless he has been judicially declared incompetent to manage his affairs," the disqualification is not the judicial declaration, but actual mental incapacity, of which the decree is but evidence, and its effect as such may be neutralized by a subsequent adjudication of competency in another state, of which the party was then a resident.

2. INSANE PERSONS ⟸87—CAPACITY TO SUE—CONFLICTING ADJUDICATIONS AS TO COMPETENCY.

A plaintiff *held* qualified to maintain an action for libel in a federal court in New York, although he had been declared incompetent by a court

of that state and a committee appointed for his property, where at the time of the alleged libel he was a resident of Virginia, where he had been judicially adjudged competent.

At Law. Action by John R. Chaloner against the New York Evening Post Company. On plea of plaintiff's incapacity to sue. Denied.

Frederick A. Ware, of New York City, for plaintiff.

Sherry & Morgan, of New York City, for defendant.

DIETRICH, District Judge. From the complaint, which was filed May 29, 1909, it appears that the alleged defamatory matter was published on March 18, 1909, and impliedly charged the plaintiff with the commission of a felony in the state of Virginia.

After sundry proceedings and numerous delays, an order was made directing that the affirmative defense set up in the answer, to the effect that plaintiff is without capacity to maintain the action, be first tried; and accordingly, a reply having been filed and a trial by jury expressly waived, that issue is now for consideration upon the pleadings, together with documentary evidence, consisting of the records of three judicial proceedings, one had in the state of New York, one in Virginia, and the other in North Carolina.

From the New York record it appears that on June 23, 1899, the plaintiff was by a court of competent jurisdiction adjudged to be of unsound mind, and pursuant to the statutes of the state of New York a committee of his person and property was appointed. This order or decree is still in effect, and the committee so appointed, or his successor in office, still continues to act. Certain details both of the New York proceedings and of the pertinent New York statutes may be supplied by reference to Chaloner v. Sherman, 242 U. S. 455, 37 Sup. Ct. 136, 61 L. Ed. 427.

Closely following the entry of the original order, the plaintiff escaped from the custody of the New York officers, and ever since has resided in Virginia and North Carolina. Soon after he came into Virginia, a citizen of that state instituted a proceeding in the county court of Albemarle county for the purpose of having a judicial inquisition touching his competency to manage his property, and the propriety of his being at large. After a hearing the court found that he was "a sane man, capable of taking care of his person and of managing his estate," and that there was "no occasion for the appointment of a committee of his person and estate," and accordingly, on November 28, 1900, ordered a dismissal of the petition.

Subsequently the question of the plaintiff's competency was incidentally raised in certain litigation in North Carolina to which he was a party, but the proceedings were of such a character that they are not thought to be highly material to the present issue.

Upon this state of facts, has the plaintiff the capacity to maintain this action? It is to be conceded that the competency of parties is a question of procedure, and that the federal courts generally follow the local state practice. Section 914, R. S. U. S. (Comp. St. § 1537); Rose's Code of Federal Procedure, § 902, A.

[1] By section 55 of the New York Code of Civil Procedure, it is provided that—

"A party to a civil action, who is of full age, may prosecute or defend the same in person or by attorney, at his election, unless he has been judicially declared to be incompetent to manage his affairs."

The controlling inquiry, therefore, relates to the meaning and application of this statute. The provision was doubtless intended for the protection of litigants who are in fact mentally incapable of managing their affairs. The gist of the disqualification is not the judicial declaration, but the actual mental incapacity of the litigant. Exclusive and conclusive though it may be, the decree is, after all, but evidence of, and does not constitute, the disqualification. So here, in the absence of countervailing evidence of equal dignity, the New York order should be accepted as controlling, and as conclusively establishing the plaintiff's present mental status. But to meet this situation the plaintiff produces a decree of a Virginia court of competent jurisdiction declaring the plaintiff sane as of a date subsequent to the New York decree.

For the purposes of this suit, therefore, we may properly recognize this later judicial declaration as competent evidence of the plaintiff's mental status, and as neutralizing the probative effect of the New York decree. In this view we do not deny full faith and credit to the New York proceedings, nor do we question the power of the New York court and its officers to execute its orders. The suit in no wise relates to the custody of the plaintiff's person or to property within the jurisdiction and control of the committee.

[2] If, as for present purpose we must assume, the averments of the complaint are true, while the plaintiff was in a jurisdiction in which his competency had been judicially declared, the defendant charged him with the commission of a heinous crime. He exhibits a transitory cause of action accruing to him where and when he was deemed to be sane and competent. Could he have found the defendant in Virginia, his right to maintain the action there would probably have gone unchallenged.

While perhaps, strictly speaking, the consideration is somewhat aside from the question of capacity, if the plaintiff were seeking to vindicate a right relating to property within the custody and control of the committee, the conflict of authority thus presented might give rise to serious complications; but such is not the present case. Upon just what theory the committee could prosecute this suit for the plaintiff is not clear. But, however that may be, in waging the claim in his own right the plaintiff in no wise puts himself in conflict with the New York court or its officers, for, in so far as the record discloses, it is a matter with which they have not concerned themselves.

The precise question has apparently not been passed upon in any of the preliminary proceedings in the case or any related proceedings; but the view here taken seems to have a measure of support in the order made by Judge Coxe overruling the demurrer to the complaint, and in the decision of the Circuit Court of Appeals in Chanler

v. Sherman, 162 Fed. 19, 88 C. C. A. 673, 22 L. R. A. (N. S.) 992, and is not thought to be out of harmony with Chaloner v. Sherman, 242 U. S. 455, 37 Sup. Ct. 136, 61 L. Ed. 427, or Gasquet v. Fenner, 247 U. S. 16, 38 Sup. Ct. 416, 62 L. Ed. 956, the two decisions chiefly relied upon by the defendant.

Accordingly, for the reasons given, the plea will be denied.

In re OHL.

(District Court, N. D. New York. August 8, 1919.)

BANKRUPTCY ⇐438—SURPLUS ASSETS OF DECEASED BANKRUPT.

Personal assets of a deceased bankrupt, remaining after payment of proved claims, expenses, and allowances, are payable to his executor or administrator.

In Bankruptcy. In the matter of J. August Ohl, bankrupt. On review of order of referee. Reversed in part.

Review of order of the referee in bankruptcy, adjudging that the balance of the bankrupt's estate consisting of personal property only, after payment of allowances and expenses, no creditor or creditors having filed or proved his claims, although the schedules show something like $30,000 of indebtedness, "be paid to the heirs at law of J. August Ohl, bankrupt, or their representatives," instead of the administrator of the estate of said Ohl, the bankrupt herein; Ohl having died during the pendency of the proceedings and prior to the final meeting of creditors and the settlement of the estate in bankruptcy.

P. H. Fitzgerald, of Utica, N. Y., for trustee.

H. C. Sholes, of Utica, N. Y., for administrator of bankrupt.

RAY, District Judge. The facts in this case are that the bankrupt, J. August Ohl, was owing various persons sums aggregating, as shown by the schedules, about $30,000. He had an insurance on his life, and the policy showed a life surrender value of about $500. This policy, on the death of J. August Ohl, was payable to his wife in case she survived him, but in case she did not it was payable to the executors, administrators, or assigns of Ohl. Ohl's wife did not survive him, and on his death, which occurred during the pendency of the bankruptcy proceedings, the company paid the cash surrender value of the policy to the trustee in bankruptcy. The balance of this fund, and there is no other, goes either to the administrator of the estate of J. August Ohl, to be duly administered as a part of his estate, or to his next of kin direct, inasmuch as no claim or claims have been filed or proved against the bankrupt estate, and there is a remainder undisposed of, after payment of all the expenses of the bankruptcy proceedings, commissions, and allowances.

As I understand the law, when a person goes into or is forced into bankruptcy, and adjudication follows, as here, and a trustee is appoint-

ed, and all proved and allowed claims and all expenses and commissions are paid from the assets of the estate, the balance of the estate, if any, goes back to the bankrupt, and is his property, to be disposed of by him as his own.

In this case there was a trustee and an estate in his hands, but no creditor or creditors have proved a claim, and all expenses and commissions have been paid and allowances made. There can be no distribution in bankruptcy to creditors, as no creditor has proved a claim, so as to be entitled to share in distribution. J. August Ohl died during the pendency of the proceedings, and his administrator, duly appointed, was substituted or brought in, and represents and succeeds to the interest and rights of the bankrupt in the property in the hands of such trustee. This administrator also represents the creditors, if any, of J. August Ohl, where debts, if any, were created after the filing of the petition in bankruptcy. There is no evidence there are or are not any such creditors, but the ordinary and legal method of disposing of the estate of a deceased person is, in case there be no will, to have an administrator appointed by the proper Surrogate's Court, notice to creditors published, and then after payment of debts, if any, and payment of the expenses of administration, the balance is decreed paid to the widow, if any, and next of kin of the deceased.

An administrator of the estate of a deceased person, duly appointed, is entitled to his personal property, and to administer it as against all the world, unless by common consent it has been divided and distributed to those entitled thereto prior to the appointment of the administrator. The United States District Court in bankruptcy has no power or jurisdiction to administer the part of the estate of the bankrupt that reverts to him or to his estate after payment of proved claims and expenses, etc., of the bankruptcy proceedings, except direct its payment to the party entitled thereto. Possession of the fund under and by virtue of the Bankruptcy Act confers no such power or jurisdiction to administer the estate. There is no provision in the law conferring on the court in bankruptcy any such power. It is not infrequent that the estate of an intestate is administered by the widow and next of kin, they being of full age and sound mind, without the appointment and intervention of an administrator. The legality of this cannot be questioned, and, assuming that there are no unpaid creditors, an administrator subsequently appointed, if appointed, could not collect in the estate from the widow and next of kin for the mere sake of again dividing it to those entitled.

But the court of bankruptcy represents neither the widow, next of kin of the deceased bankrupt, nor the administrator, nor does the trustee in bankruptcy. True, the trustee is to dispose of the balance of the bankrupt estate after payment of all expenses, allowances, commissions, and proved claims, on the order of the bankruptcy court: but any order of that court, or of its referee, is erroneous, which directs payment of such balance to the next of kin of the deceased bankrupt, when, as here, there was and is a duly appointed administrator appearing and demanding it. This administrator is

entitled to receive and administer it in due course, and apply it under the direction and decree of the Surrogate's Court which has jurisdiction of all such matters. This balance in this case is personal property, not real estate. After satisfying the claim of the widow, if any, and expenses of administration and the payment of debts, the balance goes to the next of kin under the statute of distribution in cases of intestacy. The expenses of due administration cannot be ignored, nor can the rights of creditors who become such after the petition in bankruptcy was filed. The order made assumes the money received by the trustee in bankruptcy on the policy of life insurance was payable to the heirs at law of J. August Ohl, which was not the fact, and that the bankruptcy court has the right to ignore the Surrogate's Court and assume to distribute the estate of Ohl, not required for purposes of administration under the Bankruptcy Act, which it cannot do.

Section 66b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [Comp. St. § 9650]) clearly contemplates payment of any balance of the estate not claimed by creditors to the bankrupt, if living, and, if not living, to his executor or administrator. In Johnson v. Norris, 190 Fed. 459, 462, 111 C. C. A. 291, L. R. A. 1915B, 884, attention is called to the fact that the Bankruptcy Act makes no provision for the payment of the balance of an estate not required for expenses and credits to any one, but that it belongs as matter of course to the bankrupt. In Re John Osborn's Sons & Co., Inc., 177 Fed. 184, 185, 100 C. C. A. 392, 393, 29 L. R. A. (N. S.) 887, C. C. A. 2d Circuit, the court said:

"The creditors are not owners of the bankrupt's assets; on the contrary, the trustee owns them in trust to pay the bankrupt's debts and any surplus to the bankrupt."

In fact, an administrator is the only one entitled to ask, demand, and collect money due the estate of a deceased person.

The order of the referee made April 12, 1919, so far as it makes allowances, is affirmed and approved, but that part of such order which directs that the funds remaining after paying such allowances to the trustee, $20, to P. H. Fitzgerald, his attorney, $150, and to E. J. Lewis, stenographer, $4.50, "be paid to the heirs at law of J. August Ohl, bankrupt, or their representatives," is reversed, and there will be an order that, after payment of such sums of $20, $150, and $4.50, the allowances mentioned, the balance be paid by the trustee in bankruptcy of the estate of J. August Ohl to the administrator of the estate of said J. August Ohl.

Ordered accordingly.

In re MUTUAL MOTORS CO.

Petition of FIRESTONE TIRE & RUBBER CO.

(District Court, E. D. Michigan, S. D. July 22, 1919.)

No. 3815.

1. SALES ⊜55—CONTRACTS—CONSTRUCTION—LAW GOVERNING.
The construction and effect of a contract under which property was delivered to a bankrupt is governed by the law of the state where he resided, was engaged in business, and received the property.

2. BANKRUPTCY ⊜184(2)—"CONDITIONAL SALE" CONTRACT.
A contract under which claimant delivered tires and rims to bankrupt, an automobile manufacturer, to remain claimant's property until assembled in cars and sold, and, when paid for, the agreed price to be held in a special account for claimant, was one of "conditional sale," within Pub. Acts Mich. 1915, No. 64, and unless recorded is void as against bankrupt's trustee, having the rights of a creditor under Bankruptcy Act, § 47a(2), as amended by Act June 25, 1910, § 8 (Comp. St. § 9631).
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conditional Sale.]

In Bankruptcy. In the matter of the Mutual Motors Company, bankrupt. On review of order of referee denying petition of the Firestone Tire & Rubber Company for reclamation of property. Affirmed.

Trumbull & Bisbee, of Jackson, Mich., for petitioner.
Warren, Cady, Ladd & Hill, of Detroit, Mich., for trustee.

TUTTLE, District Judge. This is a petition to review an order of one of the referees in bankruptcy for this district, denying a petition filed by the petitioner herein for the reclamation of certain automobile tires and rims furnished by petitioner to the bankrupt, and in the possession of the latter at the time of the filing of the petition in bankruptcy, under an arrangement claimed by said petitioner to constitute a conditional sale, reserving title to the said tires until resale thereof by the bankrupt. The claim of the petitioner with reference to the agreement, is thus stated in its petition for reclamation:

"Said tires and rims were not sold outright to said bankrupt, but were shipped to its factory on consignment, with the mutual understanding and agreement that the same were to be held by said Mutual Motors in trust for this petitioner, but with the privilege on the part of said bankrupt of assembling such tires and rims into automobiles and selling the same; but the purchase price of said tires and rims, in each instance, as fast as settlements were made with customers, was to be placed in an account to be known as the 'trust account' and kept separate from all other funds, and each week said bankrupt agreed to remit to this petitioner all sums realized during the previous week on the purchase price of such tires and rims; that the title to said tires and rims was to remain in petitioner until the automobiles, upon which any such tires and rims had been assembled, were actually sold, and when sold the proceeds of such sales, to the amount of the purchase price of such tires and rims, which the said bankrupt was to pay your petitioner, was to be held in said trust account and the funds therein to belong to your petitioner."

The question involved is whether the tires and rims thus sought to be reclaimed, which were in the stock of the bankrupt at the time of

the filing of the petition in bankruptcy, and had not then been assembled on the automobiles, and had not been paid for by the bankrupt, were the property of the bankrupt, or were still owned by the petitioner. If the agreement under which this property was furnished to the bankrupt constituted an absolute sale, the title to such property vested in the bankrupt, and petitioner is not entitled to reclamation thereof from the trustee. If, on the other hand, the transaction constituted a pure conditional sale, then the title would remain in the petitioner, and petitioner would be entitled to recover the property, provided the contract of sale were valid and enforceable according to its terms.

[1] As the bankrupt resided and was engaged in business in Michigan, and the goods in question were received by it and held here, the construction and effect of the contract under which such goods were received and retained must be determined by the law of this state. In re Stoughton Wagon Co., 231 Fed. 676, 145 C. C. A. 562 (C. C. A. 6); Walter A. Wood Mowing & Reaping Machine Co. v. Croll, 231 Fed. 679, 145 C. C. A. 565 (C. C. A. 6); In re American Steel Supply Syndicate (D. C.) 256 Fed. 876.

[2] Act 64 of the Michigan Public Acts of 1915 provides as follows:

"Whenever any personal property is sold and delivered to any person, firm or corporation regularly engaged or about to engage in the business of buying and selling such personal property, with the condition affixed to the sale that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, with the agreement, express or implied, that the same may be resold, every such conditional sale in order for the reservation of title to be valid except as between the vendor and vendee shall be evidenced in writing and the written contract of every such conditional sale or a true copy thereof shall be filed and discharged in the same manner as chattel mortgages are required to be filed and discharged."

It is undisputed that the bankrupt was engaged in the business of selling automobiles equipped with rims and tires like those furnished by petitioner to it for that purpose, and that the particular rims and tires involved herein had been delivered to it by petitioner for such purpose. It is the claim of petitioner that this property was furnished to the bankrupt on consignment, and that when any such property was resold the proceeds thereof belonged to the petitioner. According to petitioner's own contention, this transaction was a conditional sale. If so, it is a sale of the class described in the statute just cited, and since it falls within the terms of the statute, but was not filed as required thereby, it is void so far as reservation of title is concerned, except as between the petitioner and the bankrupt. Woolen Manufacturing Co. v. Stanton, 188 Mich. 237, 154 N. W. 48, L. R. A. 1917B, 651; In re Stoughton Wagon Co., supra.

It is urged that the statute does not apply to this case, because the trustee stands in the shoes of the bankrupt with regard to this contract, and that therefore the question here presented as to the validity of such contract arises as between the vendor and vendee, and so is within the exception mentioned in such statute. Whatever might have been the rule in such a case prior to the 1910 amendment (Act June

25, 1910, c. 412, § 8, 36 Stat. 840) to section 47a(2) of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 557 (Comp. St. § 9631), the trustee in bankruptcy is now vested, as to all property of the estate in the custody of the bankruptcy court, with "all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon." Potter Manufacturing Co. v. Arthur, 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A, 1268 (C. C. A. 6).

The only other reason urged in support of the argument that this statute is not applicable to this case is that the bankrupt was not engaged in selling tires and rims as such. It was part of the regular business of the bankrupt to buy such accessories and sell the same to purchasers of automobiles as part of the necessary equipment. The business of the bankrupt falls within the definition of the statute and there is no merit in this contention.

The failure to comply with the terms of the statute in question rendered void the attempted reservation of title, and petitioner must be denied recovery, even under its own version of the nature of the transaction involved. It is therefore immaterial, and unnecessary to determine, whether such transaction was of the nature of an absolute sale or of a conditional sale.

The order of the referee, denying the petition for reclamation, must be affirmed and an order entered in conformity with the terms of this opinion.

LELAND v. WESCOTT.

(District Court, D. Maine, N. D. August 30, 1919.)

No. 13.

1. ADMIRALTY ⊂⊃47—ATTACHMENT—WHAT CONSTITUTES.
   Where a deputy sheriff did not go aboard a vessel and exercised no dominion over her, there was no attachment of the vessel.
2. OFFICERS ⊂⊃116—LIABILITY—MINISTERIAL ACTS.
   An aggrieved person has a common-law right of action against an officer violating a ministerial duty.
3. ADMIRALTY ⊂⊃47—WRONGFUL ATTACHMENT—BURDEN OF PROOF.
   One suing a sheriff for wrongful attachment of a vessel has the burden of proof.
4. ADMIRALTY ⊂⊃47—WRONGFUL ATTACHMENT—SUFFICIENCY OF EVIDENCE.
   Evidence that defendant sheriff did not seize or exercise dominion over a schooner and made no attachment, etc., *held* insufficient to sustain a libel for wrongful attachment on the theory that the schooner's master was deceived into believing that it had been attached, and was therefore prevented from saving it from wreckage.

In Admiralty. Libel by Ralph G. Leland against Ward W. Wescott. Decree dismissing libel.

Nathan W. Thompson and George C. Wheeler, both of Portland, Me., for libelant.

Fellows & Fellows, of Bangor, Me., for libelee.

HALE, District Judge. In June, 1917, the two-masted schooner C. Taylor, 3d, was chartered to carry pulp wood from Trenton to Brewer. Having finished loading her cargo of 32 cords of pulp wood, on June 21st she started on her trip from Mt. Desert bridge, in Trenton. While proceeding in the fog she fetched up on a ledge at Job's Cove, Oak Point, in that town. The next morning Capt. Ralph G. Leland, her master and owner, with the aid of others, got most of the cargo ashore and saved it, thus lightening the schooner, in an effort to float her.

On the following day, Harland Murch, one of the seamen, after demanding his pay, brought suit for his wages, $43.83, against Capt. Leland. His writ was put in the hands of John Suminsby, a deputy of Ward W. Wescott, Esq., the sheriff of Hancock county.

While the schooner was still grounded upon the ledge, Suminsby appeared with his writ, and said to Capt. Leland that he had come to collect Murch's pay. Capt. Leland told the deputy that he could not pay him at that time, but that he would do so as soon as the vessel was in a safe place. The captain testifies that the deputy then told him that he had attached the schooner, and that he (Leland) must not touch it. The conversation between the parties took place on the shore, about 500 yards from the schooner lying upon the ledge. There is evidence tending to show that the schooner had laid upon the bottom, near Mt. Desert bridge, a part of the previous winter, and that she was not worth more than $100.

Capt. Leland brings this suit against Wescott, the sheriff, contending that Suminsby, the deputy, made an attachment of the schooner and prevented the captain and crew from saving her. He contends, further, that, whether Suminsby actually made the attachment or not, he led the libelant to believe that there was an attachment, and prevented him from taking such action as would have saved the schooner.

He says, also, that on the day the deputy attached her he could have floated her to a safe place, but that afterwards he was not able to float her for many days and until she had suffered great injury.

[1] Suminsby, the deputy sheriff, denies that he made the attachment, or that he ever said he made it. He says he made demand for the sum due Murch, and that, upon being refused payment by Capt. Leland, he said to him:

"If you don't settle I may have to attach the schooner."

Whereupon Capt. Leland said:

"You can't attach that vessel without going on board, and putting a keeper on board, and nailing a paper to the mast."

Capt. Leland denies that he said this. The deputy did not go aboard the vessel and never exercised any dominion over her. From the proofs, I must come to the conclusion that no attachment of the vessel was made. In Bradstreet v. Ingalls, 84 Me. 276, 24 Atl. 858, in speaking for the court of Maine, Chief Justice Peters said:

"To make an effective attachment of a vessel, or of any personal property, an officer must make an actual seizure." Nichols v. Patten, 18 Me. 231, 35 Am. Dec. 713.

[2, 3] But the libelant urges that, even if Suminsby did not attach the schooner, he led the captain to believe that he had attached her, and that her master would not be allowed to go near her without being in contempt of court, and that the deputy was thus guilty of an abuse of process for which the sheriff is liable.

The common law gives a right of action against an officer by any person aggrieved in consequence of a violation of a ministerial duty. The libelant relies upon Burns v. Lane, 138 Mass. 350, 355. In that case the officer was sued for the conversion of certain fishing traps, with a count for deceit. The exceptions showed that the defendant, by virtue of a writ against the plaintiffs, attached certain personal property of theirs on a certain wharf, but did not attach the traps in question; that, at this time, the plaintiffs had spread the traps upon a field at some distance from the wharf, for the purpose of drying them; that the defendant told the plaintiffs that all their personal property, including the traps, was attached, and that, if they meddled with the traps, it would be at their peril. The traps were not taken care of and were destroyed by the weather. One of the plaintiffs lived near the fields where the traps were and saw them several times. None of the plaintiffs saw the defendant, or any one for him, in possession of the traps. In speaking for the court of Massachusetts, Mr. Chief Justice Holmes said:

"If the plaintiffs * * * believed that the defendant had attached and taken charge of the traps on the faith of his representation to that effect, they were not bound to verify the fact, or to see whether the attachment had not been abandoned. * * * A man may retain or lose possession without knowing it, and the question whether he has done either may therefore be made the subject of a fraudulent representation."

[4] In that case the jury clearly found that the plaintiffs were wrongfully led to believe that the officer had attached and taken actual charge of the fishing traps. The case at bar discloses no such fact. It is clear from the testimony that Capt. Leland knew that the officer had not taken charge of the schooner; that he made no seizure; that he exercised no dominion over her; and that he made no attachment in fact. Capt. Leland denies that he told the officer that he could not attach without putting a keeper aboard; but, whether he said so or not, it is clear that he stood upon the shore with the officer, and knew that the officer never went to the vessel and never took any charge of her. It is in testimony, too, that, as soon as the deputy sheriff left him, Capt. Leland telephoned to competent counsel in Ellsworth, told him there was no keeper on the schooner, and asked him what he should do; and that his counsel told him by all means to take care of his schooner. He says that, at that time, the tides were running high and the vessel floated of her own accord, and that he could have saved her, had he not thought that she was under attachment. But the whole testimony leads me to the conclusion that he had no right to conclude that the vessel was under attachment, because he could see clearly that no attachment and no seizure had been made. The burden being upon the libelant, the proofs fail to show any attachment or seizure of the ves-

sel; or that Capt. Leland was actually deceived into believing that there had been such attachment or seizure.

The libel must be dismissed. A decree may be entered dismissing the libel. Under all the circumstances, it is ordered that the libelant recovers no costs.

UNITED STATES v. ROCKEFELLER.

(District Court, D. Montana. August 30, 1919.)

No. 3342.

GAME ⇐4—TREATIES ⇐4—MIGRATORY BIRD TREATY AND ENFORCEMENT ACT WITHIN TREATY-MAKING POWERS.

The Migratory Bird Treaty between the United States and Great Britain of August 16, 1916, Migratory Bird Treaty Act July 3, 1918 (Comp. St. 1918, Append. §§ 8837a–8837m), and the regulations adapted thereunder, *held* within the constitutional powers of the federal government, and valid.

Criminal prosecution by the United States against Howard Rockefeller. On demurrer to information. Overruled.

E. C. Day, U. S. Atty., and W. W. Patterson, Asst. U. S. Atty., both of Helena, Mont.

William I. Lippincott, of Butte, Mont., for defendant.

BOURQUIN, District Judge. The information charges that defendant in a power boat took wild ducks, contrary to regulations authorized by statute (Act July 3, 1918, c. 128, 40 Stat. 755 [Comp. St. 1918, Append. §§ 8837a–8837m]) effectuating the Migratory Bird Treaty (39 Stat. 1702) with Great Britain. Defendant demurs, upon the ground that regulations, statute, and treaty are unconstitutional, for that they purport to regulate the taking of game birds, whereas such regulation is vested in the states alone as part of their reserved police powers.

The Supreme Court has declared that fish and game birds, like air and water, are of the negative community, with common right in all persons to take of them; that this right is not property capable of taxation and transfer, save when converted into a profit à prendre; that fish and game become property when reduced to possession; that their preservation and regulation of taking thereof are vested in the states as part of the latter's reserved police powers, but "subject, of course, to any valid exercise of authority under the provisions of the federal Constitution." Kennedy v. Becker, 241 U. S. 562, 36 Sup. Ct. 705, 60 L. Ed. 1166; Silz v. Hesterberg, 211 U. S. 41, 29 Sup. Ct. 10, 53 L. Ed. 793; Geer v. Conn, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385. And see Oil Co. v. Indiana, 177 U. S. 209, 20 Sup. Ct. 576, 44 L. Ed. 729.

The power to enter into treaties is an "authority, under the provisions of the federal Constitution," vested in the United States alone.

Is this treaty a "valid exercise" thereof? Before the Constitution the states severally possessed plenary treaty-making power, and by the Constitution they were shorn of the whole thereof, and the larger part of it was vested in the United States; the larger part, not all, for it is clear a state by treaty could have entered into some contracts affecting itself which the United States cannot. This power extends to all subjects usual to treaties, to all within the international domain, to all of international concern and negotiation, but limited, nevertheless, to subjects and treaties not inconsistent with our system of government, with the relations of the states and the United States, with the federal Constitution. Treaties in relation to such subjects, and within such limits, by the federal Constitution are made of the supreme law of the land, to which all state Constitutions, statutes, and rights yield to the extent of any conflict. Gibbons v. Ogden, 9 Wheat. 211, 6 L. Ed. 23; License Cases, 5 How. 504, 12 L. Ed. 256; United States v. Whisky, 93 U. S. 197, 23 L. Ed. 846; Hauenstein v. Lynham, 100 U. S. 488, 25 L. Ed. 628; Geofroy v. Riggs, 133 U. S. 267, 10 Sup. Ct. 295, 33 L. Ed. 642; Downes v. Bidwell, 182 U. S. 312, 21 Sup. Ct. 770, 45 L. Ed. 1088; Compagnie Francaise v. Board, 186 U. S. 388, 22 Sup. Ct. 811, 46 L. Ed. 1209.

This supremacy of federal authority to that of the states is not peculiar to treaties, but extends to all "valid exercise of authority under the provisions of the federal Constitution." The states themselves (in the sense of their people) so provide in the federal Constitution ordained and established by them.

To illustrate in the matter of treaties, though it is of the reserved powers of states to control the inheritance of real property, any their laws that aliens cannot inherit yield to treaties to the contrary. See Blythe v. Hinckley, 180 U. S. 340, 21 Sup. Ct. 390, 45 L. Ed. 557, and cases cited, and United States v. Whisky, supra.

Though it is of the reserved power of states to allow, prohibit, and regulate the introduction and sale of intoxicating liquors, they cannot allow nor prohibit such introduction contrary to treaty, nor allow sale in parts of their territory where treaties otherwise provide. License Cases, 5 How. 504, 12 L. Ed. 256; United States v. Whisky, 93 U. S. 197, 23 L. Ed. 846.

Though it is of the states' reserved powers to protect health and to establish and regulate quarantine, their laws to those ends yield to the extent of any conflict with treaties. Compagnie Francaise v. Board of Health, 186 U. S. 388, 22 Sup. Ct. 811, 46 L. Ed. 1209, and cases cited.

Fisheries have been the subject of treaties always, and the principles and objects thereof are equally applicable and desirable in relation to migratory birds and other game. So doubtless of air and water, their protection from pollution, their conservation, apportionment, and use. The object of all thereof is to peacefully share those natural resources which are the property of no one till reduced to possession, from which all may take when within their territory, which are alternately found within the territory of the several nations and in places common to all as the high seas, which may be wholly seized and ex-

terminated by one to the great and irreparable damage of all, which in accord may be preserved and enjoyed a blessing to all, but in discord may be annihilated to the injury of all, and which may become legitimate causes for war, to obviate which is of the most ancient and important objects of treaties. Vide the seal and other fisheries controversies and treaties.

The United States by treaty has even authorized aliens to fish in state waters and without question. See Manchester v. Mass., 139 U. S. 264, 11 Sup. Ct. 559, 35 L. Ed. 159. Civilized nations have awakened to the value of certain wild life, and to the necessity of co-operation to conserve and perpetuate it. Not otherwise can migratory birds be preserved from extinction. It avails little to protect them at one of their resorts, if they are mercilessly slaughtered at others. If wild ducks, or their eggs and nests, are destroyed on the northern breeding grounds, there will be little sport and profit in duck shooting in the southern fields; and if these birds are exposed to unregulated killing in their winter resorts, there will be few to propagate their kind in the marshes of the north. Their continued existence is beyond the power of separate states and nations. It can be accomplished only by treaty to that end between nations. A state can protect wild life only within its territory; the United States by treaty can protect it everywhere. This treaty tends thereto.

It may be that the several states could enter into agreements to accomplish the same object, could even enter into such agreements with foreign nations, within the principle of Wharton v. Wise, 153 U. S. 169, 14 Sup. Ct. 783, 38 L. Ed. 669; but it is wholly impracticable. And in any event this possibility does not exclude a subject from the federal treaty-making power, if otherwise within it as hereinbefore defined. It is only another instance of dual authority, wherein that of the states yields to that of the United States when by the latter exercised. It is observed this treaty neither barters away nor divests any property right of state or citizen, but only regulates their control and exercise of rights of the chase, duly subordinates them to valid exercise of federal authority to enter into treaties to promote national and international objects, welfare, and peace. It is believed the treaty, and the statute and regulations effectuating it, are valid exercise of federal power, and so are constitutional.

Hence the demurrer is overruled.

WEIDEMAN v. NEWTON ARMS CO., Inc.

(District Court, W. D. New York. August 1, 1919.)

INJUNCTION ⊂⊃230(1)—RESTRAINING ORDER OBTAINED BY RECEIVER—ENFORCEMENT BY PURCHASER OF PROPERTY.

An order, made on application of a receiver, restraining a third person from making false statements which interfered with the sale of property in the receiver's hands, *held* not enforceable by proceedings for contempt, on motion of a purchaser of the property after it had passed out of the custody of the court.

In Equity. Suit by Carl J. Weideman against the Newton Arms Company, Incorporated. On motion to punish for contempt. Denied

Michael M. Cohn, of Buffalo, N. Y. (James O. Moore, of Buffalo, N. Y., of counsel), for petitioner.

Charles Newton, of Buffalo, N. Y. (August Becker, of Buffalo, N. Y., of counsel), for respondent.

HAZEL, District Judge. This is not a proceeding by the receiver herein ancillary to the principal cause of action. Indeed, the property and assets of the insolvent corporation which are the subject of this controversy are no longer in the custody of the court. The order made during the receivership, restraining Newton from interfering with the possession of the rifles in question and the good will of the business by making untrue statements to impair their salability during the time they were under the control of the court and in custodia legis, became practically a nullity, I think, upon their sale in the conservation action to a stranger to the proceeding. The effect of the restraining order was simply to protect the assets of the insolvent corporation from the improper conduct of Newton, who at the time was an officer thereof; such right of protection being unquestionably incidental to the receivership. It is extremely doubtful whether the restraining order went any further. It was not, in my opinion, a final decree or judgment in the proceeding, or such an order as carried with it to the purchaser of the rifles the right to invoke the summary power of the court to punish for contempt any subsequent disobedience.

I have carefully examined the adjudications cited in the briefs of the learned counsel for the petitioner, but in each instance the court, it seems to me, pointed out that the proceeding was incidental and ancillary to the main action in which the possession was acquired, and that the jurisdiction of the court concerning the possession of the property and rights thereunder is exclusive "so long as the premises in controversy continue in possession of the receiver." Odell v. H. Batterman Co., 223 Fed. 292, 138 C. C. A. 534; L. S. & M. S. R. R. Co. v. Felton, 103 Fed. 227, 43 C. C. A. 189; Bibber-White v. White River Valley Electric R. Co. (C. C.) 107 Fed. 176. Nor is the case of Wabash R. Co. v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379, controlling here, for though in that case the property passed into the possession of a third party by purchase from the receiver, the decree of sale expressly reserved the right to make further orders in relation to the bonds which were claimed in the state courts to be liens affecting the possession of the property in the possession of the court and the right to convey title thereto.

Neither the respondent Newton nor the Newton Rifle Corporation were parties to the conservation action based upon the insolvency of the defendant. The proceeding instituted by the receiver against Newton was summary, and designed to protect such property from slanderous or libelous statements which tended to diminish its value and salability.

The doctrine of privity is not apposite to the present situation, since the restraining order, upon giving it a reasonable interpretation, was

not, as already pointed out, a final judgment or decree. Nor was it an injunction in the nature of a provisional remedy, relating, for instance, to the determination of any disputed ownership of, or title to, property or assets in the custody of the court. Woerishoffer v. North River Construction Co., 99 N. Y. 398, 2 N. E. 47. It is undoubtedly true that the immediate purchaser of the rifles, including his successors, were privies to the defendant company, the owner of the property and good will sold; and if the title or ownership thereof were in dispute they would be regarded as privies to the sale, and the equitable rights of the owner would be held to pass to the purchasers. Such purchasers, however, were not in privity as to the restraining order in question with the receiver, who acted merely as conservator of the assets during the time he had possession of them.

Respondents' contention that the defendant company could not enforce the restraining order by punishment for its disobedience, if it were in a position to do so, or if it had paid its debts and procured the discharge of the receiver, is well taken, and it would be illogical to confer a right or relief upon the petitioners herein which the defendant itself did not possess.

Newton in this proceeding cannot be required to surrender to the petitioner the soft nose bullet for rifles patent. The asserted understanding at the sale that he would execute a specific assignment to the buyer is not enforceable on such an application as this.

The motion to punish respondents for contempt is denied.

WHITE v. JOHN W. COWPER CO.

(District Court, W. D. New York. July 31, 1919.)

No. 1128.

1. MASTER AND SERVANT ⊜129(1)—MASTER'S LIABILITY FOR DEATH OF SERVANT—UNSAFE PLACE TO WORK.

   An employer *held* liable for the death of an inexperienced employé, who was drowned on falling from a gangplank over which he was wheeling sand from a sand barge onto a scow; the proximate cause being the loading of a pile driver on the scow, causing it to settle in the water, and giving the gangplank an incline, which made it springy and unsafe.

2. ADMIRALTY ⊜20—JURISDICTION—SUIT FOR WRONGFUL DEATH.

   A court of admiralty *held* to have jurisdiction of a suit to recover for the death of an employé, killed while working on a barge anchored in navigable water.

In Admiralty. Suit by Charles A. White, administrator of the estate of Calogero Falzone, deceased, against the John W. Cowper Company. Decree for libelant.

Horace O. Lanza, of Buffalo, N. Y., for libelant.

Ulysses S. Thomas, of Buffalo, N. Y., for respondent.

HAZEL, District Judge. The deceased, one Falzone, 25 years of age, was engaged, at the time of his drowning, in rolling a wheelbar-

row loaded with sand and gravel over a gangplank from a barge to a so-called construction boat—a boat or scow smaller than the sand barge, anchored alongside and adjacent to the shore—and then over another gangplank to the shore. When he began his work the barge was low in the water because of her load, which made it impossible to go closer to the shore. At that time the boats were practically on a level, but as the unloading proceeded the barge rose in the water, while the scow sank deeper, as a large pile driver was placed on her flat deck about noon by the respondent, which increased the incline of the gangplank between the two boats. There is dispute as to how much higher the gangplank was at one end than at the other; libelant's witness putting it at about 6 or 7 feet, while the respondent says the difference was about 2½ feet. Considering that more than one-half of the sand had been unloaded at the time of the accident, and a heavy machine placed on the scow, I think it not unlikely that the difference was approximately 4½ feet, and that the springiness of the gangplank increased. The gangplank, which consisted of three boards or planks put close together, had a 2x6 cleat on the under side to hold them together, but according to the evidence this did not prevent springing. The deceased was inexperienced in unloading a sand barge over a gangplank extending from one boat to another.

[1] The main grounds of negligence attributed to respondent are fault for not sufficiently stiffening the gangplank by a stiffening timber placed lengthwise on the under side thereof, and, generally, failure to supply a reasonably safe place to work, in that by placing the pile driver on the construction boat a dangerous incline of the gangplank was created, which the deceased could not have anticipated. While it is true that the master does not insure the safety of the employé, he is nevertheless required to exercise reasonable care, in view of the character of the work, to furnish a suitable place for its performance and reasonably safe materials to enable the workman to do the work with reasonable safety to himself; and in admiralty he is liable for the acts and negligence of the crew in that regard. The Saranac (D. C.) 132 Fed. 938, citing Gerrity v. The Bark Kate Cann (D. C.), 2 Fed. 245. This is not a case where the place became dangerous during the progress of the work, owing to changing conditions. True, the gangplank became somewhat springy while the barge was being unloaded; but it became dangerously springy as a result of placing the pile driver on the scow, which increased the incline. The additional danger inherent in this, because of his inexperience, was not apparent to deceased. A stronger man than he very likely could have held the loaded wheelbarrow to the deck of the scow, but the increased springiness—an intervening cause—was, I think, the proximate cause of the accident. The cleats under the gangplank held the planks together, but the blocks which were placed 4 or 5 feet from the end of the scow to keep them from springing did not accomplish this end.

The true test of assumption of risk is said by the Supreme Court of the United States in Gila Valley R. R. Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521, to be whether the defect is known or plainly observable by the employé, and not whether he exercised care to

discover a dangerous condition. He does not assume risk arising from a defect that is attributable to the employer's negligence, until he becomes aware of such defect, or unless it is plainly observable, so that a presumption arises that he knew it. Ches. & Ohio Ry. Co. v. De Atley, 241 U. S. 315, 36 Sup. Ct. 564, 60 L. Ed. 1016. In the exercise of due care the employer in my opinion should have provided means for eliminating the danger arising from placing the pile driver on the scow, which increased the risk of wheeling the loaded wheelbarrow over it, almost immediately causing the accident. The deceased could not have known of the increased springiness without going over the gangplank, and he had a right to presume that the changed position of the planking had not only received the attention of the master, but that the latter had performed the duties of care and vigilance required of him by law.

The deceased made no objection to working under the original conditions, and may not have regarded it hazardous to do so. It does not appear how often he went over the gangplank in the afternoon just before the accident; but as the work did not begin until 1:30, after the noonday meal, and as the increased peril does not seem to have been comprehended by him, he in my opinion neither assumed the additional risk, nor was he guilty of contributory negligence.

[2] As to jurisdiction: The barge was moored in navigable waters, and the character of the work was such as to confer a right to redress in admiralty. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157; So. Pac. Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086 L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. A claim for compensation under the Compensation Act of this state (Consol. Laws, c. 67) was originally presented to the Compensation Board, but an award was opposed by respondent on the authority of the Jensen Case, supra. Section 24(3) and section 256(3) of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091, 1160 as amended by Act Oct. 6, 1917, c. 97, §§ 1, 2, 40 Stat. 395 [Comp. St. 1918, § 991, subd. 3, and section 1233, subd. 3]), relating to jurisdiction in admiralty causes, were amended to include the words "and to claimants the rights and remedies under the Workmen's Compensation Law of any state"; but I think that since this amendment was not passed until after this cause of action accrued, this court was not deprived of jurisdiction to determine the issues presented.

The deceased is survived by his widowed mother, an alien, to whom he sometimes made remittances, to what amount annually does not appear. He also has a dependent brother 17 years of age, living in Italy. It is obviously not a case for a large recovery, owing to the insufficiency of proof as to dependency, and I think an award of $1,800 fairly adequate. Approximately an equal amount would, I believe, have been awarded if the Workmen's Compensation Act applied, and the commissioners, before whom the claim was filed by libelant before this action was brought, had retained jurisdiction.

A decree for libelant, with costs, may be entered.

DUBUQUE ELECTRIC CO. v. CITY OF DUBUQUE, IOWA.

(Circuit Court of Appeals, Eighth Circuit. August 19, 1919.)

No. 5374.

CONSTITUTIONAL LAW ⊂⊃135 — PROVISION OF FRANCHISE GRANTED STREET RAILROAD NOT A "CONTRACT" WITHIN CONSTITUTIONAL PROTECTION—"CONTRACT."

A provision of a franchise ordinance granted by a city and accepted by a street railroad company, requiring the company to sell half-fare tickets to certain classes of passengers, *held* not to constitute a contract protected from change or annulment by the Legislature of the state by the contract clause of the federal Constitution, but a government regulation, made under state authority, and subject to revocation by the state.

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

Appeal from the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Suit in equity by the City of Dubuque, Iowa, against the Dubuque Electric Company. Decree for complainant, and defendant appeals. Reversed.

Harry B. Hurd, of Chicago, Ill. (P. J. Nelson, of Dubuque, Iowa, and Max Pam, of Chicago, Ill., on the brief), for appellant.

M. H. Czizek, of Dubuque, Iowa (M. D. Cooney, of Dubuque, Iowa, on the brief), for appellee.

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

YOUMANS, District Judge. Appellee filed a bill in equity in the district court of Dubuque county, Iowa, to compel the appellant by mandatory injunction "to keep on hand at its principal office, half-fare tickets for sale to laborers, mechanics, workwomen, and working girls at the rate of 2½ cents each, good from 6:15 to 7:45 a. m. and 5:15 to 6:45 p. m., and to carry said persons over their said system upon payment of said half-fare rate during said hours." The Electric Company, which is a corporation of the state of Delaware, removed the case to the federal court. Upon a hearing in that court upon the bill and answer, the prayer of the appellee was granted, and the Electric Company appealed.

The bill is based on the provisions of an ordinance of the city of Dubuque, approved March 13, 1902, granting to the Union Electric Company, its successors and assigns, the right to lay tracks on certain streets of the city of Dubuque and operate thereon a street railway system. Section 18 of that ordinance provided that:

"Said Union Electric Company, its successors and assigns, shall during the entire period of this franchise constantly keep on hand at its principal office half-fare tickets for sale to laborers, mechanics, workwomen and working girls, at the rate of 2½ cents each, good during the following hours, to wit: 6:15 to 7:45 a. m., and 5:15 to 6:45 p. m., throughout the year, except on Sundays. Said tickets shall be sold in quantities of not less than forty.

"Transfers shall be issued when necessary to carry out the above provisions on all tickets, including half-fare tickets."

The terms of this ordinance were accepted by the Union Electric Company, the predecessor of appellee, and were complied with until about the time of the bringing of this suit.

Appellant in its answer justifies its failure and refusal to comply with the terms of the ordinance as follows:

"Par. 7. Defendant avers that it is a common carrier of passengers within the meaning of the statutes of Iowa; that it has declined to keep for sale and sell half-fare tickets on its street car system in the city of Dubuque, in conformity with the provision of the franchise ordinance herein above referred to, because the same is contrary to and in violation of the statutes of Iowa, to wit, sections 2157f, 2157g, 2157h, 2157i, and 2157j of the Supplement of the Code of Iowa 1913.

"Par. 8. Defendant avers that under the terms and provisions of the statutes herein above referred to, which statutes are and constitute what is known as the Anti-Pass Law of Iowa, all common carriers of passengers for hire are forbidden to issue or sell tickets for transportation at reduced rates, and discriminate between the purchasers of the same, excepting persons falling within certain classes specifically designated in the statute, and the persons described in the ordinance herein above referred to do not fall within the excepted class designated in the statutes."

The act of the Legislature of Iowa referred to in the answer was approved April 10, 1907. The first section of that act reads as follows:

"No common carrier of passengers shall, directly or indirectly, issue, furnish or give any free ticket, free pass or free transportation for the carriage or passage of any person within this state except as permitted in the second section hereof. Nor shall any common carrier, in the sale of tickets for transportation at reduced rates, discriminate between persons purchasing the same, except the persons described in the second section of this act. Nor shall any person accept or use any free ticket, free pass or free transportation except the persons described in said section. The words 'free ticket,' 'free pass,' 'free transportation,' as used in this act shall include any ticket, pass, contract, permit or transportation issued, furnished or given to any person, by any common carrier of passengers, for carriage or passage, for any other consideration than money paid in the usual way at the rate, fare, or charge open to all who desire to purchase." Acts 32d Gen. Assem. c. 112.

The purpose of this act of the Legislature of Iowa is set out in its title which reads as follows:

"An act to prohibit common carriers of passengers from issuing, furnishing or giving free tickets, free passes, free transportation or discriminating reduced rates, except to certain described persons; to prohibit the acceptance or use of such free tickets, free passes, free transportation or discriminating reduced rates by any except certain described persons, providing a penalty for the violation of the act, also for annual reports and for the repeal of chapter ninety (90), Laws of the Thirty-first General Assembly."

The general application of the statute is departed from only in the exception in section 2 of the act, which reads as follows:

"Nothing in this act shall be construed to invalidate any existing contract between a street railway company and a city where a condition of a franchise grant requires the furnishing of transportation to policemen, firemen, and city officers, while in the performance of official duties."

This exception is referred to in the title by the words "except to certain described persons." This express exception precludes any other exception by construction. 36 Cyc. 1163.

The appellee contends that the ordinance constituted a contract binding on the Union Electric Company and its successor, the appellant in this case, that the act of the Legislature annuls a part of that contract, and that such annullment comes within the contract clause of the Constitution of the United States. In the case of City of Pawhuska v. Pawhuska Oil & Gas Co. and State of Oklahoma, 250 U. S. 394, 39 Sup. Ct. 526, 63 L. Ed. ——, decided by the Supreme Court of the United States on June 9, 1919, involving the question now under consideration, Mr. Justice Van Devanter speaking for the court, said:

"It is not contended, nor could it well be, that any private right of the city was infringed, but only that a power to regulate in the public interest theretofore confided to it was taken away and lodged in another agency of the state—one created by the state Constitution. Thus the whole controversy is as to which of two existing agencies or arms of the state government is authorized for the time being to exercise in the public interest a particular power, obviously governmental, subject to which the franchise confessedly was granted. In this no question under the contract clause of the Constitution of the United States is involved, but only a question of local law, the decision of which by the Supreme Court of the state is final.

." 'Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the states as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the federal Constitution.' Hunter v. Pittsburg, 207 U. S. 161, 178, 28 Sup. Ct. 40, 46, 52 L. Ed. 151.

"In Dartmouth College v. Woodward, 4 Wheat. 518, 629–630, 659–664, 668, 694, 4 L. Ed. 629, it was distinctly recognized that as respects grants of political or governmental authority to cities, towns, counties, and the like the legislative power of the states is not restrained by the contract clause of the Constitution; and in East Hartford v. Hartford Bridge Co., 10 How. 511, p. 533, 13 L. Ed. 518, where was involved the validity of a state statute recalling a grant to a city, theretofore made and long in use, of power to operate and maintain a ferry over a river, it was said, that the parties to the grant did not stand 'in the attitude towards each other of making a contract by it, such as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The Legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the Legislature as to this ferry must be considered rather as a public law than as contracts. They related to public interests. They changed as those interests demanded. The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the Legislature. * * * Hence, generally, the doings between them and the Legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes.' In New Orleans v. New Orleans Water Works Co., 142 U. S. 79, p. 91, 12 Sup. Ct. 142, p. 147, 35 L. Ed. 943, where a city, relying on the contract clause, sought a review by this court of a judgment of a state court sustaining a statute so modifying the franchise of a water works company as to require the city to pay for water

used for municipal purposes, to which it theretofore was entitled without charge, the writ of error was dismissed on the ground that no question of impairment within the meaning of the contract clause was involved. Some of the earlier cases were reviewed, and it was said: 'But further citations of authorities upon this point are unnecessary; they are full and conclusive to the point that the municipality, being a mere agent of the state, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed, or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection. In this case the city has no more right to claim an immunity for its contract with the waterworks company than it would have had if such contract had been made directly with the state. The state, having authorized such contract, might revoke or modify it at its pleasure.'

"The principles announced and applied in these cases have been reiterated and enforced so often that the matter is no longer debatable. Covington v. Kentucky, 173 U. S. 231, 241, 19 Sup. Ct. 383, 43 L. Ed. 679; Worcester v. Worcester Street Ry. Co., 196 U. S. 539, 548, 25 Sup. Ct. 327, 49 L. Ed. 591; Braxton County Court v. West Virginia, 208 U. S. 192, 28 Sup. Ct. 275, 52 L. Ed. 450; Englewood v. Denver & South Platte Ry. Co., 248 U. S. 294, 296, 39 Sup. Ct. 100."

The power of the Legislature of Iowa to change a contract in a franchise granted by a municipality is fully recognized and upheld by the Supreme Court of that state. Sioux City R. Co. v. Sioux City, 78 Iowa, 742, 39 N. W. 498; Marshalltown Light P. & Ry. Co. v. City of Marshalltown, 127 Iowa, 637, 103 N. W. 1005; Sioux City Street Ry. Co. v. Sioux City, 138 U. S. 98, 11 Sup. Ct. 226, 34 L. Ed. 898. It follows that the contract in the ordinance could be annulled by the act of the Legislature without violating the Constitution of the United States.

In an amendment to its answer the appellant also set up the defense that the provisions of the ordinance were void under the Constitution of Iowa. The section of the Iowa Constitution referred to reads as follows:

"All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens." Article 1, § 6.

Since the view which the court entertains of the question based on the Constitution of the United States is decisive of this case, it is unnecessary to consider the question based upon the Constitution of the state of Iowa.

The cause is reversed and remanded, with directions to dismiss the bill.

PITTSBURGH, C., C. & ST. L. RY. CO. v. COLE.

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

No. 3234.

1. MASTER AND SERVANT ⊜108—INJURIES TO SERVANT—PNEUMATIC HAMMER.
An employer cannot discharge its duties by allowing employés to operate pneumatic hammers without safety springs.
2. TRIAL ⊜178—MOTION FOR DIRECTED VERDICT—CONSIDERATION OF EVIDENCE.
On motion for a directed verdict, it is the duty of the court to take that view of the evidence most favorable to the party not moving.
3. MASTER AND SERVANT ⊜287(8)—VICE PRINCIPALS—WHO ARE.
The question whether the leader of a gang of car repairers, who controlled them, but who himself was under the general foreman, was employer's vice principal, so that a member of the gang was bound to obey his orders, *held*, under the evidence, for the jury.
4. MASTER AND SERVANT ⊜287(8)—INJURIES TO SERVANT—JURY QUESTION.
In an action under the federal Employers' Liability Act (Comp. St. §§ 8657–8665), by a member of a gang of car repairers, who was hurt, while driving out a rivet with a pneumatic hammer without a safety spring, the question of the railroad's responsibility for a negligent order given by one in charge of the gang *held*, under the evidence, for the jury.
5. MASTER AND SERVANT ⊜289(25)—INJURIES TO SERVANT—JURY QUESTION.
In an action for injury to an eye of a steel car repairer, struck by a small piece of steel while driving out a rivet with a pneumatic hammer without a safety spring, the question whether the wearing of goggles, which were supplied, would have prevented the injury, *held*, under the evidence, for the jury.
6. NEGLIGENCE ⊜101—FEDERAL EMPLOYERS' LIABILITY ACT—EFFECT OF CONTRIBUTORY NEGLIGENCE.
Contributory negligence does not bar an action under the federal Employers' Liability Act (Comp. St. §§ 8657–8665), but only mitigates the damages.
7. NEGLIGENCE ⊜119(6)—ISSUES—CONTRIBUTORY NEGLIGENCE—FEDERAL EMPLOYERS' LIABILITY ACT.
In an action under the federal Employers' Liability Act (Comp. St. §§ 8657–8665), by a steel car repairer, injured while using a pneumatic hammer without safety springs, the action of the court in charging on contributory negligence, which issue was raised by the evidence, though not by the pleadings, *held* not erroneous, as it was unnecessary to the introduction of the issue through the evidence either to allege such negligence or present an issue on that subject in the pleadings.
8. MASTER AND SERVANT ⊜288(12)—INJURIES TO SERVANT—ASSUMPTION OF RISK.
In an action for injury to an eye of a steel car repairer, struck by a piece of steel while driving out a rivet with a pneumatic hammer without a safety spring to prevent the set from being driven from the hammer, the question of assumption of risk *held*, under the evidence, for the jury.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by Ellsworth G. Cole against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Certiorari denied 250 U. S. 671, 40 Sup. Ct. 15, 64 L. Ed. ——.

Ellsworth G. Cole recovered judgment against the railway company in the sum of $5,000 for personal injuries sustained through alleged negligence of the company, and reversal is sought.

At the time the injuries were received, October 6, 1916, plaintiff and two others, Roy Dugan and W. H. Cole (plaintiff's brother), were in the company's employ as repairers of steel cars. This group of persons and other similar groups then working for the company were called "gangs," and there is testimony substantially tending to show that one member of each gang was treated by all concerned, including the company, as the leader, the superior in authority, of the particular gang with which he was associated, and that Roy Dugan acted in this capacity with respect to his gang, though, it is true, there was a general foreman of the steel car repair department, with an assistant foreman, also a gang foreman, who had charge of certain gangs working on steel cars. Thus the Dugan gang became an important object of inquiry at the trial.

When the accident occurred Dugan had been in the employ of the company some 11 months and the Cole brothers about 6 months. The work of this gang involved the use of an ordinary type of pneumatic hammer designed for riveting sheets of steel. Each of these hammers comprises a cylindrical barrel tapering toward the muzzle, with a grip handle and air connection at the rear end, and a plunger operating lengthwise through the greater portion of the barrel by means of compressed air. The hammers are provided with contrivances of different sizes, called "sets," each of which consists of a cylindrical head and shoulder, with a cylindrical extension fitting into the muzzle of the barrel and intended to be operated in connection with the plunger. The hammers were operated by one man, who, holding the hammer with the set pressed against the protruding end of the rivet and applying the air, completed the operation of forming another head on the rivet with the aid of a person located on the opposite side of the plates and pressing against the normal head of the rivet a device known as a "dolly bar."

The usual course pursued by the Dugan gang when riveting appears to have been as follows: Dugan heated the rivets and put them in place, W. H. Cole operated the hammer, and the plaintiff manipulated the dolly bar. In the afternoon of the accident, however, under the order of Dugan, the usual course of work mentioned was changed, so that the plaintiff operated the hammer and W. H. Cole handled the dolly bar. The particular work involved was patching a hopper car. The bottom of the car was wedge-shaped, and the sides of the wedge are called "hopper sheets"; it was one of these hopper sheets that was being repaired; the car seems to have been on trestles and about three feet above the floor. Dugan placed a heated rivet in one of the holes designed for it, and W. H. Cole pressed it through the two sheets with a dolly bar; this work was done from the outside of the hopper; the rivet stuck, and had to be driven out; whereupon the plaintiff, from the inside of the hopper, attempted and failed to drive the rivet out with a drift pin (an ordinary steel punch) and hammer. It is said that the usual way of driving out such a rivet was through the use of a "handle drift" and a sledge; but the plaintiff testified that the portion of the car in which he was required to work was so narrow that there was "not room enough to swing the sledge to hit the hand drift." Dugan, reaching through an adjacent opening into the hopper, grasped in one of his hands, on which he was wearing a glove, a drift pin and the exposed part of the set held in the hammer, placing the head of the drift pin against the head of the set and the end of the drift pin against the protruding end of the obstructed rivet, and then ordered plaintiff to turn the air into the hammer for the purpose of driving out the rivet. Plaintiff obeyed this order, with the result that the set was driven from Dugan's grasp, and, with the plunger, against the side of the car, so that one or the other rebounded, striking plaintiff under his left eye, and a small piece of steel was driven through this eye. The effect of the injuries was to destroy the left eye and to impair and threaten the sight of the other.

Dugan's gang was the only one at work in or about the repair shop during the afternoon of the injury. The general foreman of the car shop and his assistant, the foreman of the gangs of the car department, together with the gangs themselves, were given the privilege of attending a base ball game in the afternoon, and all availed themselves of the opportunity except the Dugan gang. Dugan testified: "We simply had the privilege of leaving if we wanted to, and we didn't exercise the privilege. * * * We had a job sheet the day of the accident; it was in my possession on the job. It was in my name; my name was at the head of the sheet. The other men's names were on the sheet. I supposed they put my name on the sheet first, because they wanted me to lead the gang. They told me to lead the gang, anyway." The plaintiff testified in respect of this occasion: "No foreman were [was] present except Dugan, foreman of our gang."

Thomas M. Kirby, of Cleveland, Ohio, for plaintiff in error.

A. E. Powell, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). In view of the assignments of error and the contentions presented in support of them, it is important to call attention to the issues made both upon the pleadings and at the trial below. In addition to general allegations of the petition describing the situation and the acts which led to the injuries, plaintiff in substance alleged "full care and caution" on his part, and that the injury was "due solely and proximately to the negligent acts and omissions of the defendant": (a) In supplying the pneumatic hammer without a safety spring, which spring would have prevented the set from being driven from the hammer; and (b) in attempting through Foreman Dugan to drive out the obstructed rivet with the air hammer and a drift pin, and in giving the order in that behalf through Dugan, who knew that the order could not be safely obeyed, while plaintiff did not know this, or have equal means of knowledge with either defendant or its foreman giving the order. In its answer defendant admitted its corporate capacity, and operation of the railroad, that at the time in question plaintiff was in its employ and received certain injuries, but interposed a general denial as to every other allegation, and, "answering further," said that plaintiff's injuries were the direct and proximate result of risks which were open and obvious, and which were known to and appreciated by plaintiff, or in the exercise of ordinary care should have been known to and appreciated by him, and that "by reason of the premises the same were assumed." However, in the course of the trial, both in its cross-examination of one or more of plaintiff's witnesses and in presenting its own testimony, defendant sought to show contributory negligence of plaintiff.

At the close of plaintiff's testimony, and again at the close of all the testimony, defendant presented a motion to direct a verdict in its favor on the ground that there was not "sufficient proof of actionable negligence to entitle the case to go to the jury," and that, if there was "any proof of any negligent act upon the part of the defendant company, a clear case of assumption of risk as a matter of law is made upon the plaintiff's own testimony." Both motions were overruled, and

it need not be said that defendant's introduction of evidence operated as a waiver of error, if there were any, in denying the motion when it was first presented.

[1-4] 1. We are convinced that the testimony fairly and substantially tends to sustain the allegations of negligence on the part of defendant. In the first place, the testimony shows without denial that the pneumatic hammer, commonly called the "Little David," was furnished by defendant for this work and without a safety spring, and that a proper safety spring attached to the hammer would have held the set as well as the plunger in place at the time the air was admitted into the hammer upon Dugan's order. While there is testimony tending to show that at some time, seemingly prior to plaintiff's employment, defendant caused orders to be given orally, possibly amounting to a rule, that employés operating the air hammers should use safety springs with them, yet these orders were not carried out. According to some of defendant's own testimony, the men fell "into the habit of refusing to use the safety spring," and the company acquiesced in this practice. The company seems to have contented itself with keeping safety springs on hand, but without furnishing any, except upon the request of an employé. In practice, however, application for a spring or its use was rarely ever made; in a word, it was open to the jury to find that, if the company ever did impose a rule requiring the use of these springs, it knew prior to and at the time of the accident that the rule was not observed—in truth, that it was ignored. This derives importance in view of the admitted fact that the air hammer plaintiff was operating at the time of his injury was not provided with a safety spring, and of the clear conflict in testimony as to whether he was even instructed as to the need or the use of the spring. Further, plaintiff testified:

"I did not use the safety spring * * * while working for the company. I did not know that there were any safety springs provided."

And Dugan testified:

"We were not using one [a safety spring] on the day of the accident, because the bosses of our gang did not demand us to use them. I never made a request for them."

Whatever, then, may be the merit of the safety spring or the need of using one on a pneumatic hammer, it cannot be that it was error in the trial judge to decline, as in effect he did in denying the second presentation of the motion to direct, to hold as matter of law that the company could both indulge its employés in a practice not to use such springs and insist that their failure to do so absolved the company from all duty respecting such use. Such a course of conduct in an employer is manifestly inconsistent with his responsibility to an employé, and in principle is opposed to well-settled rules of decision in that behalf. Heskett v. Pennsylvania Co., 245 Fed. 326, 330, 157 C. C. A. 518 (C. C. A. 6); Coal Co. v. Marcum, 257 Fed. 287, —— C. C. A. ——, decided by this court January 7, 1919.

In the next place, the use to which the air hammer was put without a safety spring accentuates, not alone the defendant's neglect of duty to plaintiff in supplying him with such a working tool, but also the

character and degree of defendant's negligence in directing plaintiff to use the ill-equipped machine to drive out the obstructed rivet. Defendant itself presented testimony tending to show that Dugan's method already described, of driving out the rivet, was both unusual and dangerous; but it is observable that the danger so pointed out was a danger to Dugan rather than to the plaintiff, and this was because of Dugan's act in attempting to hold in contact the set, the drift pin, and the protruding rivet, end against end, for the purpose of utilizing the impact of the hammer when he ordered plaintiff to turn on the air. The fact that Dugan escaped, while plaintiff received injury from this act, cannot as matter of law be said to relieve defendant from the consequences of so conducting the work. In thus ascribing the work to defendant, we may again call attention to the testimony tending to show Dugan's immediate authority over his particular men and work, and his right of control; it can make no difference that there was testimony opposed to this; the test arose under defendant's second presentation of its motion to direct, and upon such a motion it was the duty of the court to take that view of the evidence most favorable to the plaintiff.

This presented the question whether Dugan was such a vice principal of the company that his order to turn on the air was binding on plaintiff, and clearly such an issue of fact was one for the jury. E. I. Du Pont de Nemours & Co. v. Kelly, 252 Fed. 523, 524, 164 C. C. A. 439 (C. C. A. 4); Moss v. Gulf Compress Co., 202 Fed. 657, 663, 664, 121 C. C. A. 67 (C. C. A. 5). More than this: Although some of the evidence tends to show both that Dugan was a fellow servant of the plaintiff and that Dugan's acts were of a careless and negligent character, directly causing the injury, yet under the rule of the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657–8665]), in spite of the opposed common-law rule, Dugan's negligence is to be treated as that of the defendant, and, prima facie at least, as entitling plaintiff to recover. Ches. & Ohio Ry. v. De Atley, 241 U. S. 310, 313, 36 Sup. Ct. 564, 60 L. Ed. 1016; Law v. Illinois Cent. R. Co., 208 Fed. 869, 870, 126 C. C. A. 27, L. R. A. 1915C, 17 (C. C. A. 6); Central R. Co. of New Jersey v. Young, 200 Fed. 359, 366, 118 C. C. A. 465, L. R. A. 1916E, 927 (C. C. A. 3). And here again an issue of fact was presented requiring submission to the jury. However, then, the showing of negligence on the part of defendant may be viewed, it is not open to defendant to insist, as it does, that upon that question plaintiff should have been nonsuited.

[5-7] 2. In reaching the conclusion just stated we of course have in mind that the position taken by defendant in both the answer and the motion to direct was in effect that, despite any showing of actionable negligence on its part, plaintiff must fail, as a matter of law, because of his assumption of the risk involved in applying the air to the pneumatic hammer at the time he received his injuries. Before taking up this feature, however, we may consider the question of contributory negligence, which, as we have already stated, defendant seems practically to have introduced at the trial. Defendant, through its cross-examination of plaintiff, brought out testimony tending to show that it had provided him with goggles, that he had been accustomed to wear them,

that cars were often "in a more or less rusty condition, and that the constant rapping of the hammer would jar those particles loose, and that they," as also "pieces from the rivets and what not," would "fly off," and yet that he was not wearing the goggles at the time of the accident; also through its cross-examination of Dugan defendant drew from him a statement that he had known plaintiff to use goggles, and that he was using them on the day, but not at the time of the accident. Defendant, moreover, introduced direct testimony tending to show that the men engaged in this character of work were all provided with goggles and requested to wear them, "to protect their eyes from flying pieces of steel or scale or anything that might fly in working with steel parts." We have seen that defendant also presented testimony to the effect that Dugan's method of driving out the rivet was unusual, and also that it was dangerous to him, because of the difficulty of holding the parts in place simply with the hand to receive the force of the hammer; and one of the obvious effects, if not a distinct purpose, of such proof of Dugan's act, was to emphasize plaintiff's need of goggles in turning on the air.

Without setting out further specific efforts of defendant to show plaintiff's conduct, it is clear enough from the testimony thus pointed out that its tendency was to charge plaintiff himself with fault; and in view of the apparent concurring effect of this with plaintiff's showing of defendant's negligence, we do not know of any term which so appropriately and accurately defines his claimed failure to use goggles as that of contributory negligence. It should be added that in rebuttal, after testifying that neither at the time of his employment nor at any time thereafter had the company's foreman of gangs instructed him to get goggles or to wear them continually, plaintiff explained that the work assigned him at the start was "to buck rivets," that is, to use the dolly bar; that when he commenced work one of his coworkers told him to obtain an order for goggles from the foreman of the gangs, and in this way he received a pair, but without any instructions at all. It would seem, from the description given of the goggles supplied by the company, that they were of heavy glass with the usual surrounding wire netting; but to what extent they would have afforded protection at the time of the injury is purely a matter of inference, and certainly is not to be stated as matter of law.

Further, it is to be inferred, from a special instruction defendant requested to be given to the jury, that it sought at the trial to show contributory negligence because of plaintiff's failure to procure and use a safety spring. The request follows:

> "If you find from a preponderance of the evidence that the defendant furnished safety spring devices which were available to the plaintiff, that he knew the same were available to him, that he appreciated the purpose for which they were to be used, and he failed and neglected to use the same, and that such failure or neglect on his part was the direct and proximate cause of his injuries, then he cannot recover, and your verdict should be for the defendant company."

The request in this form was refused, though it was given with the necessary qualification that contributory negligence was not a complete defense. Grand Trunk Western Ry. Co. v. Lindsay, 201 Fed. 836,

844, 120 C. C. A. 166 (C. C. A. 7). Moreover, the learned trial judge understood that defendant was seeking to show negligence of the plaintiff, not only as contributing to the injury, but even as constituting the sole cause of the injury; thus in stating defendant's contentions he said:

"The defendant also, as a further defense, contends that the plaintiff was himself guilty of negligence, and that his negligence was the sole, proximate cause of the plaintiff's injuries, and that therefore for that reason he is not entitled to recover."

Despite the fact that the issue of contributory negligence was brought into the case through the evidence, counsel earnestly contend that it was error for the court to instruct the jury upon this issue. The basis of this is lack of formal issue of contributory negligence in the pleadings. Thus, at the close of the charge defendant requested the court, but the request was refused, to withdraw from the jury all that the court had said on the question of contributory negligence, and for the reason in substance that there was no predicate in the answer on which the question of contributory negligence could properly enter into the case—"even through the evidence." Granting the request would have been both to change the charge and to leave the evidence tending to show negligence of plaintiff himself and the course of trial in that behalf unexplained, either as to burden of proof or otherwise. It is to be noticed that the request did not include withdrawal of the evidence pointing to plaintiff's contributory negligence. Was it error, then, in the court below to explain the rights of the parties on the subject of contributory negligence? It is said, in addition to the lack of formal pleading upon the subject, that under the general denial the evidence was admissible to contradict the allegations of negligence contained in the petition; but, conceding such admissibility, it is not enough. It leaves the contributory feature of the same evidence unexplained. Besides, it overlooks the effect of the federal Employers' Liability Act. The case is based on that act; and since contributory negligence does not bar the action, but only mitigates damages, it was not necessary, to the introduction of an issue in that behalf through the evidence, either to allege such negligence or present an issue on that subject in the pleadings. Kansas City Southern Ry. Co. v. Jones, 241 U. S. 181, 182, 36 Sup. Ct. 513, 60 L. Ed. 943.

Nor is there any local rule of decision affecting the course pursued below. Defendant's theory of formal allegation or issue in the pleadings is based on Traction Co. v. Forrest, 73 Ohio St. 1, at page 4, 75 N. E. 818, at page 819, where Judge Spear said:

"From this it follows that there was no issue in the pleadings respecting contributory negligence. Nor was such issue raised by the evidence."

And, besides, the doctrine of contributory negligence there in question would operate as a bar to the action. Further, the rule deducible from Rayland Coal Co. v. McFadden, 90 Ohio St. 183, 107 N. E. 330, and Glass v. Heffron Co., 86 Ohio St. 70, 98 N. E. 923, cases commented on by defendant, we think shows that the fact that the pleadings present no issue of contributory negligence is not the only

test of whether that issue may be rightfully introduced. Indeed, as we understand those cases, there is no difference of importance between them and the instant case; for although the answers there made, in addition to general denials, in substance alleged only that the injuries were caused by the fault and negligence of the respective plaintiffs, yet it was held in each case that such averments did not tender an issue of contributory negligence. This was to say that, unlike an ordinary plea of contributory negligence, those answers did not impliedly set up combined negligence. This is the most that could be claimed of the answer in the present case, even if the effect of contributory negligence were to bar the action, and not merely to mitigate the damages. In the Ohio cases last mentioned, however, evidence was submitted tending to show that both parties were negligent, that there was combined negligence; and so it must be said of the natural tendency and import of the evidence in the instant record.[1]

It must follow that it was the duty of the trial judge to instruct the jury upon the subject of contributory negligence and to rule that the burden of proving such negligence was upon the defendant; and as respects the ruling that the burden of proof also rested on defendant under its further defense that plaintiff's negligence was "the sole, proximate cause" of his injuries, as the trial judge understood the position taken by defendant, it is enough to say that if there was error in this ruling—a question we do not decide—it was certainly harmless, in view of the instruction the court had already given, that the burden was on the plaintiff to show defendant's negligence.

[8] 3. It remains to consider the subject of assumption of risk. This was made, as we have seen, an affirmative defense. It cannot be necessary to dwell upon that feature of the case. It was asserted in the motion to direct, as before shown, that, if there was any proof of any negligent act on the part of defendant, a clear case of assumption of risk as matter of law is made upon the plaintiff's own testimony. Our consideration of the applicable testimony satisfies us that it cannot be said, as matter of law, that plaintiff had any such knowledge of the situation as to understand that compliance with Dugan's order to turn the air into the pneumatic hammer involved danger to himself. The testimony, when rightly considered, does not seem to prove this; its tendency, as we have said before, was to show that the danger to be apprehended was to Dugan rather than to plaintiff. It is hence vain to insist that plaintiff assumed a risk that was open and obvious, as well as known to and appreciated by him. The authorities requiring submission to the jury are too numerous to justify citation.

We conclude upon the whole case that the trial was fair throughout, that the charge was as favorable to defendant as the nature of its defense warranted, and that no reversible error intervened; accordingly the judgment is affirmed.

[1] It is worthy of remark that, in the opinion denying motion for new trial, Judge Westenhaver expressed the belief that in view of the plaintiff's actual injuries his recovery was materially reduced by reason of the mitigating effects of the testimony in relation to contributory negligence.

ELWELL v. TUCKER.

(Circuit Court of Appeals, Third Circuit. May 22, 1919. Rehearing Denied June 24, 1919.)

No. 2450.

SHIPPING ⊂=54—SINKING OF BARGE NOT CHARGEABLE TO CHARTERER'S NEGLIGENCE.

Evidence *held* not to sustain allegations of a libel that the swinging around of one end of a barge, after it had grounded at night while being moved to a new position at a wharf, which caused such end to settle on a stone pile when the tide fell, was due to fault of the charterer, who directed the movement until the grounding, and then left the barge in a safe position, from which it was moved by the master.

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

Suit in admiralty by Bernard Tucker, owner of the barge Defender, against Samuel P. Elwell. Decree for libelant, and respondent appeals. Reversed and remanded, with directions.

For opinion below, see 252 Fed. 874.

W. M. Harris, of Philadelphia, Pa., for appellant.

George P. Rich, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

BUFFINGTON, Circuit Judge. This case concerns the sinking of the coal barge Defender. From the proofs it appears that on October 29, 1917, Tucker, the plaintiff and owner of said barge, entered into a verbal contract with Elwell, the defendant, to carry on said barge, from Philadelphia, 197 tons of Elwell's coal to Pennsville, Pa. Elwell was to load and discharge the coal.

In pursuance of this contract, the barge and coal were towed to Pennsville and there delivered at a wharf designated by Elwell, where the barge remained under charge of her master, awaiting discharge by Elwell. Such discharge Elwell had to make at another part of the wharf, where there was a derrick, which was then being used to discharge another cargo of Elwell's coal from a barge lying at that point. The latter barge being thereafter discharged, Elwell directed the captain of the Defender to shift his barge from her original mooring to one near the derrick. In doing so the barge grounded, sank, and was strained and broken. Alleging such injury was caused by the fault of Elwell in misdirecting the captain, Tucker, the owner of the barge, filed this libel in personam against Elwell. The case was heard on libel, answer, and proofs, and resulted in the court below holding Elwell in fault. From such finding, and a decree so adjudging, Elwell took this appeal.

No principles or questions of law are involved. The sole issue is one of fact, namely, whether the proofs show the damage done to the barge was caused by the fault of Elwell. As the court below found

him at fault, and we have reached the contrary conclusion, we deem it proper to discuss the proofs at length, and thus place of record the reasons which lead us to such different conclusion.

Of the general features of the case there is no dispute, and they are as above stated. The case centers on what transpired in the few minutes during which the barge was being moved from her moorings under Elwell's direction. As the captain of the barge was wholly ignorant of the water at the wharf, and as Elwell was familiar with same, as the moving was done at night, and Elwell was present and in charge, there is no question of the fact that Elwell undertook, and of the duty thereby imposed on him, to give proper directions, and of the bargemaster's duty to follow them. Nor is there, under the testimony, any doubt of Elwell's capacity to give proper directions, or the fact that the line from where the barge was moved, to the derrick, was a safe path to follow. As to Elwell's knowledge of the water and the bottom, the proof is:

"Q. You said you had been using that wharf how long? A. Oh, for 20 years. Q. Have you ever had any trouble with barges grounding or sustaining damages in that particular place? A. Never had a particle of trouble there; never."

There is also no question but that, if the barge had been kept on the direct course between her mooring place and the derrick, the bottom was such that the Defender, which was built for laying on a smooth bottom between tides, would have suffered no harm. In point of fact, what happened was that, while she was being pulled across on this course, her forward end (which was the stern end of the barge section) grounded, and if she had remained on that course no harm would have resulted. But, in point of fact, her other end, which was of lighter draft, was swung around toward the wharf, and it also grounded; but as this latter grounding was not on a smooth bottom, but upon a projection, the barge was twisted and damaged when the tide fell. The case turned on the question whether this swing of the rear or hinge end of the barge in toward the wharf and over this hump, stone pile, or projection of some kind, came about through Elwell's directions.

The wharf in question projected about 250 feet into the Delaware river, and from its outer end a projection extended up the river, at right angles, about 50 feet. It was along the north side of this projection the Defender was moored, and lay until the night of the accident. On the north side of the wharf, some considerable distance from this projection and nearer shore, was the unloading derrick, where Elwell desired the Defender to be taken. Alongside the derrick Elwell had another barge, of which one Boyer was captain, unloading. On the night in question, Elwell went down to Boyer's barge between 11 and 12 o'clock, when the tide was about full, called Boyer out of his cabin, and helped him move his barge away from the derrick, so as to make room for the Defender. Having moved Boyer's barge, Elwell went and called Andrews, the captain of the Defender, to move his boat over to the derrick. At this point we note that Andrews was a Portugese, that his knowledge of English was so limited

that he testified in this case through an interpreter, a fact that gives weight to the suggestion that he may very readily have misunderstood what Elwell, from time to time, said to him. We note, also, that we start with two fundamental facts, namely, that Elwell's object in moving the Defender was, first, to take her straight over to the derrick; and, second, that he had no possible object in swinging her from that course into the position in which she was found lying the next morning.

Elwell's account is that, having helped Boyer move his barge from her place at the derrick, he called Andrews, the captain of the Defender, who threw him a line from the forward (stern) end, which Elwell made fast near the derrick. Although Elwell and Andrews differ as to which one pulled the barge forward, Elwell saying he made the line fast to the wharf and Andrews pulled, while Andrews says he made the line fast and Elwell pulled, yet, whoever did the pulling, there is no doubt that the barge was pulled ahead in the direction of the derrick until the forward (stern) end grounded. Now the uncontradicted proof is that the stern (hinge) end of the barge was drawing less water than the forward (stern) end. Consequently, while the barge was being pulled toward the derrick, it is clear the lighter draft end of the barge could not ground on bottom which the deeper draft end had passed over. This position of the barge, viz. grounded at the forward (stern) end, is the position which Elwell alleges the barge was in when he went home and left it. In that regard he testified:

"After this boat fetched up there, I saw there was going to be no tide, the wind was northwest, and I said: 'Captain, you are all right where you are. I am going home.'"

Elwell says that when he saw the sunken barge the next morning the forward (stern) end was in the same position he left her, but the stern (hinge) end had been pulled in. In that respect he testified:

"I do not think the stern had moved from where she was when I left that night, but the hinge end had been pulled in. * * * Q. Then it was the next morning, following that, that you found her swung around, with the hinge end pointing towards the corner of the dock? A. That is it exactly. Q. Aground at both ends; all aground? A. All aground."

Such is Elwell's account of the grounding of the barge, of leaving her in a safe position, and of finding her in a different position the next morning. In this he is corroborated by Boyer, the captain of the barge Madeline. Boyer says that Elwell came down about high water on that night and helped him move the Madeline away from the derrick. After this was done, he says he was standing at the offset of the wharf, and the Defender was lying where she had been all day, when her captain asked Elwell to take the stern line. Elwell did so, and fastened the line about half way between the angle and the derrick, and the captain pulled the boat in toward the derrick, and continued to do so until he was "about 10 feet from my stern. He fetched up 10 feet from my stern." Boyer's account is:

"Q. I understood you to say that he pulled straight ahead. Is that right? A. Straight ahead. Q. When you say 'he pulled,' who do you mean? Do you mean the master of the barge? A. The master of the barge. * * * Q.

The master was on the end of the barge, the stern of the barge, pulling? A. Yes. Q. Then you say he pulled a certain distance when his stern grounded? A. Yes, sir. Q. What did Mr. Elwell say then? A. He said: 'We will have to leave it lay where she is. There will not be enough water to move it in.' * * * Q. Then Mr. Elwell went home? A. Yes, sir. Q. After Mr. Elwell left this place, what took place right after that? What took place after Mr. Elwell left the wharf? A. About half an hour afterwards he heaved the hinge in. Q. Who heaved the hinge in? A. The master. Q. The master of the barge? A. Yes. * * * Q. You say he pulled the hinge in. Where did he pull it to? A. He pulled it into this notch. Q. When you saw him pulling the hinge into the notch, what, if anything, did you say to him? A. I told him there was a little hump there. * * * Q. With what process did he pull it in? With a capstan? A. With a capstan. * * * Q. You say he pulled it in 10 feet? A. No; after he had got done pulling, he fetched up about 10 feet from the wharf. Q. When you say 'wharf,' what part of the wharf do you mean? A. Inside the offset. * * * Q. And his bow or his hinge end was up in the offset? Is that where you mean? A. Yes; up in the corner. Q. When he had gotten himself in that position, what did you tell him, or did you tell him anything at all? A. I told him there was a lump there. Q. When he found he was caught, what did he do? A. He did not make an attempt to do anything. * * * Q. If the barge had remained there where she was, when he stopped pulling ahead, would he have laid safely that night? A. Yes; he would have laid safe, no matter where he laid, because I have laid all around there."

It will thus be seen that Elwell's account of how he left the barge in a safe position is corroborated by an apparently disinterested witness; but we have from that same witness an account of how the stern (hinge) end of the barge was swung around into the dangerous position, which caused her injury. Bearing on this fact it will be noted that the captain of the Defender admits he pulled that end of the barge in toward the wharf, that he did it without any orders given him, that he did not know the character of the water, and that he grounded the end of the boat he was pulling in. It is claimed, however, that this pulling in by Andrews toward the wharf took place, not, as Boyer says, after Elwell left, but while Elwell was pulling the barge ahead toward the derrick with the line at the other end. In these regards the testimony of Andrews is:

"Q. Where did Elwell stand? A. He was toward the derrick, up toward the derrick. Q. He was up near the derrick, was he? A. Yes, sir. Q. Then, when Elwell got the line, he walked up towards the derrick; is that right? A. Yes, sir. Q. That is right? A. Yes, sir. Q. And he was pulling up toward the derrick, and you were pulling in toward the wharf? Is that right? A. Yes, sir. * * * Q. At the time you started pulling in there, did you know anything about those rocks being there? A. No; I did not know anything about the stones. I never had been there before. * * * Q. Tell us what else happened. A. After that he made the line fast to the pier, then I came to the stern end and threw him another line, and he made that fast to the cleat. Then he pulled on the stern (forward) line, and I pulled on the hinge end. Q. Go on. A. Until she grounded. Then he told me to leave her lay there until to-morrow. * * * Q. Did you pull on her after Elwell left? A. I did not pull any more until the morning; when I got up, I found the boat full of water."

As to the absence of any orders to him to pull, the testimony of Andrews was:

"Q. I did not ask you about any orders to pull, I asked you whether, if you had started to pull, you could have done it by yourself. A. I would pull, but I

grounded before I got there. I would pull if there was plenty of water. Q. I did not ask you that. Could you alone have pulled the boat in without anybody helping you? A. Yes; I could pull, if I had orders to pull; but I had no orders, and I stayed there, for nobody don't give me any orders to pull and I stayed right there. Q. I did not ask you that. I do not know whether you and I understand each other. I want to know whether one man alone, like yourself, would have been able to pull that section away from where it was up there down to the wharf? A. If I don't ground I can pull; but the way the rocks were there, no man can pull by himself."

Assuming that the accounts as given by Elwell and Andrews of how and when the grounding of the hinge end on the hump near shore took place are conflicting, we see no reason to disregard the testimony of Boyer, the captain of the Madeline. He appears to be wholly disinterested, is apparently trustworthy, and in the absence of any suggestion by the trial judge, who heard the testimony, as to his interest or credibility, we see no reason to disregard his testimony. That he was present when the barge was moved is clear; that for some reason or other Andrews wanted to get and tried to get the hinge end of the barge in close to the wharf is also clear. While there is a difference in time as to when Andrews pulled that end in toward the wharf, Boyer saying it was after, while Andrews says it was before, Elwell left, it must not be overlooked that there is no question of the fact that it was Andrews who pulled that end in toward the wharf. On that point the testimony of Andrews is:

"Q. Then, when Elwell got the line, he walked up toward the derrick; is that right? A. Yes, sir. Q. That is right? A. Yes, sir. Q. And he was pulling up toward the derrick, and you were pulling in toward the wharf? Is that right? A. Yes, sir. * * * Q. At the time you started pulling there, did you know anything about these rocks being there? A. No; I did not know anything about the stones. I never had been there before."

It is quite clear that this pulling of Andrews, which was done in the dark, and the effect of which Elwell would not see, tended to pull Andrews' end in toward the notch or angle made by the angle of the projection, for the line which Andrews pulled was fastened to at that angle. In that regard Andrews testified:

"Q. Where did he [Elwell] make the hinge end fast? A. On some cleat on the dock in the corner. Q. He made the line fast on a cleat in the corner? A. Yes. Q. In the corner of the two sections? A. Yes, sir. * * * After I unhinged my boat, I started to pull on the hinge line. Q. You started to pull on that hinge line? A. Yes, sir. * * * Q. How did the barge come? Did the barge come ahead, or come sideways? A. It kept coming sideways and ahead, too. Q. The barge kept coming ahead, and kept coming sideways? A. Yes. Q. You kept coming ahead, and coming sideways, until your stern grounded? A. Yes, sir."

Taking Andrews' own story, it was his own sideways pulling, and that into water he did not know, that brought the hinge end into the corner and on the projection which caused her to strain or break. Moreover, while Andrews, when called in rebuttal, testified that he did not pull the hinge end after Elwell left, and in that regard contradicted Boyer, yet when called earlier it is to be noted that he admits that after Elwell left he was pulling on the hinge line, and in that regard confirms Boyer's account. This earlier testimony of Andrews is:

"Q. Did you pull her in after he left? A. I tried to pull her, but couldn't pull it. It is on the ground. Q. After Mr. Elwell left did you pull on this barge in any way, shape, or form? Did you pull at all? A. I tried to move her then, but I cannot move it any more. * * * Q. How did you try to move her? Which direction? A. I tried to move her. I tried, because I thought there would be some danger, but I cannot go out. * * * Q. You tried to move her so she would come into the dock? A. Yes, sir. Q. How did you try to move her? Did you put the line on the capstan? A. Yes; I just pulled it. I pulled it. I cannot do nothing. I tried to pull it with my arm. Then I made it fast. I first tried to pull it. * * * Q. Then, when Boyer came there, and told you it was a bad place to lay, was that before you tried to move out? A. That is what I tell you; I cannot remember right. I don't remember if it was before or after."

When we add to this variance in Andrews' testimony the fact that Elwell had no object in pulling the hinge end of the barge into the angle made by the projection and the wharf, but was trying to pull it in the direction of the derrick, that Elwell as soon as the barge was sunk, and at all times thereafter, asserted to Tucker that he had left the barge where he now says he did, that Tucker until the filing of the libel never asserted anything to the contrary, we incline to the belief that Andrews' account was an afterthought, and, standing alone, is overborne by the testimony of Elwell and Boyer, and that Tucker has not by the weight of the proof made out a case against Elwell.

Such being our conclusion, the case must be remanded, with directions to dismiss the libel.

NATIONAL BANK OF SAVANNAH v. ALL.

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

No. 1679.

1. DEEDS ⟸71—VALIDITY—DURESS.
   A conveyance made by a mother for the purpose of securing an indebtedness of her son, with knowledge that in incurring the indebtedness he had committed a criminal offense and with intent to prevent his prosecution, is not for that reason invalid as for an illegal consideration, where not induced by any threat of prosecution or promise of immunity.

2. DEEDS ⟸211(5)—EVIDENCE—DURESS.
   Evidence *held* insufficient to warrant cancellation of a deed executed by complainant to secure an indebtedness of her son, on the ground that it was induced by threats of prosecution of the son by the creditor, which placed her under duress or prevented the exercise of her own free will.

3. CONTRACTS ⟸138(2)—RIGHT TO RELIEF IN EQUITY—PARTIES IN PARI DELICTO.
   One party to a contract, the purpose of which was the compounding of a felony, and which has been carried out by the other party, will not be relieved from the contract in equity.

4. LIMITATION OF ACTIONS ⟸37(4)—SUIT FOR CANCELLATION OF INSTRUMENTS —"ACTION FOR RELIEF ON GROUND OF FRAUD."
   A suit for cancellation of a deed as executed under duress is one for relief on the ground of fraud, and is barred in six years from discovery of the fraud, under Code Civ. Proc. S. C. 1912, § 137, subd. 6.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action for Deceit or Fraud.]

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5. ESTOPPEL ⇐=94(1)—PERMITTING MORTGAGE OF PROPERTY.
Where complainant executed a deed to property to enable the grantee to mortgage the same to secure a debt of her son, and permitted the mortgage to be foreclosed without objection, she is barred by laches from thereafter maintaining a suit for cancellation of the deed on grounds of which she had knowledge at the time it was executed.

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. M. Smith, Judge.

Suit by T. Gertrude All against the National Bank of Savannah and another. Decree for complainant (250 Fed. 120), and the Bank appeals. Reversed.

Edward S. Elliott, of Savannah, Ga., and E. M. Blythe, of Greenville, S. C. (Jacob Gazan, of Savannah, Ga., and B. F. Martin, of Greenville, S. C., on the brief), for appellant.

Charles Carroll Simms, of Barnwell, S. C. (J. W. Vincent, of Hampton, S. C., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This case was brought in the court of common pleas of Barnwell county, S. C., and removed to the District Court of the United States for the Eastern District of South Carolina.

T. Gertrude All, on February 9, 1917, filed her bill against Harry W. All, a resident of the state of South Carolina, and the National Bank of Savannah, a corporation organized under the banking laws of the United States and a resident of Savannah, Ga. The appellee was the owner and in possession of the river plantation, containing 2,592 acres, more or less, in Bull Pond township, Barnwell county, S. C. That in August, 1910, plaintiff was approached by her son, John E. All, and an agent of the National Bank of Savannah, and requested to make such bank a mortgage to prevent it from prosecuting her son for a crime under the laws of Georgia, which was refused. That shortly thereafter, on threats being repeated by the agent, and to prevent the prosecution, arrest, and imprisonment of her son, she consented to and did execute and deliver to her son, Harry W. All, a deed conveying the land in question, which was duly recorded in Barnwell county, S. C., in order that Harry W. All might make and deliver to the bank a mortgage on the property to prevent the threatened prosecution. That appellee was not indebted to the said All or to the bank, and that the deed was made solely for the purpose of preventing the bank from carrying out its threat of having John E. All prosecuted, arrested, and imprisoned. That for the same purpose only Harry W. All made a mortgage to the bank for the sum of $15,000, the said Harry W. All not being indebted to the bank. The appellee "is and has been in possession of these lands, and the defendants are not and have not been." It is further alleged that the deed and mortgage are void and should be canceled as a cloud on the title of plaintiff.

The answer of the bank is substantially as follows: It admits that it is a corporation, and it denies all other allegations, except as admitted.

It admits the indebtedness of John E. All to the bank, and the execution of the deed and mortgage, and that Harry W. All took the proceeds from the mortgage and applied the same to the indebtedness of John E. All to the bank, but expressly denies that the mortgage and deed were procured by threats or representations made by it, or that it ever made any threats whatever. That subsequent to the making of the deed and mortgage the bank brought its action in the District Court for the foreclosure of the mortgage made by H. W. All. That it obtained a decree for sale. That the land was sold, and bought in by the bank and deed was made to it, and it went into possession of the same, and in addition to the decree for the sale of the land it obtained a deficiency judgment against Harry W. All. The plaintiff had full knowledge of the foreclosure proceedings and acquiesced in the same, and is now estopped to maintain an action for title or possession of the bank for the lands.

It is further averred that the cause of action accrued more than six years prior to the commencement of this action, and is therefore barred by the statute of limitations; that the deed and mortgage were executed for the purpose of paying a debt of John E. All, son of the plaintiff, to the bank, and was based on a good and valuable consideration; that if deed was made to suppress prosecution, which defendant denies, plaintiff was a party to the transaction, acquiesced in it for more than six years, the contract has long been executed, she was particeps criminis in it, and the court cannot lend its assistance to her to repudiate this transaction.

Harry W. All filed no answer. The court below entered decree canceling the deed in question, to which plaintiff excepted, and the case now comes here on appeal.

The first question that arises in this case is as to whether the appellee has by a preponderance of the evidence established the allegations of the complaint; the gist of the complaint being that she acted under duress in signing and executing the deed in question. Of course, there is the question as to the consideration moving her at the time she made the deed; but the first and most important question is as to whether she executed the deed of her own free will and volition. We will briefly review the evidence in order that we may properly determine this phase of the question.

The first witness offered by the appellee was her husband, J. H. C. All, who said, among other things, that he had collected the rents for the current year, and every year that his wife had owned it; had paid all taxes except last year; that his son got into financial difficulties in Savannah, and that Mr. Gazan, attorney for the bank, had gone to his residence to see him; that he said he came there by instruction of the bank; that the bank was going to prosecute his son for obtaining money under false pretenses; that he communicated this fact to his wife, and told her that the son would be prosecuted if something was not done; that he suggested she would have to make title to the bank to save the boy from the chain gang or the penitentiary; that he obtained this information through Mr. Gazan and from what his boy wrote him.

On cross-examination he said that Mr. Gazan brought "a lot of papers" for her to sign, but he would not let her sign them, most of them. "Gazan did not state that the bank only wanted me to pay the money due by J. H. C. All & Son. We met in Mr. Patterson's office at Barnwell. The understanding was she was to keep the boy out of trouble by parting with the real estate. I was just trying to see that she didn't get tangled up. I got a lawyer to help her." He also said that the national bank had never brought suit against him, and that John All did not make representations to her (meaning his wife) about signing the deed; further that the deed was prepared by her lawyer and carried back to her, and she signed it at Allendale and gave it to H. W. All.

Percy All, a son of the appellee, testified, among other things, that Mr. Gazan and the cashier of the national bank sent for him in reference to the transaction of John E. All with that bank, and when he arrived they told him that they intended to institute criminal proceedings against John E. All, as he was short a considerable sum of money, and the directors had instructed them (Garrard & Gazan) to do so, and that he wrote his father about it. He also testified that this conversation occurred in the office of Garrard & Gazan; that in addition to Garrard and Gazan, Mr. Bloodworth, the cashier of the bank, and also Mr. Hughes, were present. He said they told him that John E. All was short a considerable amount of money, and that they intended to prosecute him criminally immediately, unless something was done; that he wrote his father of the matter; that he was again called to the bank, and that, from the tone of the letter received from his father, he suggested that Mr. Gazan go to Allendale and see his father; that the whole effort on the part of those gentlemen was to secure payment by threatening prosecution, and that that was their purpose in sending for him.

Harry W. All, a son of Mrs. T. Gertrude All, said, among other things, that no consideration passed to him for the execution of the mortgage to the bank; that he signed the notes also, but was not indebted to the bank, and the mortgage was made out solely to prevent the bank from prosecuting his brother; that the mortgage was made to him, and he took the same to Savannah to "fix it up," as the bank wanted it with the intention of keeping his brother out of jail. He testified on cross-examination as follows:

"Q. Mr. All, when you delivered the mortgage to the bank that day, didn't the bank execute to you a check for $15,000, and didn't you then and there indorse that check to the bank, to be applied to this debt of J. H. C. All & Son? A. Gave me a check for $15,000?

"Q. Yes. A. No; I don't remember about that. I signed some notes.

"Q. Will you swear that they didn't deliver to you the check? A. No; I don't swear; it might have been among the notes."

Mrs. T. Gertrude All testified that she was the owner of the land in question and had executed the deed to her son Harry W. All, so that he could go down and settle with the bank, and thus keep her son out of trouble. She testified that she could not recall the conversation Mr. Gazan had in the parlor at Allendale; that her husband told

her that, unless the deed was made, her son John E. All would be prosecuted and sent to prison for a criminal offense; that she did not make the deed for a money consideration, but made it to keep her son out of jail and trouble; and that if it had not been for the threats of Mr. Gazan, as agent for the bank, she would not have made the deed.

J. H. C. All, being recalled, said that the reason they did not bring the action sooner was that the bank undertook to foreclose the mortgage, and that his son was opposing it on the ground that "it was settled or paid, and until that was settled we did not bring this suit earlier. I was looking after the matter for Mrs. All."

This constitutes the evidence relied upon by the appellee to sustain her contention.

The defendant offered the evidence of Jacob Gazan, who testified that he was a member of Garrard & Gazan and was general counsel for the national bank. He said that Percy All had suggested to him that he thought he would be able to obtain some money as security, through his father and mother; that on July 28, 1910, at the request of the Alls, he went to Allendale, to the house of Mrs. J. H. C. All; that there he "recited the facts about the matter," and it was agreed that Mrs. All would give a mortgage on the river place to secure $15,000 of this indebtedness; that at that time there was no mention of criminal prosecution by himself or any one else, and that there never had been in his conversations with the bank officials any suggestion of a criminal prosecution; that his firm's services were only on the civil side of the matter; that he prepared the mortgage and notes and sent them to Allendale, but they were not satisfactory; that he then went to Barnwell, where Mr. All met him in the office of Mr. Patterson, at which time Mr. All said that he was acting with Mrs. All; that they discussed how the matter could be arranged so that, in the event the river place should not on a foreclosure produce the money for which it was secured, "that there would be no personal liability on Mrs. All beyond the river place. She was willing to give up that place, but did not wish any other of her property involved." That her attorney, Mr. Patterson, evolved the plan solely on his own initiative, by which Mrs. All should deed the river place to her son Harry W. All, who in turn could deal with the place as his own and make such agreement with the national bank as might be satisfactory between him and the officers of the bank. A part of the plan was that Mrs. All should not lose more than the river place; that everything was agreed upon, except the drawing of the deed; that at this juncture, Mr. J. H. C. All said:

"Well, now, before we close this matter, I want you to give me a writing that there will not be any prosecution of my son."

Witness in reply said:

"Why, Mr. All, we have never discussed prosecution either with you, with the bank, or any one else. I am not here on any criminal side of the case. I am here solely for the purpose of obtaining such security as we can for as much of the debt as possible."

Witness then said:

"If that is your attitude, we stop where we are."

Mr. Patterson, who, as we have said, was attorney for Mrs. All, replied:

"Mr. All, there has been nothing said here about any criminal prosecution, and that is a matter which only the future can take care of," or words to that effect.

Then Mr. All expressed satisfaction with the situation. Mr. Patterson then prepared the deed for Mrs. All and Harry W. All. A few days thereafter Harry All went to Savannah and took the deed. By agreement Harry All executed a mortgage for the bank, not only of the $15,000 to secure All & Sons' indebtedness, but also the entire indebtedness of J. H. C. All & Son to the bank. The witness drew the mortgage and notes, and they were executed, and H. W. All executed a note for $15,000, and that amount was applied on account of the indebtedness.

The witness explicitly denied that he ever threatened any prosecution, or was ever present where any prosecution was ever mentioned, except in the manner just related in Mr. Patterson's office.

On cross-examination the witness said:

"If a man pledges cotton, and instead of cotton there are linters, I would say that would under the law of Georgia constitute crime of obtaining money under false pretenses. It is also a crime to compound a felony, and in my 27 years at the bar I have always been very careful not to come within the purview of that statute."

Witness also testified that the information as to the transactions of J. H. C. All & Son came to their firm more particularly in connection with their investigation as to what rights the bank had against oil mills who had falsely billed the linters as cotton. He further stated that John E. All claimed that he had done no wrong, as he had invented a machine by which he combed out linters—straightened the fibre, and he would take about one-third linters and two-thirds cotton, and in another machine which he had invented he would mix the two products together in a bale and sell it as cotton. He further stated that he thought he could get his mother to help him, and we told him that the matter was of no consequence to us, where it came from; that what we wanted was to get the money; that the circuity of the conveyance was the result of Mr. Patterson's advice and Mr. All as the representative of Mrs. All; that the first agreement was that she should give the mortgage to secure $15,000 on her river place, but it occurred to her that if the place should be foreclosed, and deficiency resulted, she would be liable; that Mr. All conferred with Mr. Patterson, and in that way the plan executed was evolved; that there was nothing said in Allendale in regard to the criminal liability of Mr. All; that witness had never even discussed it with the bank officials, and had never investigated the criminal law as to a prosecution; that the limitation against criminal indictment of this character is four years.

On re-direct examination the witness said that the bank became the purchaser at the foreclosure sale in the case of Bank v. Harry W. All (D. C.) 250 Fed. 120, bidding for and buying in the land in the name of the bank; that at Allendale Mrs. All agreed to execute deed and

mortgage and he prepared papers when he came back; that Mr. J. H. C. All represented Mrs. All there as far as he knew; that there was a substitution of the final agreement for the original one.

The judgment roll in the case of National Bank of Savannah v. Harry W. All was introduced.

J. O. Patterson, Jr., was introduced by defendant, who testified, among other things, that he was an attorney at law and resided at Barnwell, S. C. According to his recollection he drew the deed from T. Gertrude All to Harry W. All, dated August 28, 1910; that he was consulted by Mr. J. H. C. All, and he advised him not to allow his wife to execute the mortgage to the bank, for the reason that in his opinion the land would not bring the debt and that the bank would then procure a deficiency judgment against her; that after talking the matter over with Mr. All and Mr. Gazen it was agreed that the deed should be made by Mrs. T. Gertrude All to Harry W. All, and that he prepared the deed and turned it over to Mrs. All; that he discussed the matter with Mr. All before he communicated it to Mr. Gazan; that he could not say that he advised Mr. All to execute a mortgage to the bank, but advised Mr. All not to allow his wife to execute any mortgage, for the reason that she was solvent and that the land proposed to be mortgaged was not worth the amount of the mortgage debt in his opinion; that Mr. All accepted his advice and did not allow his wife to execute the mortgage; that he knew that the purpose was to secure the bank; that he did not remember as to what he advised Mrs. All, but that he thought possibly that he stated this, i. e., that after the deed was executed to Harry W. All he could deal with the bank as he saw fit, and she would not be responsible for the consequences; that he could not say that he heard any threat of prosecution; that the transaction was rather vague in his mind; that he could not say that the criminal business was not discussed, nor could he say that it was; that he could not say that Mr. Gazan's testimony that the whole matter would be off "if you insist on an agreement not to prosecute" is correct or not; simply did not remember.

F. J. Bloodworth was then introduced for the defendant, and testified that he was cashier of the national bank when these things happened with the Alls; that there were daily transactions of various kinds with the Alls; that they had a large note of about $60,000, and they discovered the Alls had given bills of lading which called for cotton, but were really for linters; the pledge was made by either John E. All or his agent, Mr. House Hughes; that there was a proposition made to the bank to secure a portion of the indebtedness by Mr. Harry W. All giving a mortgage in the sum of $15,000 and by making certain other arrangements in connection with it; "that was done;" that the board of directors did not at any time, to his knowledge, direct or authorize a criminal prosecution in connection with that transaction; that nothing like that appears on the notes; that he was secretary of the board, and would have known if such action had been taken. There was no threat of criminal prosecution at the meeting in the office of Garrard & Gazan that Mr. Percy All attended. The witness stated that he would say positively that there was no such threat made

at any meeting that he attended; that so far as he knew no officer of the bank directed the attorney to institute criminal proceedings; that Harry W. All gave note and mortgage aggregating $15,000, for which witness gave him a cashier's check, which All indorsed, and the amount was by his direction placed to the credit of the indebtedness of J. H. C. All.

On cross-examination he stated that he was not a lawyer, but that he thought John E. All had violated the criminal law, and that he did not know that any influence was brought to bear upon the mind of John E. All, or any of his family; so far as he knew there was no proposed prosecution; that he talked with the president about the prosecution, and the opinion was expressed that he ought to be prosecuted, but there was no action of that kind taken, and no agreement to prosecute him.

William Garrard was then introduced as a witness for the defendant, and stated that he had been a practicing attorney in the city of Savannah since 1886 or 1887; that at the time of all these transactions with the Alls his firm represented the national bank, but that he particularly had charge of it; that he was present at the meeting at his office with Mr. Percy All and others; that at that meeting there was no threat of criminal prosecution against J. H. C. All, John E. All, or any one else with reference to it; that he was at a number of directors' meetings and met the officials of the bank, and not one of them ever directed or authorized him to institute criminal prosecution; that the sole purpose of the bank was to collect its money if it could, or as much of it as possible; that the statement of Percy H. All as to what occurred in his office, to wit, that it was done under threat of prosecution, was absolutely untrue; that in the whole matter the attitude of the bank to John E. All as a criminal cut no figure at all; that if any instructions had been given by the bank that they would have been given to him, and that he would have followed them, but none were given.

In addition to this, W. Q. Hughes, clerk and attorney in fact of All & Son, testified as follows:

"Q. Had there not been a warrant taken out for the junior member of that firm? A. I never heard of it.

"Q. By this bank, by the officers of it? A. I never heard of it.

"Q. Was that mortgage given as a condition that the prosecution should not be pressed? A. Not that I know of.

"Q. You do not know anything, then, about any criminal prosecution against John All; that is his name, isn't it? A. No, sir; I know nothing about it; John E. All."

It is reasonable to assume that, if there had been any threats to prosecute, this witness, owing to his relation to the firm of All & Son, would have had knowledge of the same. The foregoing is, we think, a fair statement of the facts bearing upon the contentions of the parties in the court below.

As we have stated, appellee bases her suit upon the theory that she was under duress by virtue of the threats to prosecute her son, and therefore did not exercise her own free will at the time she conveyed the land in question to her son Harry W. All. However, the court

below failed to find that the appellee was under duress at the time that she executed the deed. In referring to this phase of the question, the court stated that under the South Carolina decisions "it is not a question of duress, but a question of the illegality of the consideration of the contract."

It is well settled that, where one seeks to cancel a deed or other written instrument upon the ground that the grantor was under duress at the time of the execution of the same, it must affirmatively appear that the execution of such deed or instrument was procured by threats or undue influence. The court below, in referring to the ground upon which it based its decision, said:

"In the present case it is found as a conclusion of fact that the National Bank of Savannah, through its officers, under the circumstances of the case, was reasonably charged with the knowledge that the motive actuating the complainant in making the deed of conveyance to her son Harry W. All was to save her son John E. All from criminal prosecution, and it is further found as a conclusion of law that that deed of conveyance is, as against the defendants Harry W. All and the National Bank of Savannah, null and void."

When the matter was before the court for rehearing, the District Court also said:

"Where the machinery of the law and the administration of public justice is not set in action by those who should do so because of some financial benefit to inure to the party who should be the prosecuting witness, it is another thing; and it is not the result which the law desires to allow consummated."

The decision of the court as to this point may be epitomized as follows:

(a) That the conveyance was illegal, because the motive influencing Mrs. All was to save her son from prosecution.

(b) Appellant was reasonably charged with knowledge of such motive.

(c) Appellee's son was guilty of a crime.

(d) His guilt was known to all.

(e) The bank was active in obtaining the deed, and it is further insisted by counsel for appellee that the fact that the appellee's son was not prosecuted is a strong circumstance tending to show that the conveyance was illegal.

[1] The question therefore arises as to whether the evidence is such as to warrant the court in the finding that the consideration was illegal. It is true that the evidence of the appellee and her witnesses tends to show that she was under duress at the time of the execution of the deed; but does the whole evidence, and especially when we consider the evidence offered by the appellant, warrant the finding that the appellee at the time she executed this instrument, executed the same on account of the threats made by the bank or its agents to prosecute and imprison her son?

In order to arrive at a correct conclusion as respects this point, we must consider the transaction as a whole, and when we do this we find that the evidence offered by appellee is wholly inconsistent with the position she now takes. The characters of the attorneys who testified in this case are good. Two of the witnesses are members of a

reputable firm of attorneys, and we feel that full credence should be given to their testimony, and this is especially true in view of the conduct of the appellee. At the inception of the whole matter she knew that the conduct of her son had been such as to render him liable in the event he should be prosecuted on a criminal charge. It was but natural that she should feel a tender solicitude for her son, and that she should be desirous of shielding him from imprisonment. This was a laudable sentiment, and one that would be entertained by any mother under such circumstances, even though no one had ever intimated that it was proposed to institute a criminal action. In nine cases out of ten, any father or mother, knowing that a child was liable to a criminal prosecution, would not have hesitated a moment to do anything that might save the child; but where it appears that such action on the part of the parent was due to the knowledge of the fact that her son had committed a crime, and not owing to any threat to prosecute him, it could not be held sufficient to invalidate any paper that is executed.

As we have stated, the court did not find as a fact that she was deprived of her own free will, and therefore executed the deed under duress, which we think conclusively determines this case adversely to the contention of the appellee. The evidence of Mr. Gazan, which is plain and explicit, clearly shows that no effort was made by the bank to intimidate or coerce appellee, and the testimony of Mr. Gazan is strongly corroborated. It affirmatively appears that the first point raised by the appellee and her husband was that she was anxious that a plan might be adopted by which she was not to be liable beyond the value of the river place. This matter was finally adjusted by a plan worked out by her own counsel, Mr. Patterson. After this point had been adjusted, it appears that the husband inquired as to whether, as a condition precedent to the signing of the deed, the bank would give him a paper writing stating that there would not be any prosecution of his son, and in reply to this proposition Mr. Gazan made it very plain that he was not there to discuss the criminal side of the case, and that the only motive he had was to secure as much of the debt as possible; and, continuing he stated, "If that is your attitude, then we stop where we are;" and the statement of Mr. Patterson, who was then and there representing appellee as her counsel—i. e., "Mr. All, there has been nothing said here about any criminal prosecution, and that is a matter which the future only can take care of"—is very significant and corroborates the evidence of Mr. Gazan.

Deed was prepared by Mr. Patterson, as attorney for appellee, in pursuance of the instructions that she gave him, and the terms of the same are plain and explicit, and could have left no doubt upon her mind as to the real import of the transaction. There were five persons present at the time the deed was executed, four of whom corroborated the evidence offered by the bank as to this point. It is further insisted that it is significant that the appellee did not bring her action to set aside the deed until after the statute of limitations applying to the offense with which her son was charged, had expired.

In order to bring this case within the rule announced by the court below, it must appear that the bank threatened a criminal prosecution

of the son, or did something that created the impression upon the mind of the mother that, unless she signed the deed, her son would be prosecuted and imprisoned. It was but natural that she should have realized the enormity of the crime which her son had committed, and being anxious to save him from punishment she executed the deed; but unless it can be shown that the bank not only threatened such prosecution, but also agreed not to prosecute the son, it could not be said that her act was not that of her own free will.

The second assignment of error is to the effect that the court—

"erred in not holding specifically that, even if the purpose of Mrs. All in executing deed to Harry W. All was to prevent a criminal prosecution against her son, John E. All, such state of mind was not brought about by any act of this defendant, was not known to it, and that its sole purpose in the transaction was to obtain security for a debt justly and legally owing to it by John E. All, son of this defendant, and that this defendant had no reason to expect that the purpose of Mrs. All in executing the deed was other than to secure the debt of her son."

The evidence above quoted applies with equal force to this assignment, showing as it does, we think, most conclusively that the bank did nothing to bring about the state of mind of Mrs. All which prompted her to sign the deed. The real question agitating the mind of Mrs. All was as to whether she would become liable for any amount of the debt that might remain unsatisfied after the sale of the land upon which she was to give the mortgage to the bank, and that the fact that the advice given by her attorney, Mr. Patterson, was accepted by the appellee's husband, upon which she acted, clearly indicates that that point was the one thing about which her mind was in doubt. The following question and answer of the witness Patterson seems to settle that question beyond peradventure. The witness was interrogated as follows:

"Q. But the final transaction that was made upon your advice as attorney for Mrs. All? A. I will say that Mr. All accepted my advice, and he did not allow his wife to execute that mortgage."

This clearly shows that in any preliminary steps that were taken by the appellee she was guided solely by the advice of her attorney, and it is but reasonable to assume that the point we mention was the one in which she was unsettled in her mind and about which there is not a scintilla of evidence to show that the bank either directly or indirectly undertook to influence her in that respect; in other words, we think that the fact being established that she only wanted to guard against any liability that might occur against her personally tends strongly to show that she had made up her mind that it was her duty as a mother to become security for her son, provided she could have this point cleared up, so that she might know what she was doing.

On the third assignment of error it is insisted that the court—

"erred in not holding specifically that, in order to avoid the deed executed by plaintiff, it was necessary for her to show, not only that it was without consideration, but also that she was caused to execute the deed by such duress, expressly or impliedly exerted upon her by this defendant, as would result in her being compelled to execute the same through fear of prosecution of her son, and not as an act of her own free will."

In other words, that the Court erred in not holding that the—

"preponderance of the testimony showed that no such duress had been exercised upon the plaintiff by the bank or any of its agents."

We have already, in referring to the other assignments of error, fully covered this point. However, we will group the third and fourth assignments of error together in order that we may discuss them at the same time.

[2] Here we have the deed of Mrs. All as the final result of the negotiations between her and the bank, or its agents, and it clearly appears from all the testimony that before she executed the deed she took such steps as an ordinarily prudent person would take in order to safeguard her interest; and under these circumstances can it be found from the testimony that there were such threats to prosecute her son as to deprive her of the exercise of her own free will and thereby render her incapable of giving her legal assent, or whether there was no legal consideration moving her to execute the instrument in question?

It should be borne in mind that no warrant was issued, nor does it appear that any steps were taken to secure a warrant, or to restrain the defendant from his liberty, on account of the transaction between the son and the bank; therefore we must conclude that there was no criminal procedure imminent at that time against John E. All.

In 14 Cyc. 1123, it is stated that duress is—

"a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition."

In United States, Lyon et al. v. Huckabee, 16 Wall. 414, 431 (21 L. Ed. 457), the Supreme Court said:

"* * * If there be compulsion, there is no binding consent, and it is well settled that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient in legal contemplation to destroy free agency, without which there can be no contract, because in that state of the case there is no consent. Unlawful duress is a good defense to a contract, if it includes such degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness."

It is further significant that Mrs. All, after the conference with Mr. Gazan, was given ample time in which to determine what she should do, and it must also be borne in mind that when the parties met at Barnwell she had her representative there in the person of her husband, who assented to the transaction. The lower court, among other things, said:

"It is found as a conclusion of fact that the National Bank of Savannah, through its officers, under the circumstances of the case, was reasonably charged with the knowledge that the motive actuating the complainant in making the deed * * * was to save her son * * * from criminal prosecution."

While these findings pertain to the question of duress, they certainly have no place in dealing with the consideration of the contract. In 9 Cyc. 320, it is said:

"Motive and consideration must be distinct, for they are not the same thing. The fact that there is a motive for a promise does not provide the element of consideration."

It is insisted by counsel for appellant that, inasmuch as there was an extension of the indebtedness of John E. All during the period of 1910 to 1914, this in itself would be sufficient legal consideration, and, in the absence of a promise on the part of the bank to compound a felony, would not vitiate the contract for lack of consideration.

It is conceded that John All secured a credit by his mother becoming security for him.

"A benefit to a third person is a sufficient consideration for a promise." 9 Cyc. p. 316, and cases cited.

Extension of time for the payment of a debt or the performance of an agreement is a sufficient consideration to support a contract. 9 Cyc. p. 338, and cases cited.

Admitting that Mrs. All realized the fact that her son had violated the criminal law and was actuated by a desire to save him harmless from prosecution of such offense, this would not be sufficient in the absence of proof that the bank had agreed not to prosecute the son in the event the mortgage should be given, and that the bank had no knowledge of the cause moving her to execute the deed in question, to invalidate the deed. This principle is well settled in the case of Moyer v. Dodson, 212 Pa. 344, 61 Atl. 937, in which the court, among other things, said:

"There is nothing in the contention that the mortgage was given to stop a threatened criminal prosecution against Dodson. Prior to and at the time the agreement and mortgage were executed no prosecution had been brought against Dodson. While he testifies that the plaintiff and the latter's counsel told him he would be prosecuted if he did not obtain the mortgage, it was not shown, nor is it even claimed, that the plaintiff or his counsel agreed not to prosecute if the mortgage was given. The contract would not be vitiated unless the plaintiff agreed to abandon or suppress the prosecution against Dodson. Johnson v. Allen [22 Fla. 224], 1 Am. St. Rep. 180; Cass County Bank v. Bricker [34 Neb. 516], 52 N. W. 575, 33 Am. St. Rep. 649."

Also in the case of Fosdick v. Barnarsdale, 74 Mich. 302, 41 N. W. 931 (1889), the court held that, in order to make a note void, the alleged understanding that the plaintiff would not appear or prosecute the case against the defendant should have been the understanding of the plaintiff as well as the defendant.

In Bankhead v. Shed, 80 S. C. 253, 61 S. E. 425, 16 L. R. A. (N. S.) 971, 15 Ann. Cas. 308, the Supreme Court, in referring to this phase of the question, said:

"Moreover, in this case, there was no duress by imprisonment and no prosecution had even been begun. At most there was a mere threat to prosecute under a void statute."

After a careful examination we fail to find any decision of the South Carolina court to sustain the contention of the appellee. In the case of Booker v. Wingo, 29 S. C. 122, 7 S. E. 52, the court of that state held:

"That contracts made solely on a compromise of indictments will, as a rule, be set aside."

There is nothing in the opinion of the court in that case which interferes in the slightest with the general rule which applies to cases of this kind. After deciding as it did, the court, among other things, said:

"But it is recognized that there are exceptions. It was held, in the case of Banks v. Searles, 2 McMul. 356, that a note given in part as compensation and partly to compromise a prosecution for assault and battery is not void, the consideration being adequate to sustain the action. In that case, Judge O'Neall said: 'There is in every assault and battery a public offense and a civil injury. The 'compensation' of the latter has always been recognized by the imposition of a much less punishment when it has been made.' There is also a civil injury in larceny, and we do not clearly see why the same principle should not apply to it, at least to the extent of 'compensation' for the property appropriated.

"Assuming, however, that the inducement was illegal, to the extent of the declaration of the defendant that he 'would use his influence to have the prosecution stopped,' does it necessarily follow that the whole transaction must be declared void ab initio? We do not think so. The plaintiff, under the advice of her friends, entered into the arrangement voluntarily. After the deed was executed and possession given, she acquiesced for over 18 months, and, in the meantime, the defendant had fully executed his part of the agreement. We concur with the referee and circuit judge that the plaintiff and defendant were in pari delicto, and that equity will not now, at her instance, declare the whole transaction void."

[3] Even if it had been shown that the parties to this transaction were actuated by the motives as contended by the appellee, there is no escaping the proposition that such action on their part was in the nature of compounding a felony, and each party, as we have said, would be guilty of fraud. The court below recognized this principle when it said:

"It may well be that the complainant, T. Gertrude All, does not appear in a very admirable position. She was, in the opinion of the court, beyond doubt stimulated in her action by her desire to protect her son from criminal prosecution and punishment. She acted upon the pressure of her maternal feelings for the safeguarding of her offspring."

The fact that she did not institute this suit until after the statute of limitations of the state of Georgia relating to the compounding of a felony expired tends strongly to show that she appreciated the enormity of the crime which, according to her own testimony, he had committed, and that she was careful to take no action as respects the cancellation of the deed until she had gotten her "head out of the halter."

It is a well-settled maxim that he who comes into equity must come with clean hands, and that the law will leave wrongdoers where it finds them. In Creath's Administrator v. Sims, 5 How. (U. S.) 192, 12 L. Ed. 111, the court said:

"The following principles of equity jurisprudence may be affirmed to be without exception, namely: That whosoever would seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith; that it will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence."

In the case of Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13, 33 L. Ed. 242, the court announced the following rule:

"Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct. * * * The maxim, 'In pari delicto potior est conditio defendentis,' must prevail. It is against the policy of the law to enable either party, in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another."

[4] However, it is insisted by counsel for plaintiff that appellee's right of action is barred by the statute of South Carolina, and counsel for appellee replies to this proposition by saying that the cause of action did not accrue until the discovery of the fraud. We think that the contention of appellee as respects this point is untenable, inasmuch as the facts relied upon by appellee to cancel the deed, according to her own testimony, were known and fully understood by her at the time of the execution of the deed. This being so, we must inquire as to whether a sufficient length of time had elapsed to bar appellee's right to recover.

Counsel for appellants insists that this case comes within the purview of section 137, vol. 2, subdivision 6, of the Code of 1912, which is in the following language:

"Any action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the Court of Chancery, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

This being a suit for cancellation of a deed, it comes clearly within the provision "solely cognizable by the Court of Chancery." Furthermore, it is "an action for relief on the ground of fraud" within the meaning of the term "in equity jurisprudence." In the case of Smith v. Linder, 77 S. C. 535, 58 S. E. 610, and Tucker v. Weathersbee, 98 S. C. 403, 82 S. E. 638, the Supreme Court of that state held that a suit in equity to set aside conveyances in fraud of creditors is barred within six years after creditors had knowledge of facts sufficient to put them on inquiry which, if followed up, would have disclosed the fraud. In the case of Dupont v. Du Bos, 52 S. C. 244, 29 S. E. 665, where it was sought to cancel a forged deed, the court said:

"At law fraud must be taken advantage of within six years of its discovery. Where, however, an equitable action must be brought, by analogy a court of equity will follow the period fixed in law cases by statute."

It is insisted by appellee that duress is not a species of fraud, and that therefore this statute does not apply. In 14 Cyc. § 1123, in referring to "duress" it is said to be "a species of fraud in which compulsion in some form takes the place of deception in accomplishing the injury." The doctrine is well stated in Pomeroy's Equity Jurisprudence, vol. IV, paragraphs 922 and 936, paragraph 922 being in the following language:

"Constructive fraud is simply a term applied to a great variety of transactions, having little resemblance either in form or in nature, which equity regards as wrongful, to which it attributes the same or similar effects as those

which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud. It covers different grades of wrong. It embraces contracts illegal, and therefore void at law as well as in equity; transactions voidable in equity because contrary to public policy; and transactions which merely raise a presumption of wrong, and throw upon the party benefited the burden of proving his innocence and the absence of fault."

And in paragraph 936 it is said:

"It is unnecessary to discuss the meaning of the phrase 'contra bonos mores,' since the doctrine is familiar. It is enough to say that all agreements in which the consideration past or future, or the executory terms stipulating for acts to be done or omitted, are contrary to good morals, are illegal and void in equity, and with a very few exceptions at the common law. This doctrine applies in equity, whatever be the external form of the contract, or its immediate purpose, or the particular nature of its illegality. Among the most important and familiar illustrations are the following: Contracts based upon the consideration, either past or future, of illicit sexual intercourse, or stipulating of such future intercourse, or in any manner promoting or furnishing opportunities for unlawful cohabitation or prostitution; contracts which constitute or amount to champerty or maintenance, these being highly criminal at the common law; contracts, executed or executory, given under the consideration of or stipulating for the compounding of a felony, the forbearance to prosecute for a crime, or the abandonment of a pending criminal prosecution."

The case of Brown v. Brown, 44 S. C. 378, 22 S. E. 412, is very much in point:

"With regard to the fourth exception, it may be better to state what the circuit judge did charge the jury on the subject of the statute of limitations. He charged: 'A man has six years from the discovery of fraud to attack that fraud—to attack the deed for fraud—six years from the time he discovers it; that is, six years from the time he knows, or has sufficient information to put him on inquiry as to the facts which constitute the fraud. Well, if Brown, the deceased, knew what he was doing when he made that deed, or had notice of all the circumstances of that deed, then the statute of limitations ran out at the end of six years, and he could not commence an action, nor those who come after him, because the heirs at law stood in his shoes.' The propositions of law embraced in this charge are fully sustained by the cases of Beck v. Searson, 8 Rich. Eq. 130, and Kirksey v. Keith, 11 Id. 33."

Also in the case of McMillan v. Cheeney, 30 Minn. 519, 16 N. W. 404, the Supreme Court of that state held that an action to set aside deeds of real estate obtained by threats, intimidation, and undue influence was "an action for relief on the ground of fraud, and subject to a limitation of six years."

[5] We are of the opinion that this statute applies to the instant case and that appellee's action is barred inasmuch as it appears that more than six years had elapsed before suit was instituted. Even if the statute in question did not apply to this case, we think appellee's cause of action is barred by laches. She had knowledge of the pendency of the suit to foreclose the mortgage. It further appears that she did nothing to assert any right which she may have had, nor did she notify the bank that she claimed the title to the land, thus permitting the bank to proceed to foreclose the mortgage and by her silence the bank expended large sums of money, to wit, $280.49 in that proceeding, in addition to employing attorneys to prosecute the same.

If this statute were not in existence she would not only be estopped from ever thereafter asserting title to the premises in question, but she would be clearly barred by laches. There are many cases in equity where, under peculiar circumstances, one is barred from right of recovery by laches wherein not even the time required by the statute of limitations in actions at law had expired. When we consider the attitude of Mrs. All, to which we have referred, we think that this is peculiarly a case where the rule relating to laches should be applied. According to her own contention, if such be true, she is equally guilty with the bank of the offense of compounding a felony, and her subsequent conduct at every stage of the proceedings confirms this view. She comes into court with unclean hands and under the circumstances a court of equity will not permit her to take advantage of her own wrong.

We have carefully considered the various cases relied upon to sustain the contention of the appellee, but we are clearly of the opinion that they do not apply to the case at bar, inasmuch as the facts upon which the decision in such cases is based are not analogous to the facts of this case. There are all told 17 assignments of error, but we do not deem it necessary to discuss the others in view of what we have already said.

For the reasons stated, the decree of the lower court is reversed.

Reversed.

SAUNDERS et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 3, 1919.)

No. 3180.

1. CRIMINAL LAW ⟸559—EVIDENCE—INFERENCES—VERDICT.
   A verdict may be based on a rightful inference arising from the testimony, as well as on the direct testimony.

2. POISONS ⟸2—HARRISON ACT—CONSTITUTIONALITY.
   The Harrison Anti-Narcotic Act (Comp. St. §§ 6287g–6287q), relating to sales of narcotic drugs and prohibiting the sale direct to a consumer without a prescription issued in good faith by a physician in the course of his professional practice, under the revenue powers of the federal government, is not invalid as an attempt by the federal government to exercise a police power, which was not delegated, but was reserved to the states.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

A. L. Saunders and Leon S. Thompson were convicted of violating Harrison Anti-Narcotic Act Dec. 17, 1914, and they bring error. Affirmed.

Ralph Davis, of Memphis, Tenn., for plaintiffs in error.

Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. December 11, 1917, A. L. Saunders, a licensed physician, and Leon S. Thompson, a druggist, both of Memphis, Tenn., were indicted for violation of the Act of Congress (Act Dec. 17, 1914, c. 1, 38 Stat. 785 [Comp. St. §§ 6287g–6287q]), known as the Harrison Anti-Narcotic Law. On the 18th of that month they were tried by court and jury and found guilty; and on the following January 16th motion for new trial was denied and defendants were sentenced.

The indictment in substance charged that under a fictitious prescription defendants sold and dispensed one-eighth of an ounce of morphine sulphate, a derivative of opium, to one Joe Peak, without the written order form required by the act (38 Stat. 786, § 2 [Comp. St. § 6287h]), and that the offense was committed in this way: Saunders, on August 9, 1917, made and issued to Peak a prescription for the drug, under date, however, of August 10th, and in the name and with the address of Florence McKnight, and not in the course of his professional practice only, nor in good faith to treat Peak as a patient for a disease or otherwise. Saunders also aided and abetted, induced and procured, Thompson to fill the prescription and to sell the morphine sulphate to Peak, and on the same day, August 9th, Thompson with knowledge of these facts filled the prescription and sold the morphine sulphate to Peak; such acts being committed with intent on the part of both defendants to evade the provisions of the act mentioned.

Motion to quash the indictment was overruled and pleas of not guilty were entered. Under the issues of fact thus presented the case was tried on proofs offered by both sides, including the testimony of defendants themselves. It was assumed throughout that defendants had each registered and also paid his tax, Saunders as a physician and Thompson as a druggist, and that Thompson had procured his drugs through the order forms prescribed. No motion for directed verdict was presented, but in the course of the charge request was made for special instructions, first, to limit the scope of certain telephonic communications of Saunders, so as not to affect Thompson, and, second, that if Saunders and Thompson were acting independently of each other, the one in writing and the other in filling prescriptions, neither could be convicted. Thereupon the court explained the charge in respect of both requests, and there is no reversible error in the charge or in the explanations given in pursuance of the requests mentioned, at least so far as such requests were made the subject of both exception and assignment.

[1] The remaining assignments relate either in terms or in effect to the legal sufficiency of the judgment and of the evidence. Apart from a proposition of law presently to be noticed, it is perhaps enough to say of the assignments that as respects their relation to the evidence they have not been supported by any argument and are in practical effect waived; it may, however, be added that the record discloses evidence directly tending to sustain the allegations of the indictment, and which, if believed, is sufficient in law to support the verdict as to each of the defendants (Kelly v. United States, 258 Fed. 392, —— C. C. A. ——, decided by this court January 7, 1919), and, besides, verdicts may

be rendered upon rightful inference arising from the evidence, as here, as well as upon direct testimony (Robilio v. United States, 259 Fed. 101, — C. C. A. —, decided by this court March 4, 1919).

[2] The logic of the verdict is that Thompson sold the drug to Peak in pursuance of a prescription which he knew Saunders had not issued in good faith, but in furtherance of the sale; and the only conceivable justification of the transaction must rest upon the theory that these two men through their partial observance of the act were in effect licensed to deal in the forbidden drug to any extent they desired. Indeed, the proposition of law urged and before alluded to is that the portion of the act which prohibits a person, qualified as Thompson was under the act, from selling morphine sulphate directly to a consumer and without a prescription issued in good faith by a registered physician in the course of his professional practice only, is distinctly a police regulation and unconstitutional. Such a view cannot be accepted; it is decisively answered by several recent decisions sustaining the validity of the act. Webb v. United States, 249 U. S. 96, 99, 39 Sup. Ct. 217; United States v. Doremus, 249 U. S. 86, 93 to 95, 39 Sup. Ct. 214; Stetson v. United States, 257 Fed. 689, — C. C. A. —, decided by this court May 12, 1919. The decision in Blunt v. United States, 255 Fed. 332, — C. C. A. — (C. C. A. 7), relied on by counsel, is on its facts inapplicable to the instant case, and, moreover, so far as the decision holds a portion of section 2 of the act to be constitutionally invalid, it must be regarded as overruled

The judgment is affirmed.

FRIEDMAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 3, 1919.)

No. 3187.

1. POISONS ⊂⊃4—NARCOTICS—HARRISON ACT—PRESCRIPTIONS.
Under Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), a druggist filling a prescription for narcotics, issued to an addict, is not justified in filling the prescription, regardless of the fact that he knows or has reason to know it was not issued in good faith.

2. CRIMINAL LAW ⊂⊃743—PROVINCE OF JURY—CREDIBILITY OF WITNESS.
The jury is the sole judge of the credibility of witnesses.

3. POISONS ⊂⊃9—HARRISON ACT—VIOLATION—EVIDENCE.
In a prosecution, under Penal Code, § 37 (Comp. St. § 10201), for conspiracy to violate Harrison Anti-Narcotic Act (Comp. St. §§ 6287g–6287q), evidence *held* sufficient to sustain a conviction of druggists, who conspired with a physician who wrote prescriptions for addicts, not in good faith and without regard to any treatment.

4. CONSPIRACY ⊂⊃43(5)—EVIDENCE—OVERT ACTS.
In a prosecution, under Penal Code, § 37 (Comp. St. § 10201), brought against druggists and a physician for conspiracy to violate Harrison Anti-Narcotic Act (Comp. St. §§ 6287g–6287q), where purchases of narcotics by the druggist were alleged as overt acts, purchases in excess of those alleged were provable as additional and similar overt acts.

5. CONSPIRACY ⊂⊃45—EVIDENCE.
In a prosecution against druggists and a physician for conspiracy for violation of the Harrison Anti-Narcotic Act (Comp. St. §§ 6287g–6287q),

by unlawful sales of narcotics, evidence of quantities of narcotics purchased by the druggists was admissible.

6. CONSPIRACY ⟸45—EVIDENCE.
In a prosecution against druggists and a physician for conspiracy to violate Harrison Anti-Narcotic Act (Comp. St. §§ 6287g–6287q), by unlawful sales of narcotics, evidence of the number of narcotic prescriptions filled by the druggists, as compared with the number of prescriptions filled by other druggists, is admissible.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Benjamin Friedman and others were convicted under Penal Code, § 37, of a conspiracy to violate Harrison Anti-Narcotic Act Dec. 17, 1914, and they bring error. Affirmed.

See, also, 224 Fed. 276. Certiorari denied 250 U. S. 671, 40 Sup. Ct. 15, 64 L. Ed. ——.

Ralph Davis, of Memphis, Tenn., for plaintiffs in error.

Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Plaintiffs in error complain of verdict against them and judgment thereon under the first and second counts of an indictment in effect charging that they conspired contrary to section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]) to violate the Act of December 17, 1914 (38 Stat. 785, c. 1 [Comp. St. §§ 6287g–6287q]), known as the Harrison Anti-Narcotic Law. Motions to quash the indictment were overruled as to those counts, but sustained in respect of a third count, in which Friedman alone was charged with violation of the Anti-Narcotic Law.

The first count in substance charged that Friedman and the Thompsons, in January, 1917, and continuously thereafter until the date of the indictment, December 3, 1917, at Memphis, Tenn., unlawfully conspired and agreed among themselves to sell and dispense large quantities of morphine sulphate, a derivative of opium, to divers persons to the grand jurors unknown and without the written order forms required by the act; the plan of the conspiracy being as follows: Friedman, a physician and registered under the act, was to prepare and deliver prescriptions for morphine sulphate to applicants who were in fact or were claiming to be addicted to the use of narcotic drugs, though not with an intent on his part in good faith or in the course of his professional practice only to meet the immediate needs or to effect a cure of such persons, but for the purpose of catering to and satisfying their cravings, and the Thompsons, being engaged in business and registered under the act as retail druggists, were to fill these prescriptions and sell and dispense the drug for the purpose mentioned and not in the conduct of a lawful business. That in pursuance of the conspiracy, and to effect its object, defendants unlawfully committed the following acts at Memphis: (1) On or about August 1,

1917, Friedman made and signed a prescription in the name of F. Hassel, with a definite address in New Orleans, for ten one-eighth ounces of morphine sulphate, delivering the prescription to Homer Vance, and it was filled by the Thompsons and subsequently found in their files; (2) on or about the 4th of the same month, Friedman made and signed a prescription in the name of Homer Vance, with specific address in New Orleans and for a like quantity of morphine sulphate, and the Thompsons filled this prescription and it was also found in their files.

The second count is substantially the same as the first, except that the object charged was to "buy and obtain opium, coca leaves, their salts, derivatives, or preparations thereof, by means of order forms issued" as provided by the act, for purposes other than the lawful use or sale thereof or the legitimate practice of a profession; the defendants were to carry out the conspiracy in the manner alleged in the first count; that in pursuance of the conspiracy, and to effect its object, the defendants at Memphis "did unlawfully * * * do the following acts": On or about July 16, 1917, the Thompsons purchased of the Van Vleet-Mansfield Drug Company and of the Hessig-Ellis Drug Company of Memphis, and on government order forms issued under the provisions of the act, "large quantities of morphine sulphate."

[1] The evidence took rather a wide range, and so far developed into mere questions of fact that no request was made for special instructions to the jury. The court delivered a general charge to which no exception was reserved, and for that reason the charge is not included in the record. It is therefore to be presumed that the jury was fully and rightly instructed both as to the law and the issues of fact. Defendants nevertheless filed motion for new trial which was in part a renewal of the motions to quash the first and second counts of the indictment, and the grounds so relied on are by reference carried into the assignments of error. The position thus taken assumes that it is not the true intent of section 2 of the act (Comp. St. § 6287h), that indeed it was not within the power of Congress to require persons situated as defendants were to concern themselves, either about questions of good faith respecting the issue or the filling of prescriptions for persons addicted to the use of narcotic drugs, or about the use of order forms when selling the drugs to such persons. This position is not tenable. The same view in effect was urged and denied in the recent case of Webb v. United States, 249 U. S. 96, 99, 39 Sup. Ct. 217, 63 L. Ed. 497, wherein the first and second counts of the indictment involved were in marked resemblance to the first and second counts of the indictment in the instant case. And see United States v. Doremus, 249 U. S. 86, 93, 95, 39 Sup. Ct. 214, 63 L. Ed. 493; Stetson v. United States, 257 Fed. 689, — C. C. A. —, decided by this court May 12, 1919; Saunders & Thompson v. United States, 260 Fed. 386, — C. C. A. —, decided to-day by this court.

[2, 3] The assignments of error relied on deny (1) sufficiency of evidence to support the verdict and (2) admissibility of certain testimony. The arguments amount to an admission that Friedman was

accustomed to issue prescriptions for morphine sulphate to persons addicted to the use of narcotic drugs, in excess of any immediate need and not intending to effect a cure, and that when these prescriptions were presented to the Thompsons they filled them, sold the prescribed drugs to the users, and placed the prescriptions in their files. The real controversy hinges on the presence or not of evidence tending to show the alleged concert of action, the conspiracy, of the defendants, and a common intent touching the issue and filling of the prescriptions and the sales as well as the purchases of drugs; in a word, is it sufficiently shown that there was a joint object to acquire the morphine and upon simulated prescriptions and without order forms to effect its sale to habitual users? Defendants do not seem to appreciate the manifest import of some of the evidence. For example, in a period of upwards of six months next preceding the date of the last overt act alleged in the first count, the Thompsons filled 9,642 prescriptions for narcotic drugs and only 107 for nonnarcotic drugs, and of the former Friedman wrote and issued 3,230. Evidence was received to show comparison between the Thompsons' prescriptions and those of a number of other druggists in Memphis during the period stated. The average number of narcotic prescriptions filled by the other druggists does not distinctly appear, though it is to be inferred from their purchases of the drug that the number was very small, amounting at most to only a few hundred, while the number of nonnarcotic prescriptions filled, for instance, by three of them, averaged more than 12,000 each. Within this period the Thompsons purchased of the two drug companies named in the second count about 20 times as much morphine as was purchased by any other retail druggist appearing in the record, and something like 60 times as much as was bought by the average retail druggist doing a larger general business in Memphis.

Further, Homer Vance, who had been a user of the drug, came from New Orleans and applied twice within four days to Friedman for morphine, and was given at each time a prescription, the first being in a fictitious name, for 10 drachms of morphine sulphate, each prescription purporting to be for "30 days' supply." There is also testimony tending to show that on a number of occasions Friedman gave more than one prescription for morphine at the same time to the same person, but under different names; that at least in the Vance transactions Friedman arranged with the Thompsons to have them fill the prescriptions; that the Thompsons never refused to fill his prescriptions, while they were refused by some of the other druggists, and were not even presented at other well-known drug stores. Not a word of criticism appears in respect of the credibility of the other druggists who testified, or of the representative character of their business; and, assuming the credibility of all the witnesses called by the government, the inferences naturally arising from their testimony and pointing to a common understanding and concert of action on the part of defendants can scarcely escape attention or be misunderstood. Judge McCall was asked to grant a new trial for the reason, among others, that the evidence was insufficient to support the verdict, and

with the advantage of having seen and heard all the witnesses when testifying he denied the motion. We are hence constrained to say of the present defendants' contention as we recently had occasion to say in another case:

"Their motion for new trial upon this ground was overruled, and the record makes clear that this court cannot interfere. If the testimony offered for the government was true, the defendants were guilty; and the jury is the sole judge of the credibility of witnesses." Mayer & Persica v. United States, 259 Fed. 216, — C. C. A. —, decided January 7, 1919. And see citations in Saunders & Thompson v. United States, supra.

[4, 5] It is insisted that the quantity of narcotic drugs purchased by the Thompsons was not relevant to any issue in the case. This is to overlook the purchases alleged in the second count as overt acts. Even if the purchases proved exceeded those so alleged, such excess purchases were provable as additional and similar overt acts, although not specifically set out in the indictment. Heike v. United States, 227 U. S. 131, 145, 33 Sup. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914C, 128; Houston v. United States, 217 Fed. 852, 858, 133 C. C. A. 562 (C. C. A. 9). Further, these purchases were items of evidence which, when considered in connection with other related matters, tended to show the character of the business carried on by the Thompsons. Naturally an inquiry would arise whether such a quantity was necessary to the conduct of any legitimate drug business.

[6] This brings into review another objection urged for defendants. It is said that evidence was inadmissible to show the quantities of narcotic drugs purchased and sold, as also the quantities of nonnarcotic drugs sold, by other druggists. Such evidence was calculated to furnish a fair test of the true nature and purposes of the Thompson business. It is not suggested, much less shown, that there was anything peculiar to the business of the other and neighboring druggists in Memphis which would differentiate their business from any legitimate drug business; and it cannot be doubted that the purchases and sales involved in the business of each of a number of different druggists in the vicinity would afford appropriate means of testing the character of the particular drug business under inquiry. We had occasion to consider questions similar to these in the case of Webb v. United States, before cited. We thought that facts there disclosed, which were kindred to the instant facts, gave color to the transactions involved in the vital issues, and we see no reason why this is not true here. The question of admissibility of such evidence cannot be tested by reference alone to any single fact; it is the sum of the facts so collocated and presented from which the claimed related features must be determined.

Other assignments of error are presented, which we do not discuss; but so far as based on objection and exception they do not appear to be well taken.

The judgment must be affirmed.

STOCKYARDS LOAN CO. v. NICHOLS et al.

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

No. 5378.

1. CHATTEL MORTGAGES ⟸157(2)—IMMATERIAL EVIDENCE.
On an issue as to whether defendants had notice of a chattel mortgage on cattle before purchasing them, where a witness testified to giving such notice verbally to one of defendants, the date of a conversation between the two after the purchase, when it was not claimed that such notice was given, was immaterial, and the admission over objection of evidence to fix such date was error.

2. WITNESSES ⟸414(1)—CORROBORATIVE EVIDENCE.
Where a witness testified positively from his independent recollection as to the date of a transaction, checks which he testified were given by him at about the same time were inadmissible to corroborate his testimony as to such date.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Thomas C. Munger, Judge.

Action at law by the Stockyards Loan Company against James Nichols, William B. Miller, and William M. Brisco. Judgment for defendants, and plaintiff brings error. Reversed.

R. F. Blair, of Tulsa, Okl., and B. F. Deatherage, of Kansas City, Mo., for plaintiff in error.

William B. Moore and W. W. Noffsinger, both of Muskogee, Okl., for defendants in error.

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

SANBORN, Circuit Judge. The Stockyards Loan Company, the plaintiff below, loaned about $10,000 to Nichols on January 2, 1915, and Nichols then gave his note and a chattel mortgage to the loan company on his cattle to secure the payment of this debt. A copy of this mortgage was filed in the office of the county clerk of Cherokee county, Okl., where the cattle were situated, on January 12, 1915; but the filing of this copy was insufficient under the statutes of Oklahoma to give notice of the existence or of the terms of the mortgage to a subsequent innocent purchaser of the cattle for value from Nichols. Stockyards Loan Co. v. Nichols, 243 Fed. 511, 515, 517, 156 C. C. A. 209, 1 A. L. R. 547. About February 8, 1915, Nichols sold and delivered the mortgaged cattle to the defendants Miller and Briscoe, and thereafter the plaintiff by means of this action replevined them. Miller and Briscoe defended, on the ground that they had bought and paid to Nichols full value for the cattle without any notice of the chattel mortgage, or of any claim of the plaintiff to any lien upon the cattle, and the chief issue at the trial below was whether or not the defendants had such notice, before their purchase, of the plaintiff's dealing with Nichols, as would have caused a person of ordinary prudence in their situation to have made such inquiry before the purchase as would have informed him of the chattel mortgage.

The fact that some time after February 8, 1915, when Miller and Briscoe bought the cattle, they had such notice of the mortgage was conceded, and the real issue at the trial became whether they first received such notice before the date of their purchase. Upon this subject C. D. Waller testified that he and Nichols lived at Hulbert; that in 1915 he was the assistant cashier of the First National Bank of Hulbert; that about the middle or the latter part of January, 1915, and prior to the time when Miller and Briscoe bought the cattle from Nichols, Miller was at Hulbert for the purpose of buying hogs; that it was the custom of the banks to charge exchange on checks drawn upon outside banks; that early one morning Miller came into the bank to see what the bank would charge for exchange on checks, and asked him where Nichols was getting this money to buy cattle with; and he told him that he had procured a loan for Nichols from the Stockyards Loan Company, in Kansas City, on the cattle that Nichols was then buying. Upon his cross-examination, in answer to questions by counsel for the defendants, he testified that he did not know whether Miller bought any hogs that trip or not; that he was there several times during January and February, and he had other conversations with him, but no other conversation concerning Nichols and his stock buying. Asked, "Why does the fact of his coming there to purchase hogs fix January in your mind?" he answered, "Because he was over there before the time he bought the cattle, the 1st of February." Asked, "You didn't know when he bought the cattle, did you?" he answered, "I knew it by the check that was deposited there."

On the other hand, the defendant Miller testified that he never, during the middle or latter part of January, 1915, or at any other time, had any conversation with Waller, in which he asked him where Nichols was getting the money to buy these cattle with, or in which Waller told him that he had secured a loan for $10,000 from the Stockyards Loan Company, of Kansas City, on the cattle Nichols was then buying; that he was not at Hulbert in January, 1915; that he went to Hulbert about the 25th of February, stayed there until the 2d of March, and bought some hogs; that about the 25th he had a conversation with Mr. Nowlin, another officer of the bank, about the payment of exchange on checks for hogs he was going to buy; that the first time he saw Waller, knowing who he was, was on March 1, 1915; that the way he knew it was the 1st of March was by his check; that he went to the bank to pay the exchange on these checks, found Waller, and asked him to figure out his exchange, told him he would pay him, and did so; that he never had any other talk with Waller about exchange on hog checks. The witness then testified that about 20 checks made by the defendants, payable to numerous third parties, and dated from February 26, 1915, to March 1, 1915, inclusive, were the checks he gave for the purchase of hogs on which he paid this exchange, and the defendants then offered these checks in evidence. The plaintiff objected to their introduction, on the grounds that they were incompetent, irrelevant, and immaterial, and that they did not tend to support or shed any light upon any is-

sue in the case. This objection was overruled; the court received the checks in evidence, as it said, "as evidence on the date of the transaction"; the plaintiff excepted, and it now assigns this ruling as error.

[1] The pertinent issue was whether or not Miller received notice of the plaintiff's loan to Nichols upon the cattle before he and his partner bought them on February 8, 1915. Waller had testified that he gave him such notice in January, 1915, before the defendants purchased the cattle. Miller had testified that Waller never gave him any notice, but that he had a conversation with him on March 1, 1915, long after the purchase, in which Miller did not give any such notice, and that he (Miller) knew that this latter conversation was on March 1, 1915, because on that date he paid exchange on his hog checks to third persons, which were dated about that time; but the hog checks had no tendency to prove that the notice in issue was or was not given, or that it was or was not given prior to February 8, 1915.

It is contended that they were admissible to prove the date of the transaction. The date of what transaction? The only date the checks could have any tendency to prove is the date when Miller testifies he paid the exchange, and he testifies that no notice was given him by Waller on that day, and no witness comes to say that there was. That date is therefore immaterial. The only material date is the date the notice was given, and, as the checks have no tendency to indicate the date when any notice was given, they are irrelevant and immaterial to any issue in this case; nor would they have been admissible; if the date when Miller testified he paid his exchange, and received no notice, had been material.

[2] Under that supposition, if the witness Miller had testified that he knew the dates of the checks to be correct, that they were dated about the time that he paid the exchange and had the conversation about it with Waller, and that he did not recollect and could not testify at what time that conversation was, independent of the checks, then those checks might in that way have been made admissible evidence of his past recollection of the time of that conversation. Insurance Co. v. Weide, 76 U. S. (9 Wall.) 677, 680, 681, 19 L. Ed. 810; Jones on Evidence, § 883; Wigmore on Evidence, § 764. There was, however, no such qualifying testimony, and these checks were not admissible as the verified record of Miller's past recollection. They were at most memoranda permissibly usable to stimulate or revive the present recollection of the witness as to the date of his payment of the exchange and his conversations at that time. Such memoranda, although usable when properly verified to refresh the memory of the witness, are inadmissible in evidence on the offer of the party whose witness uses them to stimulate his recollection. It is not permissible to corroborate the testimony of his witness by the admission of such memoranda. Weaver v. Bromley, 65 Mich. 214, 31 N. W. 839, 840, 841; Palmer v. Hartford Dredging Co., 73 Conn. 182, 47 Atl. 125, 127; Commonwealth v. Ford, 130 Mass. 64, 66, 39 Am. Rep. 426; Friendly v. Lee, 20 Or. 202, 25 Pac. 396, 397; Com-

monwealth v. Jeffs, 132 Mass. 5, 6; Kipp v. Silverman, 25 Mont. 296, 64 Pac. 884, 887.

Moreover, these checks were inadmissible, because there was no evidence that Miller's recollection needed refreshing, no evidence that he did not recollect and could not testify to the date of his payment of the exchange and his conversation with Waller about it independently of the checks, and the absence of such proof is an insuperable objection to the introduction of such memoranda. Vicksburg & Meridian R. R. v. O'Brien, 119 U. S. 99, 101, 102, 103, 7 Sup. Ct. 118, 172, 30 L. Ed. 299; Bates v. Preble, 151 U. S. 149, 157, 14 Sup. Ct. 277, 38 L. Ed. 106; De Witt v. Skinner, 232 Fed. 443, 444, 146 C. C. A. 437; Inman v. Dudley & Daniels Lumber Co., 146 Fed. 454, 455, 456, 76 C. C. A. 659; Stewart v. Morris, 89 Fed. 290, 291, 32 C. C. A. 203; Coxe Bros. & Co. v. Milbrath, 110 Wis. 499, 86 N. W. 174, 175, 176; National Ulster County Bank v. Madden, 114 N. Y. 280, 285, 21 N. E. 408, 11 Am. St. Rep. 633.

The defendants made a motion in this case to affirm the judgment of the court below, because the bill of exceptions was not allowed in due time; but the certificate of the judge to the bill reads, "And now, and within the time allowed by the court, the plaintiff presents this its bill of exceptions, and asks that the same be allowed, signed, and certified, and made a part of the record," and in the face of that certificate this court is unwilling, upon a careful examination of the record, to hold that the court below was in error in this statement.

The motion must accordingly be denied, the judgment below must be reversed, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered.

LAUGHNER et al. v. SCHELL.

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

No. 2429.

COURTS ⟸322(3)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

Where a stockholder, a citizen of California, brought a bill against the corporation and its officers, citizens of Pennsylvania, to require them to account to the corporation for certain commissions paid, the cause of action and prayer for relief constituting in substance a stockholder's bill merely, the District Court has no jurisdiction on the ground of diversity of citizenship, where complainant has not complied with the mandatory direction of equity rule No. 27 (198 Fed. xxv, 115 C. C. A. xxv), requiring a stockholder's bill to contain a verified allegation that the suit is not a collusive one to confer jurisdiction on the federal court in a case of which it would not otherwise have cognizance.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Bill by J. E. Schell against P. O. Laughner, C. A. Cooper, and others. Decree for complainant, and the named defendants appeal. Bill dismissed, and cause remanded, with directions.

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

Arthur E. Young, of Pittsburgh, Pa., for appellants.

John G. Frazer, Edwin W. Smith, and Reed, Smith, Shaw & Beal, all of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

BUFFINGTON, Circuit Judge. This was a bill in equity filed by J. E. Schell, a citizen of California, against the Minnetonka Oil Company, a corporate citizen of Pennsylvania, and P. O. Laughner, H. J. Wheeler, C. A. Cooper, and E. M. Iland, who were also citizens of Pennsylvania. It alleged said defendant individuals were directors of the oil company; that Laughner was its president, Wheeler its vice president, and Cooper its secretary and treasurer; and that Schell, the plaintiff, owned 70 shares of its capital stock. It further alleged the defendant company had sold to the Prairie Oil & Gas Company certain oil and gas properties, and received the purchase money therefor; that its said officers were about to pay to one A. V. Laughner a commission of 3 per cent., or $41,250, on the purchase price; that such payment, if made, "will be fraudulent, illegal, and unauthorized, and against the rights of your orator and of the other stockholders of the Minnetonka Oil Company, said A. V. Laughner not having been duly and legally appointed the agent of the Minnetonka Oil Company to negotiate a sale of the property, and not having brought the Minnetonka Oil Company together with the Prairie Oil & Gas Company, the purchaser, and the said sale was not made as a result of the efforts of the said A. V. Laughner."

The bill prayed, first, for an injunction to enjoin payment of such commission; but, as the payment had been made before the bill was filed, this prayer failed of its purpose. Its second prayer was for an accounting by the defendant individuals to the company for their alleged fraudulent action as follows:

"Second. That said defendants P. O. Laughner, H. J. Wheeler, C. A. Cooper, and E. M. Iland be directed to account to the Minnetonka Oil Company for any and all sums of money whatsoever paid to the said A. V. Laughner, or to any other person, as a commission for or on account of or by reason of the sale of said property."

The court below heard the case on bill, answer, and proofs, and entered a decree as follows:

"That P. O. Laughner and C. A. Cooper, two of the defendants, forthwith pay to J. E. Schell, the plaintiff, the sum of fifty-seven hundred seventy-five dollars ($5,775.00), with interest from April 2, 1917, amounting to $549.58, making a total of sixty-three hundred twenty-four and $^{58}/_{100}$ dollars ($6,324.58), and that the plaintiff have execution against them for that amount with costs; that the bill be dismissed as to Minnetonka Oil Company, H. J. Wheeler, and E. M. Iland, the other defendants; that the defendants P. O. Laughner and C. A. Cooper pay the costs in this proceeding."

From such decree Laughner and Cooper took this appeal.

The decree, it will be observed, makes a money award in favor of an individual stockholder against two officers for the alleged wrong of unlawfully misapplying corporate funds. As such individual relief was not stated as a cause of action in the bill, or prayed for as relief,

it follows the decree entered was different from the cause of action stated and the relief prayed for. Indeed, when the gist of the bill is sensed, it will be seen that the real cause of action, if it exists, is a right of action of the Minnetonka Oil Company, and the bill is a stockholders' bill to enforce such corporate right. Such being the case, the real dispute is one between the Oil Company, on the one side, and the individual defendants on the other; in other words, it is a question between citizens of Pennsylvania, and as between citizens of Pennsylvania the District Court for the Western District of Pennsylvania had no jurisdiction. Such being the fact, the real parties to the dispute being citizens of Pennsylvania, it is sought to base jurisdiction on the citizenship of the plaintiff, who is a citizen of California. But, as we have seen, the plaintiff neither had nor does he state any individual cause of action. On the contrary, the basis of his bill is "the rights of your orator and of the other stockholders of the Minnetonka Oil Company," and it prays the defendants "be directed to account to the Minnetonka Oil Company."

The cause of action and prayer for relief constituting, in substance, a stockholders' bill, it follows that to invoke the jurisdiction of the District Court on the ground of diversity of citizenship, Schell was bound to comply with the mandatory direction of equity rule No. 27 (198 Fed. xxv, 115 C. C. A. xxv). Having failed to do so, this shareholders' bill should have been dismissed, and the cause will therefore be remanded to the court below, with directions to enlarge its decree by dismissing the bill as to Laughner and Cooper as well as the other defendants.

THE COOLGARDIE.

(Circuit Court of Appeals, Ninth Circuit. September 8, 1919.)

No. 3294.

SHIPPING ⊂⊃82—INJURY TO MEDICAL INSPECTOR CAUSED BY UNSAFE CONDITION OF DECK.

A ship *held* not chargeable with negligence for not providing a step between the deck and the top of a lumber pile 2 feet 9 inches above the deck, which rendered it liable for injury to a medical inspector, who, on boarding the vessel, fell when attempting to step or jump from the lumber pile to the deck.

Appeal from the District Court of the United States for the District and Territory of Hawaii; Horace W. Vaughan, Judge.

Suit in admiralty by William F. James against the British steamship Coolgardie; H. A. Thompson, master and claimant. Decree for libelant, and claimant appeals. Reversed.

This is an appeal from a decree for damages in favor of appellee for personal injuries sustained while boarding a vessel to make a medical inspection. Dr. James, appellee, was a physician 57 years old, employed by the government to make medical inspection of vessels entering the harbor of Honolulu, and for years had been accustomed to boarding ships to make medical examinations. On the morning of August 12, 1917, in pursuing his official duties, he was taken in a launch to where the Coolgardie, a freight ship, lay in calm water waiting to enter the harbor. The ship was loaded with lum-

ber, which was lashed to the deck. The doctor, after climbing up the Jacob's ladder and over the ship's rail, stepped on a cocoa mat about 18 by 24 inches, which was lying on top of the pile of lumber upon the deck of the ship; the edge of the mat being parallel with the edge of the lumber. The top of the lumber was a little less than 2 feet below the deck rail, and about 2 feet 9 inches above the deck. The doctor stepped over the rail onto the mat, and then stooped to get down or to jump to the deck, when the mat probably slipped, and the doctor fell almost head first, and struck and injured his right knee. The mat was wet, and the deck was damp from recent washing down.

Alexander G. M. Robertson, Clarence H. Olson, and Marshall B. Henshaw, all of Honolulu, T. H. (S. H. Derby, of San Francisco, Cal., of counsel), for appellants.

Frank E. Thompson, John W. Cathcart, and R. A. Vitousek, all of Honolulu, T. H. (Grant H. Smith, of San Francisco, Cal., of counsel), for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). Whether or not the mat slipped at the instant the doctor moved to step from it to the deck is not certain. Some witnesses said that it did slip a little, while others said it did not. We are inclined to believe that it did. The District Court, however, was of the opinion that the point was immaterial, and that the vessel could not be held liable if there were nothing in the case but the slipping of the mat, and rested decision upon the ground that the ship was negligent, in that "the exercise of ordinary care would have provided something for him [the doctor] to step down upon from the lumber pile where he got off the Jacob's ladder." We agree that the question is narrowed to this: It being perfectly evident that the doctor was in no danger until he was in the act of getting down from the mat to the deck, can negligence be attributed to the ship in failing to provide something for him to use in getting from the top of the lumber to the deck?

As already said, the step down was 2 feet 9 inches. The doctor saw that the deck was damp, and he knew that the mat was wet, and of course he could fairly judge the height from the lumber to the deck. Had there been any thought by him that there was the slightest danger in jumping down, naturally he would have asked for some means whereby he would have felt perfectly safe. Even a hand of one of the crew would have been enough to ease the force of the jump. But evidently he believed, as ordinarily almost any one would believe, it was perfectly safe to step or jump down. He testified that it was "an easy jump." We gather that, as his body was bent to jump, the mat slipped just enough to shift the equilibrium of the body, and that as a result he was pitched forward, and in that way fell on the knee.

But we cannot see that the ship can be held to have omitted to exercise due care. A careful reading of the whole record satisfies us that the accident was one of those unavoidable ones for which no one can be legally held responsible. The Euxinia, 150 Fed. 541, 80 C. C. A. 254.

The decree is reversed.

VAN DORN IRON WORKS CO. v. MATHIS BROS. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 12, 1919.)

No. 3230.

PATENTS ⊂=328—INVENTION—MAIL BOX.

The Van Dorn patent, No. 827,482, for a mail box, *held* void for lack of invention in view of the prior art.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit by the Van Dorn Iron Works Company against the Mathis Bros. Company and the New York Blower Company. Decree for defendants, and complainant appeals. Affirmed.

E. L. Thurston, of Cleveland, Ohio, for appellant.

Thomas A. Banning, of Chicago, Ill., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Suit for infringement of letters patent of the United States, No. 827,482, granted on July 31, 1906, to James H. Van Dorn, assignor to the appellant company, for improvement in mail boxes. The defenses presented are that a construction equivalent to that of the mail box in issue was on sale more than two years prior to filing application for the patent; that the mail box is lacking in invention; that it was designed by one M'Giehan, and not by Van Dorn, the patentee; also laches. The first two defenses were sustained, and the other two not passed on; the bill was dismissed, and the assignee company appeals.

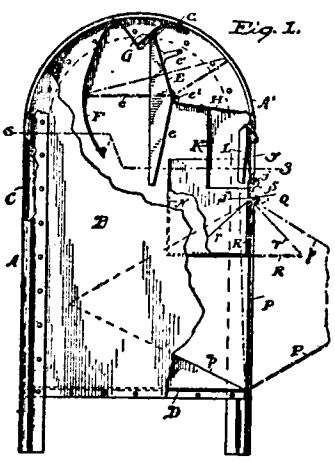
The controversy grew out of differences between competitors for the supply of mail boxes to the Post Office Department. It will be helpful to observe, as far as the record discloses, the course pursued by the department in securing mail boxes. The plan, at least since 1893, appears to have been to select forms of postal package boxes and letter boxes from designs which were submitted by persons wishing to supply the boxes, though subject to such changes and modifications as the department itself might require, and then, under competitive bidding upon the forms so determined, to enter into contracts with the accepted bidders to furnish the boxes.[1]

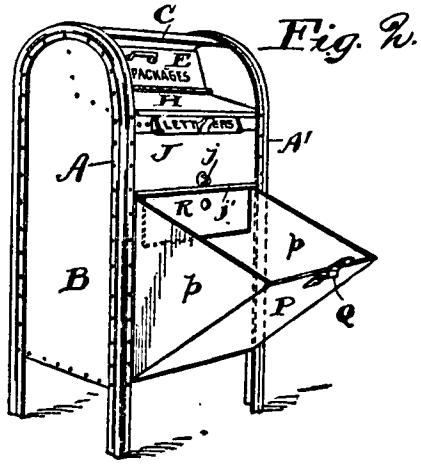
[1] In accordance with the plan thus described a combination package and letter box, in all material respects the same as the one now in issue, was constructed by the Van Dorn Company and submitted to the Post Office Department in 1900 or 1901, some four years before Van Dorn applied for the patent; but it appears that this box was rejected by the department, and no bids for supplying it were requested or made. In 1900, or thereabout, the Van Dorn Company also constructed a number of combination boxes for the Post Office Department which were used by the postmaster at St. Louis. Upon these transactions, particularly the submission of the first-mentioned box to the department, the court below based its decision that the mail box in suit had been on sale more than two years prior to application for the patent. It should be observed that Isaac S. M'Giehan claims to have devised both of these types of boxes, though, as we have seen, the question whether he devised any of the boxes was not determined below. In our view of the case it will not be necessary to pass on the ruling of the trial judge that the submission of the box in 1900 or 1901, as stated, was to place the box on sale within the meaning of the act of Congress.

Pursuant to bids accepted and contracts entered into under the plan of procedure above described, Isaac S. M'Giehan, through companies managed by him, supplied package mail boxes to the government continuously from 1893 until the latter part of 1903, when the government discontinued ordering boxes under the last contract controlled by M'Giehan. Throughout this period close business relations existed between M'Giehan and J. H. Van Dorn; indeed, Van Dorn's company, the present appellant, constructed for the M'Giehan companies all the boxes they furnished. In September, 1904, against the protest of M'Giehan, the department advertised for bids in accordance with its usual course before pointed out. A contract for a term of four years was awarded under that bidding, and again in 1908, to appellant herein, for the supply of combination package and letter boxes. In 1913, however, a contract to supply such boxes for a period of four years was secured by appellee, Mathis Bros. Company, and the boxes furnished by it were constructed by the New York Blower Company, appellee.

It should be observed that the contracts made with appellant, as stated, one in 1904 and the other in 1908, called for a combination package and letter box, which was the same in construction as the one described and claimed in the patent in suit, and that the contract made in 1913 with the Mathis Company provided for a box like the one furnished by appellant under its contracts. It is consequently admitted that, if the patent is valid, the appellees have infringed it.

Van Dorn applied for the patent January 30, 1905, something more than a month after his company had secured its first contract (December 3, 1904) to furnish this type of mail box, and, as stated, the patent was issued July 31, 1906. The box is of the familiar type used by the government in receiving and gathering mail, and kept at street corners in the various cities of the country. It will be easily recognized in two of the drawings, Figs. 1 and 2:





The specification states:

"The object of this invention is to provide a strong, efficient, and neat mail box which shall have conveniently accessible receptacles for both letters and packages. Each of these receptacles is accessible from the front of the box. * * * *AA'* represent a pair of angle bars, which are bent into the inverted U shape shown, and thus constitute four standards, forming legs for the box and corner pieces for it. The sides of the box are designated *B* and are metal sheets riveted to the angle bars. The back sheet *C* is also riveted to the angle bars and curves over a portion of the top, as at *c*. The bottom of the box (designated *D*) is a sheet having downwardly turned flanges, which are riveted to the sides and back and the angle bars."

The front of the box, Fig. 2, is composed of sheet metal and, for the most part, of the portions associated with the receiving gates, marked "PACKAGES" and "LETTERS," and the exit door *P*, which when closed, covers both the exit for packages, and the supplemental exit door *R* for letters. The box is divided into two compartments; the larger one is designed for the reception of packages, and as shown in Fig 1, comprises the greater part of the interior between the upper receiving gate *E* and the bottom *D*, while the smaller compartment is intended for letters, and, as likewise shown in Fig. 1, consists of the receptacle *N* extending from the lower receiving gate *L* to and including the supplemental exit door *R* (see, also, Fig. 2). Protection against robbery of the mail is secured by inwardly depending extensions (*e* and *L*, Fig. 1) of the respective gates; upon opening the gates these extensions are raised into engagement with guard plates (one called "baffle plate *F*" and the other "hood *K*"), and upon closing the gates they release the packages and letters and in connection with the guard plates guide each class of mail into its proper receptacle. The box is further explained by the claims in issue, 3, 6, and 9, which appear in the margin.[2]

In view of the defense that the box is lacking in the quality of invention, the most natural observation to be made upon the structure is that, when Van Dorn applied for the patent, the prior art, as it appears in this record, disclosed package boxes singly and letter boxes in combination with package boxes. The initial inquiry then is wheth-

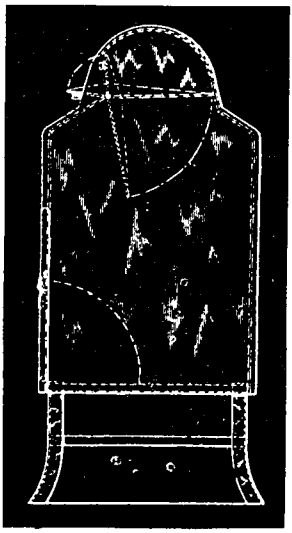
[2] "3. In a mail box, in combination, a package receptacle having an opening in the lower portion of its front side and door for closing said opening, a letter receptacle located within the package receptacle and above the bottom thereof, but extending below the upper end of said opening, whereby the exit door for the package opening overlaps the letter box and a supplementary door for the letter box adapted to swing outwardly through said opening."

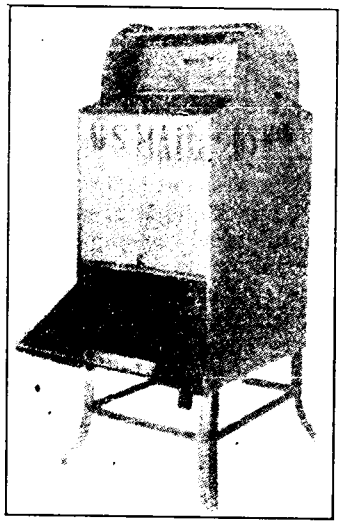
"6. In a mail box, the combination of a comparatively large package receptacle, a comparatively small letter receptacle within the package receptacle on the front side thereof and above the bottom thereof, a pivoted gate for the package receptacle, a plate extending from such gate to the front of the box, a hood secured to the under side of such plate and extending downward into the letter receptacle, and a letter gate operating in such hood."

"9. In a mail box, in combination, a pair of angle bars bent into the form of an inverted U and thus constituting four corner posts, each angle bar being flat near its edges and intermediately bulging from one flat edge to the other, and walls for the box having their edges within the bulging portion of the angle bar, said walls being held in place by rivets passing through the flat portion of the angle bars, one of said walls substantially abutting the other within the bulging portion of the angle bars."

er the patent shows any advance over the prior art which can be said to signify invention rather than skill.

The arguments of counsel amount to a concession that the unpatented mail boxes which had in fact been on sale or in public use for more than two years before the date of the patentee's application are to be treated as part of the prior art, as well as boxes designed for kindred purposes and covered by patents issued prior to the patent in suit. The package boxes required and furnished under contracts with the Post Office Department in 1893, 1897, and 1901, which passed into the control of the M'Gehan companies as stated, were in form and material and construction substantially the same as the patented mail-box, save that they were not equipped with a receiving gate and receptacle for letters, or with angle bars bent into the inverted U shape described in the patent; they were, however, equipped with metal supports in the form of legs disposed at the lower corners of the box. The similarities between the mail box in issue here and the structures used under these contracts are sufficiently illustrated by the following exhibits, showing the interior and exterior of one of the two forms of boxes furnished under the contract of 1901:





It is particularly to be observed of the boxes thus illustrated that the lines indicating the receiving gate with its depending extension, the baffle plate, and the exit door were in every material respect the same as those parts of the patented structure (*E*, *e*, *F*, *P*, Fig. 1), and that the feature of accessibility at the front of the box, both for depositing and removing mail matter, which is here relied on as a distinguishing characteristic of the patented structure, in fact existed in these earlier boxes.

We may now look into the prior art in relation to the letter box and its association with the package box of the patented structure.

The De Mets patent of 1872, No. 132,954, for an improvement in post office letter boxes, states in the specification:

"My invention relates to the enlargement of the boxes and separation of them into receptacles for letters and printed matter, respectively; the object being to give additional security and symmetry, as well as to supply a receptacle for printed and bulky matter, now totally wanting."

The exterior of the structure differed from that of the patent in suit, but the interior comprised two receptacles, one for letters and the other for packages, which in relative dimensions and in arrangement were similar to those of the box in suit, though the packages were received in the smaller receptacle; the openings *G* and *F* to the package and letter receptacles respectively, were disposed similarly to the receiving gates of the present mail box. While the letters and packages, it is true, were deposited through openings in the front of the box, they were removable through a door maintained at the rear, which led directly into the letter box and indirectly (through an interior downwardly sliding door *D*) into the package box; in a word, the facilities for removing the mail matter through the main and supplemental exits at the rear of that structure were to all intents and purposes the same as the means designed for such removal through the main and supplemental exits at the front of the patented structure.

The Maize patent of 1884, No. 294,483, for an improved letter box, consisted of a box of rectangular form and having two receptacles, one above the other; the upper being designed for packages and the lower for letters. Both receptacles were accessible for depositing mail at the front through openings provided with suitably hinged drop lids with fixed stops. Specific means to prevent abstraction of mail deposited in the box appears to be provided at the upper opening, and the form of the lower opening would seem in itself to prevent abstraction. Removal of the mail was to be made through a single door maintained at the side of the box and covering both receptacles.

Rosenthal was granted a patent in 1889, No. 410,379, upon an improved letter box with two transverse compartments, one adapted to receive letters and the other papers and similar articles. The mail matter was all deposited and removed through suitable openings in the front of the box. Each compartment, it is true, was provided with a door; but, as stated in the specification and shown in the drawings, the doors were so connected that when "the upper door is opened the lower door will be automatically opened also, and vice versa," and a single lock placed upon the upper door served, through the connecting device mentioned, to fasten both doors.

The Spear patents, Nos. 479,576 and 481,772, one of July 26 and the other of August 30, 1892, show "a mail box having two separate compartments with a common door," and the difference between that structure and the one now in issue is that Spear located his door at the side, instead of the front, as in the instant patent. In all other respects the two structures are substantially alike, despite the fact that Spear provided for a third compartment and for "fingers," as they are called, instead of baffle plates, to prevent abstraction of the mail.

Metcalf's patent in 1894, No. 527,614, was for a letter and package box comprising two adjoining and perpendicular compartments, with receiving and exit openings which were all accessible at the front of the box. Packages were deposited upon platform *G* (after raising lid *C* at the front portion of the circular top), whence they were carried by a revolving tray into the rear compartment, with full protection against abstraction of the mail; and letters were deposited through a suitable opening into the front compartment at a point immediately below the normal horizontal level of two arms of the package tray. Removal of the letters was effected through an outwardly swinging door with quandrant flanges and hinged at the front lower edge of the letter compartment; and the packages were reached through this door and an additional one hinged at the bottom of the partition between the two compartments. Still other patents appear in the record, and their teachings are more or less pertinent; but we do not think it necessary to pursue the subject.

Plainly, then, at the time the patent in suit was applied for, the idea, if not the practice, of uniting package and letter receptacles with suitable appliances in a single inclosure, and so as to render them accessible on one side or another, and, indeed, wholly in front, for depositing and removing the mail, was old. It is true that the receptacles varied in form, location, and dimensions, and that the openings for depositing and removing the two classes of mail likewise varied in these respects, and also in means of protection against theft and effects of weather; and yet, as applied to the patented structure, these variations were negligible, since, in the sense of equivalency, the essential parts of that structure were old, and they severally operate here in the same way as they operated before, and effect the same result. This is sufficiently shown by the obvious identity in form and function between the gate *E* with its depending extension *e*, baffle plate *F*, and exit door *P* (Figs. 1 and 2, supra, of patent in suit), and the corresponding parts of the earlier package boxes (illustrations thereof, supra), on the one hand, and the gate with its depending extension *L*, hood *K*, and the supplemental exit door *R* (Figs. 1 and 2, patent in suit), on the other hand. The supplemental exit door *R* not only finds analogy in exit door *P*, but in point of equivalency exit door *R* cannot be differentiated from the supplemental exit door of either De Mets or Metcalf. The feature of accessibility at the front of the box for both depositing and removing mail was old, not alone in respect of the earlier post office package boxes on sale and in use from 1893 until the latter part of 1903, as already pointed out, but also as shown in the Rosenthal and Metcalf patents. In view of these last-mentioned patents no advance was made in the patented structure by simply extending the exit door of the old post office boxes, as was done, so as to cover the exits of both the package and letter receptacles of the box in suit.

It remains to notice the features of the patent in suit which involve angle bars "bent into the inverted U shape shown." We cannot think it necessary to dwell on these devices. We are satisfied from the testimony, if indeed we may not take judicial notice of the fact, that

angle bars of this form and of different weights have been on sale in the market for many years. They have been commonly known as "ridge roll," and used in the construction of "ridge roofs," and also in reinforcing boxes and putting a finish on them; one witness testifying that this form of angle bar is used to "hide the seam and the defects from the riveting, the marks, and also it is an ornamental affair for the box." It is also shown that "cutting slots or notches" in one of the flanges of the angle bar for the purpose of bending the bar into the "U shape" mentioned, was well known to the mechanic. It appears that in the contract made by the Post Office Department in 1897 for package boxes the contractor was required to make the corners of the boxes "round," and we think it may fairly be inferred that the use of the present form of angle bar grew out of that requirement. However this may be, it is manifest that the remedy for rough or unsightly edges of a mail box would be found in an order addressed to the skilled mechanic. It is too clear for argument that the extension and use of these angle bars as legs for the box added nothing of patentable importance to the metal legs previously used.

We are thus led to believe that the patent shows no advance over the prior art which can be said to signify invention rather than skill, and, consequently, that the defense of lack of invention was rightly sustained. The rule laid down in Werk v. Parker, 249 U. S. 130, 133, 39 Sup. Ct. 197, 63 L. Ed. 514, is at once applicable and controlling. In respect of certain combinations there claimed under two divisional patents relating "to an oil press mat or cloth for use in the extraction of cotton seed oil," it was said by Mr. Justice Pitney:

"And this, in our opinion, goes no further than a mere mechanical adaptation of familiar materials and methods, not rising to the dignity of invention."

See, also, decisions of our own court in Huebner-Toledo Brew. Co. v. Mathews Grav. Carrier Co., 253 Fed. 435, 446, 447, — C. C. A. —; Luten v. Whittier, 251 Fed. 590, 596, 163 C. C. A. 584; Windsor v. Mercier, 253 Fed. 448, 450, — C. C. A. —.

The decree is affirmed.

TREO CO. v. JOHNSON et al.

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

No. 3156.

PATENTS ⊂=328—INFRINGEMENT—CORSET.

Letters patent No. 1,104,664, described as a "low corset," *held* not infringed, where claims in issue were closely limited, as they should be, to the full equivalents of the specific device which they, in connection with the specifications and drawings, describe.

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

Suit by the Treo Company against Edward Johnson and another, copartners trading as the Uprite Manufacturing Company. Bill dismissed (260 Fed. 409), and complainant appeals. Affirmed.

Victor D. Borst, of New York City, for appellant.

Alfred M. Allen, of Cincinnati, Ohio, for appellees.

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

PER CURIAM. Appeal from decree adjudging appellant to be the owner of patent No. 1,104,664, granted to Guggenheim July 21, 1914, and of all claims made for its infringement, also adjudging the patent to be valid, and not infringed, and dismissing the bill.

We approve the holdings of the District Judge and in substance for the reasons stated in his opinion. The specification states that the device invented consists of "improvements in supporting belts," is designed "to be worn around the body at the region of the waist for the purpose of sustaining or preserving the natural shape of the figure," and "is of considerable width and therefore partakes of the nature of a waist or corset." The only two claims allowed are in issue and are identical, except that the second one contains a provision for hose supporters which is not here important; aside from that provision each claim is as follows:

"A low corset, consisting of a flat body portion whose upper and lower edges are substantially parallel and unshaped to the figure of the wearer, said body portion being elastic in a longitudinal direction and provided in the upper portion and at substantially the waist line with a zone of elastic, but less yielding, nature than the remainder of the body portion for the purpose set forth."

In order to secure the patent, applicant was required in the Patent Office to make numerous changes both as to specification and claims. The original specification and the four accompanying claims were rejected. Applicant canceled them and presented a new specification with two claims. The four original claims alike called for a "supporting belt or band," and the two substituted claims for a "supporting belt." The examiner made a number of objections to the new specification and re-

jected both of the claims; applicant then amended his second specification, canceled the two claims filed with it, and introduced two new claims. These last claims called for a "low corset," instead of a supporting belt. The second of these last claims was rejected upon a recently discovered reference, and applicant canceled both claims and substituted the two now in suit.

As to the effects of these changes, it is enough for the present case to call attention to one phase of alteration made in the claims: According to all four of the rejected original claims, while the entire "supporting belt or band" was "elastic in the direction of its length," it was designed to have a narrow and more rigid elastic portion "extending lengthwise thereof"; but as regards the width of the belt the location of this rigid portion was not fixed in the first, third, or fourth claim, though in the second one its location was required to be "intermediate of its [the belt's] upper and lower edges," and this was in accordance with the drawings, since no change appears to have been exacted in respect of them; in other words, the first, third, and fourth, though not the second, of those claims would have permitted the rigid portion to be located, even at the upper edge of the belt. This rigid portion is found in the "zone of elastic, but less yielding, nature than the remainder of the body portion" of the "low corset" described in the claims already quoted as those here in suit; and we think it plain that this zone could not be rightfully placed at the upper edge of the corset, since that would be to accord to the present claims a breadth equal to that of claims distinctly surrendered in the Patent Office. Further, the claims in suit, when read in connection with the specification and drawings, as also distinct evidence offered at the trial, show that a substantial portion of the corset is to be placed and maintained above its waist line; indeed, the specification in substance states that the "compression" of the corset upon the larger parts of the body, above as well as below the waist line, is designed to "round out" the figure.

We are thus constrained to hold that the claims in issue must be closely limited to the full equivalents of the specific device which they, in connection with the specification and drawings, describe, and that under this interpretation the charge of infringement is not sustained. The alleged infringing devices do not provide for any extension above the waist line.

Decree affirmed.

TREO CO. v. JOHNSON et al.

(District Court, S. D. Ohio, W. D. June 25, 1917.)

No. 77.

PATENTS ⇐328—INFRINGEMENT—"CORSET."

Letters patent No. 1,104,664, entitled "Supporting Belt," and described as a "low corset," *held* valid, but not infringed, by defendant's device, in view of narrowness of complainant's patent, which, though describing the same as a "corset," is not such, in that it does not inclose the chest and waist as a corset worn by women to support or correct the figure.

In Equity. Suit by the Treo Company, a corporation, against Edward Johnson and another, copartners trading as the Uprite Manufacturing Company. Bill dismissed.

Decree affirmed 260 Fed. 407, —— C. C. A. ——.

Victor D. Borst, of New York City, and Kittredge, Wilby & Stewart, for complainant.

Allen & Allen, of Cincinnati, Ohio, for defendants.

HOLLISTER, District Judge. Action for infringement of patent. Defense: Lack of invention and anticipation, and denial of infringement.

The letters patent (No. 1,104,664, granted to Guggenheim July 21, 1914) are entitled "Supporting Belt"; the two claims describing the device as a "low corset." It is not a corset at all, as that word has been generally understood. It does not inclose the chest and waist, worn—chiefly by women—to support or correct the figure. Webster. It differs from abdominal belts, as those commodities were known for many years prior to the date the patent was granted, in that it does not hold up the abdomen at all. The drawing of the patent (Fig. 3) is very like surgical bands, Exhibits N and O, which, if provided with an opening either in front or behind and composed of lighter material, would, to some extent, serve the same purposes as that part of complainant's device (Exhibit 5) which is below the band or belt about three inches below the top. They would serve as hip reducers, as does also that device to some extent.

The nearest approach to complainant's device as it is put on the market (which differs in material respects from the drawing) are Exhibits S and T, which are not abdominal belts, but are hip reducers, and have, about three inches below their top, a band or zone of less yielding material than the rest of the garment, quite similar in purpose and function to that band or zone in complainant's device. That part of the garment above the band serves to hold in its natural shape the part of the human body to which it is applied, as does complainant's. It does not appear that Exhibits S and T were ever used as corsets, or had depending therefrom hose straps, and they are to some extent shaped to the body, while complainant's device is not, and not intended to be. Assuming, however, that S and T might be regarded as anticipations, the testimony concerning the time

at which they were made, while strong, is not of that character required to prove prior use.

The patent itself was granted after much deliberation after references to prior patents; and, while the patent is about as narrow as any patent could be and still survive as such, yet it made a marked impression on the market, and the complainant has built up an important business on it. It is useful, and, with Exhibits S and T out of the way, novel. On the whole, the court is not convinced that the prima facie validity of the patent has been overcome by anything in the case.

Complainant's device differs from his drawings, and, while more resembling a corset, is not in fact a corset and could not be used as such. It was made to shape itself to the figure below the bust. The less yielding band is at the waist line; the part above the band holding the figure in shape below the bust.

It will be seen, upon examination of the offending article (Exhibit No. 2, "Paris Girdle"), that the band of less yielding material is at the waist line, and the article is devoid of that feature of complainant's device and drawing, extending several inches above the band of less yielding material. This band, in defendant's device also, is applied to the figure at the waist line, so that it is quite clear that defendant's device differs from complainant's in at least one very important particular. Defendant's device much more nearly resembles the surgical belts, long known to the market, than does complainant's device; and, considering the narrowness of complainant's patent, defendant's device cannot be said to infringe it. This was the opinion of the court when the case was tried, and some consideration since has not changed the court's view at that time entertained and expressed.

The conclusion is that the complainant's patent is valid, but that defendant's device does not infringe it. Order accordingly.

MEURER STEEL BARREL CO., Inc., v. DRAPER MFG. CO.

(District Court, N. D. Ohio, E. D. August 14, 1919.)

No. 437.

1. PATENTS ⇐327—INFRINGEMENT—FOLLOWING DECISION OF OTHER DISTRICT COURT—COMITY.

In the absence of clear conviction that the decision was wrong, and the record being essentially the same, under the rule of comity, a prior carefully considered decision of another federal District Court, after full trial, in another suit, for infringement of the same patent, should be followed; there having been no appeal, and other alleged infringers having on advice acquiesced therein.

2. PATENTS ⇐328—INVENTION—FLUID-TIGHT METAL BARREL JOINT.

The Young patent, No. 891,895, for securing by a malleable iron clamping ring the heads in metal barrels to form fluid-tight receptacles, *held* valid, against the defense of lack of novelty and invention, in view of the prior art.

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3. PATENTS ⟸26(1)—INVENTION—COMBINATION.
A combination of old elements, which produced an old result in a new and cheaper way, embodies patentable invention.

4. PATENTS ⟸36—INVENTION—COMMERCIAL SUCCESS.
If the question of invention be doubtful, the balance will be turned in favor of patentability by a showing of undoubted commercial success.

5. PATENTS ⟸312(1)—INFRINGEMENT—PRESUMPTION—GRANT OF LATER PATENT.
Any presumption of noninfringement of plaintiff's patent because of the grant to defendant of a later patent, both being specific patents for a combination of elements in precisely the same art, *held* nullified by the fact that defendant's barrel, as manufactured and sold commercially, departed from his patent.

6. PATENTS ⟸328—CONSTRUCTION—LIMITATION BY PROCEEDINGS IN PATENT OFFICE.
The Young patent, No. 891,895, for so joining the heads and bodies of steel barrels by a shoulder as to form a fluid-tight joint, *held* not limited to a shoulder bent at an abrupt angle, notwithstanding words inserted in claim 1, after another claim without them had been rejected; the addition of words being merely to distinguish between the Young construction, with a shoulder, and that under prior patents, which did not have a joint, or at least not one in the form of a shoulder.

7. PATENTS ⟸328—INFRINGEMENT—FLUID-TIGHT METAL BARREL JOINT.
The Young patent, No. 891,895, for joining the heads and bodies of steel barrels by a shoulder to form a fluid-tight joint, *held* valid and infringed.

In Equity. Suit by the Meurer Steel Barrel Company, Incorporated, against the Draper Manufacturing Company. Decree for complainant.

Emery, Booth, Janney & Varney, of New York City, for plaintiff.
Albert Lynn Lawrence, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. Complainant's bill charges infringement by defendant of United States letters patent No. 891,895, issued June 30, 1908, to Frank E. Young, on an application dated April 27, 1907. This patent was assigned by Young to the Brooklyn Range Boiler Company, a New York corporation, and later, in 1913, the complainant corporation was organized, and succeeded to the title and interest therein of the Brooklyn Range Boiler Company. Complainant's title or its corporate existence is not in dispute. The defenses are that complainant's patent, in view of the prior art, is invalid for lack of novelty and lack of invention, and that, if the claims of complainant's patent are properly limited and construed, defendant's construction does not infringe.

This patent relates to metal or steel barrels, or similar receptacles, in which the heads, formed separately from the body, are secured to the latter in such a manner that a fluid-tight receptacle is provided, and this result, it is contended, is accomplished in an improved manner in complainant's patent by means of a malleable iron clamping ring.

This patent was under consideration in the District Court, Eastern Division of New York, and on April 12, 1917, District Judge Chat-

field, by whom the case was heard, rendered a decision (Meurer Steel Barrel Co. v. National Enameling & Stamping Co., 242 Fed. 273), in which he held complainant's patent valid and infringed. An examination thereof shows that the prior art relied on to show lack of novelty or invention, and to limit the scope of the claims of the patent, was that which is now before me relied upon, with the following exceptions: The Cope (British) patent, No. 2,429, issued in 1860; Brown patent, No. 636,752, issued in 1899; McSherry patent, No. 690,312, issued in 1901; Stollberg patent, No. 880,834, issued in 1908, and the second Reynolds patent, No. 881,951 issued in 1908. The Hardie patent, No. 814,375, issued March 6, 1906, cited in the Patent Office against Young's application, was said by Judge Chatfield not to have been shown in the record before him. The issues, therefore, of lack of novelty and lack of invention, differ in the instant case in no substantial respects. The prior art, in my opinion, adds nothing of material value to the prior art then under consideration; indeed, the most pertinent prior art patents are those cited in the Patent Office against the Young application, and if complainant's patent is not invalidated thereby a different conclusion is not called for by the additional prior art introduced in the former case or in the instant case. For instance, the McSherry patent is similar to Booth, No. 516,073, and Reynolds, No. 621,540, both of which were cited in the Patent Office and considered in the former case. The Cope and Stollberg patents are even less pertinent than either Booth or Reynolds.

[1] In view of this situation, complainant invokes the doctrine of comity between courts of equal dignity in different jurisdictions, and, while this court is not asked to abdicate its own judgment, it is urged that in the interest of uniformity of ruling, and in order to avoid confusion, prior carefully considered decisions should be adhered to until some higher court reaches a different conclusion.

The force of this rule is well stated by Mr. Justice Brown in Mast, Foos & Co. v. Stover Manufacturing Co., 177 U. S. 485, 488, 20 Sup. Ct. 708, 44 L. Ed. 856. It is said 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 fol-

lows 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 Co., 204 Fed. 274, 122 C. C. A. 472; Cincinnati Butchers' Supply Co. v. Walker, 230 Fed. 453, 144 C. C. A. 595.

The situation now before me is one justifying, if not requiring the application of these principles of comity, unless my conviction is clear that Judge Chatfield's decision was wrong. It was made on a final hearing, upon pleadings and proofs, and after protracted litigation, in which the defendant was represented by able counsel. The record was in all essential respects the same before him as it is before me, and his opinion contains internal evidence that he gave to his judgment the most careful and painstaking consideration. In addition thereto it now appears that after his decision the defendant withdrew its appeal, agreeing to pay substantial damages for past infringement, and entered into a substantial royalty agreement; that later another suit was brought against the Whitaker-Glessner Company, in which, under advice of counsel, the defendant refrained from making a defense, paid substantial damages for past infringement, and entered into a substantial royalty agreement; and that still later the S. F. K. Company, also without waiting to be sued, paid substantial damages for past infringement, and entered into a substantial royalty agreement.

[2] In my opinion, while the references cited in the prior art are close, and the differences between them and complainant's patent are not great, there is still sufficient difference and advance over the art there shown to sustain its validity against the defense of lack of novelty and lack of invention. This prior art has been so ably and fully reviewed by Judge Chatfield that I do not deem it necessary to review it. I concur in his summing up of it as expressed in the following paragraphs:

"Young created the shoulder, which he recognized was necessary, by rolling up the side of the barrel and folding around this the flange of the head, so as to make the beaded rim and the interlocking seam shown in the tin receptacles of the prior art. He thus produced a seam which, when made of malleable sheet iron, would of itself be strong enough to resist ordinary strains, and might be water-tight. In other words, he then had the seam of the Byrnes anti-rust vessel and that of the Scaife coal oil barrel, but with a slightly different form of fold in the beading. No novelty was presented by the mere form of the fold. But in his claims he describes different thicknesses of metal forming this fold, as different embodiments of his way of creating the shoulder which, as has been said, he recognized must be present if the chime ring was either to be locked on or to furnish any clamping effect with respect to the seam itself. He secured this clamping effect, and locked the chime ring on, by carrying over the outstanding flange, and forcing it around the beaded seam, and then bending it sharply in against the side of the barrel. He then had the old idea of the beaded rim, which was capable of being compressed, when made out of malleable metal, into a water-tight joint. He used the old idea of a shoulder, which, by the interposition of a ring of larger circumference, would prevent the straightening out of the metal flange or seam after it had been drawn into the smaller diameter. He reinforced the resistance to the stripping off of the metal which formed the smaller ring, and absolutely

prevented the pulling out or opening of the folds (which constituted the seam as well as the shoulder), by locking them up inside the chime ring, which was the adaptation of another old idea, but which was applied to new uses.

"Young thus secured, also, the protecting or armor feature of the Booth, Trust, Barrath, and Reynolds patents, as a part of the mechanical or physical conditions resulting from forming a water-tight seam under the application of that force which was used to bend around and into the clamping position the projecting flange of the chime ring. He pointed out in his specifications and in his discussion with the Patent Office the differences between his application and the Reynolds patent. In so doing he assumed the lack of patentability in the old ideas of the prior art. He distinguished his patent from Reynolds, in that the presence of a shoulder, upon which to clamp down his ring and the flanges of the side and head of the barrel, was not required within the chime ring itself. He pointed out the desirability of being able to roll up the beaded seam, and form the shoulder for the clamping purpose, outside of the chime ring. He shows the economic advantage of rolling up this beaded seam as the chime ring is folded around. Thus he produces a tighter joint than if the seam were not rolled up within the flange; and he also pointed out the freedom from distortion or dangerous strain which would be presented if a previously rolled-up beaded rim were bent back and compressed into a recess, as would be the result if one sought to use the Reynolds chime ring upon a beaded seam like those of the prior art."

Some criticisms are made by defendant's counsel of this opinion to which a few words should be devoted. The learned judge does not accord the Le Febvre patent a place in the prior art, and defendant has produced evidence tending to show its effective date of publication as being prior to the filing date of Young's application. Complainant, on the other hand, has produced evidence, which, it is contended, shows Young's actual date of invention to have been earlier than the publication date thus relied on. Mr. Young having died shortly before this case was heard, this evidence of prior invention date rests upon the testimony of Henry Reynolds, the patentee of the two Reynolds patents referred to in the prior art, and of Mr. Meurer, president of the Brooklyn Range Boiler Company, at the time Young is said to have made his invention, supported by certain confirmatory records and entries in bookkeeping accounts. I find from this evidence that Young's date of invention is as contended for by complainant, and I also agree with Judge Chatfield's conclusion that, granting the Le Febvre patent a place in the prior art, it would not strengthen the case of anticipation as made by Reynolds, Booth, and other prior patents.

Criticism is also made that Judge Chatfield misapprehended the chime joint invented by Young, as disclosed by his patent application, in that he says (242 Fed. 275) that Young carried the flange of the head far enough around so that it not only entered into the formation of the shoulder, but was bent under the folded parts of the side of the barrel to tighten the seam. Further (242 Fed. 280) he says that Young folded around this and bent over parts of the body in the flange of the head, so as to make the beaded rim and the interlocking seam shown in the tin receptacles of the prior art, and that he thus produced a seam which, if made of malleable sheet iron, would of itself be strong enough to resist ordinary strains and might be water-tight. This method of forming the chime joint and the function to be performed by the method of forming the joint are not, it is true,

disclosed in Young's specification, and to this extent the above statements are, perhaps, inaccurate. These errors, if such they be, do not modify the essential correctness of this analysis of the prior art. No novelty resides in the exact form of making the seam or chime joint, and neither in the Patent Office nor on the former trial was any element of novelty claimed or disclaimed by reason thereof. The invention in this aspect consists in forming a seam or chime joint by bending or folding the body and head together, so as to create a shoulder of certain thicknesses of metal. This result, and not the manner of forming the shoulder, was the material element. This conclusion is supported by the Patent Office proceeding. The examiner cited against Young's application Scaife, No. 6,391, as embodying a similar type of seam or chime joint; but Scaife shows a double or locked joint or seam, rather than the exact form of seam or joint disclosed by Young's specification. The distinction between Young's invention and the prior art was made upon grounds other than the form of seam, and the patent was allowed upon grounds other than the specific manner shown of forming the seam or chime joint.

[3, 4] Young's patent is of that class known as specific, as distinguished from generic. It is specific with respect to the prior art, and also with respect to defendant's construction. Young made his invention in a crowded art, and, as noted by the patent examiner, the references cited against his application are close. Many persons were then, and had been previously, working along the same or different lines in the same field. He is entitled to his specific construction, and not to any broad range of equivalents. All the elements of Young's combination, it may be, are old; but his combination of them is new, and is not anticipated by any of the devices of the prior art. The results thereby accomplished may also be old, and were accomplished in Reynolds, No. 621,540; but Young accomplishes them in a new, different, and substantially better and cheaper manner. Reynolds' steel barrel is the only device of the prior art which it is shown had any commercial success, yet its success, as compared with the success of the Young type of barrel, has been small. Upon legal principles so familiar as not to require the citation of authority, a combination of old elements, which produces an old result in a new and substantially better and cheaper way, embodies patentable invention. And also on like familiar principles, if the question of invention be doubtful, the balance will be turned in favor of patentability by a showing of undoubted commercial success. This showing in favor of Young's type of steel barrel is made clear by the evidence. The Reynolds barrel has been on the market many years, and the patent covering the same expired some years ago; but of the heavy steel barrels or containers, now much used and widely sold, only 5 per cent. is of the Reynolds type, as against 95 per cent. of the Young type. My conclusion, therefore, is that Young's patent is valid as to the specific construction embodied therein, and that the complainant is entitled to be protected against any infringement thereof.

Defendant strongly contends that, if complainant's patent is valid,

its claims must be so limited that defendant's construction does not infringe. The structure considered in the former case was sought to be distinguished upon the same grounds without success, and the same rule of comity, already invoked and allowed, should be properly applied as to the respects in which defendant's construction resembles that there held to infringe.

[5] A new feature, however, exists in this case. Defendant is the owner of United States letters patent, No. 1,125,011, issued to Charles T. Draper, January 12, 1915, and by him assigned to the defendant. The contention is that defendant's barrel is made in conformity to these letters patent.

Complainant urges that no presumption of nonfringement arises, even if defendant's barrel is manufactured under and in conformity to this patent, and cites Walker on Patents (5th Ed.) § 362a, and Herman v. Youngstown Car Manufacturing Co. (C. C. A. 6) 191 Fed. 579, 584, 112 C. C. A. 185. If the Draper patent were for an improvement upon the construction covered by the Young patent, or if the invention embodied in the Young patent were generic, and entitled to a broad range of equivalents, undoubtedly no presumption of noninfringement follows from the issue of the letters patent, whatever may be inferred from such issue of the existence of patentable differences.

As already stated, the Young patent is specific, and entitled only to a narrow range of equivalents. The Draper patent is not for an improvement upon the Young invention. Both are specific patents for a combination of elements in precisely the same art. If, therefore, the defendant's barrel was made in strict conformity to the Draper patent, the presumption of patentable differences resulting from the issue of the patent might carry with it a presumption of noninfringement; but I am of opinion that defendant's barrel, as manufactured and sold commercially, so far departs from the Draper patent as to nullify any presumption from the allowance thereof.

Draper's application recites that steel barrels, as previously constructed, have been provided with reinforcing members; but these prior structures have depended upon the maintenance of the annular joints at the heads, by the closeness of engagement of the reinforcing chime with said annular joints. Certain disadvantages in this type of construction, and also in the annular rolling ribs or elevations about the body of the barrel, are then pointed out. To overcome the disadvantages first mentioned, the applicant says he has sought to remedy these defects first, by making a liquid-tight, double-locked joint between the head and barrel body, independently of the reinforcing means; and, second, that he has provided a peculiarly shaped reinforcing chime, having a protective overturned lip for the joint, and frusto-conical walls extending within the head, wherein said chime is seated by shaping said head and barrel body thereto.

There are cited against this application both the Young and Reynolds patents. These citations, particularly Young's, are distinguished by the applicant on the ground that Young does not show a double-locked joint and that his protective ring is straight-sided; further,

that Young secures his retaining function by overlapping the seam completely by the protective flange; further, that Young expressly omits the salient feature of claims 1 and 2 (Draper's application) in providing a cylindrical reinforcing rim; further, Draper's attorney says, "as for the use of 'frusto-conical' (which had been criticized by the examiner as an inapt term), the engaging walls of applicant's reinforcing rim actually conform to this geometrical shape, and it is the inward crimping of the body portion and closure members which affords the effective seal." He further states that this forms a permanent closure, and that the edges of the closure member are interiorly sealed within those of the body portion.

The application was passed for allowance on the basis of these distinctions as to the inwardly inclined or crimped or frusto-conical shape of the walls of reinforcing rim and of the head and body. The difference in the manner of forming the chime joint was not, in my opinion, a controlling consideration with the examiner. The valid distinction was found in the manner of closing or sealing the joint by the inward crimping of the body portion and closure members. The drawings and specifications did not show, and the applicant did not claim, that the overturned flange or lip of the protecting chime ring performed any function in forming the liquid-tight joint, but, indeed, just the reverse. It did not have the positive interlocking or clamping action of the Young patent, but rather relied on compression and frictional engagement, as in Hardier, No. 814,375, to keep it in place and to serve as a protecting armor.

Defendant's barrel in litigation departs widely from this specific construction. It does not have the inwardly inclined or frusto-conical shape, either of head or body, or of chime ring. On the contrary, the wall of the head and body are almost in a direct plane with the barrel body. The departure from a true plane is scarcely perceptible to the naked eye. The same is true of the inner wall of the reinforcing chime ring. This ring is straight-sided and cylindrical, and does not possess the salient features of claims 1 and 2 of the application. Its protective flange overlaps the shoulder of the chime joint in such a way as to produce the positive interlocking and clamping action of the Young patent. The free end of the chime ring flange, it is true, in Young's invention, is bent around the shoulder of the chime joint at an abrupt angle, and brought into contact with the barrel body, while in defendant's it overlaps the shoulder to a much less extent and does not contact with the barrel body. Something is claimed for this difference. One advantage, it is said, is that this open space between the flange end and the barrel body leaves exposed the chime joint, so that if a leak occurs the place of leakage may readily be discovered and remedied. This may be admitted; but it is also true that the free end of the flange overlaps the chime joint shoulder sufficiently to produce the positive interlocking and clamping action of Young's invention.

Defendant's expert sought to obviate this effect by asserting that the overlapping of the flange was sufficient only to anchor the chime ring; that it did not perform any funtion in making the liquid-tight,

double-locked joint; and that it could be easily removed with a hammer and restored without injuring the chime joint. I do not agree to these contentions. An inspection of defendant's structure, exhibited in various forms, convinces me, as it must convince any one, that this reinforcing chime ring has the positive interlocking and clamping action of complainant's structure, even though the flange end is not bent at an abrupt angle around the shoulder of the chime joint and does not contact with the body barrel. It cannot be removed without great force or without distortion.

[6] Defendant strenuously urges that the file wrapper history of Young's patent shows that the manner of forming the joint or shoulder, as therein disclosed, and that the bending at an abrupt angle of the free end of the chime ring flange about the shoulder of the chime joint, are positive limitations upon defendant's patent. The last-mentioned feature of bending at an abrupt angle was inserted after a claim without it was rejected. In support of this contention the familiar principle is invoked that if an applicant, in order to get his patent, accepts one with a narrower claim than that contained in his original application, he is bound by it, and is estopped from claiming a broader construction. Sargent v. Hall Safe & Lock Co., 114 U. S. 63, 5 Sup. Ct. 1021, 29 L. Ed. 67; Shepard v. Carrigan, 116 U. S. 593, 6 Sup. Ct. 493, 29 L. Ed. 723; Hubbell v. United States, 179 U. S. 77–83, 21 Sup. Ct. 24, 45 L. Ed. 95; Vanmanen v. Leonard, 248 Fed. 939, 161 C. C. A. 57.

An examination of the Patent Office proceedings convinces me that these contentions cannot be sustained in this broad manner. As to the form of the chime joint or shoulder, enough has already been said to indicate my opinion. In brief, the forming or creation of a shoulder, and not the method of forming the joint, was the essential feature. As to the abrupt angle at which is bent the free end of the reinforcing ring, it would, in my opinion, be an unreasonably narrow interpretation to hold that the specific angle of the bending is an essential element, or that Young is so limited. Reynolds, No. 621,540, and Hardie, No. 814,375, had both been cited against Young's application, and the examiner had in the first instance rejected the application in large part because of them. Reynolds, however, did not show or claim a seam or shoulder in any form, much less one made by folding or bending the head or body upon each other. This was a form of construction in the prior art which Young sought to distinguish. Hardie showed a joint, not, however, in the form of a shoulder, but one with the metal of the body bent upon itself, and the metal of the head section bent around it, and also a reinforcing chime ring applied thereto depending upon compression and frictional engagement, and not upon interlocking action to keep it in position.

This was a form of construction which Young sought to distinguish. This and other references were, in the language of the patent examiner, close, and it was necessary that the differences between them and Young's construction should be made distinct. Additions made in Young's claim 1, as compared with canceled claim 6, much relied on by counsel, were made to bring out these distinctions. The pre-

vious rejection, and the addition of plain language to bring out these distinctions, are not to be regarded as an acceptance of claims limited to this specific form of construction. Young's invention, as finally allowed, consisted of a seam or shoulder of certain thicknesses of metal, formed by bending or folding together the edges of the head and body members and a reinforcing chime ring, with a flange so bent around and overlapping the shoulder as to positively lock and clamp it together, thereby producing a fluid-tight joint. His claims as finally allowed are no narrower than this construction.

[7] Defendant produces a fluid-tight joint independently of the positive interlocking action of the reinforcing ring, but in so doing it produces a chime joint or shoulder of the same thickness of metal as is covered by Young's patent claims. Defendant also uses a reinforcing chime ring with the flange bent around and overlapping that shoulder, so as to positively interlock and clamp the joint together, just as is done in Young's invention. There is identity of function and substantial identity in the way of performing the function. It follows that defendant's commercial barrel with this form of reinforcing ring is an infringement of complainant's patent, and it is none the less an infringement because the free end of the flange is not bent at an angle as abrupt, nor overlapped to an extent as great, as that of Young's invention. Whether or not a construction strictly in conformity to Draper's patent would be an infringement is not involved, and no opinion with respect thereto is expressed.

My conclusion is that complainant's patent and all its claims are valid and infringed. The usual decree for an injunction and an accounting will be entered, with the following modification: On this hearing it was disclosed that a substantial part, perhaps 50 per cent., of defendant's product is being supplied on a contract to the United States War Department, with the performance of which complainant disclaims any desire to interfere. The injunction order will be so framed as to permit the further and complete performance of this contract. If the parties are unable to agree upon the conditions and form thereof, both may submit drafts of a suitable order, and, if necessary, an informal hearing will be accorded.

THE ACUSHLA.

(District Court, D. Massachusetts. September 9, 1919.)

No. 1692.

MARITIME LIENS ⊂=4—VESSEL ON THE LAY NOT LIABLE TO LIEN FOR REPLACEMENT OF FISHING GEAR.

The settlement of the Massachusetts fishermen's strike, in April, 1917, by which the fishing gear on old vessels, then owned by the masters and for use of which the fishermen were charged a percentage of their shares, was to be appraised and paid for, together with replacements, by deductions from the gross stock on each trip, and then became free to use of the fishermen did not change the ownership of the gear and a vessel known to be on the lay is not subject to a lien for replacements bought by the master.

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

In Admiralty. Suit by Ernest M. Cromwell and others against the fishing schooner Acushla. Decree for respondent.

Wendell P. Murray, of Boston, Mass., for libelants.
Frederick H. Tarr, of Gloucester, Mass., for claimant.

MORTON, District Judge. The case is an interesting one, as any controversy involving the customs of the sea is apt to be; and it has been presented by counsel familiar with such matters. The principal question is whether fishing gear delivered to the master of a fishing vessel in January, 1919, to replace gear lost or condemned as unfit for further use, is chargeable to the vessel, she being at the time, as the seller knew, on the one-fifth lay. The facts are as follows:

The schooner Acushla was owned by the claimant. She was let to one Parsons as master on the one-fifth lay, under which the vessel takes one-fifth of the gross stock and pays no part of the running expenses. Prior to the settlement of the fishermen's strike by the Public Safety Committee in April, 1917, fishing gear was owned by the masters of the vessels and they deducted 10 per cent. of the men's shares on each trip as pay for the use of the gear. Under that arrangement the vessel was not liable, as both parties agree, for gear bills.

The rental (or use) charge for gear was believed by the men to be unfair and was one of the causes of the strike. By the settlement it was agreed between the vessel owners and the men that new vessels should thereafter furnish their own gear, for which no charge should be made; that the old gear (owned by the masters) should be appraised and paid for by deductions of 10 per cent. from the gross stock on each trip, and when so paid for should become "free" gear i. e., the men should not be charged for the use of it; and that replacements of lost or condemned gear (on both old and new vessels) should be paid for from the gross stock of the trip on which the loss or condemnation occurred. This settlement was accepted by all parties concerned, and is recognized as establishing the custom in the Massachusetts fishing ports.

Capt. Parsons bought a new string of gear when he was on the Georgia in 1915. After that he changed vessels several times before taking the Acushla, and each time carried his gear with him. The value of it was paid for in accordance with the settlement; and at the time in question the string was "free" gear. Capt. Parsons testifies that it belonged to him, and so does the claimant's principal witness. The only evidence to the contrary is that of the libelant. He testified:

"Capt. Parsons owned this gear and carried it with him from vessel to vessel. It was old gear, and had been paid for from the 10 per cent. It belonged to the vessel. She never paid for it. But I maintain that the vessel, on which it was finally paid for, owned it. No; I say that it belonged to the captain or the crew. The captain takes it with him, but after it has been paid for it becomes free gear. * * * I change that answer; if the gear is paid for it belongs to the vessel. I understand that this gear belongs to Parsons."

This testimony shows, I think, the difficulty of maintaining that the strike settlement changed the ownership of existing gear. The men

were not concerned with who owned the gear; what they objected to was paying unfair rental on it. The settlement eliminated that complaint. There was no reason for altering the ownership of the gear as between the captain and the vessel. There was no advantage to the men in having it owned by the latter, rather than the former. The Acushla was not a new vessel, within the meaning of the strike settlement. The string of gear on her was, it seems to me, the property of Capt. Parsons, not of the vessel.; and I so find. The previously recognized incidents of the one-fifth lay were not changed as to gear, on old vessels at least, by the terms of that settlement, and the vessel was not liable for replacements.

On the trip ending January 10, 1919, gear to the value of $314.73 (according to Parsons' testimony) was lost or condemned and was deducted from the gross stock. He bought from the libelant, for replacements, gear to the amount of $282.55. On the trip ending January 21st the lost and condemned gear, amounting to $159.57, was deducted from the gross stock, and Parsons bought from the libelant $140 worth for replacements. These two charges less certain credits make up the claim in suit. The deductions were paid over to Parsons, but he failed to apply them to the libelant's bill.

The libelant knew that the Acushla was on the one-fifth lay and he knew the incidents of that lay. He first endeavored to collect his bill from Parsons, and went so far as to sue him and trustee his share in the trip. No bill was ever presented to the vessel or her owners, and it was not until after Parsons had gone into bankruptcy that any claim was made against her. The conclusion seems to me irresistible that the attempt to hold the vessel is an afterthought; and I so find. I am not satisfied that the libelant supposed at the time when the gear was sold that the vessel was liable for it, and originally extended credit to her. It is true that on the libelant's books the account was in the name of the schooner; but it is admitted by him that the account included everything furnished for use on board that vessel, including provisions and other supplies with which she was, as he knew, not chargeable, and that he customarily separated the items when the bills were made out. This being so, the form of the account does not show an intention to hold the vessel for the items here in controversy. Running vessels on shares or lays is a well-understood method of employing them, and while the captain may, under certain circumstances, bind the vessel, there is no hardship in holding that in Massachusetts ports, where the relation between the captain and the owners is understood, as it was here, replacements of gear belonging to him should, in the absence of authority on the part of the owners to have them charged to the vessel, be paid for by him.

On all the evidence, I find and rule that the libelant is not entitled to recover.

Decree dismissing libel, with costs.

LINCOLN v. PEOPLE'S NAT. BANK.

In re CUTTING MOTOR CAR CO.

(District Court, E. D. Michigan, S. D. July 18, 1919.)

No. 5911.

BANKRUPTCY ⊂=341—ACTION TO RECOVER PREFERENCE—RES JUDICATA.

Where a claim filed against a bankrupt estate is contested by the trustee on the ground that the creditor received a voidable preference, the decision of the referee that such preference was received and an order for its return, unappealed from, renders the question res judicata, and the creditor cannot relitigate it in a plenary action by the trustee to recover the preference.

At Law. Action by Bela J. Lincoln, trustee in bankruptcy of the Cutting Motor Car Company, against the People's National Bank. Trial to court, and judgment for plaintiff.

Clark, Emmons, Bryant & Klein, of Detroit, Mich., Price & Whiting, of Jackson, Mich., and Warren, Cady, Ladd & Hill, of Detroit, Mich., for plaintiff.

Thomas E. Barkworth, of Jackson, Mich., for defendant.

TUTTLE, District Judge. This is a plenary action, brought by the trustee of the estate of the Cutting Motor Car Company, bankrupt, against the People's National Bank, one of the creditors of said bankrupt, to recover, under section 60b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. § 9644]), an alleged voidable preference received by it from the bankrupt within four months prior to the filing of the petition in bankruptcy. By stipulation between the parties hereto a jury has been waived and the cause submitted to the court upon the files, records, and proceedings in the bankruptcy matter.

After the Cutting Motor Car Company had been adjudicated a bankrupt by this court in the bankruptcy proceedings referred to, the defendant in the present case filed a claim against the bankrupt estate for a balance alleged by it to be due from the bankrupt on certain promissory notes. The trustee filed objections to the allowance of such claim on the ground that the claimant had received from the bankrupt the voidable preference to recover which the present action was afterwards brought. After the taking of testimony at a hearing before him, in which the trustee and the claimant participated, the referee in bankruptcy made and entered an order sustaining the objections of the trustee, disallowing the claim unless the claimant should, within a period of time fixed in such order, surrender to the trustee the amount of the preference found to have been received by it, $6,277.89, and directing the trustee, in the event that the amount of such preference substantially exceeded the dividend payable to unsecured creditors, to consider the advisability of bringing suit against the claimant for the recovery of the preference so received. The claimant filed a petition for the review of such order, alleging that the referee erred in finding that it had received a voidable preference. Thereafter the trustee com-

menced the present action. Subsequently, the appeal from the order of the referee was dismissed by consent of the claimant, the defendant in this action.

The question involved is whether the defendant has received from the bankrupt a preference voidable under section 60b of the Bankruptcy Act. If the transaction resulting in the receipt of such money constituted, under the circumstances surrounding it, such a preference, plaintiff is entitled to recover herein; otherwise, not.

It is urged by plaintiff that the decision of the referee holding that the transaction referred to did constitute the voidable preference alleged is res judicata and precludes defendant from again trying, in this action, the question passed upon and decided by the referee. The identical question involved in the present action was presented and necessarily involved in the proceeding before the referee, to which the present defendant was a party and in which it took part, and that question was there decided adversely to the claim of the defendant. Manifestly, therefore, the doctrine of res judicata is applicable and controlling, and, the question whether the defendant has received a preference from the bankrupt, voidable under section 60b of the Bankruptcy Act, having been properly put in issue and litigated in the bankruptcy proceeding between the present plaintiff and defendant and in that proceeding decided in favor of plaintiff, such question must now be considered a matter adjudicated against the defendant, as between it and the plaintiff, and it cannot be retried in this action. Breit v. Moore, 220 Fed. 97, 135 C. C. A. 573; McCulloch v. Davenport Savings Bank (D. C.) 226 Fed. 309; Ullman, Stern & Krausse v. Coppard, 246 Fed. 124, 158 C. C. A. 350; Clendening v. Red River Valley National Bank, 12 N. D. 51, 94 N. W. 901, 11 Am. Bankr. Rep. 245.

It follows that the plaintiff is entitled to recover herein from the defendant the amount of the preference found by the referee to have been received by it, together with interest thereon at the legal rate from the time of the receipt thereof, and an order will be entered in conformity with the terms of this opinion.

In re YOUTSEY.

(District Court, S. D. Ohio, W. D. March 3, 1916.)

No. 5529.

1. WILLS ⊂=629—CONSTRUCTION—TIME OF VESTING.
The rule in Ohio is to construe devises and bequests as vesting at testator's death, unless his invention to postpone vesting is clearly indicated in the will.

2. PERPETUITIES ⊂=4(10)—CREATION OF FUTURE ESTATES.
There is no attempt to create a perpetuity in violation of Gen. Code Ohio, § 8622, by a will giving to A., living at time of execution of the will and death of testator, certain lands for life, and after his death to the heirs of his body, part to be possessed by him on arriving at majority, and the balance after that event and the death of testator's wife, the wife being given the use and occupation till such times.

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3. WILLS ⟸607(2)—ESTATES TAIL—INTERESTS OF FIRST DONEE AND CHILDREN UNDER STATUTE.
Under Gen. Code Ohio, § 8622, if a will creates a fee tail, the interest of the first donee is not a mere life estate, but his children do not take the fee-simple title till his death, when the estate tail is enlarged into an absolute estate in fee simple, and a deed by a child of the donee conveys no estate if the grantor dies before the donee, leaving issue surviving.

4. WILLS ⟸601(1)—ESTATE DEVISED—CONTROLLING PROVISIONS.
Language of a will which, standing alone, gives one a fee simple, is controlled by subsequent provisions, which by positive language reduces his interest to a life estate.

5. WILLS ⟸614(19)—DEVISE OF TWO LIFE ESTATES.
Land may be devised to one for life, and after her death to another for life.

6. ESTATES TAIL ⟸1—LIMITATION TO HEIRS.
To create an estate tail there must be a limitation in express terms or by direct reference, not only to heirs, but to heirs of the donee's body.

7. ESTATES TAIL ⟸1—INTENT TO CREATE—PRESUMPTION.
Estates tail are not favored, and there is a presumption against intention to create them, which must be overcome by language free from ambiguity.

8. WILLS ⟸605—ESTATE TAIL OR LIFE ESTATE WITH REMAINDER.
A will devising a farm to testator's son for life, and on his death to the heirs of his body, and providing that, if any devisee died leaving no heirs of his body, such devisee's portion should go to the devisees living or their heirs per stirpes, *held* not to create an estate tail, but to devise a life estate to the son, with remainder to the son's children, or, in default thereof, over to testator's other children or their heirs per stirpes.

9. WILLS ⟸634(17)—CONTINGENT REMAINDERS—VESTING OF FEE.
Where a life estate is devised to a son, single and childless, with remainder to his children, or in default thereof over to testator's other children or their heirs per stirpes, the fee at death of testator vests in his heirs, subject to be divested when a child is born to the life tenant, and then vests in such child, subject only to open up and let in subsequently born children.

10. PARTITION ⟸16—TITLE TO SUPPORT ACTION.
The life tenant, being also vested by deed of a remainderman with an interest in fee, may maintain partition against the other remaindermen.

11. PARTITION ⟸109(1)—SALE—TITLE.
So long as partition decree, under which sale is made and confirmed, remains in force, the parties are divested of title, and the purchaser is vested therewith.

12. INFANTS ⟸29—ESTOPPEL—ACCEPTANCE OF BENEFIT.
Infant defendants in partition ratify the proceedings, and are estopped to take advantage of a mere irregularity, by receipting to their guardian for and appropriating their shares of the proceeds, with full knowledge of the facts, on arriving at age.

13. JUDGMENT ⟸479—COLLATERAL ATTACK—PARTITION.
Proceedings in partition are judicial, and cannot be collaterally impeached, in the absence of fraud.

14. JUDGMENT ⟸747(2)—MATTERS CONCLUDED—PARTITION.
Partition forms no exception to the general rule that a judgment is conclusive of every matter which is actually and necessarily involved in its determination, and hence of the title.

15. JUDGMENT ⟸948(1)—RES JUDICATA—NECESSITY OF PLEADING.
A judgment, to be available as res judicata, must be specially pleaded.

16. JUDGMENT ⇐736—MATTERS CONCLUDED—QUIETING TITLE.
Judgment against plaintiffs in action in which they claimed a fee under a will, and sought to have their title quieted, it being held that they took only a life estate, is not conclusive as to effect of partition proceedings and deeds from remaindermen to life tenant, not considered.

In Bankruptcy. In the matter of Andrew S. Youtsey, bankrupt. On application to construe will and sell real estate. Decree rendered.

D. B. Van Pelt, of Dayton, Ohio, for trustee in bankruptcy.

Keifer & Keifer and Paul C. Martin, all of Springfield, Ohio, for the Agenbroad interests.

SATER, District Judge. The primary question for decision is, What estate has Andrew S. Youtsey, the bankrupt, in the 158 acres of land hereinafter mentioned?

On February 25 and June 21, 1915, certain creditors filed a petition and a supplemental petition, respectively, averring that the bankrupt is seized in fee simple of the land in question, and that the trustee in bankruptcy asserts that there is a cloud upon its title which prevents him from conveying it in fee to a purchaser. A construction of the will of Harrison Youtsey is requested in each of such pleadings. On June 23d the trustee in bankruptcy by intervention pleaded that the bankrupt's only property is the 158-acre farm located in Lost Creek township, Miami county, which farm was devised to the bankrupt by his father, Harrison Youtsey, who died testate in 1882, his will being duly probated in the early portion of that year. The testator left a widow and five children, to wit, William H., John C., Clara, Ella, and Andrew, the bankrupt. Andrew, at the time of his father's death, was a minor, unmarried, and without children, but subsequently married, from which marriage there were born to him the following children: Sarah K. (deceased without children), Hattie, George R., and Earl, all of whom are now of age, Earl having attained his majority subsequent to the institution of these proceedings. A controversy has long existed as to the extent of the bankrupt's estate in the premises in question. Averments are made by the trustee as to a partition proceeding instituted in the state court by the bankrupt against his children other than Sarah K. Youtsey, and of various deeds which were executed and delivered to the bankrupt to lodge in him the title to such property, which partition proceeding and conveyances will be hereinafter noted. The trustee's prayer is for a determination of the estate held by Andrew in the lands in question. On June 25th Earl L. Youtsey, then of full age, admitting that he is one of the bankrupt's children, and also the will and death of his grandfather, Harrison Youtsey, and the unsecured character of the petitioners' claims, by answer denied all else, and asks for a construction of such will.

In his will, duly executed February 5, 1882, Harrison Youtsey gave and devised to his son William H. a farm of 161 acres; to his daughter Ella a farm of 100 acres; to his son John C. 160 acres; to his daughter Clara 146 acres; and to his son Andrew the west portion of the home farm, to be possessed by him when he should arrive at the

age of 21 years, and the remaining portion of such home farm after the death of the testator's wife and Andrew's attaining the age of 21 years. The will then provides:

"All of the foregoing devises to the several devisees as named are to be to them for their natural lives, and on their decease are 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) as hereafter provided, and to be divided equally between those living or their heirs per stirpes.

"It is my will that the provisions I have herein made in relation to the several tracts of land by me devised to my several children shall not be so construed as to exclude the husbands of my deceased daughters from holding curtesy in said tracts of land so devised by me to my daughters, or the wives of my deceased sons from holding dower in the tracts of land devised by me to them, and after their decease then to be governed by the provisions in this will made. I mean by this that 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."

He then gave to his wife the use and occupation of the home farm until Andrew should arrive at his majority, at which time she was directed to surrender to him the west portion of the home farm. She was to retain the occupancy, use, and control of the east portion of it during her natural life. All household goods were given to her absolutely and subject to her disposal. The will then proceeds:

"At the death of my said wife my son Andrew S. Youtsey (if he be twenty-one years of age), and, if not, when he shall be twenty-one years of age, shall have that part of the home farm as above devised to my said wife during her natural life, and I hereby devise the same to him during his natural life, and then to be subject to the same provisions as are hereinbefore made as to all the other devisees."

Provisions were made for executors and the settlement of the estate, which has been fully administered. Harrison Youtsey's widow died July 2, 1907.

[1] The Ohio rule is that, unless the intention of a testator to postpone the vesting of a devise or bequest to some future time is clearly indicated in his will, such devise or bequest vests in the devisee or legatee at the testator's death. Bolton v. Bank, 50 Ohio St. 290, 293, 33 N. E. 1115; McArthur v. Scott, 113 U. S. 340, 378, 5 Sup. Ct. 652, 28 L. Ed. 1015. The law favors the vesting of estates. Section 10578, G. C. Ohio; Linton v. Laycock, 33 Ohio St. 128, 134. The presumption is that, whatever life or particular estate Harrison Youtsey first created, he intended to pass the fee under his will. The language of the will discloses the existence of such a purpose and an intention to dispose of his entire estate.

[2] As Andrew was in being at the time of the execution of the will and the death of his father, the testator did not create, or attempt to create, a perpetuity. Section 8622, G. C. Ohio; Turley v. Turley,

11 Ohio St. 173, 180, 181; Dungan v. Kline, 81 Ohio St. 371, 380, 90 N. E. 938.

[3] If the will created a fee tail in Andrew, then his interest, as the first donee in tail, was not the same as that of a mere life estate (Dungan v. Kline, 81 Ohio St. 383, 90 N. E. 938; Harkness v. Corning, 24 Ohio St. 428); nor has the fee as yet in that event vested in the children. If the will created a fee tail, his children would not take the fee simple until the estate shall reach them at his death, at which time the statute (section 8622) will enlarge the estate tail into an absolute estate in fee simple. Dungan v. Kline, 81 Ohio St. 382, 383, 384, 90 N. E. 938. If a fee tail was created, no deed executed and delivered by any one of Andrew's children conveyed an estate to the grantee, if the grantor should die before Andrew, leaving issue surviving. Dungan v. Kline.

[4, 5] The will, however, did not create a fee tail estate. The language of the earlier portion of its second item is such, standing alone, as to give to Andrew a fee simple in the 158 acres of land in question. By positive language, equally clear and decisive and twice stated, the subsequent provisions of the will reduce his interest to a life estate. The testator had power to do this. Collins v. Collins, 40 Ohio St. 353, 364, 365. He took a life estate in the west part of the farm, to be possessed by him on attaining the age of 21. His mother, who had the use and occupancy of the whole of the farm until that time, was required, on his attaining his majority, to surrender such portion of the farm to him. The residue of the farm she retained during her life, after which he took a life estate. It was competent for the testator to provide thus for two life estates. Paris v. Winterburn, 6 Ohio Cir. Ct. R. 635; Jones, Law of Real Property, etc., §§ 607, 608; Gibson v. McNeely, 11 Ohio St. 131, 135.

[6-8] A consideration of the will justifies the conclusion that an estate tail was not created in favor of the heirs of Andrew's body, and that Andrew was given a life estate. Washburn on Real Property (5th Ed.) vol. 1, p. 104, defines an estate tail thus:

"Estates tail then are estates of inheritance, which, instead of descent to heirs generally, go to the heirs of the donee's body, which mean his lawful issue, his children, and through them to his grandchildren in a direct line, so long as his posterity endures in a regular order and course of descent, and, upon the extinction of such issue, the estate determines."

To create an estate tail there must be a limitation in express terms or by direct reference, not only to heirs, but to heirs of the donee's body. At common law the necessary language to create an estate tail was, "To A. and the heirs of his body," the words "heirs of his body" following the devise to the donee in tail. Washburn, Real Property (5th Ed.) 105, 107; Pollock v. Speidel, 17 Ohio St. 439, 445, 446; Williams v. Haller, 13 Ohio N. P. (N. S.) 329, 336. Estates tail, however, are not favored in this country. The presumption is against the intention to create them, and that presumption must be overcome by language entirely free from ambiguity. Collins v. Collins, 40 Ohio St. 353, 363, 364. The ambiguity in the Harrison Youtsey will is fatal to a construction favorable to the creation of an estate tail.

King v. Beck, 12 Ohio, 390, is not controlling, not only because that case was subsequently reversed (15 Ohio, 559), but also on account of the dissimilarity between the will there under consideration and that of Harrison Youtsey. The will does not run to "Andrew S. Youtsey and the heirs of his body." As regards the eastern part of his farm the testator devised the same at the death of his (the testator's) wife to Andrew (if Andrew be then of age, and, if not so, then when he shall be thus of age) "*during his natural life*, and then to be subject to the same provisions as hereinbefore made as to all other devisees." This carries us back to the earlier provision that "all the foregoing devises to the several devisees as named are to be to them *for their natural lives*, and on their decease are to go to the heirs of their bodies." Andrew was one of the devisees to whom this clause refers, and his entire devise, being both the eastern and the western portions of the home farm, was thus to be for his natural life, and on his decease was to go to the heirs of his body, i. e., to his children or issue. The testator's intention was to make certain provision for his children in the way of life estates, and for his sons-in-law and daughters-in-law in the way of curtesy and dower; but his grandchildren were made quite as much the objects of his bounty as the persons just named. The provision that, if any devisee died leaving no heirs of his body (children, issue), such devisee's portion should go over to the devisees still living or their heirs per stirpes, to be equally divided, betrays a purpose not only to dispose of his whole estate, but, consistently with what has just been said, to care for both his children and grandchildren. He twice declared that Andrew should take a life estate only. With equal emphasis he declared that "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." It thus appears that his intent was first to secure a livelihood for his respective children during their natural lives and their respective wives and husbands; and, second, to make available on the death of each for the use of his grandchildren the lands devised to his respective children. The advantage to accrue to the grandchildren would be much greater, and his purpose thereby better accomplished, if he gave each a vested remainder instead of creating an estate tail. Each grandchild on attaining its majority could realize on its vested remainder, for such an estate may be so conveyed as to pass the title in fee (subject, of course, to the life estate), or may be levied on and sold under execution. Rhea v. Dick, 34 Ohio St. 420, 423. If, however, an estate tail was created, Andrew's children, as issue of him, the first donee in tail, would have no transferable right during his life. Harkness v. Corning, 24 Ohio St. 416, 427.

The creation of a life estate in the testator's children is inconsistent with an entailment. When a life estate is created, the fee is vested in the remainderman and not in the life tenant. When an estate tail is created, the fee is vested by the grant or devise in the first taker, the first donee in tail, and a fee simple is taken at his death by operation of law (section 8622) by the immediate heirs of his body. Section 10578, G. C. Ohio, first enacted in 1840, abolishes the rule in Shelley's

Case (for a statement of which see Brockschmidt v. Archer, 64 Ohio St. 512, 60 N. E. 623). It gave to the words "for his life" or "for his natural life" their natural effect, and made the first taker a life tenant. It changed the word "heirs" from a word of limitation to a word of purchase. By virtue of such statute they take not by descent, but as devisees. The 158-acre farm being devised to Andrew for his natural life, and the will expressly declaring that the fee shall not vest in him, but in the heirs of his body (children or issue), such children as a class of devisees, and not as heirs generally, take as remaindermen under the will, and not by descent from Andrew as a life tenant, because he has nothing to transmit. To hold that Andrew took a fee simple is to read out of the will the express provisions that he shall have but a life estate, the declaration that the fee is to vest in the testator's grandchildren, and his manifest intention to make his estate available to such grandchildren to some degree, at least, at the earliest practicable date. To interpret the words "heirs of his body" as designating a class of devisees is not to ignore those words. Against the theory of an estate tail is not only the presumption against an intent to create such (which presumption is strengthened by an avowed intent to vest the fee in his grandchildren), but also the repeated declaration of a purpose to give a life estate to Andrew.

[9] It is urged that, if Andrew did not take a fee simple, the title to the premises in question was in abeyance for want of a person or persons in whom to vest. This contention is unsound. In Gilpin v. Williams, 25 Ohio St. 283, decided by one of the ablest Judges that ever adorned Ohio's Supreme Bench, it appears that the testator gave to his daughter, Euretta Williams, "during her natural life, and to her children after her death, forever, one undivided eighth part" of his estate. She was then single and childless. She subsequently married, but died without children. McIlvaine, J., at page 295, employed this language:

"The right by means of which the real owner of the fee will eventually come into possession of this property as an estate of inheritance is vested in some person or persons awaiting the event which will unite the right of property and the right of possession in the same person or persons. We do not believe it is in abeyance or that it rests in nubibus. It is clear that it is not in Euretta—her only title is to an estate for her natural life; nor in her children—she has none. * * * The fee-simple title was in the testator until his death, and, if it did not pass by his will to any devisee therein named, it either ceased to exist in any one, or it passed by way of descent to his heirs at law. In our opinion it descended to the heirs, subject, however, to be divested, by force of the will, in the event that Euretta shall die leaving children; but subsisting in the meantime in the heirs, for the purpose of drawing the possession to them in the event of her death without children."

The will did not use the words "heirs of her body," but the words "to her children"; but, as the words "heirs of their bodies" employed in the Harrison Youtsey will mean none other than "children" of the devisees who took a life estate, the rule in the Gilpin Case is directly in point. The fee in the premises here in question vested at the death of the testator in his heirs, subject, however, to be divested when a

child was born to Andrew, and to open up from time to time for the benefit of his other children as they were respectively born.

By the terms of the will considered in Craig v. Rowland, 10 App. D. C. 402, there was devised to a mother and her unmarried childless son certain real estate, with the provision that, if the son thereafter married and died leaving lawful issue, or lawful descendants of such children, such issue or descendants, if in being at the time of the death of both mother and son, should take such real estate in fee simple; but if the son should die without having married, and without lawful issue surviving him, the premises should go to the testator's right heirs. Following the death of the testator the son married and had children. The situation was such as to make the rule announced in that case applicable here. It was held that the remainder, limited to the children or descendants of the son, became a vested remainder in fee simple in the first child born to the son or that came into being and capable to take, and did not wait for the death of the father; and this remainder thus vested was subject to open and let in the after-born children. Neither in that case nor in Carver v. Jackson, 4 Pet. 1, 90, 91, 92, 7 L. Ed. 761, did the court have any difficulty about the title being held in abeyance.

In Doe v. Considine, 6 Wall. 458, at page 477 (18 L. Ed. 869), a case which arose in and involved land in this judicial district, and has therefore all the force of an Ohio authority, Mr. Justice Swayne quoted Chancellor Kent with approval to the point that—

"A. devises to B. for life, remainder to his children, but, if he dies without leaving children remainder over, both the remainders are contingent; but if B. afterward marries and has a child, the remainder becomes vested in that child, subject to open and let in unborn children, and the remainders over are gone forever. The remainder becomes a vested remainder in fee in the child as soon as the child is born, and does not wait for the parent's death, and, if the child dies in the lifetime of the parent, the vested estate in remainder descends to his heirs."

He quoted, as I do, the above language on account of its appositeness to the case under consideration. He cited Jeffers v. Lampson, 10 Ohio St. 101, as in harmony with the above-quoted passage.

Having learned that the Harrison Youtsey will had been construed by the court of common pleas of Miami county, and by two of the state courts of appeals, counsel, at my instance, furnished for my assistance such of the opinions and records as are available. It is gratifying to know that the seven state judges who have had the will under consideration, although not stating their views in extenso, all reached the same conclusion as that at which I have arrived after an independent investigation. When Andrew's daughter Sarah K. was born she took a vested remainder in the 158-acre tract, which opened up, as his other three children were born, to let them in. Harrison Youtsey's heirs at law at her birth, under the rule announced in Gilpin v. Williams, became divested of the fee to said premises, the fee then passing to her. On November 22, 1902, for a valuable consideration, she conveyed her interest in the farm by deed of warranty to her father. His mother, on or about the same date, conveyed to him her life estate in the premises. As he already owned the life estate, by his daughter's deed for

her one-fourth interest in remainder he became vested with an undivided one-fourth interest in fee in the premises. On November 25, 1902, he instituted in the common pleas court of Miami county proceedings against his three remaining children to partition the farm, all of whom were properly brought before the court, and were represented by a guardian ad litem, who answered for each of them. The averments of his petition that he was seized in fee of the one-fourth part, and had a life estate in the one-fourth portion held by each of his three minor children, Hattie M., George R., and Earl, were adjudged to be true. He was held entitled to partition. Commissioners were appointed to make partition, with the direction that, if they should find such to be impracticable, they make a just valuation of the property and return it to the court. The commissioners, being unable to divide the property by metes and bounds, appraised it at $12,324. Thereupon the premises were, by proceedings duly had in accordance with the Ohio statute, sold, Andrew being the purchaser. He received from the sheriff on January 7, 1903, a deed in fee simple for the entire tract. All of the proceedings relating to the sale were by appropriate action confirmed by the court.

On January 7, 1903, Andrew was duly appointed guardian of his three minor children, Hattie, George R., and Earl, by the probate court of Miami county, duly qualified as such, and entered upon the discharge of his duties. When Hattie and George R., respectively, became of age, they each receipted to their father as guardian for the funds belonging to them, respectively, in his possession. Such funds represented the proceeds arising from the sale in the partition proceedings of their respective interests in the 158-acre tract. Each also executed and delivered a deed to the father for the premises.

[10-12] Andrew could maintain proceedings in partition. Morgan v. Staley, 11 Ohio, 389; Tabler v. Wiseman, 2 Ohio St. 207, 214, 215. So long as the partition decree remains in force his children are divested of title and he is invested with it. Dabney v. Manning, 3 Ohio, 321, 326, 17 Am. Dec. 597; Williams v. Haller, 13 Ohio, N. P. (N. S.) 350, 351, and cases cited. Two of his children, on respectively arriving at full age, ratified the partition proceedings by receipting to their guardian for and appropriating the proceeds of the sale in so far as the same belonged to them, with full knowledge of the facts, and thus estopped themselves in equity from taking advantage of a mere irregularity, if there was such, in the proceedings. Bohart v. Atkinson, 14 Ohio, 228, 239, 240. In Tabler v. Wiseman it was said by Judge Ranney at page 216 of 2 Ohio St.:

"A party ought not to be permitted voluntarily to take the benefit of a judgment and then attempt to reverse it. No more direct affirmance of the validity of the proceeding [in partition] could be made than by claiming title to the money of the adverse party received in pursuance of it."

[13, 14] Other cases in point as to estoppel by the acceptance of the proceeds of sale or by conduct amounting to a ratification are Wisby v. Bonte, 19 Ohio St. 238; Piatt v. Hubbell, 5 Ohio, 243; Rice v. Smith, 14 Mass. 431. Jurisdiction of the proceeding in partition was entertained by the state court. Those proceedings were

judicial, and cannot be collaterally impeached in the absence of fraud. Bohart v. Atkinson, 14 Ohio, 228, 239. No attack has ever been made on them. In Black on Judgments, § 660, it is said:

"The action of partition forms no exception to the general rule that a judgment is conclusive of every matter which is actually and necessarily involved in its determination. And hence, if the title of the property comes in issue, it is bound by the judgment. And now, in most of the American states, partition has ceased to be regarded as a mere possessory action, and has come to involve the right of property as well as the possession; and in such cases the judgment is conclusive upon every right or title which either of the parties present, or might have put in issue, in the litigation."

The same rule prevails in Ohio, as will appear from cases cited in support of the above-quoted text, and from Dabney v. Manning, 3 Ohio, 321, 325 (17 Am. Dec. 597), in which it was ruled that—

"The proceedings and judgments of the courts, in a petition for partition, must, like judicial proceedings in all other cases, bind both parties and privies, while they remain unreversed, however erroneously they may have been conducted.

"In this case the court of common pleas clearly was invested with jurisdiction over the subject and between the parties. Whether such interest descended to the heirs of Dabney, as entitled one of them to demand partition, was a judicial question, which that court were competent to decide. It naturally arose in the cause, and the decision of it concluded all concerned until reversed. The adjudication upon every other fact in the cause was of the same character."

See, also, Landon v. Payne, 41 Ohio St. 303. It follows that by virtue of the partition proceedings Andrew became vested with the title to the premises in question as against all of his children. By the terms of the will, if Andrew should die leaving no heirs of his body, then the devise to him and his children is "to revert back" and to be divided equally between the testator's living children or their heirs per stirpes. Considering Andrew's age and the number of his grandchildren by his daughter Hattie and his son George R., the possibility of the property passing over to Andrew's brothers and sisters or their heirs is a negligible quantity.

[15, 16] Allusion has been made to the court's request that counsel procure the rulings of the state courts for its consideration in the study of the present case. They submitted the records of the cases in both the common pleas court and the court of appeals of the second circuit, brought by Andrew S. Youtsey and wife against his daughter Hattie and his sons George R. and Earl. His daughter Sarah K. had theretofore died. The petition was filed in 1913, and sets up the Harrison Youtsey will, that the plaintiffs are in possession of the 158-acre tract, that the defendants are giving out reports that the plaintiffs have but a life estate, and that they own the remainder in fee, and the prayer is that the will may be construed, and that plaintiffs be adjudged and granted all relief to which they may be entitled in law and equity. The defendants were all duly served with summons. A guardian ad litem was appointed for Earl, who alone answered, admitting the provisions of the will, and denying all the other allegations of the petition, but further alleging that the will is plain, certain, and unambiguous, and that by its terms the plaintiffs

own but a life estate, and that the fee is in him and his brother and sister. His prayer was for a dismissal of the petition and for such other and further relief as he might be entitled to. The excellent opinion of the judge of the court of common pleas shows that the only question considered by him was the construction of the will. The final decree found Andrew S. Youtsey to have a life estate only. The opinion rendered by the court of appeals states that the action involves "the construction of the last will and testament of Harrison Youtsey, deceased"; that the plaintiffs claim a fee-simple interest under such will, and seek to have their title quieted. It then recites that the particular question is whether the plaintiffs take a fee-simple or only a life estate in the property devised. The trial court was affirmed. Andrew did not appeal from or prosecute error to the judgment rendered by the court of appeals. The decree so rendered against him at first appeared troublesome. The prior proceedings in partition were neither pleaded nor brought to the attention of either of the state courts. In the present case the proceedings in the action to quiet title have not been pleaded. The matter set up in such action was not, therefore, the same as that pleaded here. The rule is that, if a party relies on the record of a former adjudication of the same matter set up in answer as an estoppel, he should plead such former judgment. Such record is not admissible in evidence under a general or special denial of new matter contained in an answer. Fanning v. Insurance Co., 37 Ohio St. 344; Meiss v. Gill, 44 Ohio St. 253, 258, 6 N. E. 656. The last-named case, at page 258 of 44 Ohio St., at page 658 of 6 N. E., cites with approval Lockwood v. Wildman, 13 Ohio, 450, to the point that "a former decree, to be a bar, even when well pleaded, or set up by way of answer, must be such as shows that the rights of complainants, now set up, have been already conclusively determined." Again on page 259 of 44 Ohio St., on page 658 of 6 N. E., it is said: "And when a judgment is not pleaded, and could have been pleaded, 'in evidence,' such a judgment is not conclusive to estop a party from proving the truth of a fact in dispute." It was further declared in that case on page 260 of 44 Ohio St., on page 659 of 6 N. E., approving an Indiana ruling, that—

"To render a former recovery an estoppel to a subsequent suit, embracing the same matter in controversy with the first, the judgment must be specially pleaded. * * * If it be not so pleaded, and the defendant rely on the general issue, the former judgment is admissible in evidence, but it is not a conclusive bar to the action; the jury may still find for the plaintiff, if they think him entitled to recover."

In Porter v. Wagner, 36 Ohio St. 471, 474, Judge White said:

"The question is not what the court might have decided in the former action between the parties, but what the court did in fact decide, as shown by the record. * * * The system of pleading under the Code does not affect the question. Since the adoption of the Code, as well as before, the question in each case is, what was adjudicated in the former suit? In answering this question, reference must be had, of course, to the pleadings as well as to the judgment or decree."

See, also, Railroad Co. v. Hoffhines, 46 Ohio St. 643, 647, 648, 22 N. E. 871. What the state courts decided, and all that they decided,

was, if we may consider the record, that under the will of his father Andrew took but a life estate and his children a remainder in fee. The rights of Andrew under the deed from his daughter Sarah K., and acquired by the partition proceedings which are now set up, were not before the state courts and were not determined. The judgments of those courts, not being pleaded, are not admissible in evidence, and, if they were so, would not be conclusive to estop the trustee in bankruptcy from proving what the title of Andrew actually is.

A decree may be entered in accordance with the foregoing, finding Andrew possessed of a fee simple in the premises in question.

STERNS LUMBER CO. v. JOHN H. RICE CO. et al.

(District Court, D. Maine, N. D. September 6, 1919.)

No. 8.

1. SHIPPING ⟸54—CHARTERER LIABLE FOR DOCKING SHIP IN UNSAFE BERTH.
The charterer of a schooner, which was to discharge her cargo of coal at its own dock, and which designated the berth where she was to lie overnight before unloading, *held* liable for her injury by settling at low tide on a dangerously uneven bottom, by which she was broken and strained.

2. SHIPPING ⟸54—SHIP DOCKED BY CHARTERER IN UNSAFE BERTH DID NOT ASSUME RISK.
The fact that the master of a schooner had once before discharged her at the wharf where she was directed by the charterer to lie overnight before unloading, and where she was injured by settling on an uneven bottom, *held* not to charge her with assumption of the risk, where on the former occasion she was largely unloaded before the fall of the tide.

3. CORPORATIONS ⟸306—OFFICER OF CORPORATION CHARTERER NOT PERSONALLY LIABLE FOR INJURIES TO SHIP.
Where the president and general manager of a corporation which was the charterer of a vessel acted for the corporation and within his powers in directing the vessel to a berth, where she was injured by reason of the insufficient depth of water, he is not personally liable for the injury.

In Admiralty. Suit by the Sterns Lumber Company, owner of the schooner Florence and Lillian, against the John H. Rice Company and John H. Rice. Decree for libelant against the John H. Rice Company, and dismissed as to John H. Rice.

Nathan W. Thompson and George C. Wheeler, both of Portland, Me., for libelant.

Fellows & Fellows, of Bangor, Me., for libellees.

HALE, District Judge. This libel is brought in behalf of the schooner Florence and Lillian, to recover damages sustained by the schooner in September, 1917, while discharging a cargo of coal at the dock of the respondent company at Bangor. The libel was amended, joining John H. Rice as a respondent.

The schooner is a three-masted vessel, of the burden of 250 tons, and a coal-carrying capacity of 400 tons. At the time of the injury

she was in command of Nelson A. Crocker, a part owner. In August, 1917, she was chartered, under an oral charter, to the respondent company to load coal at Port Reading, N. J., to be carried to the respondent's wharf at Bangor. The terms of the charter were agreed upon by the libelant, the agent for the schooner, and by the company, the charterer, as appears by the bill of lading.

The schooner arrived, with her cargo, at the mouth of the Penobscot river early Sunday morning, September 2, 1917. By means of the lighthouse keeper, Capt. Crocker reported to the charterer by telephone, and was told by John H. Rice, in behalf of the company, to "come right up; the dock is all right." The vessel was towed up the river, and reached Bangor early in the afternoon of Monday, Labor Day, September 3, 1917. After the schooner anchored, Capt. Crocker talked with Wilbur Reed, the head stevedore of the Rice Company, who was standing on the wharf. In reply to the question whether it was all right to come in, Reed said it was, and added: "If the tug don't come after you, why, it will be all right to lay there until morning." While the schooner was being towed in, John H. Rice, the president of the Rice Company, came down and had some conversation with Capt. Crocker. Reed also engaged in the conversation. Capt. Baldwin, of the tug which had the schooner in charge, says he feared that there might not be water enough and said to Rice: "How much water have you got here at low tide?" Rice replied: "Twelve or 13 feet." Capt. Baldwin then called Rice's attention to the low run of tides, and said: "You must have dug it out." Rice said: "Yes." Capt. Baldwin said: "It must be all right now, then?" To which it appears that Rice assented.

It appears from the proofs that Rice was there when Reed took the docking lines of the schooner, and that Rice determined when the after hatch was under the staging. The wharf extends out into the river about 60 feet, and up and down the river about 62 feet. Vessels assigned to this wharf with cargo belonging to the company were discharged by Reed, who appears to have had full control of discharging all vessels for the company.

The schooner was docked at the end of the wharf under the circumstances which I have outlined. That night she filled and sank. The libelant says that her damage occurred as a result of the condition of the bottom, which the respondents knew, or ought to have known. This libel is brought to recover expenses in repair of this schooner, and for the loss arising from her detention in order to make necessary repairs, and also because of permanent damages to her by stranding.

The respondent company denies that the schooner was staunch, strong, and fitted for the work she was engaged in, and says that the dock at which she came to anchor was a suitable, convenient, and proper berth for a vessel of her size, and that the damage to her was occasioned by her own unsuitable condition and negligent management; that the injury occurred by reason of the libelant's fault; that Capt. Crocker was fully acquainted with the dock, had been there before, and knew its condition; and that the damages resulted from no fault of the respondent.

1. The proofs show that the schooner was an old vessel, but that she had been overhauled and recaulked at Camden, just before the injury; that, during the voyage to Bangor, she had required pumping only once in three days with the gasoline pump forward, which appears by the testimony to have been in good condition; that, two months previous to the injury, she had carried a cargo of coal to the same respondent, and that no complaint was made as to her condition; that her crew were all Maine men, of experience in the class of work in which they were engaged. From the testimony I must conclude that the schooner was in a staunch and seaworthy condition at the time of her docking.

2. On the question of the condition of the dock, the principal direct testimony in behalf of the libelant is given by Percy H. Richardson, a civil engineer of experience. He put in evidence a cross-section plan of his soundings, which shows the unevenness of the bottom at the place where the schooner lay. He testifies that the dock had a hard gravel bottom, with many cobble stones in it, and one boulder about a foot in diameter; that at the lower end, near where the stern of the vessel would come, there were 7.8 feet of water; that at the bow of the vessel there were 8.5 feet, and amidships 10.9 feet; and that it would be necessary for the keel of the vessel to settle 3 feet and 7¼ inches to have the entire keel of the vessel rest on the bottom.

The proofs show that the schooner grounded at her bow and stern and sagged amidships; that as a result of the straining the foremast raked aft and the mizzenmast raked forward; that cracking was heard near the mainmast by those on board. It appears that other vessels had docked there without apparent injury, but that such vessels had been discharged before they had time to ground, or that they had been towed off into the stream. It does not appear, from the testimony, that a vessel of the size and draught of this schooner had lain there and grounded out with a whole cargo on board.

Reed, the stevedore, says that he had full control of all vessels discharging, and that he did not have to ask whether he should discharge or not. Capt. Crocker testifies that Reed told him it would be all right to come into the wharf, if he wanted to lie there, and reminded him that he had been there before.

The evidence convinces me that at the point indicated on Richardson's cross-section plan the dock was uneven, the schooner grounded upon this uneven bottom, and her straining was occasioned by such grounding. The testimony shows that the agent of the respondent designated the place where the schooner was to lie.

It was clearly the duty of the respondent company to exercise reasonable care in ascertaining the condition of the dock thus designated. It was not a guarantor as to the condition of the dock, but was bound to the exercise of reasonable care in ascertaining its condition before assigning it for the discharge of a vessel. Its want of knowledge cannot relieve it of responsibility, if the defects were readily discernible by the exercise of reasonable care. In Look v. Portsmouth, Kittery & York Street Railway Co. (D. C.) 141 Fed. 182, this court dealt with a question similar to that arising in the case at bar. The

court held that it was incumbent upon a consignee, charged with the duty of discharging a vessel, to designate a suitable place for her to lie while discharging, and to know, as far as by reasonable effort it could know, that the place was reasonably safe; that it was a part of the obligation of the consignee to furnish an agent to have charge of the unloading who should have sufficient knowledge to provide a reasonably safe place; that it was not necessary for the libelant to prove actual knowledge on the part of the respondent, or his agent, of any unfitness of the dock, but that it was sufficient that the respondent's agent had means of such knowledge; that the agent was bound to know the condition of the dock, and not to permit vessels to enter unless the dock was reasonably safe. Philadelphia & Reading Ry. Co. v. Walker (D. C.) 139 Fed. 855; Merritt v. Sprague (D. C.) 191 Fed. 627; Docks v. Gibbs, 11 House of Lords Cases, 512; Hartford, etc., Transportation Co. v. Hughes (D. C.) 125 Fed. 981; Smith v. Burnett, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756; Smith v. Havemeyer (D. C.) 32 Fed. 844.

In the case at bar the evidence discloses that the principal examination of the dock made by the respondent was that of a bookkeeper who went down to see if there were any logs or foreign substances on its bottom, but who had no such experience as would enable him to determine its fitness for the docking of a large vessel. It is not shown precisely upon what the president and agent of the company relied, when he stated that the wharf had been dredged and that there were 12 or 13 feet of water at low tide.

Capt. Crocker had formerly lain at the wharf and knew something of it; and this is an important consideration. The case would undoubtedly be much stronger for the libelant if Capt. Crocker had never been at this dock before. Thompson v. Winslow (D. C.) 128 Fed. 84; Philadelphia Railway Co. v. Walker (D. C.) 139 Fed. 855; Union Ice Co. v. Crowell, 55 Fed. 87, 5 C. C. A. 49; Merritt v. Sprague (D. C.) 191 Fed. 627. But Capt. Crocker did not know from former experience the dangers to which he was subjected in allowing his schooner to be stranded upon this bottom before discharging any of her coal. He had been at the wharf once before, but at that time he arrived on high water, and 150 tons of his cargo were discharged before the tide had fallen, so that the vessel did not ground, and he had no occasion for sounding. With this imperfect knowledge, he had the assurance from the respondent's agent that the dock had been dredged, and that there were 12 or 13 feet of water. The attention of the respondent's agent seems to have been called to the extreme tides which were running that day, and I cannot escape the conclusion that, if he had made an effort to sound the dock, he would have discovered that it was unsafe to allow this large vessel, with her full cargo, to be grounded at the point designated for her discharge. After the grounding, when the schooner was hauled out, it was found that she was badly strained; her butts had opened; the oakum had started. After the vessel was docked, snapping sounds were heard near the mainmast. Soundings were made, the vessel was found to be leaking badly, and the pumps were started. Report was made to Capt. Crocker; when he arrived

at the schooner, he noticed that the foremast was raking aft, and the mizzenmast raking forward, which made it evident that the keel, amidships, had gone down—that her "back had broken." Soundings were made, and it was found that the water was as deep in the hold of the schooner as it was outside—that the water was running through her. When the tide came up, the schooner did not lift. Before the cargo was discharged, it was found necessary to discharge some coal and to get the wrecking pump on a scow to assist her own pump. Before docking, the testimony shows that the schooner had needed to be pumped only five or six strokes every third day. After the injury, it required her own pumps and the wrecking pump to keep her free, even after the discharge of the cargo. From the whole testimony, I am convinced that her injuries arose from the fact of the grounding, and that such grounding might have been prevented by the exercise of reasonable care on the part of the respondent corporation.

[1, 2] 3. The respondent charges fault on the part of the libelant, and says that Capt. Crocker knew the condition of the dock when he came to it, and that he assumed all risk of injury arising from its condition. As has been said, Capt. Crocker had been at the wharf once before. I have already referred to the testimony showing that on that occasion he arrived at high water, that 150 tons of his cargo were discharged before the tide had fallen, and that, under these circumstances, his schooner did not ground, and he had no occasion for sounding. The testimony indicates that the respondent's agent had knowledge of the condition under which the schooner had discharged at the wharf on the former occasion. When we consider what, in fact, the agent of the respondent told Capt. Crocker, I think it clear that the captain had a right to assume that the water in the dock was sufficient for the schooner to lie there in safety at the time in question, and that, if there were any special dangers to which the schooner might be exposed, on account of the running of the tides, or for any other reason, he should have been fully informed. He was not informed. He says he was told, on the other hand, that the dock had been dredged, and that there were 12 or 13 feet at low water. The proofs show that the agent of the respondent, who undertook to act in the premises, had himself no such information as he ought to have had under all the circumstances of the case.

It seems clear to me that the respondent company has not met the burden of showing that there was any waiver on the part of the libelant, or that the libelant was guilty of contributory negligence, or of any fault.

[3] 4. By the amended libel it is contended on the part of the libelant that John H. Rice, the president and general manager of the respondent company, is personally liable for the injury. It appears that John H. Rice was the managing head of the respondent corporation; that at the time of the injury he owned all its stock, with the exception of 2 shares. His interests and the interests of the corporation were closely connected. He cannot, however, be held personally liable for damages, unless it is shown affirmatively that the injury resulted from his mismanagement, misconduct, or negligence.

The libelant charges that it was the duty of Rice, both individually and as a representative of the company, to notify Capt. Crocker, on September 3, 1917, that the berth at the wharf in question was not suitable for the schooner to dock; that Rice purposely refrained from giving such warning by reason of his anxiety to obtain the schooner's cargo of coal as soon as possible; that his testimony shows that he felt personally responsible regarding the vessel's docking, whereas he says that he knew nothing about the extreme tides and made no efforts to find out in regard to them. Rice admits that Reed was his agent; that he heard Reed tell Capt. Crocker that there were 12 or 13 feet of water there. Capt. Baldwin testifies that, when they got into the dock, he asked Rice how much water there was, and he said 12 or 13 feet; that the captain then said, "You must have dug it out?" To which Rice replied, "Yes." Capt. Baldwin added, "It must be all right now, then?" Rice replied, "Yes."

The testimony is clearly sufficient upon which to base the conclusion that Rice bound the corporation by what he said and did. The corporation and the libelant were the parties to the contract, for the terms of the bill of lading were the terms under which the coal was carried. The ship, then, was dealing with the corporation. Rice was representing the corporation in his declarations.

The testimony is not sufficient to persuade me that Rice committed an ultra vires act. His actions did not result in the corporation doing any act beyond its powers. As agent, he did nothing beyond the power of an agent. The libelant has not, in my opinion, met the burden of showing that Rice was guilty of such mismanagement, misconduct, or negligence as to make himself personally liable to the libelant in damages. Cook on Corporations (7th Ed.) § 682, and cases cited.

My conclusion is: As to John H. Rice, the libel is dismissed, but without costs. The John H. Rice Company is to answer in damages for the injury to the schooner and for her detention.

A decree may therefore be entered for the libelant against John H. Rice Company, with an order of reference to assess damages. Fritz H. Jordan, Esq., is appointed assessor. The libelant recovers costs against the John H. Rice Company.

PREST-O-LITE CO. v. BOURNONVILLE et ux.

(District Court, D. New Jersey. September 21, 1914.)

1. TRADE-MARKS AND TRADE-NAMES ⊂=72—REFILLING AND SELLING GAS TANKS, WITHOUT OBLITERATING TRADE-MARK, UNFAIR COMPETITION.
Defendants *held* chargeable with unfair competition in refilling acetylene gas tanks originally made, filled, and sold by complainant without obliterating its trade-mark "Prest-O-Lite," or its offer placed thereon to replace worn-out tanks.

2. COURTS ⊂=328(3)—IN SUIT FOR INJUNCTION, AMOUNT IN CONTROVERSY IS PROPERTY RIGHT TO BE PROTECTED.
In a suit for an injunction, the value of the matter in dispute is not tested by the more immediate pecuniary damage resulting from the acts complained of, but by the value to complainant of the business or property right for which protection is sought.

In Equity. Suit by the Prest-O-Lite Company against Camille Bournonville and Ida Bournonville, his wife. On final hearing. Decree for complainant.

See, also, 260 Fed. 442, 446.

Winter & Winter, of New York City, for complainant.
W. P. Preble, of New York City, for defendants.

HAIGHT, District Judge. [1] A preliminary injunction was granted in this case by the late Judge Cross. The evidence before him was, in no material respect, different from that presented on final hearing. The practices which the bill seeks to prevent have been the subject of litigation in several districts, and have been passed upon by two Circuit Courts of Appeals. In each case an injunction has been issued, at least as broad as that granted by Judge Cross. Prest-O-Lite Co. v. Avery Lighting Co., 161 Fed. 648 (C. C. N. D. N. Y.); Prest-O-Lite Co. v. Post & Lester Co., 163 Fed. 63 (C. C. D. Conn.); Prest-O-Lite Co. v. Bogen, 209 Fed. 915 (C. C. S. D. Cal.); Prest-O-Lite Co. v. Davis, 209 Fed. 917 (D. C. S. D. Ohio, W. D.), affirmed by the Circuit Court of Appeals, 6th Cir., July 25, 1914, 215 Fed. 349, 131 C. C. A. 491; Searchlight Gas Co. v. Prest-O-Lite Co., 215 Fed. 692, 131 C. C. A. 626 (C. C. A. 7th Cir.). I am also informed by counsel (although I have not seen copies of the opinions) that the same disposition was made of similar cases in the district of South Carolina (Prest-O-Lite Co. v. Jenkins, not reported) and in the Eastern District of Pennsylvania (Prest-O-Lite Co. v. Auto Equipment Co., not reported).

There are no facts in the present case which distinguish it from the cases above cited. The decision in this case might therefore properly be rested on those authorities, as I consider them entirely sound. All of the points urged on behalf of the defendants, save one which I will hereafter discuss, have been considered and decided adversely to defendants' contention by one or more of those cases. The defendants are competitors of the complainant in the manufacture and sale of acetylene gas. The complainant has established a system for marketing its gas, which is fully described in the various opinions to which

I have referred. I will therefore not attempt to explain it in detail. The evidence convinces me that the defendants were, at the time the preliminary injunction was granted, engaged in refilling and delivering tanks, which had been originally distributed by the complainant under its system, and bearing the trade-name "Prest-O-Lite" (which the complainant had adopted and which had become generally recognized), to various automobile supply dealers in the city of Newark, on an extensive scale. These tanks were then distributed by the dealers among automobile owners as tanks containing gas manufactured by the complainant, there being no way by which a purchaser could ascertain the deception. The defendants, I am convinced, had knowledge of this, and for that matter were actual participants therein.

While the gas furnished by the complainant has become recognized very generally as of excellent quality, probably the most important inducement to an automobilist to purchase the complainant's tank and gas is the fact that, under the complainant's system, a holder of one of these tanks (when its supply of gas has become exhausted, or it has been damaged or worn out) may exchange it almost anywhere in the United States or Canada, at a depot established by the complainant, for the same kind of a tank fully charged with gas at a relatively small cost. This exchange could not be made, under the complainant's system, with a tank which had been refilled by any one other than the complainant. The defendants have no such system, nor do they furnish tanks; their business being confined to refilling. It is clear that the defendants could not, without deception, sell their gas to the ordinary automobilist. But by refilling the tanks originally distributed by the complainant and bearing the trade-name "Prest-O-Lite," and placing them, either directly or indirectly, upon the market, they were thereby enabled, fraudulently, to secure business which they otherwise could not have gotten, and to reap the benefit of the system and business which the complainant, by industry and an expenditure of a large amount of money, had built up, and to which it was entitled. This constitutes almost as flagrant an example of unfair competition as it is possible to imagine.

There is another aspect of the case in which the complainant may be seriously injured unless the defendants are compelled to obliterate the words "Prest-O-Lite" from all tanks refilled by them and bearing those words, namely:

"It is part of the complainant's system to replace a tank which has become worn out or damaged with another fully charged, at the same price as it charges a holder of an exhausted tank for one filled."

The inducement for the complainant to do this is the profit which would inure to it from refilling exhausted tanks. If these exhausted tanks are refilled from time to time by the defendants, the complainant would lose this profit, and, when any such tank had become damaged or worn out, the complainant would be required to furnish a new one in its place, because it would have no way of ascertaining whether it had been refilled at any time by others. In this way it is conceivable that considerable damage might result to the complainant. This feature was considered by the Circuit Court of Appeals in Search-

light Gas Co. v. Prest-O-Lite Co. as a sufficient ground upon which to require the obliteration of the word "Prest-O-Lite" from any tanks filled by the defendants in that case. I do not deem it necessary to base my decision in this case upon that ground, because it seems entirely clear to me that complainant is entitled to the relief granted by Judge Cross, upon the theory of unfair competition.

[2] The defendants, in their answer, challenge the jurisdiction of the court on the ground that the value of the matter in controversy is below the jurisdictional amount. The answer alleges:

"The amount to which the complainant has been damaged and injured by the defendants' acts, if at all, cannot exceed $500."

In the brief filed, counsel has contented himself with the mere statement that—

"It is inconceivable that the amount in controversy is large enough to give jurisdiction by adverse citizenship."

He has made no argument to support this. It is not clear upon what theory he bases his contention. It is entirely well settled that in a suit for an injunction the value of the matter in dispute is not tested by the mere immediate pecuniary damage resulting from the acts complained of, but by the value to the complainant of the business or property right for which protection is sought. Hunt v. New York Cotton Exchange, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821; Bitterman v. Louisville & Nashville R. R., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693. Judged by this standard, the matter in controversy in the present suit far exceeds the jurisdictional amount.

There will be a decree for the complainant, with costs, the injunction to be in the same form as that granted by Judge Cross.

PREST-O-LITE CO. v. BOURNONVILLE et ux.

(District Court, D. New Jersey. March 12, 1915.)

1. TRADE-MARKS AND TRADE-NAMES ⇐98—RECOVERY OF PROFITS ALLOWED ON UNFAIR COMPETITION.

The injured party is not entitled as of right to recover profits in cases of strictly unfair competition; but a court of equity may upon what seems sufficient grounds, include in its decree an accounting of profits, as well as an award of damages, as punishment for illegal acts.

2. TRADE-MARKS AND TRADE-NAMES ⇐62, 98—ACCOUNTING FOR PROFITS ALLOWED ON INFRINGEMENT AND UNFAIR COMPETITION.

The refilling and resale of acetylene gas tanks, originally made, filled, and sold by complainant and bearing its trade-mark, "Prest-O-Lite," without obliterating the trade-mark, *held* not only unfair competition, but also an infringement of the common-law trade-mark, which entitled complainant to an accounting of profits.

In Equity. Suit by the Prest-O-Lite Company against Camille Bournonville and Ida Bournonville, his wife. On motion to modify interlocutory decree. Denied.

See, also, 260 Fed. 440, 446.

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

Winter & Winter, of New York City, for complainant.
W. P. Preble, of New York City, for defendants.

HAIGHT, District Judge. The defendants seek to have modified that part of the interlocutory decree, entered herein on November 11, 1914, which adjudged that the complainant recover from the defendants all of the profits, gains, and advantages which the latter had derived from the sale of gas cylinders or tanks bearing the trade-mark "Prest-O-Lite," and containing any other material than that prepared and placed therein by the complainant. It is urged that the defendants should respond only for the damages suffered by the complainant, because the basis of the decree was not an infringement of a technical trade-mark, but unfair competition on the part of the defendants. In support of this contention, the recent decision of the Circuit Court of Appeals of the Third Circuit in P. E. Sharpless Co. v. Lawrence, 213 Fed. 423, 130 C. C. A. 59, is relied upon.

At the time the interlocutory decree was settled and signed, no objection was made on behalf of the defendants to an accounting for profits; it apparently being assumed that such was entirely proper, if the acts of the defendants warranted the injunction ordered by the decree. Subsequently the before-mentioned opinion of the Circuit Court of Appeals came to the attention of counsel for the defendant, and then this motion was made.

Defendants' contention, that the decree was made on the theory of unfair competition, is unquestionably correct. As the acts complained of constituted, in the judgment of the court, unfair competition, it was not considered necessary to determine whether the complainant's trade-mark, "Prest-O-Lite" was valid, and whether the defendants' acts were an infringement of it, especially as counsel for the defendant, at the argument, relied entirely upon the authorities cited in the memorandum heretofore filed in this matter. Although this trade-mark had been registered in the Patent Office, it was quite clear that the remedies provided in the Trade-Mark Act of Feb. 20, 1905 (33 Stat. 724, c. 592, § 16 et seq. [Comp. St. § 9501 et seq.]), were not available to the complainant in this suit, because there was no evidence of the use by the defendants of the registered trade-mark in commerce among the several states, or with a foreign nation, or with the Indian tribes.

[1] Whatever may be the rule in other circuits regarding the liability of a wrongdoer to account for profits, in strictly unfair competition cases, as distinguished from cases of infringement of technical trade-marks (see Wolf Bros. v. Hamilton-Brown Shoe Co., 206 Fed. 611, 616, 124 C. C. A. 409, certiorari allowed by Supreme Court 231 U. S. 756, 34 Sup. Ct. 323, 58 L. Ed. 468, and cases there cited), and whatever may have been heretofore considered to be the rule in this circuit (see Rowley v. Rowley, 193 Fed. 390, 113 C. C. A. 386), it is now settled, so far as this circuit is concerned (Sharpless Co. v. Lawrence, supra), that the injured party is not entitled as of right to recover profits in cases of strictly unfair competition, but that in such cases courts of equity "may, upon what seems to them sufficient grounds, include in their decrees an accounting of profits as well as

an award of damages." As to what are considered sufficient grounds, I think, quite clearly appears from the remarks of Judge Gray in the case last cited (213 Fed. 426, 130 C. C. A. 62), viz.:

"It is true, however, as contended by the plaintiffs below, that courts of equity, in granting injunctive relief in cases of unfair competition, have sometimes decreed that the plaintiffs should recover of defendant, not only damages, but the profits, gains, and advantages that have accrued to the defendant by reason of his unfair competition. Such an enlargement of the scope of the decree is generally made on the ground that the unfair competition is adjudged to have been willful and fraudulent, and the recovery of profits in such cases is a punitive addition to the ordinary decree of compensatory damages."

It thus appears that profits are allowed, as a punishment for illegal acts. The evidence in the case at bar is quite meager, but I cannot find from it that the acts of the defendant were of such a character as to warrant the imposition of a punishment, other than which follows from compensating the complainant for the losses which it has sustained. It is, however, entirely well settled that, so far as an infringement of a technical trade-mark is concerned, the owner thereof is entitled, not only to protection from further trespass, but to the recovery of all the profits realized by the infringer from the sale of articles under color of the infringing trade-mark, as an incident to and part of his property right. Sharpless Co. v. Lawrence, supra; Rowley v. Rowley, supra. The decree in question is broad enough to protect any infringement of the complainant's trade-mark. That the complainant is the owner of the common-law trade-mark "Prest-O-Lite" and that it is a valid trade-mark, has not been seriously contested, and will be so adjudged in this case.

[2] As the complainant is entitled to an accounting for profits, if there has been an infringement of its trade-mark, and as I have determined that it is not entitled to such an accounting, under the circumstances of this case, for strictly unfair competition, I think it proper to determine whether the defendants' acts did constitute, in addition to unfair competition, an infringement of the trade-mark.

Among the cases cited in the original opinion filed in this matter, it was held in Prest-O-Lite Co. v. Avery Lighting Co. (C. C.) 161 Fed. 648, and in Searchlight Gas Co. v. Prest-O-Lite Co., 215 Fed. 692, 131 C. C. A. 626, and in Prest-O-Lite Co. v. Bogen (C. C.) 209 Fed. 915, that the acts of the respective defendants constituted infringement of the complainant's trade-mark. The acts of the defendants in those cases, as far as can be gathered from the reported opinions, do not materially differ from those of the defendants in this case. The decision of the Circuit Court of Appeals in Prest-O-Lite Co. v. Davis, 215 Fed. 349, 131 C. C. A. 491, seems to proceed upon the theory that the defendants had been guilty of unfair trade. Whether there was an infringement of the trade-mark does not seem to have been considered. It is impossible to ascertain, from the opinion in Prest-O-Lite Co. v. Post & Lester (C. C.) 163 Fed. 63, whether the court proceeded on the theory that the defendant's acts constituted unfair competition or an infringement of a technical trade-mark. It does appear, however, that the decision in the Avery Lighting Company Case was followed.

What the defendants did in the case at bar was to fill tanks bearing

the complainant's trade-mark "Prest-O-Lite," and originally placed on the market by the complainant, with acetylene gas manufactured by them, and either sell or distribute them for sale among automobile supply dealers. It would unquestionably constitute an infringement of the complainant's trade-mark, if the defendants had acquired tanks similar to those of the complainant, had caused to be inscribed thereon the trade-mark "Prest-O-Lite" and had then sold them, filled with gas of their own manufacture. I cannot see that a situation different in principle is presented when they acquired tanks, originally manufactured and put out by the complainants and bearing the trade-mark, filled them, and placed them on the market for sale. The refilling of receptacles on which a trade-mark is inscribed, with a product different from that of the owner of the trade-mark, and offering them for sale, has been quite uniformly held to constitute an infringement of a trade-mark. Van Hoboken v. Mohns & Kaltenbach (C. C.) 112 Fed. 528; Pontefact v. Isenberger (C. C.) 106 Fed. 499; General Electric Co. v. Re-New Lamp Co. (C. C.) 128 Fed. 154.

While there is no evidence in this case that the defendants directly sold the tanks so refilled by them to the automobilists, the evidence is uncontradicted that they did fill them for various automobile dealers, and that the latter sold them to automobilists as genuine "Prest-O-Lite" tanks. I have already found that the defendants had knowledge of the practice of the dealers, and for that matter were actually participants therein. I conclude, therefore, that the defendants' acts, which were the subject of complaint in this suit, constituted not only unfair competition, but also an infringement of the complainant's common-law trade-mark.

It follows from this conclusion that the complainant is entitled to an accounting of the profits realized by the defendants from the refilling and selling of the tanks bearing the complainant's trade-mark, except in cases where they have refilled them directly for automobilists for their individual use. The interlocutory decree is not broad enough to embrace the excepted class.

The motion to modify the decree will therefore be denied.

PREST-O-LITE CO. v. BOURNONVILLE et ux.

(District Court, D. New Jersey. October 18, 1916.)

1. TRADE-MARKS AND TRADE-NAMES ⟸98, 93(1)—ON INFRINGEMENT COMPLAINANT ENTITLED TO ACCOUNTING OF PROFITS.
Where, in making sales of their product, defendants infringed complainant's trade-mark, the latter is entitled to the profits due to the use of the trade-mark; and where the entire profits are shown, but it is impossible for complainant to show what part was attributable to the trade-mark, the burden is cast on defendants to show what part, if any, was due to other causes.

2. TRADE-MARKS AND TRADE-NAMES ⟸89—STOCKHOLDER NOT INDIVIDUALLY LIABLE FOR PROFITS FROM INFRINGEMENT.
A stockholder cannot be held individually liable for profits realized by the corporation from infringement of a trade-mark, beyond the share of such profits received by him.

In Equity. Suit by the Prest-O-Lite Company against Camille Bournonville and Ida Bournonville, his wife. On exceptions to special master's report on accounting. Sustained in part, and overruled in part.

See, also, 260 Fed. 440, 442.

Keyes Winter, of New York City, for complainant.
W. P. Preble, of New York City, for defendants.

HAIGHT, District Judge. In the order of reference the master was directed to state and report the profits realized by the defendants up to and including the 18th of July, 1913, and the amount derived after that time. For the first period he has assessed against the defendants the sum of $3,541.45, and for the latter the sum of $9,340. As the relationship of the parties towards each other, and their connection with the business in which the profits were realized, were different during the two periods, it is necessary to consider the two awards separately. No objection is made to the amounts which the master found had been realized by some one during the respective periods; but it is primarily insisted that he was not justified, under the evidence, in finding that any profits had accrued to the defendant Camille Bournonville during the first period, because he testified that he then had no interest in the business; it having been a partnership composed of his wife, Ida Bournonville, and one Lewis Stever.

It was agreed between counsel at the argument that the record and testimony in the case of Commercial Acetylene Company and Prest-O-Lite Company v. Bournonville had, by stipulation of counsel, been considered by the master as part of the record in the case at bar. Considering that testimony in connection with the evidence given by Bournonville on the accounting proceedings in this suit, I think that the master was justified in finding, as he undoubtedly did, that up until the 1st day of July, 1913, the business had been conducted by Camille Bournonville jointly with Ida Bournonville; that, if there did not ostensibly exist between them a partnership, the venture in which they were engaged was a joint one. The version of his connection

with the business, given in the present suit, is so inherently improbable as to be absolutely unworthy of belief. In the Commercial Acetylene suit he sought, jointly with his wife, to recover from the present plaintiff, by way of damages, the profits which they would have realized from the same business as that in which he now claims that he had no interest, and of which profits they were jointly deprived by the injunction in that suit. All of his testimony in that suit indicated that he was jointly interested in the business with his wife; also in the present case, in one part of his testimony, he testified, "Mrs. Bournonville and Lewis Stever and myself recharged tanks at 43 Herman street for a period of one year;" that period being from the time that the business was begun until the injunction in the patent suit was issued.

It also appears from his testimony that when the corporation was formed, in July, 1913, $5,000 worth of stock (each share being of the par value of $100) was issued; that 250 of such shares were subsequently turned over to a Mr. Lawrence, one of the incorporators, for cash, and the remaining 250 shares divided between Camille Bournonville and his wife; that the property for which the stock was so issued had been acquired from the profits realized in the business which had been theretofore carried on at 43 Herman street. It is true that Bournonville further testified that he had carried on a welding business at that place, and that the stock which was issued to him represented the value of his welding business. But, of course, this testimony must be considered with all of the rest; and, as before stated, I think that the master was undoubtedly justified in finding that Camille Bournonville was jointly interested in the unlawful business with his wife. A careful reading of his testimony in both suits, indicates that he would not hesitate to testify as would best suit his interest, without regard to the actual facts. The profits having been realized by them jointly, either as partners or otherwise, and a debt thus created in favor of the plaintiff, on the theory of a trust ex maleficio, it needs no argument to demonstrate that they are jointly liable to the plaintiff for the same. I find, therefore, that in this aspect of the case there was no error on the master's part in assessing the damages for the first period against them jointly.

[1] But it is further urged that the master was not justified in attributing any part of the profits thus realized to the use of the trade-mark. With this contention I am unable to concur. It having been found that, in marketing their product in the way which they did, the defendants were infringing plaintiff's trade-mark, it follows that the latter was entitled to the profits realized on such infringing sales, due to the use of the trade-mark. The profits on such sales having been shown, and it being inherently impossible for the plaintiff to show what part of them were attributable to the use of the trade-mark, and what part, if any, to other causes, the burden was then cast upon the defendants to show what part, if any, were due to causes other than the use of the trade-mark. Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629. See, also, Westinghouse Co. v. Wagner Electric & Mfg. Co., 225 U. S. 604, 614, et seq., 32

Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653. No attempt was made by the defendants to do so. The master, therefore, was clearly justified in awarding all of the profits of the business to the plaintiff.

As to the first period of time, therefore, the master's report will be confirmed, and a decree awarded the plaintiff against the defendants jointly for the sum of $3,541.45 and costs.

[2] As to the second period of time, a decidedly different state of affairs is presented. On July 1, 1913, the business which had theretofore been carried on by the Bournonvilles was incorporated, and through the corporation other persons acquired a substantial interest therein. The business was thereafter carried on by the corporation, but very largely under the management and control of Camille Bournonville. For the period of time after the incorporation until the Bournonvilles severed their connection with the corporation, the master has found that $9,340 was realized in profits. All of this sum he has assessed jointly against the two Bournonvilles. The theory upon which he did so has not been made to appear, except rather vaguely and quite unsatisfactorily, in the oral argument of counsel for the plaintiff. It cannot be presumed, in the absence of positive proof, that two stockholders of a corporation, who own only one-half of its capital stock, received all of the profits of the business which the corporation conducted. There is no proof to that effect. In a suit such as this the defendants are liable to account for such profits only as have accrued to themselves, and not for those which have accrued to another and in which they have had no participation. Belknap v. Schild, 161 U. S. 10, 25, 16 Sup. Ct. 443, 40 L. Ed. 599; Clark Thread Co. v. William Clark Co., 55 N. J. Eq. 658, 37 Atl. 599.

It follows, therefore, that the master's report awarding profits against the defendants jointly during the latter period of time cannot be confirmed, and the exceptions to that part thereof must be sustained. The matter will, however, be re-referred to him, to make a new report in accordance with the conclusions here announced, and additional testimony may be taken. He shall make an award of profits against the two defendants separately, not jointly, and only to the extent of the profits of the corporation which they have individually and respectively received.

SUN LIFE ASSUR. CO. OF CANADA v. CASANOVA.

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

No. 1336.

1. COURTS ⊜339—ATTORNEY'S LIEN GIVEN BY LOCAL LAW ONLY RECOGNIZED BY FEDERAL COURT.
   The federal courts recognize no lien at common law in behalf of an attorney beyond that given by the local law.
2. CHAMPERTY AND MAINTENANCE ⊜5(3)—CONTRACTS WITH ATTORNEYS TO RECEIVE SHARE OF RECOVERY INVALID.
   Both by the common law and by Rev. Civ. Code Porto Rico 1911, § 1362, a contract by an attorney to conduct a litigation, to pay the costs and expenses, and to receive as compensation a share of the amount recovered, is champertous and invalid.
3. EXECUTORS AND ADMINISTRATORS ⊜87—RELEASE OF JUDGMENT IN OFFICIAL CAPACITY PRESUMED.
   Where one executed a release of a judgment individually, instead of in his capacity of administrator, as he should have done, it will be presumed that he intended to execute it in such capacity.

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

Action at law by Angel Rivera Casanova against the Sun Life Assurance Company of Canada. From an order directing issuance of execution, defendant brings error. Reversed.

Clifford H. Walker, of Boston, Mass. (Cecil E. Whitney and Ropes, Gray, Boyden & Perkins, all of Boston, Mass., on the brief), for plaintiff in error.

Joseph B. Jacobs, of Boston, Mass. (Jacobs & Jacobs, of Boston, Mass., and Willis Sweet, of San Juan, Porto Rico, on the brief), for defendant in error.

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

JOHNSON, Circuit Judge. This is a writ of error to an order of the United States District Court for the District of Porto Rico, directing the issuance of an execution upon a judgment recovered in that court on January 30, 1914, in an action brought by Luisa Rivera, the beneficiary named in a policy of insurance issued by the Sun Life Assurance Company of Canada, hereinafter for brevity called the company, upon the life of one Felix Rivera to recover $5,000, the amount of said policy.

March 18, 1914, the company sought to review this judgment by a writ of error entered in the Supreme Court of the United States, and gave a supersedeas bond in the amount of $6,000, and the case was docketed in the Supreme Court of the United States June 10, 1914. The policy upon which the action was brought was dated April 29, 1913, and insured the life of Felix Rivera Casanova in the amount of $5,000, payable on his death to his sister Luisa. The assured died July 21, 1913. An action to recover the amount of the policy was

brought by Luisa against the company in the United States District Court of Porto Rico, in which, after a trial, she recovered judgment on January 30, 1914. On February 27, 1914, she died, and on April 13, 1914, her father, Angel Rivera, as administrator of her estate, was substituted as plaintiff, in accordance with section 43 of the Code of Civil Procedure of Porto Rico. On October 28, 1914, the judge of the District Court ordered a satisfaction of the judgment to be entered upon two releases, signed by both the father and the mother, in which they represented themselves to be the sole and universal heirs of Luisa and the owners of said judgment. The release was executed by the father individually, and not in his capacity as administrator of Luisa. In these releases the father and the mother respectively confessed full accord and satisfaction of said judgment as to the interest of each and prayed that the said judgment might be fully discharged against the company.

Upon motion of the company, the defendant in the original action, the court ordered an entry to be made that judgment in the above action was discharged and satisfied. On January 29, 1917, the writ of error pending in the Supreme Court of the United States was dismissed, and the judgment of the court below affirmed.

On March 31, 1917, Willis Sweet and Eduardo Carpo Cintron, attorneys for the plaintiff in the original action, in behalf of the defendants in error and in their own behalf, moved in the court below that the releases on file in said court be stricken from its files, and that the satisfaction of the judgment, entered on the records of said court, be set aside and vacated, on the following grounds: That the parties executing said releases had no knowledge of the contents of the papers which they executed, being unable to read and write; that, as attorneys for the plaintiff in the original action, they had no notice or knowledge of the alleged settlement and release of judgment until after the affirmance of said judgment by the Supreme Court of the United States; that, as counsel for the plaintiff, they had an interest in said judgment based upon a contract made by Luisa with Eduardo Carpo Cintron, which was on the files of the court at the time of the alleged settlement; that, as counsel for said plaintiff, they had paid all costs required to be paid in behalf of the plaintiff and performed their duties of counsel in obtaining said judgment, and also as attorneys for the plaintiff in the Supreme Court of the United States; that the father and mother had neither right nor power to release the interest of counsel for the plaintiff in said judgment; or, if the court should hold that the interests of the father and mother had been released, then that the court should order execution to issue for the interest of counsel in said judgment to the amount of $2,500, with interest thereon at the rate of 6 per cent. from the date of said judgment, with costs; but, if the court should hold that the releases of said judgment were invalid, that it should order execution to issue for the entire amount of said judgment, with interest and costs. Annexed to this motion was a copy of the contract entered into by Luisa with Eduardo Carpo Cintron for his professional services, which is in form a special power of attorney authorizing him to appear in her name and behalf and cause the

judgment recovered by her to be executed, and empowering the said Cintron to collect from any officer of the court or the company, or from any of its agents, the amount of the aforesaid policy, either in cash or by check, for which he might receipt and collect as freely as if performed by herself; and for these services in the power of attorney she—

"gives, grants and transfers to Mr. Eduardo Carpo Cintron, in payment for his professional services, the sum of $2,500, which he will collect and retain for himself from the $5,000, which he may receive from the Sun Life Assurance Company of Canada, and which he will collect through the said District Court of America for the District of Porto Rico, or through any agent of the said company, and he shall deliver to the deponent, or to any person authorized by her to receive it, the sum of $2,500."

By an arrangement entered into by the said Eduardo Carpo Cintron with Willis Sweet, the said Sweet agreed to act as senior counsel with Cintron, as attorney for the plaintiff in the original action, and was to receive for his services 25 per cent. of any amount recovered in the suit, in cash, the said Cintron to furnish all money necessary for expenses to be incurred in bringing and prosecuting the action.

Upon this motion an order to show cause was made by the court below, to which the company made return, setting up the releases of judgment and the acknowledgment of satisfaction, and also that, after the judgment had been rendered in the original action, one Cristobal Pascual, upon information presented against him by the proper judicial officer of the district court of San Juan, Porto Rico, charging him with defrauding the Sun Life Assurance Company by falsely and fraudulently obtaining the issuance of a policy upon the life of Felix Rivera by representing him as a healthy person, when he knew at the time that the said Felix was in a dying condition with a pulmonary disease, appeared before the court and confessed his guilt, and was sentenced to imprisonment in the penitentiary on the island of Porto Rico for the term of one year. Annexed to the return was a copy of said sentence and of the information filed against the said Pascual, and the testimony of Angel Rivera thereon. The return also alleged that before the conviction of the said Cristobal Pascual the father went to the offices of the general agents of the company in San Juan and stated that it had come to his knowledge that a prosecution had been commenced against the said Cristobal Pascual; that he knew said policy of assurance had been obtained by fraud under false representation, but that neither he nor his wife were guilty of any fraud in the matter; and that they desired to release the company from all responsibility for payment of the judgment obtained upon the policy, and that, of their own free will, both he and his wife executed releases of the judgment. To this answer the plaintiff demurred, on the ground that the return constituted no legal reason for not ordering the issuing of said writ of execution; that in part the alleged reasons are res adjudicata; that the releases which were set up by the return had been stricken from the files of the court; that, if one Pascual committed a crime against the law, it did not appear directly or indirectly that the insured or the beneficiary, or any person or persons interested in their behalf, were par-

ties to the crime, but that, on the contrary, the beneficiary in said insurance policy and her administrator, who was substituted for her as plaintiff at her death, were the victims of said crime; that any confession by the said Pascual of an offense, with which neither the insured nor the beneficiary nor the substituted plaintiff were or are in any way connected, did not constitute a reason for not issuing an execution on said judgment. The court overruled the demurrer, except as it related "to the interest of the attorneys of the case as may be made to appear." The attorneys, Sweet and Cintron, then filed a motion in their own behalf that the court order the issuance of an execution "on the judgment heretofore entered in said cause, amounting to 50 per cent. of the amount due to this date, to wit, $3,005.85, which includes the interest, also the costs of court as duly allowed." This motion was supported by their affidavits. The court granted the motion and ordered execution to issue as prayed for. From this order the Sun Life Assurance Company has sued out a writ of error, returnable to this court, and the errors assigned are the finding that the attorneys, Sweet and Cintron, were entitled to one-half the amount of the original judgment and the ordering of an execution to issue for the same.

It is evident from the return of the company to the rule to show cause that the judgment could not have been obtained if the fraud that had been practiced had been shown.

But the court correctly held that this could not be shown in a hearing upon the motion before it, but might be done by a bill in equity to review the judgment, which, until it had been vacated by proper proceedings, must be held to be valid. We regret that the judgment has not been attacked in an independent proceeding, so that we would not be compelled to deal with a judgment as valid, against which charges of such gross fraud are alleged, and which, it is apparent from the record, could be easily proven.

The writ of error, however, brings before us only questions of law, and compels us to deal with the judgment as valid; but the effort of attorneys to obtain any part of a judgment resting upon such fraud as alleged does not call for a liberal construction of the contract upon which they rely.

The District Court has found that the father and mother as sole heirs of the original plaintiff, Luisa Rivera, have released their claim; but that they had no authority to release the interest of the attorneys therein, whatever it might be. It has found that the attorneys have an interest in the judgment by virtue of the contract which was made by the original plaintiff, Luisa Rivera, with Eduardo Carpo Cintron. That such a contract was made is uncontroverted, and the finding by the court that the attorneys, by virtue of it, had an interest in the judgment, is not a finding of fact, but only its conclusion from uncontroverted facts. The claim of the attorneys is not for taxable costs, such as a statutory allowance for attorney's fees, but for their compensation for legal services and repayment of disbursements for transportation, board of witnesses, and other disbursements.

[1] The federal courts recognize no lien at common law in behalf of an attorney beyond that given by the local law (Gregory v. Pike,

67 Fed. 837, 15 C. C. A. 33); and it is not claimed by counsel that, under the laws of Porto Rico, any such lien is given. The defendants in error have based their claim upon the contract made with the beneficiary in the policy, and the District Court has found that their interest in the judgment rests upon this contract, which must be construed by the local law of Porto Rico. In the affidavits of the attorneys, filed in support of their motion for the issuance of an execution, it appears that Mr. Cintron made an oral contract the latter part of September, 1913, with Luisa, and that under the contract he agreed to pay costs and expenses incident to the suit upon the policy; that he later reduced the terms of this contract to writing, but that, owing to her illness, she was unable to sign it. The unsigned contract was annexed to his affidavit to show what his agreement was, because he stated that he acted upon it as if it was signed; that he showed this unsigned contract to his associate, Mr. Sweet, and that it formed the basis of an agreement made with him by which he became associated as counsel in the case; and that the power of attorney which was signed by Luisa after judgment had been recovered was "intended to take the place of the unsigned contract, as we supposed the cause was finished." The affidavit of Mr. Cintron further discloses that he expended between $300 and $400 in the payment of witnesses and their transportation and all of the costs connected with the carrying on of the suit.

The power of attorney, in substance, authorizes the attorney, Mr. Cintron, to collect the judgment which had been rendered in favor of Luisa, and grants and transfers to him, in payment for his professional services, the sum of $2,500, "which he will collect and retain for himself from the $5,000 which he may receive from the Sun Life Assurance Company of Canada."

[2] The contract under which the suit was prosecuted was clearly champertous, as by its terms the attorney, Cintron, was not only to render professional services, but was to pay all the expenses of costs and litigation. Peck v. Heurich, 167 U. S. 624, 630, in which, on page 631 of the opinion, 17 Sup. Ct. 927, on page 930 (42 L. Ed. 302), the court quotes with approval part of the opinion of the Court of Appeals of the District of Columbia:

"We must regard an agreement by any attorney to undertake the conduct of a litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the recovery, or of the thing in dispute, as obnoxious to the law against champerty."

Such an agreement is champertous also by the local law of Porto Rico.

The Revised Civil Code of Porto Rico of 1911, § 1362, is as follows:

"The following persons cannot acquire by purchase, even at public or judicial auction:

* * * * * * * * * *

"5. Judges * * * and officials of justice, the property and rights in litigation before the court in the jurisdiction or territory over which they exercise their respective duties, this prohibition including the act of acquiring by assignment.

"The prohibition contained in this number shall include the lawyers with regard to the property and rights, which may be the object of the litigation, in which they may take part by virtue of their profession and office."

In Jones v. Pettengill, 245 Fed. 269, 157 C. C. A. 461, this court has found a similar contract champertous under the law of Porto Rico.

The court therefore erred in holding that the attorneys acquired an interest in the judgment by virtue of the oral contract made by Mr. Cintron. The power of attorney of February 17, 1914, authorized Mr. Cintron to "retain the sum of $2,500 for his professional services, which he will collect and retain for himself from the $5,000 which he may receive from the Sun Life Assurance Company." Its language plainly imports that he was to have no part of the proceeds of the judgment until he had collected the whole of it. The power of attorney which was given had for its purpose the carrying into effect the oral agreement which had been made before the suit, and in reliance upon which the suit against the company had been prosecuted by the attorneys and the expenses of the litigation incurred.

[3] The court, having found that the father and mother of the beneficiary had released the judgment so far as their interests were concerned, and the attorneys having acquired no interest in the judgment by reason of their champertous contract, such interests would cover the whole judgment. The father and mother of the beneficiary, Luisa Rivera, were her sole heirs and her father was her administrator. Technically, a release of the judgment should have been signed by him in his capacity as administrator; but it will be presumed that, where a party neglects to execute a written instrument in the capacity in which he should execute it—and he is in fact qualified to execute it—that he intended to execute it in his said capacity. Yeaton v. Lynn, 5 Pet. 224, 229 (8 L. Ed. 105), where the court said:

"The two characters being united in the same person and that person being directed to execute the decree, it would seem reasonable to presume that he acted in the character in which he ought to perform the particular act, especially if it be necessary to give the act its full effect, and to make it rightful."

We think there was error in ordering an execution to issue in favor of the attorneys for the amount of their claim for professional services and disbursements.

The order of the District Court is reversed, with costs to the plaintiff in error, and the case is remanded to that court for further action not inconsistent with this opinion.

BELVIN v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 1, 1919.)

No. 1708.

1. CONSPIRACY ⇐43(10)—INDICTMENT SUFFICIENT TO CHARGE CONSPIRACY TO DEFRAUD UNITED STATES.
An indictment charging that defendants were employés of a firm of contractors for government work, one being in charge of the pay roll; that under the contract the contractors were to be reimbursed for their expenditures and paid a commission as their compensation; that defendants conspired to have one of them, employed as a fireman, placed on the pay roll as an engineer, whereby he would receive a higher rate of pay; and that he was so placed by his codefendant—*held* sufficient to charge a conspiracy to defraud the United States.

2. CONSPIRACY ⇐47—EVIDENCE SUSTAINED CONVICTION.
Evidence *held* to sustain a conviction for conspiracy to defraud the United States.

3. CRIMINAL LAW ⇐786(1)—JURY MAY CONSIDER INTEREST IN WEIGHING TESTIMONY OF DEFENDANT.
Where a defendant testifies in his own behalf, the jury may properly be instructed to consider his interest in weighing his testimony.

4. CRIMINAL LAW ⇐1151—REFUSAL OF CONTINUANCE ON ABSENCE OF WITNESSES IN DISCRETION OF COURT.
Refusal of continuance to a defendant on the ground of absence of witnesses *held* within the discretion of the court, and not subject to review, unless discretion has been grossly abused.

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 George W. Belvin and another. Judgment of conviction, and defendant Belvin brings error. Affirmed.

Nathaniel T. Green and Daniel Coleman, both of Norfolk, Va., for plaintiff in error.

Hiram M. Smith, U. S. Atty., of Richmond, Va.

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

PRITCHARD, Circuit Judge. This was a criminal action, tried in the District Court for the Eastern District of Virginia. The defendants were found guilty, and the defendant Belvin was sentenced to the penitentiary, and defendant Hoffman was given a jail sentence. The defendant Belvin excepted to the judgment of the court, and the case as to Belvin comes here on a writ of error. The plaintiff in error will be referred to as defendant, and the defendant in error will be referred to as plaintiff; such being the relative positions parties occupied in the court below.

The indictment charges that the plaintiff in error, George W. Belvin, and one Karl Hoffman, did unlawfully conspire, combine, etc., to defraud the United States of America. The facts alleged in the indictment as constituting the conspiracy are: That the United States

had a contract with a partnership known as Porter Bros. for the construction of certain buildings and doing certain other work for the government near Norfolk, Va.; that this contract contained provisions by which the United States was to pay the full costs of the work done thereunder, and Porter Bros. were to be paid a certain percentage of such costs if they amounted to certain sums stated therein, and a stipulated amount if such costs amounted to certain other sums stated therein; that Belvin and Hoffman knew of such provisions; that Porter Bros. employed Belvin as a fireman and Hoffman as a division timekeeper in said work; that the rate of pay or wages of Porter Bros. for the position of fireman (the position occupied by Belvin) was the rate of 42 cents an hour, while they, Porter Bros., paid engineers at the rate of 72½ cents an hour; that Belvin and Hoffman unlawfully and feloniously agreed that Belvin, though occupying only the position of fireman, should be falsely and fraudulently "carried upon the pay rolls of said Porter Bros." as an engineer, and receive the higher rate of pay of engineer, instead of the lower rate of firemen; that in pursuance of such agreement Hoffman illegally approved and authenticated for entry "upon the pay rolls of said Porter Bros." a time card of Belvin, wherein Belvin was designated as an engineer, and that Belvin was in accordance with said authenticated time card entered "upon the pay rolls of the said Porter Bros." as an engineer; and that "the said Porter Bros., through their duly authorized officers and employés, issued in the name of George W. Belvin a check and voucher for payment to the said George W. Belvin for compensation as an engineer, whereas in truth and fact the said George W. Belvin was not an engineer, but a fireman," etc.

[1] The demurrer is based upon two grounds: (a) That the indictment does not charge a violation of any statute of the United States; (b) that the indictment is vague and indefinite, and does not set forth sufficient facts to enable the defendant to properly assert his defense. The third ground of demurrer appears to have been abandoned.

It is insisted by counsel for defendant that the indictment sets out a conspiracy to defraud the Porter Bros., but that it does not set out a conspiracy to defraud the United States; also that the indictment is not full enough, and that the court will have to supply much and infer much in order to sustain it.

It appears that the defendants Hoffman and Belvin were indicted for conspiracy to defraud the United States, and the overt act alleged is that they padded the pay roll of the Porter Bros. It appears that Porter Bros. had entered into a contract with the government to construct the quartermaster terminal or army base near Norfolk. The contract in question contained the following clause; Porter Bros. contract (extracts):

"Article 2. *Cost of the Work.*—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

"(a) All labor," etc.

"Article 3. *Determination of Fee.*—As full compensation for the services of the contractor, * * * if the cost of the work is under $100,000, a fee of ten per cent. (10%) of such cost. [Then follows a scale of compensation to the contractor, under varying amounts, to and including $3,500,000.]"

The contract is signed:

"Porter Brothers, by R. S. Porter (a member of the copartnership). United States of America, by I. W. Littell, Brigadier-General, Quartermaster Corps, N. A., Contracting Officer."

Any amounts paid out by Porter Bros. in excess of its "net expenditures in the performance of said work," in the absence of any knowledge on the part of the government, would have necessarily resulted in a loss to that extent to the United States. It is not necessary, in order to secure the conviction of one charged with conspiracy to allege or prove that the object of conspiracy has been fully consummated. It is sufficient if there has been the common meeting of minds to the accomplishment of a certain object, and that some overt act shall have been done in pursuance of such conspiracy.

The defendants sought by this conspiracy to do that which would necessarily result in defrauding the government. Porter Bros. could not in any view of the case lose a cent by virtue of this transaction. Their pay rolls were only used as a means by which the defendants could make a false charge, the burden of which would fall, not upon Porter Bros., but upon the government.

In the case of Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392, the defendant and two others, one of whom was General Superintendent of the Division of Free Delivery of the Post Office Department of the United States, were charged with a conspiracy against the United States; the charge being that by manipulation of bids a company, of whom one of the defendants was a representative, should receive the contract for mail carriers' satchels for the Post Office Department. Among other things, it was alleged that the conspirators agreed that in the event of success the company would pay a certain sum to the three defendants. It was not alleged, nor does it appear, that the government was defrauded, that the government paid any higher price for the satchels, or that the satchels furnished were of inferior quality to what could have been obtained if the conspiracy had not been entered into. In that case the demurrer interposed was to the effect that the indictment did not state any offense under section 5440 of the Revised Statutes of the United States (Comp. St. § 10201), nor did it set forth any offense under any statute, or the common law; furthermore, that it did not appear how the government would have been defrauded by such conspiracy. The Supreme Court, in that case, discussing this phase of the question, said:

"The agreement is alleged to have been an unlawful and fraudulent one, wrongfully and corruptly to defraud the United States. * * * The fraud might be perpetrated by getting the contract at a higher price than otherwise would have been obtained, or, if already obtained, then the United States might be defrauded by the General Superintendent accepting improper satchels, not made of the materials or in the manner specified in the contract, or by his requiring the delivery of more satchels than were sufficient for the

wants of the department. It is not necessary in such a case as this (of an alleged unlawful and corrupt contract) to allege in the indictment which of the various ways the government might be defrauded was in the minds of the conspirators, or that they all were. Dealy v. United States, 152 U. S. 539, 543 [14 Sup. Ct. 680, 38 L. Ed. 545]. Such a corrupt agreement, if carried out, would naturally, if not necessarily, result in defrauding the United States by causing it to pay more for satchels than was necessary, or for more satchels, or possibly inferior ones, than it otherwise would, but for the corrupt agreement set forth. The indictment was sufficient. United States v. Hirsch, 100 U. S. 33 [25 L. Ed. 539]; Hyde v. Shine, 199 U. S. 62, 82 [25 Sup. Ct. 760, 50 L. Ed. 90]; United States v. Keitel, 211 U. S. 370 [29 Sup. Ct. 123, 53 L. Ed. 230]."

The following from Atwell on Federal Criminal Law, on page 221, is very much in point:

"If the indictment alleges, in proper terms, the formation of the conspiracy for either one of the inhibited purposes mentioned in the statute, and then sets out the offense for which the conspiracy was formed with sufficient certainty to apprise the defendant thereof, and then the proof shows that the conspiracy existed as charged in the indictment, and that, if such conspiracy existed, the overt act charged was committed in furtherance of such conspiracy, and that the defendant was one of the conspirators, a case will have been made out, both by allegation and proof."

[2] It is insisted in the fourth and fifth assignments of error that there was not sufficient evidence to prove that Belvin knew that the government would suffer by his wrong. In referring to this matter the court said:

"The court further charges the jury that the said Hoffman and Belvin must have had a specific intent, which intent must be proven by the government beyond all reasonable doubt, to defraud the United States government, before they can find the accused guilty as charged in the indictment."

The witness Hoffman, who testified on behalf of the government as to this point, said:

"At the time the work started at the base the newspapers carried a whole column or more relative to adjusting percentages and scale of the fees contractors were to receive for the government work. We, Belvin and I, had discussed that. We had been wondering if Porter Bros. were getting 10 per cent. on actual job work, and the piece in the paper explained just how much they did get."

Witness Gaughan also testified that the government settled with contractors for the cost of construction, etc., weekly and daily, in fact, on material, but on labor once a week, on a weekly pay roll. Porter Bros. were reimbursed for the preceding week by Wednesday or Thursday of the following week. Witness also testified that he knew Hoffman, but he did not know Belvin. He said:

"Hoffman has never spoken to me directly about this case. He turned over some money to me, $452. Nothing was said about it, and I gave him a receipt for it. I have that money now."

We think there was sufficient evidence to warrant the jury in inferring that Belvin had knowledge of the fact that the government would suffer by his wrongdoing. Hoffman being an accomplice of the defendant Belvin, the court instructed the jury to receive his evidence with caution; also instructed it as to the weight to be given testimony of Hoffman. This was purely a question for the jury, the

jury having heard the evidence under proper instructions from the court, and we are not inclined to disturb the verdict.

[3] The seventh assignment of error challenges that portion of the charge of the court which refers to the weight to be given defendant's evidence when he testifies in his own behalf. The following is that portion of the charge to which an objection is made:

"The defendant Belvin in this case has testified in his own behalf, as he has the right to do under the laws of the United States, and you shall give to his evidence the same consideration as you give to that of other witnesses, having in mind, however, the deep personal interest which he has in your verdict."

The court simply announced the rule, as we understand, which is universal where one testifies in his own behalf. The rule is well stated in Underhill on Criminal Evidence, par. 58, p. 100, wherein a number of cases are cited. It is as follows:

"* * * But the court must (without, however, giving too much prominence to the fact) instruct them that they should or that they may consider the fact that he is interested in the outcome of the trial, and in testifying in his own behalf, in determining his credibility."

We think the court's charge in this respect was strictly in accordance with the well-settled rule, and therefore we do not deem it necessary to enter into a discussion of same.

[4] The eighth assignment of error is to the effect that the court below erred in refusing to continue the trial of this case on the ground of the absence of alleged material witnesses. The court below, in refusing to grant a continuance, said:

"The motion to continue the trial of the said defendant, because of the absence of his two said witnesses, the court overruled, and the court certifies that the materiality of the testimony of the said two witnesses was not apparent to the court, nor did it appear that the defendant would ever be able to secure the presence of the said witnesses, and that one of the material witnesses for the government resided in the state of Indiana, and to have permitted a continuance of the case would have necessitated that this witness return to Norfolk for the trial, and it further did not appear that the defendant or his counsel had used proper diligence in attempting to secure the witnesses Bowles and Liston."

It appears that, while the affidavit upon which defendant based its motion for the continuance contains an allegation to the effect that the evidence of the two witnesses was material, it does not set forth the facts which defendant expected to prove by the witnesses, nor does it appear that the evidence of such absent witnesses was material to the issue, and there is no allegation as to why their presence could not be had at that term of the court; nor is it alleged that in the event of postponement the presence of such witnesses could be had at a future date. The general rule is to the effect that the refusal of the trial court to grant a continuance is a matter of discretion of the court, and never subject to review, unless it shall appear that such discretion has been grossly abused. In the case of United States v. Rio Grande et al., 184 U. S. 416, 22 Sup. Ct. 428, 46 L. Ed. 619, Mr. Justice Harlan, in delivering the opinion of the court, stated the rule as follows:

"We think that the District Court, upon the showing made by the government, might well have granted the motion to postpone the final hearing to a date later than that fixed. * * * But the motion for a continuance of the cause, and the application for a rehearing, were addressed to the discretion of the trial court; and it is well settled that matters of discretion or practice cannot, generally speaking, be made the basis of an appeal, and do not constitute in themselves grounds for the reversal of a final decree."

See Dexter v. Kellas, 113 Fed. 48, 51 C. C. A. 35; Myers v. Kessler, 142 Fed. 730, 74 C. C. A. 62; Copper Mining Co. v. McClellan, 138 Fed. 333, 70 C. C. A. 623; St. Louis Stave Co. v. United States, 177 Fed. 178, 100 C. C. A. 640; State of Rhode Island v. State of Massachusetts, 11 Pet. 226, 9 L. Ed. 697; Myers & Axtell v. Trice, 86 Va. 835, 11 S. E. 428, in which the court said, quoting the late John B. Minor:

"The continuance of a cause to another term of court is a matter peculiarly within the discretion of the court below, and the United States courts hold it, as they hold all others matters of discretion, to be no ground upon which error can be imputed."

The sixth assignment is to the effect that the court below erred in refusing to grant instructions 1, 2, 3, 4, 5, and 6. We have carefully considered these instructions, together with the charge as given by the court. The charge covers practically every point raised in these instructions which we think is a substantial compliance with the law, and, such being the case, we feel that the court was warranted in refusing to grant the same.

After giving a most thorough and careful consideration of the contentions urged by the defendant, we are impelled to the conclusion that the defendant received a fair and impartial trial. Therefore, for the reasons stated, we are of opinion that the judgment of the court below should be affirmed.

HANSON v. SJOSTROM.

(Circuit Court of Appeals, Eighth Circuit. September 9, 1919.)

No. 5387.

1. PRINCIPAL AND AGENT ⟸69(4)—AGENT FOR SALE OF PROPERTY CANNOT PURCHASE FOR HIMSELF.

An agent representing his principal in the sale of property is not permitted to purchase it for his own benefit, directly or indirectly, without his principal's consent; and a purchaser from him, with notice of his illegal purchase, stands in no better position, and the principal may recover, at his option, the profits made by such purchaser as a trust fund.

2. PRINCIPAL AND AGENT ⟸69(4)—AGENT LIABLE FOR PROFITS FROM ILLEGAL PURCHASE OF PRINCIPAL'S PROPERTY.

An agent for sale of land, who sold through a subagent and afterwards bought part of the subagent's interest in the land, which the latter indirectly purchased for himself, with knowledge that it was so acquired, *held* liable in a suit by the principal for accounting for the profit made thereon, but not for the capital which he invested.

⟸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 Minnesota; Page Morris, Judge.

Suit in equity by J. P. Sjostrom against Henry E. Hanson. Decree for complainant, and defendant appeals. Modified and affirmed.

O. J. Finstad, of Windom, Minn. (S. B. Wilson, of Mankato, Minn., on the brief), for appellant.

Albert R. Allen, of Fairmont, Minn. (Leo J. Seifert, of Fairmont, Minn., on the brief), for appellee.

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

MUNGER, District Judge. The plaintiff brought suit against the defendant for an accounting, and recovered judgment, and the defendant has appealed. The plaintiff's bill alleged that he had appointed defendant as his agent to sell and convey and manage his lands, and that defendant had leased the lands for a period of years, and then had sold them and collected the purchase price, but had failed and refused to render to plaintiff an account of his transactions, or to pay over the proceeds of the leases or sales, and prayed that defendant be required to account for all dealings with plaintiff's property, and to pay plaintiff $10,000 and any residue that might be due plaintiff in regard to the agency transactions.

The answer of the defendant was, in effect, a claim that he had fully accounted to plaintiff for all his transactions and had paid him all that was justly due. The plaintiff is a citizen and resident of Sweden. His son was a resident of Cottonwood county, Minn., and died intestate there in 1905, owning a large amount of land in that county, and leaving plaintiff as his only heir. The probate court of Cottonwood county appointed the defendant as administrator of the estate, and he qualified and acted as such administrator for about five years, when his accounts were approved, he was discharged, and the administration closed. The defendant resided at Windom, in Cottonwood county. About two years after he was appointed administrator, he obtained from the plaintiff a power of attorney, authorizing him to lease, sell, and convey the lands. He made some effort to sell the lands and employed as a subagent for that purpose one D. A. Stuart, an attorney of Windom, who also acted as attorney for the administrator in the general conduct of the estate. Stuart reported to the defendant that he had found a purchaser who would buy the land in the person of a Mr. Clark, a banker at Windom.

The defendant made a deed of conveyance to Clark, part of the purchase money was paid down, and payment of part was deferred. By all the testimony on the subject, the lands were sold for their full value at that time. While the legal title was conveyed to Clark, there was an agreement between Clark and Stuart by which Stuart was to have a share in the ownership of the lands. Very soon after the deed was executed by defendant to Clark, there was an agreement between Clark and Stuart by which it was determined that Stuart was to own two-thirds and Clark to own one-third of the lands, although the legal title was to remain in Clark.

The defendant filed his final account as administrator about four months after he had made the conveyance to Clark, and it was approved in five weeks thereafter. The defendant made final payment of the balance which he claimed was due to plaintiff arising from the lease and sale of the lands under the power of attorney two months after he was discharged as administrator. Three months after making this payment he entered into negotiations with Stuart by which he became the owner of a one-third interest in the lands, purchasing half of Stuart's interest and paying therefor $1,000 more than it had cost Stuart. Clark afterwards conveyed the land to intermediary, but nominal, grantees, who reconveyed to Clark, Stuart, and defendant, and later the land was sold and a large profit realized by each of these grantees.

The trial court required the defendant to account to plaintiff for the profits he had made, and also to account for the profits made by Stuart, and refusing credit to defendant for the $1,000 which he paid to Stuart for the purchase of his one-third interest.

[1] Appellant does not strongly urge that he was not liable to account to plaintiff for the profit he made between the purchase price and the sale price of his one-third interest, and such a claim could not well be supported. An agent representing his principal in the sale of property is not permitted to purchase it for his own benefit, directly or indirectly, without his principal's consent. Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076; Robertson v. Chapman, 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592; Warren v. Burt, 58 Fed. 101, 7 C. C. A. 105; Baker v. Schofield, 221 Fed. 322, 136 C. C. A. 320; 2 Pom. Eq. Jur. §§ 958, 959; Mechem on Agency, § 461.

A purchaser of such property from the agent, unless he has no notice of the fact of the agent's purchase of his principal's property for his own benefit, stands in no better position than the agent, and the principal may recover, at his option, the profits made by such purchaser, as a trust fund belonging to the principal. 3 Pom. Eq. Jur. §§ 1048, 1052; United States v. Carter, 217 U. S. 286, 30 Sup. Ct. 515, 54 L. Ed. 769, 19 Ann. Cas. 594; Central Stock & Grain Exchange v. Bendinger, 109 Fed. 926, 48 C. C. A. 726, 56 L. R. A. 875; Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; People v. Open Board, 92 N. Y. 98; Cumberland Coal & Iron Co. v. Sherman, 30 Barb. (N. Y.) 553.

[2] The defendant failed to show any lack of notice that Stuart had purchased his principal's property while acting as agent for its sale. The title stood in the name of Clark by virtue of the deed that defendant had executed as plaintiff's attorney in fact, and yet defendant purchased his interest from Stuart, knowing that he had no record title, and there is no suggestion that Stuart's purchase was not of his principal's property. The amount of profit which defendant made by reason of his purchase of a share in these lands was $3,300. He is not required to account to his principal for the capital he invested in such purchase, and hence was not liable to pay to his principal the $1,000 which he invested in purchasing the land. Such a payment was for the benefit of his principal, if he chose to ratify it, as he has

done, and hence he was entitled to be reimbursed therefor out of the proceeds of the sale.

In support of the portion of the decree requiring defendant to account to plaintiff for Stuart's profits, appellee claims that a conspiracy was entered into between defendant and Stuart whereby Stuart was to purchase the land for the joint benefit of the conspirators, and because of this agreement the principal is entitled to recover the entire profits from one conspirator. The evidence does not disclose any such conspiracy, nor show any knowledge on the part of the defendant that, at the time he made the conveyance to Clark, he was aware that Stuart was interested as a purchaser.

The claim for the recovery of Stuart's profits is not within the issues as presented by plaintiff's bill. The theory of the bill is not that defendant negligently permitted plaintiff's lands to be purchased by another agent, causing him loss, but that defendant leased and sold plaintiff's lands and collected the purchase price, and has failed to pay the proceeds to plaintiff. No claim is made that there is any testimony tending to show that plaintiff received any portion of the profits made by Stuart, so this portion of the decree is not supported by the pleadings and evidence.

An order will be made, modifying the decree and allowing to plaintiff the amount of the profits made by the defendant in the sum of $3,300, with interest from December 31, 1913; the costs of this appeal to be taxed to appellee.

INDEPENDENT COAL TAR CO. v. CRESSY CONTRACTING CO.

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

No. 1402.

1. PATENTS ⟸328—APPARATUS FOR SPRAYING ROAD SURFACES VALID AND INFRINGED.
   The Pillsbury patent, No. 1,062,029, for apparatus for spraying oil or other surfacing material on roads, discloses a new combination in a unitary structure of old elements, which produces a new and useful result, and is valid; also *held* infringed.

2. PATENTS ⟸26(1)—COACTION OF PARTS UNNECESSARY TO RENDER COMBINATION PATENTABLE.
   It is not necessary, to render a combination patentable, that its elements should act at the same time to secure joint action, but is enough that each contributes to the result which, but for the successive action of each, would not have been produced.

3. PATENTS ⟸243—COMBINATION OF OLD ELEMENTS MAY BE PATENTABLE.
   It is no defense to a claim of infringement that one or more elements of a patented combination, or one or more parts of a patented improvement, may be found in one old patent, and others in another, and still others in a third.

4. PATENTS ⟸172—DESCRIPTION NOT NECESSARILY MEASURE OF INVENTION.
   While the patentee must describe the best mode of applying the principle of his invention, the description does not necessarily measure the invention.

Appeal from the District Court of the United States for the District of Massachusetts; George H. Bingham, Judge.

Suit in equity by the Cressey Contracting Company against the Independent Coal Tar Company. Decree for complainant, and defendant appeals. Affirmed.

W. Orison Underwood and Horace Van Everen, both of Boston, Mass., for appellant.

Emery, Booth, Janney & Varney, of Boston, Mass. (Frederick L. Emery, Jesse W. Morton, and Everett S. Emery, all of Boston, Mass., on the brief), for appellee.

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

JOHNSON, Circuit Judge. This is an appeal from a final decree sustaining the validity of patent No. 1,062,029, for apparatus for spraying oil on road surfaces, issued May 20, 1913, to Franklin C. Pillsbury, assignor to Walter H. Cressey, and finding that the same was infringed by the defendant.

[1] The first claim only of the patent is involved in this suit, which reads as follows:

"The combination with a tank wagon having a discharge pipe and a valve in said pipe, of a spray pipe communicating with the discharge pipe, a steam pipe communicating with said discharge pipe intermediate the valve and the tank, whereby steam may be admitted to the tank through the discharge pipe, a steam pipe communicating with said discharge pipe in rear of the valve, whereby steam may be blown through the spray pipe, and means for applying a pressure to the tank above the liquid therein."

Pillsbury, in his application filed in the Patent Office May 27, 1911, conceived that the novelty in his invention consisted in the introduction of steam under pressure directly into the tank of the tank wagon on top of the body of the contents. He then had in mind that the contents would consist of oil, and in his specification he thus describes his apparatus:

"My improved apparatus comprises a spraying attachment adapted to be readily applied to a tank wagon, and means for introducing steam, under pressure, directly into the tank of the tank wagon and on top of the body of oil therein, so that the steam pressure within the tank will furnish the desired pressure for forcing the oil out through the spray device, and will also constitute means for heating the oil in the tank, thus increasing its fluidity, so that it will flow more freely. Where the steam is thus admitted directly to the interior of the tank, said steam will not only force all the oil out of the tank, but when the oil is exhausted the steam will then be discharged through the spray device and during its discharge it will heat and thus increase the fluidity of any oil or other surfacing material which may remain in or upon the spray device; and will also blow out and clean the spray device thoroughly, so that said device will be ready for use again without any further attention as soon as the tank has been filled."

The surfacing material to be used is not confined to oil, as the description contains the following statement:

"My invention is not confined to use in connection with heavy oils, such as are commonly used in surfacing of roads, but may be used in connection with any road-surfacing material which is capable of being sprayed from a tank."

The principal elements of the apparatus set out in the description and shown by the drawings are a tank wagon propelled by steam from a boiler located upon it or drawn by a steam tractor; a tank designed to carry the material to be sprayed upon the road surface and made sufficiently strong to resist internal pressure; at the rear of the tank a discharge pipe, having a valve to shut off the flow from the tank, and connecting with a spray pipe having a series of nozzles similar to that used upon the familiar street sprinkling cart; a steam pipe with a valve in it connecting with the boiler upon the tank wagon, if it has one, or the boiler of the steam tractor, if drawn by that, so that steam under pressure may be supplied through a pipe to the top of the tank above the contents in the same, and also to a coil within the tank for the purpose of heating the contents; a branch of this steam pipe with a valve leading to the rear of the tank, where it branches again, one branch entering the discharge pipe between the valve and the tank and the other between the valve and the spraying device, and each branch having a valve, so that the supply of steam through each may be separately controlled. The advantage of the use of the branching steam pipes at the rear of the tank is stated in the following language:

"The advantage of this construction is that steam may be admitted to the valve 5 on either side thereof, thereby warming the latter; or steam may be admitted directly to the spray device without passing through the tank wagon, if it is desired to heat the oil in the spray device or to blow it out."

None of the original claims contained any mention of these steam pipes, and the combination which Pillsbury claimed as new was:

(1) "The combination with a tank wagon of a spray device connected thereto, a source of steam supply for generating steam under pressure and means to introduce steam under pressure therefrom into the tank above the body of oil therein, whereby the steam in said tank not only furnishes pressure for spraying the oil but also helps heat the oil, and when the oil is exhausted blows out through and cleans the spray device."

All the original claims were rejected, because anticipated by several patents which were cited by the examiner. On reconsideration several times by the Patent Office, amendments involving the same combination were rejected, because anticipated, although these amendments contained, as one element of the combination, the introduction of steam pressure fluid into the discharge pipe in the rear of the valve between it and the spraying device. The claim as allowed abandoned the introduction of steam as a pressure fluid into the tank as one element of the combination, and in place thereof introduced "means for applying a pressure to the tank above the liquid therein."

The only new element which was introduced by the amended claim was:

"A steam pipe communicating with the discharge pipe intermediate the valve and the tank, whereby steam may be admitted to the tank through the discharge pipe."

The Patent Office could find no novelty in a combination by which steam was admitted to the top of the tank above the contents to serve as

a pressure fluid to expel the contents of the tank, nor in the introduction of a steam pipe into the discharge pipe between the valve and the spraying device; but the combination, in which the introduction of a steam pipe between it and the tank was an element, was found to be novel and patentable. Before the patent in suit great difficulty had been experienced in securing a uniform discharge of road surfacing material by any then known device. Earlier patents consisted of a tank wagon equipped with a sprinkling arrangement so constructed as to admit pressure to the top of the tank to force out its contents through the spraying device, with an arrangement also for heating the contents of the tank; but none of them contained the branching steam pipe which enters the discharge pipe on either side of the valve as in Pillsbury's.

The only witness who testified in regard to the operation of one of these stated that:

"The flow was very irregular; the space covered was not perfectly smooth, as was intended; these spaces had to be patched up. This was done by hand with a coal hod or watering pot containing some of the material. This left a space full of humps, or high and low spaces; the high spaces being those filled by hand. The traffic pushed the bunches back and forth, very soon producing holes. The first time I saw this machine, it had no means for cleaning the pipes, with the result that, for several feet after the machine was drawn along, no material came out, and the material that came out was in streaks, which was true after the machine finished."

The Nichol patent, No. 604,479, which had been many times cited against Pillsbury's application before the amendment which was allowed, is a device for spraying the roadbed of a railroad with oil. It has a steam pipe leading into the spray pipe to heat the contents and force the oil out during the process of spraying; but it is evident that its use is confined to oils and materials which are fluid at ordinary temperatures, and is not adapted to the use of either tar or asphalt.

An English patent to Salvisberg for a road-tarring machine, also cited against Pillsbury, closely resembled his patent in its structure, except that it did not have the branching steam pipe which enters the discharge pipe. In it pressure is applied to the contents of the tank above its surface, and they were heated by a steam coil. In this machine, as in others of a similar nature, when tar or asphalt, or any other material which is solid at an ordinary temperature, was used, the discharge pipe between the tank and the valve became clogged with the material, which would harden and congeal when the machine was not in operation, and the valve in the discharge pipe would be so clogged that it could not be moved freely. Material also in the discharge pipe between the valve and the spraying device, and also that left in the spraying device, would harden and congeal, and when, in the operation of the machine, a crosswalk or some space was reached, which it was not desired to cover with surfacing material, and the valve in the discharge pipe was closed, the material would drip from the spray pipe, causing streaks.

In the operation of the patent in suit the tank is filled with surfacing material, which may be oil, tar, or asphalt, and, if this is not hot enough, steam is passed into coils within the tank to heat it.

Steam is then allowed to pass through the steam pipe, entering the discharge pipe in rear of the main valve and through the nozzles of the spray pipe, heating these pipes, and forcing all material from them. Steam is then admitted to the tank above the contents in the same, and is also allowed to pass through the branch pipe, which enters the discharge pipe intermediate its valve and the tank. When the steam is active in the steam pipes on either side of the valve in the discharge pipe, this valve is closed. Each time, before spraying, steam is allowed to enter the discharge pipe and the spraying device in the rear of the valve; but it is only necessary to admit steam through the pipe which enters the discharge pipe intermediate the valve and the tank before the first trip in the morning, unless the weather is cold, when this is done before each trip. The order in which the valves are used varies. It would seem that the best results would be secured by admitting steam under pressure to the discharge pipe on each side of the valve in it before admitting steam through the pipe leading to the top of the tank. The only witness who testified in regard to it stated:

"I have actually seen sometimes steam put through the valve in the rear of the discharge valve first before steam is put onto the tank for pressure, and sometimes steam is used first to get up your pressure to run the compressor. Sometimes pressure is put onto the tank first; sometimes the steam valve intermediate the tank and the discharge valve is used first."

The Pillsbury machine secures a uniform discharge of tar, asphalt, or heavy oils through the spraying device at all times, whatever the temperature of the air. It provides means for readily opening the valve in the discharge pipe after the apparatus has been used and allowed to stand, and prevents the dripping of the material to be discharged when portions of a street are reached which are not to be covered with the surfacing material. By the introduction of steam through the pipes which enter the discharge pipe upon each side of the valve, the discharge pipe and spraying device are heated and their contents liquefied.

[2] The claim in suit is for a combination none of the elements of which are new. Everybody before Pillsbury knew that pressure exerted upon the fluid contents of a tank would cause a discharge therefrom, and that steam under pressure would heat and liquefy objects which are solid at ordinary temperatures; but the combination of these elements in one structure produced a beneficial and useful result at a time when there was a public demand for a machine which would distribute road surfacing material uniformly and with sufficient force to cause it to penetrate the surface upon which it was used. The question presented for our consideration is whether these elements, in a unitary structure, produce a new and useful result by the co-operation of all. It is claimed that what Pillsbury did was only by mechanical skill to produce an aggregation of elements in which each produced its own result without any co-operation from the others. While it is true that steam is shut off from the pipes which enter the discharge pipe when the machine is in operation and pressure is applied to the contents of the tank, yet it is nevertheless

true that the effect produced by the connection of the steam pipes with the discharge pipe on either side of the valve produces effects which co-operate with those produced by pressure upon the material in the tank; for, by the action of the steam upon the material in the discharge pipes and upon the pipes themselves, the pipes have been heated and the material in them liquefied, so that it will flow freely, and this heated condition of the spray pipe, discharge pipe and valve in the discharge pipe continues while material from the tank is being forced out through the same. The separate effects produced by all the elements contribute to one result, viz. a free and uniform flow of the material through the discharge pipe and out of the spraying device with sufficient force to drive it into the surface which it strikes. It is not necessary, to render a combination patentable, that its elements should act at the same time to secure joint action; but it is enough that each contributes to the result which, but for the successive action of each, would not have been produced. Forbush v. Cook, 2 Fish. Pat. Cas. 669, Fed. Cas. No. 4931; National Cash Register Co. v. American Co., 53 Fed. 367, 3 C. C. A. 559; E. J. Manville Mach. Co. v. Excelsior Needle Co., 167 Fed. 538, 93 C. C. A. 216; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 C. C. A. 516; Sanders v. Hancock, 128 Fed. 424, 63 C. C. A. 166; National Tube Co. v. Aiken, 163 Fed. 254, 91 C. C. A. 114.

Even if the Nichol patent and the English patent to Salvisberg for road-tarring machines, and other prior patents, taught Pillsbury that the fluid contents of the tank could be forced from the same by steam pressure applied from above; and even if the Grun patent, No. 666,051, had taught him that the discharge pipe and the spraying device could be cleared out by the introduction of a pressure fluid into the same in the rear of the valve in the discharge pipe; or if the Darrin patent, No. 839,119, had taught him that steam admitted under pressure into the discharge pipe on each side of the valve in the same would liquefy the contents of the discharge pipe and the spraying device, and heat the pipes so that the liquid which entered them would not be hardened by the coldness of the pipes, no unitary structure possessing all of the elements of his combination was cited against him, and it is admitted that there was none. The Grun patent was an apparatus designed for the distribution of beer and other fermented liquors, in which a tank wagon for delivering beer and other fermented liquors had a receiver for carbonic acid gas supported on the wheel frame of the tank, from which pressure was supplied to the contents of the tank and also the discharge pipe beyond the valve in the same, but not between the valve and the tank, so that, after a receptacle had been filled with liquor from the tank, the carbonic acid gas could be shut off from the tank and caused to flow through the hose connecting the tank with the receptacle, thus forcing the beer from it and the standpipe. It is evident, however, that the purpose of forcing the carbonic acid gas through the discharge hose is not only to force the beer out of the same, but also to supply a charge of carbonic acid gas to the standpipe connected with the receptacle for beer, and that the Grun patent does not disclose a combination which,

in a unitary structure, accomplishes the result that Pillsbury accomplished. It is only a beer delivery wagon, and designed for an entirely different use from that of the Pillsbury patent. The Darrin patent, upon which the appellant relies as showing that the introduction by Pillsbury of steam under pressure into the discharge pipe on each side of the valve in the same had been anticipated, is an apparatus for the distillation of resinous woods for abstracting therefrom turpentine, pitch, tar, tar oil, and pyroligneous acid. After the process of distillation has been carried on for some time, a valve in the pipe connecting the retort with the condenser is closed, and then steam admitted to this connecting pipe on either side of the valve for the purpose of cleaning out the condensations which may have gathered in the conduit pipe, and which would stain or discolor the turpentine passing through it, and which are revaporized and blown out through a threeway valve.

Pillsbury, however, made use of the introduction of steam into the discharge pipe on either side of the valve, not only for the purpose of cleaning out the pipe, but also for the purpose of heating and liquefying its contents, thus accelerating their flow, and also for heating the valve so that it might be opened freely. As a unitary structure the Darrin patent in no way resembles the Pillsbury patent, nor is the introduction of steam into the discharge pipe employed for the same purpose. The use of steam to clean and scour out the interior of a pipe, or to heat it and liquefy its contents, is a matter of such common knowledge that we do not think it can be said that any information was necessary in regard to its use for these purposes. But, admitting that all of the elements of the Pillsbury patent are old, as we think they are, he nevertheless produced by their combination in his patent a unitary structure in which they all co-operate to produce a new and beneficial result, viz. the free and uniform discharge of heavy oil, tar, and asphalt upon a road surface with sufficient force to cause penetration to a depth desired for practical purposes, with means for clearing out the spraying device when it is desired to suspend the process of sprinkling, so that there will not be a dripping and streaks caused over surfaces which it is not desired to cover, and also means for freeing the valve in the discharge pipe when it stuck.

[3] None of the patents cited in the Patent Office or by the appellant disclose the combination of Pillsbury or any single machine that produced the same result; but it is claimed that all the elements of Pillsbury are contained in earlier patents, none of which contains them all. It is no defense to a claim of infringement that one or more elements of a patented combination, or one or more parts of a patented improvement, may be found in one old patent, and others in another, and still others in a third. J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 C. C. A. 561; Imhaeuser v. Buerk, 101 U. S. 647, 660, 25 L. Ed. 945; Bates v. Coe, 98 U. S. 31, 40, 25 L. Ed. 68.

It is further claimed by the appellant that Pillsbury in his specifications limited the use which can be made of the introduction of steam

into the discharge pipe between the valve and the tank by the "whereby clause," which reads as follows:

"whereby steam may be admitted to the tank through the discharge pipe"

—and that, the use of this pipe being so limited, the claim is void because inoperative; that with steam admitted to the top of the tank above the contents in the same it would not be possible to force steam under pressure from the same source into the tank through the discharge pipe.

We do not think that the patentee is limited by this "whereby clause" solely to the use expressed in it, provided the elementary structure which he specified is capable of other uses. Nor do we find it necessary, as did the District Court, to treat the "whereby clause" as surplusage, because it is evident from the structure of the combination, as shown by the drawings, that, if steam is inactive in the tank, and the valve in the discharge pipe is closed and steam admitted through the pipe leading to the discharge pipe between the valve and the tank, steam will be admitted to the tank. It is also evident that one of the practical uses of this steam pipe in the combination is to clear the section of the discharge pipe between the tank and the valve, and also the entrance into the discharge pipe from the tank, and this can be done when the steam is shut off from entering the top of the tank and is admitted into the tank through this steam pipe which enters the discharge pipe, which would liquefy and blow back into the tank any of the surfacing material which clogged that part of the discharge pipe between the tank and the valve, and would at the same time accomplish the purpose, which Pillsbury pointed out as an advantage in his specification, of warming the valve.

We think this function is plainly inherent in the combination covered by Pillsbury's claim and in the arrangement of pipes shown in his drawings and described in his specification. The necessity for the use of this steam pipe at the beginning of the day's work with the machine demonstrates that when the machine was not in use the tar must have become solidified in this part of the discharge pipe, and that before the machine can be successfully operated and the valve opened steam must be applied here for the purpose of heating and liquefying the contents of the pipe and any material which may have adhered to the valve, and that particularly in cold weather would this be necessary, as then steam must be admitted through this pipe at the beginning of each trip.

The appellant has found it to be an advantage to copy the construction of pipes of the Pillsbury patent, and the testimony of the witness who saw the uses to which it was put in heating the valve when it stuck, upon the appellant's machine, demonstrates that it was found to be operative. It is also claimed by the appellant in argument that there is no discharge pipe between the main valve *5* and the tank, but that the valve connects directly with the tank. The drawings disclose, however, in Figures 2 and 3, a discharge pipe at this point and a steam pipe entering it here.

[4] It is admitted by the appellant that, if this claim is valid, it is infringed by the appellant's machine, in which steam is used as a pressure fluid to expel the contents of the tank; but it strenuously contends that, even if it be valid, it is not infringed by its machine in which pressure is supplied to the tank by an air-compressing pump. In support of this contention our attention is called to the statement made by Pillsbury in his application, which, it is claimed, limits the pressure to be used upon the contents of the tank to that exerted by steam. This statement is as follows:

"I am aware that it has heretofore been proposed to admit compressed air to the oil containing tank with which a spray device is used, for the purpose of providing within the tank a suitable pressure to force the liquid out through the spraying device. My invention is to be distinguished from devices of this nature, however, in that the pressure is secured by the use of steam, which is admitted under pressure directly to the tank, and which has the capacity for not only heating the oil within the tank, but also cleaning out automatically the spray device."

It appears from the file wrapper and its contents in the case that, when Pillsbury made this statement, he supposed his invention lay in providing steam pressure within the tank to force out its contents, and the claim which he then made, and which we have quoted, showed that he believed the merit of his invention to reside in this. But, after the rejection of this claim upon references to prior patents, he canceled all his original claims, and, after an interview between himself and attorney and the principal examiner, he filed the amended claim, which is the one in suit, in which the pressure to be applied above the contents of the tank was not limited to steam, but was broadened to include any "means of applying pressure to the tank above the liquid therein." No amendment was made to the description, nor the drawing, and none was necessary. The dominant feature of the combination which made it novel and patentable was the pipes that entered the discharge pipe on each side of the valve in the same. It was important for the successful operation of the combination that pressure be exerted upon the top of the contents of the tank; but it was unimportant whether it be supplied by steam or by any other means. The inventor was therefore allowed a broad scope for this element in his combination.

It is apparent from the history of the progress of the case through the Patent Office, as shown by the file wrapper and its contents, that, after the original claims were rejected upon references to earlier patents, the statement made by the inventor in his description in regard to the use of steam as pressure in the tank was not intended to limit the combination for which a patent was allowed to the use of steam alone for this purpose, for it became immaterial what pressure fluid should be exerted upon the contents of the tank. The branching steam pipe, in combination with a pressure fluid applied above the contents of the tank, was specified in his description and drawings, and Pillsbury could legally file an amended claim for a combination which would contain as one of its elements any means for applying

pressure to the contents of the tank, for, although he had suggested steam, the principle would remain the same, whether that or other means for introducing pressure within the tank were employed.

"The claims measure the invention, and while the inventor must describe the best mode of applying the principle of his invention the description does not necessarily measure the invention." Paper Bag Patent Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122.

We think the District Court correctly held that the claim in suit is valid, and that it is infringed, not only by the machine of the appellant, in which steam is used to force out the contents of the tank, but also by its machine in which compressed air is used for the same purpose.

The decree of the District Court is affirmed, with costs to the appellee in this court.

UNITED STATES v. BASIC PRODUCTS CO.

(District Court, W. D. Pennsylvania. September 9, 1919.)

No. 2214.

1. UNITED STATES ⊂⊃97—CANNOT APPROPRIATE PATENT WITHOUT COMPENSATION.

   There is no reservation in the patent laws of right in the United States as against the inventor, and it cannot appropriate or use the invention without just compensation in any different way than it can appropriate or use any other article owned by a private citizen.

2. COMMERCE ⊂⊃48—FEDERAL TRADE COMMISSION CREATED UNDER POWER TO REGULATE INTERSTATE AND FOREIGN COMMERCE.

   The Federal Trade Commission Act (Comp. St. §§ 8836a–8836k) was enacted by Congress in the exercise of its constitutional power to regulate interstate and foreign commerce.

3. COMMERCE ⊂⊃57—TRADE-MARKS AND TRADE-NAMES ⊂⊃80½, New, vol. 8A Key-No. Series—POWERS OF FEDERAL TRADE COMMISSION WHERE INTERSTATE COMMERCE OR UNFAIR TRADE ARE NOT INVOLVED.

   The Federal Trade Commission *held* without power to demand access to the books and papers of a corporation which manufactured a patented article by secret process, not alleged to be engaged in interstate or foreign commerce, nor charged with unfair competition, for the purpose of obtaining information for the Navy Department as to the cost of manufacture, annual production, capital invested, etc.

4. MANDAMUS ⊂⊃10—RIGHT TO DEMAND AND DUTY TO PERFORM NECESSARY.

   Mandamus issues where, and only where, there is a right to demand, and a corresponding duty to perform, the act required.

At Law. Mandamus by the United States against the Basic Products Company. On demurrer to answer. Overruled.

R. L. Crawford, U. S. Dist. Atty., of Pittsburgh, Pa.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., for defendant.

ORR, District Judge. To a petition filed by the Attorney General of the United States, at the request of the Federal Trade Commission, for a writ of mandamus upon the Basic Products Company, the

latter has made answer at considerable length. To that answer, the plaintiff has demurred. It is upon the demurrer that this case is now before the court.

While all the material averments of the answer, which are well pleaded, must be taken as true, yet the important questions in the case cannot be clearly outlined without reference to the petition as well, and without a statement of the particular grounds upon which the demurrer is based. The court therefore sets forth the substance of the pleadings, with quotations from the same, and with the use of italics where deemed proper for special emphasis.

With respect to the petition, it is to be noticed:

That there is no averment of any facts which show that the defendant is engaged in interstate commerce. The recital in the resolution of the Federal Trade Commission, which is hereinafter set forth, is not such averment.

The petition sets forth that on the 8th day of March, 1917, the Federal Trade Commission passed a resolution, and on the 11th of March following, caused notice thereof, and its demand in pursuance thereof, to be served on the defendant, which notice and demand are both set forth at length in the petition. They are embodied in one paper duly executed by the Federal Trade Commission. The part of said paper which contains the notice recites the date of the passage of the resolution as aforesaid, that it was passed at a regular session of said commission, and contains the resolution itself, which is as follows:

"Resolved, that pursuant to the provisions of subdivision (a) of section 6 of the act of Congress entitled 'An act to create a Federal Trade Commission, to define its powers and duties and for other purposes,' approved September 26, 1914, the commission proceed forthwith to gather and compile information concerning, and investigate the organization, business, conduct, practices, and management of the Basic Products Company, a corporation engaged in interstate commerce, and the relation of said Basic Products Company to other corporations, individuals, associations and partnerships; and be it further

"Resolved, that pursuant to the provisions of section 9 of said act of September 26, 1914, L. W. Plowman and H. L. Maxey are hereby designated as duly authorized agents of the Federal Trade Commission to examine and copy any and all documentary evidence of whatsoever character concerning the organization, business, conduct, practices, and management of said Basic Products Company, and its relation to other corporations, individuals, associations, and partnerships; and be it further

"Resolved, that a copy of this resolution be served on the said Basic Products Company, with a demand on behalf of the Federal Trade Commission that the said L. W. Plowman and H. L. Maxey, its agents, be permitted access to the books, papers, records, memoranda, and data of the said Basic Products Company for the purpose of carrying out the direction of this resolution."

The part of that paper containing the demand is as follows:

"Pursuant to the terms of said resolution, the Federal Trade Commission hereby formally demands of you an opportunity to examine any documentary evidence in your possession which relates to the organization, business, conduct, practices, and management of said Basic Products Company, a corporation, and its relation to other corporations and to individuals, associations, and partnerships, in order that copies may be made of any portions of said documentary evidence, as appears to be relevant to the subject matter of said investigation.

"The said Federal Trade Commission, by its duly authorized agents, viz. L. W. Plowman and H. L. Maxey, presents itself for the purpose of examination and making copies, if deemed advisable, of any documentary evidence within your possession or control and which relates to the above-entitled investigation now being conducted by it. *In particular, the Federal Trade Commission demands that it be permitted to examine and take copies, if deemed advisable, of all documentary evidence which relates to the production costs, annual production, and capital investment in the manufacturing of a commodity known as 'Syndolag.'*"

The petition further avers that, upon the service of said notice and demand, certain examiners, duly authorized by the commission, presented themselves, within the usual business hours, at the office of the defendant in Pittsburgh—

"for the purpose of examination and making copies, if deemed advisable, of any documentary evidence within the possession and control of said defendant, *which related to the investigation then being conducted by said commission, as aforesaid,* and particularly of such documentary evidence *which related to the production costs, annual production, and capital investment in the manufacturing by defendant of a commodity known as 'Syndolag'; but said defendant wholly failed and refused and still fails and refuses to permit said representatives of the commission to examine said documentary evidence and make copies of same.*"

The petition concludes with a prayer for a writ of mandamus.

The answer to said petition avers:

(1) That the defendant is the manufacturer of a patented article known as "Syndolag," which has been developed by the defendant after great expenditure of time and money, and which, among its other uses, is widely sold by defendant for repairing the bottoms of open hearth steel furnaces, a purpose for which heretofore only imported Austrian magnesite could be used. Not only is the article patented, but in the production thereof the defendant has developed certain refinements of method which are and have been kept secret by defendant and which constitute trade secrets of great value, as are also the cost accounts relating to the production of such article.

(2) On or about September 4, 1918, the Navy Department of the United States ordered from defendant 250 tons of syndolag, for which defendant quoted a price of $35 per ton, which was then the usual and ordinary price, but the Navy Department refused to agree to such price, and required such material to be billed at the tentative price of $30 per ton. Pursuant to such order the defendant shipped to the said department 64.9 tons of said material. Subsequently thereto, after the armistice with Germany was signed, the balance of said order was canceled by the Navy Department and the defendant waived any claim against the United States by reason of such cancellation.

(3) During November and December, 1918, and January and February, 1919, repeated demands were made by the Navy Department for affidavits from defendant showing defendant's costs of production of said article for the pretended reason of enabling the Navy to decide upon the price which it would be willing to pay defendant for its product. Defendant then offered, and in the answer in this proceeding renews said offer, to accept any price for said material which the Navy Department may see fit to pay. While such demands were

being made by the said department, the latter nevertheless, on December 14, 1918, and January 19, 1919, paid defendant at the rate of $30 per ton for all syndolag delivered as aforesaid. The defendant, prior to the filing of the answer in the present proceeding, offered, and in the said answer renews such offer, to return to said department, or to the Treasurer of the United States as directed, any part of such price which is in excess of the price which the Navy Department, in its discretion, sees fit to pay for such product, or, should the Navy Department be unwilling or unable to fix such price, to refund to the Navy Department or to the Treasurer of the United States as directed, the whole amount received by defendant for such product.

(4) That the foregoing offers have been continuously made by defendant, yet under the pretense of fixing a price therefor, the aforesaid demands for affidavits have been made by the Navy Department without reason or just cause. When the defendant finally refused to furnish such affidavits, the Navy Department's said demands were then taken up by the Federal Trade Commission, at the request and for the purpose of the Navy Department, in an effort to secure for the Navy Department such information through an assertion of the powers of the Federal Trade Commission. Such Trade Commission did, on March 1, 1919, send examiners to defendant's plant with the following communication:

"Federal Trade Commission.

"Washington, March 1st, 1919.

"Basic Products Company, Kenova, W. Va.—Gentlemen: This will serve to introduce Messrs. L. W. Plowman and H. L. Maxey, examiners of the Federal Trade Commission.

"At the request of the Navy Department, the Federal Trade Commission has undertaken to ascertain the cost of producing the product known as 'Syndolag.' The commission also desires to ascertain the investment involved in the production of this product. It will, therefore, be necessary for its examiners to have full access to your books and records, including not only your cost sheets, but your profit and loss statement and balance sheet. The period to be covered is the year 1918.

"The commission requests your prompt co-operation with its examiners.

"Very truly yours, Federal Trade Commission,

"[Signed] Francis Walker, Chief Economist.

"L. H. H."

(5) No complaint has at any time been filed or entered against defendant by the government, or by any citizen, in regard to the organization, business, trade practices, or conduct of the defendant in any respect, nor has the defendant been guilty of unfair competition, nor has it been charged therewith.

(6) The defendant has refused, and, unless required by court, will continue to refuse to surrender its trade secrets as aforesaid to any such examiners, or to any other representatives of said Trade Commission, or said Navy Department.

(7) The defendant charges that the demand of said Trade Commission is unlawful, unconstitutional, and void for the following reasons:

(a) It is in direct violation of the provisions of the act creating said Trade Commission (Act Sept. 26, 1914, c. 311, 38 Stat. 721 [Comp.

St. 8836f]), section 6 whereof forbids the publication of trade secrets, whereas the demand upon defendant by said Trade Commission affirmatively shows that the purpose of said "investigation" is the ascertainment of trade secrets and the disclosure of information thereof to the Navy Department.

(b) That in the absence of charges or complaints against defendant, said Trade Commission is without power or authority to make the "investigation" demanded.

(c) That the access to defendant's properties and records, demanded by said Trade Commission and by the petition of the Attorney General, would constitute an unreasonable search and seizure from which defendant is entitled to protection by the Fourth Amendment of the Constitution of the United States.

(d) That the access to defendant's properties and records, demanded by said petition, would constitute a taking of the property of the defendant without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

The reasons in support of the demurrer filed by the plaintiff are:

(1) A general demurrer that the answer is insufficient and irresponsive.

(2) That the defendant company has no standing to question the right of the plaintiff to a mandamus on the ground that no individual complaint or information has been made against it. That the right of the plaintiff is the right of original investigation conferred upon the Federal Trade Commission by Congress.

(3) That any reason which the defendant might have to withhold its books, etc., from inspection, should have been presented to the Trade Commission and not to the court.

(4) There is no attempt in this proceeding to take the properties or records of the defendant without due process of law, because the plaintiff in filing this proceeding is acting according to due process of law, and not in violation of any constitutional provision or any law thereunder.

In view of the Federal Trade Commission's letter of March 1, 1919, its resolution of the 8th day of the same month, and its notice and demand under date of the 11th of the same month, it plainly appears that said commission has undertaken to ascertain the cost of producing a product which is the subject of a patent, and to ascertain also the annual production thereof and the capital invested in the manufacture thereof. Why it has undertaken to do that is explained by the averments in the answer which must be taken as true. The purpose of such investigation is that the commission can give information as to the results of its investigation to the Navy Department. It would seem that it was intended by the commission to ascertain what is the just compensation which the Navy Department should pay for acquiring a right to such patented article, as is to be inferred from the following quotation from the brief of counsel on behalf of the plaintiff:

"It is inconceivable that the ascertainment of the cost of the production of a commodity produced by defendant under a process patent which gives it a

legal monopoly in the production of that product, could work any hardship upon the defendant; it has an exclusive property in the patented invention which cannot be appropriated or used by the government itself without just compensation (30 Cyc. 818), and certainly an orderly proceeding to ascertain what is just compensation in a given case could not violate the due process clause of the Constitution or any other provision."

[1] Under the constitutional power vested in Congress "to promote the progress of science and useful arts," letters patent of the United States secure to inventors the exclusive right to their discoveries. There is no reservation of right in the United States as against the inventor. The United States cannot appropriate or use the invention without just compensation, in any different way than it can appropriate or use any other article owned by a private citizen. James v. Campbell, 104 U. S. 356, 26 L. Ed. 786.

[2] The act of Congress under which the Federal Trade Commission has proposed to investigate the cost of producing a patented product and perhaps the amount of compensation which should be paid by the United States, in order that the Navy might acquire the same, does not in terms justify such proceeding. The act is aimed at unfair methods of competition in commerce. This is clearly seen by the first paragraph of section 5 (Comp. St. § 8836e), which consists of this language:

"That unfair methods of competition in commerce are hereby declared unlawful."

That provision is qualified by the meaning given in the act to the word "commerce." In section 4 it is provided that the word "commerce," when found in the act, means:

"Commerce among the several states or with foreign nations or in any territory of the United States, or in the District of Columbia, or between any such territory and another, or between any such territory and any state or foreign nation, or between the District of Columbia and any state or territory or foreign nation."

By applying that definition, then, to said first paragraph of section 5, we ascertain that it was the intent of Congress, by the passage of the act, to exercise some of the powers vested in it by the Constitution to regulate interstate and foreign commerce.

[3] The second paragraph of section 5 contains the expression of a general power conferred upon, and a general duty imposed upon, the said commission in these words:

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce."

Following that broad provision there are set forth many powers and duties. The remaining paragraphs of section 5 relate to complaints against persons, partnerships, or corporations; the methods of proceeding upon such complaints; the findings of fact by the commission, which "if supported by testimony shall be conclusive," and methods of enforcement of the orders of said commission through the aid of the courts.

As appears from the resolution of the commission hereinabove set forth, the provisions of section 5 are not relied upon as justification for the commission's action in the present case. The commission relies upon subdivision (a) of section 6 of the act. Section 6 contains a further statement of particular powers vested in the commission, and appears to authorize proceedings in which no complaints against any person, partnership, or corporation are required to be served. The opening of that section, including subdivision (a), is as follows:

"That the commission shall also have power—

"(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships."

The substance only of the remaining subdivisions of section 6 need be stated:

(b) The commission may require detailed reports from such corporations under oath.

(c) May investigate whether a final decree, intended to restrain any violation of the anti-trust acts, is being carried out, and upon the application of the Attorney General are required to do so.

(d) Upon direction of the President, or either house of Congress, the commission shall investigate alleged violations of the anti-trust acts by any corporation.

(e) Upon the application of the Attorney General, the commission shall investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust acts.

(f) The commission may make public information obtained, "except trades secrets and names of customers," and may submit recommendations to Congress for additional legislation.

(g) May from time to time classify corporations and make rules and regulations for the purpose of carrying out the provisions of the act.

(h) The commission may investigate trade conditions in and with foreign countries.

The remaining sections of the act have little to do with the matter now before the court, yet their provisions may tend to assist the court in reaching the proper conclusion.

Section 7 (section 8836g) authorizes the court, in any suit in equity brought by the Attorney General, as provided in the anti-trust acts, after the conclusion of the testimony therein, if the court be of opinion that the plaintiff is entitled to relief, to refer said suit to the commission as a master in chancery, to formulate a decree. Section 8 (section 8836h) provides that, when directed by the President, the several departments and bureaus of the government shall furnish, upon its request, papers and information, in their possession relating to any corporation subject to the provisions of the act. Section 9 (section 8836i) gives the commission power to secure testimony, issue subpœnas, and compel the attendance of witnesses, and the production of documentary evidence from any place in the United States, at any designated place of hearing (which by section 3 [section 8836c] may be "in any part of the United States"). Such section also authorizes the District Court to enforce obedience to subpœnas issued by the commission, and gives the District Courts of the United States

jurisdiction to issue writs of mandamus upon the application of the Attorney General, commanding any person or corporation to comply with the provisions of this act. Section 10 (section 8836j) provides the penalties for failure to comply with the provisions of the act or with the orders of the commission. The punishment of any person disobeying a subpœna is by fine of not less than $1,000, nor more than $5,000, or by imprisonment for not more than one year, or by both. The punishment of any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required, or in any account, record, or memorandum kept by any corporation subject to this act, or who shall willfully neglect or fail to make, or cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appurtenant to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation within its possession or within its control, shall be subject, upon conviction, to a fine of not less than $1,000, nor more than $5,000, or to imprisonment for the term of not more than three years, or to both such fine and imprisonment. If any corporation required by the act to file any report shall fail to do so within the time fixed by the commission, and such failure shall continue for 30 days after notice of such default, such corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure. There follows, then, a provision in said section for the punishment of any officer or employé of the commission who shall make public any information obtained by the commission without its authority, unless directed by the court.

From the foregoing review of the act it is plain that Congress intended to give the commission a power unprecedented in its scope. In the argument on behalf of the plaintiff, it was insisted that under the act, the commission was given the right to investigate any question having to do with any business of any corporation, except banks and common carriers subject to the control of the Interstate Commerce Commission, to conduct a hearing at any point in the United States, and compel there the attendance of any witnesses and the production of any records from any other point in the United States. There was no suggestion of the limitations to be found in the acts themselves, other than the limitation just mentioned. In other words, it was probably assumed that every corporation, with respect to which the commission intended to conduct an investigation, was engaged in interstate commerce within the meaning of the act. In the argument, as well as in the petition, there was lacking the assertion of facts which would bring the defendant within the terms of the act of Congress. Nowhere has it been made to appear that the defendant is engaged in interstate commerce in any other way than any other corporation or

any citizen may be so engaged, by making one or more shipments of manufactured goods from one state into another.

The following quotation from the opinion of Judge Jackson, in Re Greene (C. C.) 52 Fed. 104–113, contains not only a definition, but an elaboration thereof, which suggests not only the limitations upon the power of Congress, but also possibilities of the existence of activities by entities corporate or otherwise, which might be brought within the jurisdiction conferred by the act upon the Federal Trade Commission:

"Commerce among the states, within the exclusive regulating power of Congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities.' County of Mobile v. Kimball, 102 U. S. 691–702 [26 L. Ed. 238]; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 203, 5 Sup. Ct. 826 [29 L. Ed. 158]. In the application of this comprehensive definition, it is settled by the decisions of the Supreme Court: That such commerce includes, not only the actual transportation of commodities and persons between the states, but also the instrumentalities and processes of such transportation. That it includes all the negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one state to another. That such commerce begins, and the regulating power of Congress attaches, when the commodity or thing traded in commences its transportation from the state of its production or situs to some other state or foreign country, and terminates when the transportation is completed, and the property has become a part of the general mass of the property in the state of its destination. When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. At that time the power and regulating authority of the states ceases, and that of Congress attaches and continues, until it has reached another state, and becomes mingled with the general mass of property in the latter state. That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another state, constitutes that interstate commerce which comes within the regulating power of Congress, and, further, that after the termination of the transportation of commodities or articles of traffic from one state to another, and the mingling or merging thereof in the general mass of property in the state of destination, the sale, distribution, and consumption thereof in the latter state forms no part of interstate commerce. Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1 [24 L. Ed. 708]; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091 [29 L. Ed. 257]; Coe v. Errol, 116 U. S. 517–520, 6 Sup. Ct. 475 [29 L. Ed. 715]; Robbins v. Taxing Dist., 120 U. S. 497, 7 Sup. Ct. 592 [30 L. Ed. 694]; and Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6 [32 L. Ed. 346]. In the latter case the Supreme Court pointed out the distinction between commerce and the subjects thereof, and held that the manufacture of distilled spirits, even though they were intended for export to other states, was not commerce, falling within the regulating powers of Congress."

Imagination, if not experience, can suggest that persons, partnerships, and corporations may be engaged in interstate commerce by the transportation of merchandise solely by water; that their activities may give them their income from lighterage; or they may be engaged in the sole business of forwarding goods, with no interest in the ves-

sels or wagons on which they are transported. The foregoing are merely illustrations of activities which may perhaps be within the scope of the powers granted to the commission by the act as found in the fifth section thereof.

Imagination, however, cannot suggest such an extension of constitutional limitation as may justify the investigation undertaken by the commission in this case. Indeed, so far as the matter has been brought to the attention of the court, no such assertion of power has ever been made to the courts. Investigation under subdivision (a), section 6, is limited to corporations engaged in interstate commerce. The defendant is engaged in manufacture.

A comprehensive consideration of the lack of constitutional authority over industry is found in the language of Mr. Justice Lamar, who delivered the opinion of the court in Kidd v. Pearson, 128 U. S. 1, 20, 21, 9 Sup. Ct. 6, 10 (32 L. Ed. 346), as follows:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. * * * If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the states, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be local in all the details of their successful management. It is not necessary to enlarge on, but only to suggest, the impracticability of such a scheme, when we regard the multitudinous affairs involved, and the almost infinite variety of their minute details."

In Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, Ann. Cas. 1918E, 724, the Supreme Court held an act of Congress to be unconstitutional, as exceeding the commerce power of Congress and invading the powers reserved to the states, which act was intended to prohibit transportation in interstate commerce of goods made at a factory in which children of tender years might be employed. In that case the court again emphasizes in the strongest language that Congress has a regulatory power over interstate transportation and its incidents, but that the production of articles intended for interstate commerce is a matter of local regulation; and it appears from the opinion of the court (247 U. S. 273, 38 Sup. Ct. 532, 62 L. Ed. 1101, Ann. Cas. 1918E, 724) that argument was made that Congress had authority to control the interstate shipments of child-

made goods in order to prevent unfair competition which would operate unjustly upon those who were forbidden by some states to employ child labor, and the court uses this language:

"There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions."

Counsel for the defendant urges upon this court the necessity of declaring section 6 of the Trade Commission Act to be unconstitutional, not only "in so far as it authorizes investigations and compulsory disclosures of matters which are beyond the commerce power of Congress," but also "in so far as it attempts to authorize a search or seizure by an administrative agency of the Government without charge or suspicion of wrongdoing." While the contention of counsel is probably sound, this court does not deem it necessary to go farther than to hold that the commission have not the power to carry on investigation which they have assumed in the present case.

An incident of such investigation is the ascertainment of trade secrets. It is plain that the cost of manufacturing a patented product to which the manufacturer has the exclusive right may be a trade secret, a species of property of great value. This is also true of refinements of method in producing the same. The act prohibits the disclosure of trade secrets. The assumption that no such disclosure will be made disappears before the expressed intention to give the information to the Navy Department. We have, then, a contemplated search and seizure, and a contemplated taking of private property for public use, without due process of law, which are violative of the Fourth and Fifth Amendments of the Constitution.

[4] With respect to the third reason in support of the demurrer, little need be said. The act itself authorizes a petition for mandamus in aid of the commission.

"Mandamus issues where, and only where, there is a right to demand, and a corresponding duty to perform, the act required." 19 Standard Encyclopædia of Procedure, 128.

It never was intended that the extent of a free man's duty to perform should be determined by those who demand performance.

The demurrer must be overruled, and the petition for a writ of mandamus must be refused.

UNITED STATES v. STUPPIELLO.

(District Court, W. D. New York. September 10, 1919.)

1. ALIENS ⇐=46—EXCLUSION OF IMMIGRANTS—"ANARCHISTS."
The word "anarchist," as used in the immigration statutes, includes, not only persons who advocate the overthrow of organized government by force, but also those who believe in the absence of government as a political ideal, and seek the same end through propaganda.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Anarchist.]

2. ALIENS ⇐=71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATE.
The certificate of citizenship of a naturalized citizen *held* subject to cancellation at suit of the United States, on the ground that he was an anarchist when it was issued, and procured it by fraud and in violation of Act June 29, 1906, § 7 (Comp. St. § 4363).

Suit to cancel naturalization certificate by the United States against Michael Stuppiello, also known as Michael Stubbello. Decree for the United States.

Leroy N. Kilman, of Buffalo, N. Y., for the United States.
James W. Kelly, of Rochester, N. Y., for defendant.

HAZEL, District Judge. The defendant, Michael Stuppiello, also known as Michael Stubbello, a cobbler by trade, was born in Italy in the year 1886, and came to this country on May 18, 1900, locating in Rochester, where he has ever since resided. He married an American, and has two children born in this country. He declared his intention to become an American citizen July 21, 1909, and thereafter, on March 6, 1915, having filed his application for citizenship, was duly naturalized. In his declaration of intention and petition for naturalization he stated that he was not an anarchist nor opposed to organized government, and that he was attached to the principles of the Constitution. In May, 1918, he was arrested by the Bureau of Immigration on a warrant charging him with being an anarchist. Upon his examination he testified:

"Q. Do you believe in our form of government, the government of the United States? A. No.
"Q. Do you believe in anarchy? A. Yes.
"Q. How long have you held this belief? A. Six or seven years."

Upon testifying that he was a naturalized American citizen, he was released from custody, and this action to cancel his certificate of naturalization on the ground of fraud was instituted.

[1] At the time defendant was naturalized, indeed since March 3, 1903, section 2 of the Immigration Act of March 3, 1903 (32 Stat. 1213, c. 1012), in enumerating the excluded classes, included aliens who are "anarchists, or persons who believe in or advocate the overthrow by force or violence of the government of the United States or of all government or of all forms of law, or the assassination of public officials." The latter phrase is not, in my opinion, used as the

equivalent of the word "anarchists," but the disjunctive "or" is believed to signify that either one or the other—i. e., an anarchist or one who believes in or advocates the overthrow of the government by force or violence—is of the excluded class; and under section 38 any person who disbelieves in or who is opposed to all organized government may be refused entry into the United States.

On October 16, 1918, Congress passed a law (40 Stat. 1012, c. 186) providing for the exclusion of aliens "who are anarchists, * * * or are opposed to organized government," and under section 2 of the same act any alien who after entering the United States becomes a member of such classes becomes subject to deportation. No question is raised as to the retrospective character of such provisions, and it is believed that none could be. Johannessen v. United States, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066. Regardless of such provisions, however, the Naturalization Act of June 29, 1906 (34 Stat. 596, c. 3592), in terms provides that no person who disbelieves in or is opposed to organized government shall be naturalized or be made a citizen of the United States, and that in his declaration of intention to become a citizen an alien shall state that he is not an anarchist, and shall show to the satisfaction of the court admitting him to citizenship that he is attached to the principles of the Constitution of the United States.

At the trial the defendant frankly admitted that he was an anarchist, coupling his admission with the statement that he did not believe in the use of force or violence for the overthrow of the government, but simply believed in philosophical anarchy—anarchy tantamount to that entertained by political philosophers—or, as he puts it, in "evolution by education, in order to reach a state of education of mind that it won't be necessary to have a government." He limited his definition of an anarchist to a person who believed in violence or the destruction of the government by force of arms. Although he testified before the Bureau of Immigration that he did not believe in the form of government of the United States, he now modifies such testimony by stating that he believes it necessary to have a government as society is at present organized. He was uncertain as to whether or not he entertained such views at the time of his naturalization, but finally admitted having them for about five, six, or seven years.

If the defendant had declared on the hearing of his application for citizenship that he was a philosophical anarchist, as distinguished from a dynamic or or nihilistic anarchist, or one who believes in destroying the government by violence, and a disbeliever in organized government as now constituted, it is inconceivable that his application would have been granted. In a popular sense, it is true, an anarchist is regarded as one who seeks to overturn by violence all constituted forms of society and government, including all law and order and all rights of property, without intending to establish any other system of order in place of that destroyed. Century Dictionary. Yet the word is also defined as one who advocates the absence of government as a political ideal—a believer in an anarchic theory of society. In using the word "anarchists" without qualification Congress intended

to include all aliens who had in mind a theory of anarchy, or the absence of all direct government, in opposition to that of organized government. The former is diametrically opposed to the latter, and the philosophical anarchist who exploits and expounds his views is none the less dangerous to the welfare of the country than the anarchist who believes in overthrowing or destroying the government by force or violence. The means of accomplishing the end, though different, are both destructive; one consisting of insidious propaganda to arouse sentiment in opposition to the government, and the other to incite violence and disorder. Both are designed to discredit constituted authority. As recently stated by Judge Knox in Re Frank R. Lopez (opinion unreported) [1]:

"The theory of anarchy and that of government must at all times be in conflict, and I cannot believe that the philosophical anarchist, at least so far as his ultimate purpose is concerned, is any less dangerous than is the advocate of violence. Indeed, in a sense the insidious character of the teachings of the one is more to be feared than are the teachings or activities of the other. It may be that I am lacking in liberality of thought, but I am unable to divorce my mind from the idea that the doctrinnaire, who spreads his doctrine that all forms of government as we know them shall be subverted to a so-called citizenizing of the world, is an anarchist, and as such comes within both the terms and spirit of the act of Congress upon the subject."

To urge that the defendant in his testimony implied only disbelief in government as at present organized, and that society ultimately would be benefited by the absence of government, does not relieve him, since, as before pointed out, a disbeliever in organized government is barred, I think, from the privilege of naturalization, regardless of whether or not he is also an anarchist of any kind. Congress, in conferring naturalization rights upon aliens, bestowed on them a boon or privilege only to be acquired by compliance with the conditions expressed in the statutes.

In the case of Turner v. Williams, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979, the Supreme Court had before it the question of whether an anarchist could be deported after having unlawfully entered the country. It was contended that Turner, an admitted anarchist, was merely a believer in the absence of government as a political ideal—that, in short, he was a philosophical anarchist—and did not come within the word "anarchists" as used in the statute. The Supreme Court declined to disturb the conclusion of the Board of Immigration as to the fact that the relator was an anarchist, and as to the classification of anarchists Chief Justice Fuller said:

"If the word 'anarchists' should be interpreted as including aliens whose anarchistic views are professed as those of political philosophers innocent of evil intent, it would follow that Congress was of opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few, and, in the light of previous decisions, the act, even in this aspect, would not be unconstitutional, or as applicable to any alien who is opposed to all organized government."

[1] Appealed to Circuit Court of Appeals. For opinion on appeal, see Lopez v. Howe, 259 Fed. 401.

In a concurring opinion by Mr. Justice Brewer it is substantially stated that, since the relator had not given any evidence to negative the finding of the Board of Immigration, it was unnecessary to consider what rights he would have if he were only a philosophical anarchist, or one who held and expressed the opinion that all government was a mistake and society benefited by its absence. It will be observed that the Supreme Court does not undertake to interpret the statute under consideration, since it was not necessary to do so.

In this case I am unable to conclude from the evidence in its entirety that the defendant merely gave expression to the opinion that all government was a mistake, or that he was a harmless, optimistic dreamer, possessed of Utopian ideas, since his admissions before the Bureau of Immigration show him to be interested in anarchistic propaganda movements, not only during the war, but presumably to some extent at least at the present time. Such philosophical anarchism as he professes is fully as dangerous as the anarchism of one who advocates violence to bring about a state of society without a government. It tends to create a spirit of unrest and dissatisfaction among our population, which is inimical to organized government and subversive of law and authority.

It is argued that the defendant has shown himself to be a believer in a so-called systematic form of government, "a government in which they may educate society what should be done for the benefit of all"; but any such testimony does not negative his asseverations that he does not believe in organized government, under which the present social order is maintained.

The certificate of citizenship issued to the defendant should be canceled, on the ground that at the time of its procuration he was an alien anarchist, and an alien who disbelieves in and is opposed to organized government.

A decree may be entered.

UNITED STATES v. STANDARD BREWERY.*

(District Court, D. Maryland. July 1, 1919.)

INTOXICATING LIQUORS ⟸216—INDICTMENT FOR ILLEGAL MANUFACTURE INSUFFICIENT IN NOT ALLEGING LIQUOR INTOXICATING.

Demurrer sustained to an indictment charging defendant with violation of Act Nov. 21, 1918, § 1, by the manufacture of a malt liquor having an alcoholic content of one-half of 1 per cent., or more, but not alleged to be intoxicating.

Criminal prosecution by the United States against the Standard Brewery. On demurrer to indictment. Demurrer sustained.

Samuel H. Dennis, U. S. Atty., of Baltimore, Md.

Randolph Barton, Jr., William L. Rawls, and William L. Marbury, all of Baltimore, Md., for defendant.

ROSE, District Judge. According to the dictionary, beer is an alcoholic beverage resulting from the fermentation of cereals or

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

*Affirmed in 250 U. S. —, 40 Sup. Ct. 139, 64 L. Ed. —.

other starchy substances. To be beer, it must contain alcohol. If it contains so little that nobody wants it because of the alcohol in it, it is not beer from any practical standpoint. The Internal Revenue Department, years ago, had to deal with this question. The statute taxed all fermented liquors. When was a liquor fermented? The department answered that fermentation had not taken place enough, to make it within the taxing meaning of the words "a fermented beverage," unless it resulted in an alcoholic content of at least one-half of 1 per cent. If Congress had forbidden any one to sell beer or other fermented liquor, beer containing one-half of 1 per cent. or more of alcohol would have been covered by the statute. Act Nov. 21, 1918, c. 212. Congress has not used those words. It has used others, which may mean that it intended to forbid the making and sale of nothing which is not intoxicating.

I must confess that my mind has a tendency towards what might be called a historical, rather than the more or less artificial legal, construction of such an enactment. I have no doubt that everybody who in Congress voted for or against the statute, and practically everybody affected by it, supposed at the time it was enacted that it covered all beer containing any appreciable amount of alcohol. That view is not shaken by the critical analysis to which the statute has been subjected. The contemporaneous interpretation of what they were doing at the time by all who had any part in the doing is to my mind more persuasive than the most careful analysis made after the event. So holding, had this question come up four or five weeks ago, I would have overruled the demurrer. I do not do so now because it is evident that in many minds there is much doubt as to what the statute does mean. It is a penal law, and it may not be so interpreted as to make punishable anything which it does not clearly forbid. I cannot now say that it clearly forbids the making or sale of beer which is not intoxicating, because five of the judges of the Second Circuit have each expressed the opinion that it has no relation to anything which is not intoxicating. I have profound respect for their opinions, not only because they are judges, but because they are unusually able men. It is impossible for me to say that the construction they put upon the statute is not one which a reasonable man might put on it, even although it may not be the one that I should personally have put on it, had I known nothing of their views.

It is, moreover, very important that this act shall be uniformly construed, and that it shall mean the same thing in Maryland as in New York. Moreover, the error committed in sustaining the demurrer can be much more speedily and conveniently corrected than the opposite mistake. I shall therefore sustain the demurrer. What is the practical effect of so doing? It is merely this: Until the Supreme Court decides differently, prosecutions are not likely to be instituted in this district against any man for selling any fermented or vinous liquor which is not intoxicating. If he sells any that is intoxicating, he breaks the statute, and can and I suppose will be immediately prosecuted. It may be well for all to bear in mind that I have not decided, nor, so far as I know, has any one as yet decided,

that 2¾ per cent. beer is not intoxicating. All that has been determined on that question is that the affidavits presented by the brewers in New York that it is not were strong enough to induce the United States court to restrain the collector of internal revenue from refusing to sell stamps, etc., to the brewers of that beverage. If any one makes or if any one sells it, and the jury shall determine that what he made or sold is intoxicating, he will be liable to the penalty, and is as liable, I take it, in New York, as anywhere else.

Moreover, if the Supreme Court shall ultimately decide that the government's contention is right, any one who now sells any beer containing one-half of 1 per cent. or more of alcohol will be then subject to indictment for everything he has done in that respect since July 1st. I do not know that any one is forced to sell such beer, or to make it, and if he takes the chance, and sells it to make money by so doing, and the Supreme Court concludes that he has broken the statute, he has no claim to special leniency of treatment.

JONES v. ILLINOIS CENT. R. CO. et al.

(District Court, S. D. Mississippi, Jackson Division. September 25, 1919.)

No. 6739.

DEPOSITIONS ⟸56(4)—SUPPRESSED FOR INSUFFICIENCY OF NOTICE.

Two depositions of plaintiff in an action in Mississippi, taken at El Paso, Tex., suppressed for want of sufficient notice, either under Rev. St. § 863 (Comp. St. § 1472), requiring "reasonable notice," or under Code Miss. 1906, § 1927, requiring 10 days' notice; the first having been taken on 2 days', and the second on four days', notice.

At Law. Action by R. L. Jones against the Illinois Central Railroad Company and the Pullman Company. On motions of defendants to suppress depositions. Motions sustained.

R. H. & J. H. Thompson and Wells, May & Sanders, all of Jackson, Miss., for movants.

J. W. Cassedy, of Brookhaven, Miss., and L. M. Burch, of Jackson, Miss., contra.

HOLMES, District Judge. The issues in this case having been made up, the plaintiff's attorneys took two depositions of the plaintiff himself, and the motions of the defendants are to suppress them. There are several reasons why these depositions should be suppressed, but the principal and insuperable defect which pertains to both of them is the unreasonably inadequate notice under which they were taken.

The record discloses that the first deposition was taken on May 2, 1918, in El Paso, Tex., pursuant to notice given attorneys for defendants in Jackson, Miss., on the 30th of April, 1918; a commission to take this deposition having been issued by the clerk on the same day the notice was served, thereby depriving defendants of an opportunity to file cross-interrogatories to accompany the commission.

Without explanation, a second deposition of the same witness was taken on May 7, 1918, pursuant to a similar notice given on May 3, 1918, which informed defendants' attorneys that the commission would be issued the next day. The notice to take the first deposition was not withdrawn, modified, or referred to in the notice to take the second.

It is clear that in ordinary circumstances the notice given in each instance was wholly insufficient; but it is contended that the emergency of the witness being upon his deathbed authorized the depositions to be taken upon a shorter notice than is ordinarily required. The right to take the deposition of a witness is not of common-law origin, but is purely statutory. We must therefore look to the statutes for both the source and limit of the grant of authority to take depositions in this case.

The federal act is found in Revised Statutes U. S. § 863 (Compiled Statutes, § 1472). It requires "reasonable notice" in all cases, except, whenever the giving of such notice is impracticable, "it shall be lawful to take such deposition as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct." The notice given in this case was unreasonably short, unless there was "'urgent necessity," in which case the plaintiff should have applied to a Circuit or District Judge of the United States to direct what would be a reasonable notice under the special circumstances. This was not done.

It is, however, provided by Act March 9, 1892, c. 14, 27 Stat. 7 (Compiled Statutes, § 1476), that:

"In addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the District and Circuit Courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held."

Under the laws of Mississippi, provision for taking depositions of witnesses is made by sections 1927 and 1928 of the Code of 1906; the former section applying to "witnesses in this state," and the latter to "any witness absent from or residing out of the state." Under both sections 10 days' notice is required; but under section 1927, which applies only to depositions of witnesses in this state, in cases of emergency, to be expressed in the notice, shorter notice shall be sufficient.

Both of these depositions were of a witness absent from the state, and in such cases the requirement of 10 days' notice is absolute and mandatory, without any provision for a shorter notice in cases of emergency. The 10 days' notice was not given, and therefore the depositions were not taken "in the mode prescribed by the laws of the state."

It is therefore apparent that neither the state nor federal statutes can be invoked in support of either deposition, and the motions to suppress will be sustained.

In re ERIE LITHOGRAPH CO.

(District Court, W. D. Pennsylvania. January, 1919.)

BANKRUPTCY ⊂=188(1)—MACHINERY IN PLACE COVERED BY MORTGAGE OF PLANT.

Machinery placed in its lithographing plant by bankrupt under bailments or leases, with an option to purchase, but title reserved in the bailors, *held*, as against the trustee and creditors, to pass under a mortgage of the plant and machinery therein; the rights of the bailors not being involved.

In Bankruptcy. In the matter of the Erie Lithograph Company, bankrupt. On question certified by referee. Order of referee reversed.

George M. Mason, of Erie, Pa., for trustee.
Lewis M. Alpern, of Pittsburgh, Pa., for mortgagee.

ORR, District Judge. The referee has certified to this court, at the instance of an assignee of one of the mortgages hereinafter referred to, the following question:

"Whether, where more than four months prior to proceedings in bankruptcy the bankrupt corporation procured certain machinery, equipment, etc., used in the operation of their plant, which said property was held under bailment or leases from the owners thereof, the said bailment or leases providing for payment of certain rental for a specified term at the expiration of which said property was to be returned to the bailors or lessors, coupled with an option to buy at a price stipulated, and said property was placed on premises covered by a mortgage or mortgages, which said mortgages contained a clause that it should be a lien on all machinery, fixtures, equipment, etc., then on the premises or thereafter to be acquired by said mortgagor, such property so leased becomes subject to the lien of said mortgages."

It seems clear that the answer to this question depends upon the person who makes the inquiry. The mortgagor and those who succeed to the title of the mortgagor would not be entitled to an answer in the negative, whereas the paramount owners of the property (to wit, the bailors), against whose rights the mortgagor attempted to pledge the bailed property, would be entitled to an answer in the negative. The answer given by the referee was an answer to the trustee in bankruptcy of the mortgagor, and therefore a successor to the mortgagor's title and was in the negative. As we shall see, the referee was in error.

The particular mortgage before the court was executed and delivered on the 23d of January, 1917. It covers the real estate, describing the same by metes and bounds, after which there follows this language:

"Having erected thereon a large brick building, and two smaller buildings, together with engines, boilers, elevators, and such shafting wire, etc., as are attached to the buildings, also containing machinery, equipment, and fixtures constituting the plant of Erie Lithograph Company together with the land, buildings, machinery, fixtures, and property of Erie Lithograph Company, now owned or which may be hereafter acquired by it."

At the time of the execution of the mortgage there were on the premises, constituting part of its plant, certain rotary lithograph presses, certain electric motors, and other property, all of which has been delivered to the mortgagor under contracts of bailment, commonly designated as leases, which provided for payments of rentals from time to time, and with the privilege of purchase after the rentals had been paid. The several bailors, after the institution of the proceedings in bankruptcy, presented their several petitions to have the trustee return the several subjects of bailment, or pay the balance of rental which might be due under the respective contracts. The referee has made an order directing the trustee to sell the presses and other property, which were the subjects of bailment in the several leases, and this, notwithstanding objection by the assignee of said second mortgage.

It is perfectly clear, under the law of Pennsylvania, that if the presses and other property had been purchased outright by the Erie Lithograph Company, in such case they would be embraced within the terms of the mortgage. See In re East Stroudsburg Glass Co. (D. C.) 247 Fed. 614; In re Beeg (D. C. Pa.) 25 Am. Bankr. Rep. 572, 184 Fed. 522, and authorities referred to in said cases. It is also perfectly clear that if all the sums specified to be paid as rentals in the different contracts of bailment had been paid, and the corporation had elected to purchase the bailed articles prior to the date of the mortgage, the mortgage creditor would have been entitled to hold the same as against any subsequent creditors of the mortgagor, and as against the bailors themselves.

Inasmuch as there is no question of preferential or fraudulent transfer in this case, the general creditors of the bankrupt have no standing to impeach the validity of the mortgage; nor has the trustee in bankruptcy such standing, because, under the amendment to the Bankruptcy Law, passed June 25, 1910, he is vested only with rights, remedies, and powers of creditors. Subsequent creditors could not enforce any remedies by levy upon property of the bailors, because, as between such creditors and the bailors, the bailors have a title paramount to that of the bailee. As to such creditors, the bailed chattels are subject to the mortgage on the printing plant, although, as to the bailors, such chattels might not be subjected to the mortgage without their consent.

The case of Hill v. Sewald, 53 Pa. 271, 91 Am. Dec. 209, was a case which was brought to the attention of the learned referee, and was relied upon by the attorneys for the trustee as one in support of the trustee's position. The facts in that case are briefly as follows: The Sewalds conveyed to Snodgrass a piece of ground on which was a steam mill, and took a mortgage from him for a balance of purchase money. The boilers in the mill, becoming worn out, were removed, and one Hill, by agreement with Snodgrass, placed some boilers belonging to himself in the mill, under an agreement that he was to be paid $4 a month for their use and have the right to remove them whenever he pleased. The boilers remained attached to the mill and

continued to be used as part of its motive power for some years, when the premises were sold by the sheriff and repurchased by the Sewalds upon a judgment recovered by them for the balance due on the mortgage. At the time of the sheriff's sale, notice was given to the bidders of Hill's claim. Hill subsequently demanded his boilers from the purchasers at sheriff's sale, who were the original mortgagees, and upon their refusal brought his suit. The court below entered judgment for the defendant, holding that Hill could not maintain his action. The Supreme Court reversed.

It is apparent that the controversy in Hill v. Sewald was not between creditors of the bailee, but was between the mortgagees and Hill, whose ownership of the boilers was paramount to any title of the mortgagor. So, also, Case v. L'Oeble (C. C.) 84 Fed. 582, which was also brought to the attention of the referee, and was relied upon by counsel for the bankrupt in this court, was an action of replevin brought by the paramount owner against one taking title under a mortgage.

While it is a general rule that the intent of the parties to a contract of bailment, as set forth in said contract, must be controlling as between them, no case has been brought to our attention holding that the intent of a mortgagor which embraces within its mortgage the subject-matter of the bailment can be questioned by any person, except by the other party to the contract of bailment. The situation is somewhat analogous to a situation where a mortgagor does not own the real estate which is the subject of his mortgage. No subsequent creditor of the mortgagor could impeach the interest of the mortgagee under his mortgage. The paramount owner alone could defeat the mortgagee's title.

The bailors in the case at bar have received most of their rentals. They have filed petitions with the referee, asking for the return of their property, or the payment of the balances due. It was stated at the argument in this court, and not denied, that these bailors were all willing that the mortgagee, upon payment of the balances due, should have such benefits as the mortgagor might have had, had the rentals been paid in full. Equity seems to suggest that the mortgage creditor should be accorded the privilege of having the bailed chattels included within the security of the mortgage, because such was the intent of the mortgagor, as ascertained from the terms of the mortgage, and because, under the evidence in the case, the mortgagee believed that the chattels were security for the mortgage debt, because they were parts of the plant necessary to the operation thereof.

The certified question, therefore, inasmuch as it may be treated as the question asked by the trustee, must be answered in the affirmative; the decision of the referee must be reversed, and his order directing sale of the bailed chattels set aside. Inasmuch as his order of sale covers other property in addition to the chattels subject to the bailment, if a specific order is needed separating those chattels which should be sold and those which should not be sold, such order will be made on presentation, after notice.

OTTAWA TRANSIT CO. v. 261,000 BUSHELS OF WHEAT.

(District Court, W. D. New York. June 9, 1919.)

No. 1049.

1. SHIPPING ⟸174—CONSIGNEE'S LIABILITY FOR UNREASONABLE DELAY IN DISCHARGE OF VESSEL.
The consignee of a grain cargo, required to unload the vessel, is bound to exercise due diligence under the circumstances and the custom of the port to discharge the vessel as speedily as possible and is liable for her unreasonable detention.

2. SHIPPING ⟸184—IN ACTION FOR NEGLIGENT DETENTION OF VESSEL BY CONSIGNEE BURDEN IS ON LIBELANT.
In a suit against a consignee to recover for delay in discharging, the burden is on libelant to establish negligent detention beyond the time when, under the custom of the port the vessel would ordinarily be unloaded, but respondent may show special circumstances excusing the delay.

3. SHIPPING ⟸177—CONSIGNEE LIABLE WHERE DELAY CAUSED BY HIS NEGLIGENCE.
Consignee of an export cargo of wheat *held* liable for detention of the vessel for discharging, where her turn, under the custom of the port, came seven days before she was actually discharged, and the delay was because consignee made no effort to obtain cars for reshipment and in consequence the elevators would not receive the wheat.

In Admiralty. Suit by the Ottawa Transit Company, owner of the steamer Normania, against 261,000 Bushels of Wheat, ex cargo of the steamer; the Norris Grain Company, claimant. Decree for libelant.

Goulder, White & Garry, of Cleveland, Ohio, and Brown, Ely & Richards, of Buffalo, N. Y. (Harvey D. Goulder, of Cleveland, Ohio, and John B. Richards, of Buffalo, N. Y., of counsel), for libelant.

Clinton, Clinton & Striker, of Buffalo, N. Y., for claimant and respondent.

HAZEL, District Judge. This is a proceeding in rem to recover damages for unreasonable delay in unloading the freight steamer Normania of her export cargo of grain, consisting of approximately 261,000 bushels. The Normania arrived at Buffalo May 6, 1916, at 8 o'clock in the evening, and on the next day consignee's agent, as is customary, was immediately notified by the vessel's agent that the vessel was ready to unload; but unloading did not begin until May 13th when 44,000 bushels only of the grain were taken from the steamer's hold, the balance of the cargo being unloaded May 19th, at 7:40 in the morning.

The libel originally pleaded that under the agreement the carrying steamer was entitled to a stipulated sum for detention beyond four days; but this allegation was not insisted upon at the hearing, and the trial proceeded upon another allegation, namely, that the claimant, Norris Grain Company, was required to discharge the cargo within a reasonable time after the steamer's arrival and notice of delivery or

readiness to discharge, in accordance with the custom of the port, and that its failure so to do was negligence on its part. The answer set forth that other vessels had arrived in port ahead of the Normania, that the custom was to unload the grain at elevators, and that because of continued congestion at the elevators the claimant was unable to procure prompt discharge of the cargo in question. It was also stated that all possible effort was made to secure an earlier discharge, and that under the custom of the port the consignee was entitled to a reasonable time for discharging, depending upon the facilities of the port. Accordingly the issue presented is whether due diligence was exercised by the consignee in the discharge of the grain consigned in care of Mr. Strassmer, agent for the Connecting Terminal Elevator at Buffalo, who was to procure an elevator for unloading and to arrange for rail shipment to the seaboard.

[1, 2] In the notice of arrival by the agents of the steamer to Mr. Strassmer, the designation of an elevator was requested, but nothing was done until May 7th, when, as heretofore stated, a portion of the grain was unloaded at the Connecting Terminal Elevator, while the final unloading was at the Export Elevator. The rule of law applicable here is unlike that applied in cases of demurrage, wherein the charter party establishes the rights of the parties, but to exonerate from liability for detention it must be shown that under the circumstances due diligence was exercised to unload the vessel so as not to detain her unreasonably. The consignee was required to furnish the place of unloading to discharge as speedily as possible after notice of arrival, and to conform to the usage of the port in relation thereto, or suffer damages for delaying the carrying vessel. Fulton v. Blake, Fed. Cas. No. 5153; Williscroft v. Cyrenian (D. C.) 123 Fed. 169. With this rule the parties are in agreement; the difference between them arising over the question of whether the libelant was required to establish negligent detention beyond the time when, under the custom of the port, the steamer would ordinarily be unloaded, or whether the burden of proof rested upon claimant to show reasonable dispatch in so doing.

Libelant, to recover, must prove negligence. The burden of proof can scarcely be said to shift though claimant in view of the circumstances may justify its conduct or apparent negligence in detaining the steamer. The rule is stated in Heinemann v. Heard, 62 N. Y. 455, and in Cowen Co. v. Houck Mfg. Co., 249 Fed. 285, 161 C. C. A. 293, that during the progress of the trial the burden does not ordinarily shift from plaintiff to defendant, even though the prima facie case may require countervailing testimony of a substantial character to prevent recovery on a prima facie case.

[3] Did the circumstances excuse the claimant from responsibility for the delay in unloading? It is true that from April 25th to May 6th, inclusive, 104 vessels carrying and transporting grain arrived in port, and there no doubt was congestion in the elevators at the time of the arrival of the Normania; such congestion continuing for several days. The custom of the port entitled vessels to be unloaded at the

elevators in turn, those first arriving at the break wall having the right to discharge ahead of later arrivals. While there were a number of vessels ahead of the Normania waiting their turn to unload on May 6th, when she came into the river, yet all were discharged by May 12th; and it is shown that 55 grain carrying vessels arriving after the Normania were unloaded before May 19th. While they all suffered delay, some as much as six days and ten hours, none was detained as long as the Normania. If the Normania had been unloaded in turn, she would no doubt have been discharged not later than May 13th.

The consignee's agent, Mr. Strassmer, attributed the delay, or the greater portion thereof, to congestion of the elevators, but this view is unacceptable, since it appears that later arrivals were unloaded ahead in violation of the rules of the port. He testified, true enough, that between May 16th and 17th he at various times inquired at elevators for space, but that space was denied him, where reasons for doing so were assigned on the ground that the elevators were full. But this, as will appear presently, was not the actual reason for rejection.

Why, then, was the Normania delayed in unloading? Any congestion there may have been at the elevators on her arrival concededly did not continue during the entire time of her detention. There is testimony showing that reluctance on the part of the elevators to receive the cargo was due to the fact that no arrangement had been made for transporting it to the seaboard. Because of the war, an unusually large amount of grain was moving through the port of Buffalo at this time with great celerity, the custom being to elevate it from carrying vessels, and almost immediately to release from the elevator an equal amount to be placed on waiting cars for transportation to the seaboard. These in the main were continuous operations, necessitating a constant demand for elevator space, and none of the elevators was desirous of taking into storage such a large quantity of export grain as the Normania had aboard without some assurance as to when it would be relieved of a similar amount. To receive it and store it for any length of time would have seriously interfered with the movement of grain to and from the terminal elevators.

Mr. Rogers, a representative of the vessel, upon the consignee's failure to secure elevator space, made inquiries and learned that none of the elevators would accept the cargo without shipping orders. That such was the fact is not disputed. Upon receiving instructions from the owner of the grain on the night of May 16th, the Export Elevator immediately unloaded the cargo. Presumably if earlier efforts had been made to procure transportation, rail booking at least would have been obtained, and the unreasonable detention of the steamer avoided.

It makes no difference that the Normania's cargo was consigned to a representative of the Pennsylvania Railroad, with the possible expectation that he would furnish cars for forwarding the grain. There was no contract provision for forwarding the grain via the Pennsylvania Railroad to the seaboard. Nor could claimant be relieved from responsibility by notifying the vessel agent to take the "freedom of the port," or procure a place for discharging the cargo. The obligation or duty to furnish such a place was primarily upon the consignee and

the liability arising from failure to exercise reasonable diligence to provide a suitable place for unloading, after notice of arrival, and within the time prescribed by the custom of the port, could not be limited by suggesting that the vessel obtain the unloading facilities.

Importance was attached by proctor for claimant to the existence of a car shortage at Buffalo, at that time on all the railroad lines, which it was alleged made it impossible earlier to transport the grain; but this did not, as contended by libelant, prevent the consignee from making a rail booking, or at least endeavoring to do so. If the elevators had been advised of the probable time of shipment, they could easily have determined whether the cargo would have to be held by them beyond a reasonable time. Nothing whatever was done to procure bookings, and indeed the consignee was without authority to procure transportation. Therefore, I am unable to escape the conclusion that the libelant has fairly established that there was a lack of diligence on the claimant's part which caused the unreasonable detention of the carrying vessel from May 12, 1916 (the date when the steamship Bixby, which arrived only about three hours ahead of the Normania, was unloaded) to May 19th at 7:40 a. m., the time of unloading the Normania. Decree for libelant, with costs, and reference to a commissioner to ascertain the damages.

GOODSPEED v. LAW.*

(Circuit Court of Appeals, Ninth Circuit. September 8, 1919.)

No. 3303.

1. CORPORATIONS ⟨⟩221 — THOUGH FRAUD WAS SHOWN IN ORGANIZATION, RIGHTS OF PARTIES AS TO NOTES EXECUTED WILL BE DETERMINED.
Where there was fraud and misrepresentation in an agreement providing for the forming of a corporation, the fact that the corporation was organized and executed its notes in accordance with the agreement will not prevent a court from adjudicating rights as between the parties themselves, independently of the corporation.

2. PRINCIPAL AND AGENT ⟨⟩175(2)—BANK RATIFYING ACT OF AGENT AFFECTED BY HIS FRAUD IN TRANSACTION.
A bank, which took as collateral to a note a contract by which a sum was to be paid the debtor in 30 days, and appointed the debtor its agent to collect, and afterward accepted in place of the contract notes of a corporation formed under a substituted contract made by the debtor, *held* to have ratified the acts of its agent in making the substitution, and to be affected by his fraud in the transaction, which invalidated the notes as between the parties.

3. PRINCIPAL AND AGENT ⟨⟩172—RATIFICATION OF PART OF UNAUTHORIZED ACT OF AGENT RATIFIES THE WHOLE.
If a principal elects to ratify any part of the unauthorized act of his agent, he must ratify the whole.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Frank H. Rudkin, Judge.

Action at law by Charles F. Goodspeed against Herbert E. Law. Judgment for defendant, and plaintiff brings error. Affirmed.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, Cal., for plaintiff in error.

Pillsbury, Madison & Sutro, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Goodspeed, plaintiff in error and plaintiff below, brought this action to recover from the defendant, Law, upon a statutory liability as a stockholder in a California corporation, the Hydrox Chemical Company of the Pacific Coast, half of the amount of 17 promissory notes. The writ of error is prosecuted from a judgment entered in the District Court by direction of the court to the jury.

The plaintiff alleges the execution of 17 notes, negotiable in form, by Hydrox Chemical Company of the Pacific Coast, to be called the Pacific Coast Company, to the order of a New Jersey corporation, Hydrox Chemical Company, to be called the New Jersey company; that all these notes were transferred before maturity to Irving National Bank of New York, which bank transferred them to the assignors of the plaintiff, Goodspeed; that defendant, Law, was the owner and holder of half of the capital stock of the Pacific Coast com-

pany. The judgment prayed for was for half of the aggregate amount of the notes, or $4,250, with interest.

The defendant, Law, denied that he was the holder of stock in the Pacific Coast company at the time that the indebtedness upon the note was incurred, and set up affirmatively that he was induced to become a stockholder in the corporation because of certain fraudulent representations made to him by the New Jersey company and one Robert M. Hawk, and that the various holders of the notes, and especially the Irving National Bank, had notice of the fraud at the time of the taking of the notes. Goodspeed admitted that he held the notes as the agent for collection of the Irving National Bank.

The facts as admitted and clearly proved upon the trial were in substance as follows:

In May, 1915, and prior thereto, Hydrox Chemical Company, the New Jersey company, had a principal office in New York and an office in San Francisco, with Robert M. Hawk in charge. In May, 1915, Hawk, after negotiating with the New Jersey company for the purchase of the San Francisco branch, made an agreement, dated May 17, 1915, wherein it was provided that the Pacific Coast company agreed to sell and Hawk agreed to buy, through the medium of a new company, the Pacific Coast company for $17,000. The agreement recited that $4,500 of the total purchase price had been received at the time of the execution of the contract, and that the balance of $12,500 should be paid as follows: $8,500 in cash within 30 days, and the remaining $4,000 in five promissory notes, maturing, respectively, at dates between December 1, 1915, and December 31, 1916. Hawk was to cause a new corporation to be organized, Hydrox Chemical Company of the Pacific Coast, and agreed to transfer to the new company his rights under the contract, and that the notes, aggregating $4,000, being the final payment under the contract, should be made by the newly formed company. The New Jersey company was also to receive 10 per cent. of the profits of the new company during the first five years of its operation. After May 17, 1915, Schuyler Lestrade, president of the New Jersey company, applied to the Irving National Bank of New York for a loan of $8,500. Lestrade showed Van Doren, the assistant cashier, the contract which had been made between Hawk and himself as president, and told Van Doren that the money to be borrowed would be repaid to the bank from the $8,500 payment which would become due under the contract within 30 days after the date thereof, which would be on or about June 17, 1915. The loan was arranged for, and the $8,500 borrowed from the bank was credited to the account of the New Jersey company, and a promissory note for $8,500, dated May 27, 1915, was made by the New Jersey company in favor of the bank, due 30 days after date; the terms of the note reciting that it was secured by collateral in the form of an assignment of the $8,500 payment to be due. The assignment, so made as collateral security, is as follows:

"For and in consideration of the payment of the sum of eighty-five hundred ($8,500) dollars to the undersigned, by Irving National Bank, New York, a national banking corporation conducting business in the borough of Manhattan, city of New York, the receipt whereof is hereby acknowledged, the un-

dersigned, Hydrox Chemical Company, a corporation organized under the laws of the state of New Jersey, does hereby sell, assign, transfer, and set over unto the said Irving National Bank, New York, all its right, title, and interest in and to the sum of eighty-five hundred ($8,500) dollars, to become due to the undersigned on or before the 17th day of June, 1915, from one Robert M. Hawk, pursuant to the terms of paragraph 8 of a certain agreement made the 17th day of May, 1915, between the said Hydrox Chemical Company and said Robert M. Hawk, and the undersigned does hereby agree to collect the said sum of eighty-five hundred ($8,500) dollars to become due to it under the contract hereinbefore mentioned, as the agent of the Irving National Bank, New York, but at the cost and expense of said Hydrox Chemical Company, and to promptly pay over the said sum to the said Irving National Bank, New York.

"In witness whereof, the said Hydrox Chemical Company has caused these presents to be subscribed by its president, and its corporate seal to be hereunto affixed, this 27th day of May, 1915. Hydrox Chemical Co., Schuyler Lestrade Pres. [Seal.]"

When the note of May 27th matured in June, it was not paid, and Lestrade told Van Doren that the $8,500 had not been collected. The note was renewed from time to time, and again on August 11, 1915, to mature on August 23d, but was not paid. Lestrade told Van Doren that they were trying to collect, and that J. W. Lestrade was in California representing the New Jersey company in trying to consummate the deal. On August 26th a new note for $8,500, due on demand after date, was made and accepted by the bank. This new note was secured by collateral in the form of notes, aggregating $3,500, made by R. M. Hawk individually, and also the promissory notes of the Pacific Coast company, all aggregating $11,500. Upon some of the latter notes this action is based. The notes were indorsed by the New Jersey company, payee, to Irving National Bank (on August 26, 1915), as security for the loan of $8,500, evidenced by the note dated August 23, 1915; the indorsements being made prior to the maturity of any of the notes in suit.

Upon the assumption that the foregoing facts show a transfer of negotiable notes to the bank before maturity and for value, we must look further into the facts as bearing upon the question of fraud and the knowledge of the bank. After the contract of May 17th between Hawk and the New Jersey company was made, Hawk signed another agreement with the New Jersey company, wherein he recited that he owed the New Jersey company $3,500, and, desiring to satisfy the debt, agreed to pay the company $3,500 in several payments, and deposited as collateral $3,500 of the capital stock of the proposed Pacific Coast company, and also sold and assigned 45 shares of the New Jersey company held by him. The evidence is that Hawk never owned any stock in the New Jersey company, and never paid anything in cash in connection with the sale of the business provided for by the agreement of May 17, 1915. Hawk returned to San Francisco, and in efforts to enlist financial interest wrote to Law on July 31, 1915, stating the substance of his agreement with the New Jersey company, and that he had paid $4,500 on account of the purchase price, proposing a new corporation, of which Hawk should receive 100 shares for the $4,500 he had paid out, and that Law should buy 100 shares for $4,500, and 50 shares should remain in the treasury. Law "accepted"

this proposal. Prior to this, and about June 22d, J. W. Lestrade, father of Schuyler Lestrade, president of the New Jersey company, came to San Francisco with power to act for the New Jersey company. Law testified:

That at a meeting with Lestrade and Hawk, about July 30, 1915, "they stated that the business had net assets of $11,000; that the bills payable and receivable about offset each other; that the business was earning $6,000 a year; and Mr. Lestrade produced a letter and read it, in which they said that the process had been changed, and that the business would then earn $12,000 a year, assuming that there was no increase of business. Mr. Hawk said that the business would increase at least 50 per cent., and they figured the probable profit and discussed the advantages of the business, covering that afternoon and that evening and the next afternoon. That was on July 31, 1915. Mr. Lestrade and Mr. Hawk repeatedly emphasized the fact that I should pay cash to these people for their good will, and I did not want to do that. They said that the business earned enough to pay it, and I suggested that would be the best way to do; and they urged then, in view of the fact that Hawk had paid $4,500, I should at least pay him that much. Hawk said that was all the money he had in the world, and that the business would certainly be even more than calculated, and as an evidence of his confidence he had operated it for a year, and he had put every dollar he had in it, and had taken a chance of taking somebody else to join him. Mr. Hawk was then manager of the San Francisco branch. At that time Mr. Lestrade produced a letter, of which he read a part to me. The part which he read to me was upon the subject of increase of earnings that would accrue upon the change of the process. He did not leave the letter with me, nor did I read it, nor was there anything which he read to me with respect to Mr. Hawk. * * * He extolled Mr. Hawk in his ability and his judgment, and what a fine man he was, and what a splendid opportunity it was, and how dependable the business would be in his hands. At that time I did not see the agreement of May 17, 1915 (Plaintiff's Exhibit 21). It was not shown to me at that time, and I have never seen it until now. Nothing was said at that time with reference to there being any other agreement than the agreement of May 17, 1915, which purported to sell the business to Hawk for $17,000, and purported to show that $4,500 had already been paid, and nothing was said about that not being the only agreement between the parties. As the result of this conversation, I finally agreed to become interested in the matter as expressed in the agreement of July 31st."

When Law agreed to take an interest, the paragraph of the agreement between Hydrox Chemical Company and Hawk, dated May 17, 1915, relating to payment, was amended by reciting that, $4,500 having been received, there remained $12,000 to be paid as follows: $500 cash, and $12,000 in sums of $500 per month, beginning with October 31, 1915. It was also agreed that the New Jersey company was to receive 5 per cent. of the net profits of the new corporation for five years, and that the time of the contract should be extended, so as to enable the new company to form a corporation and carry out its obligations. This agreement was signed by Hydrox Chemical Company, J. W. Lestrade, and Robert M. Hawk. Law said that he believed the representations made to him, and relied upon them in entering into the arrangements, and said:

"I would not have entered this agreement, if I had not believed and relied upon each and every one of those representations."

Thereafter experts examined the books and found that the Pacific Coast company owed the Wells Fargo Bank $2,000, and Law testified

that he then first learned that the $4,500 had not been paid by Hawk, and that the business, instead of making $6,000 or more per annum, had lost approximately $6,000 during the current year. Law called upon Hawk and told him of the discoveries, and that he would have to adjust matters. Hawk said he would telegraph and have the New Jersey people rescind the agreement and make it right. Law testified that Hawk suggested the possibility of a mistake in the books, and asked that a certified accountant be appointed; that thereupon certified accountants were appointed, and made the same statements as had previously been made; that thereupon Hawk telegraphed to the New Jersey company (September 18, 1915), informing Lestrade that the books did not bear out the statements which they—Hawk and J. W. Lestrade—had made to Law, and that his own investigation convinced him that Law's demand for "cancellation of contract and return of notes" should be complied with, and that suit would be commenced unless action was had immediately. It appears that the New Jersey company did nothing about the matter, and the corporation went into the hands of a receiver. Law surrendered his stock to the company, but never received anything for $4,500 in cash which he had put in.

About November 26, 1915, the Irving Bank telegraphed to Law that it was the owner of the notes and wished payment. Law replied that he was not a stockholder of the Hydrox Chemical Company when the indebtedness was incurred. Thereafter, on December 6th, the bank was notified that the notes had been obtained through fraud, and was warned not to transfer them to a bona fide holder. The San Francisco business was later sold out by the creditors, and matters ran along until about November 20, 1916, when the bank, having announced that it would sell the notes at auction on November 22d, was notified by the Pacific Coast company, through its attorneys, that it protested against the sale of the notes upon the ground that the notes had been executed and delivered through fraud and fraudulent representations. On November 22, 1916, all of the notes of the New Jersey company were sold by the bank at auction for $30, and all of the Hawk notes, aggregating $3,500, were sold for $15.

Law testified that it was not until January or February, 1917, that he discovered the document of May 27, 1915, and the fact that the Hydrox Chemical Company had been acting as the agent of the bank, and that the $4,500 had not been paid. Schuyler Lestrade, president of the New Jersey company, testified that when the $8,500 note became due, on August 11, 1915, he called upon Mr. Van Doren, of the bank, and showed to him the agreement signed by J. W. Lestrade, representing the New Jersey company, and Hawk, with Law as a witness, and stated that the notes covering the payment would be received when the charter of incorporation of the Pacific Coast company was issued. He testified that he explained the situation in detail to Van Doren and told him of Law's interest in the matter. He also said that between August 21st and 23d he received a telegram from Hawk that the notes of the Pacific Coast company had been mailed, and that before August 23d he showed this telegram to Van Doren and asked him to hold the $8,500 note due August 23d, until the notes arrived; that on August

25th or 26th he received the 17 notes made by the Pacific Coast company, which are the notes in suit, and delivered them to Mr. Van Doren on August 26th as collateral for the loan. Van Doren testified that, if he had known of the facts on May 27, 1915, he would not have loaned the $8,500; that he would not have loaned the money if he had not thought that the $4,500 would be paid in cash. He said that on August 11th he told Lestrade that he was very much surprised to find that the payment of $4,500 had not been made, and that he had been deceived. At that time, August 11th, Van Doren read the amendatory agreement and the letter of July 31st from Hawk to Law, "accepted" by Law, setting forth the matter of the proposed corporation, and that Hawk had paid $4,500 on account of purchase. It is evident that Van Doren then knew that the parties must have been deceiving Law with respect to the payment of $4,500, as they had deceived him with respect to such payment. Notwithstanding this, however, he concluded to accept the notes of Hawk for $3,500 as additional security for the $8,500 indebtedness due August 11th.

While these things were happening in New York, the new corporation was being formed in San Francisco. The notes were issued by the new concern, and Law became a stockholder following the arrangements made on July 31, 1915. Van Doren says that he saw the telegram from the Pacific Coast company stating that the "deal" was "all completed" and that the notes here involved had been forwarded to New York; and of course he knew of the delivery to and acceptance of the notes by the bank, in addition to the notes of Hawk, as collateral security for the note for $8,500. No new money was advanced by the bank. The last note was a renewal of the note for the same amount which had been given on May 27, 1915, when the original loan was made.

The plaintiff states the material question to be whether fraud was practiced upon the defendant, and whether the Irving National Bank was a holder in due course of the notes in suit, and the specifications of errors are in the main predicated upon these points. The theory of plaintiff is that the defendant is liable under article 12, § 3, of the Constitution of California, which provides that a stockholder of a corporation shall be personally liable for such proportion of all of its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him bears to the subscribed capital stock or shares of the corporation. Section 322 of the Civil Code of California also provides that a creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claims or debts for which each defendant is liable and render separate judgment against each in conformity therewith.

It being admitted that the Pacific Coast company on August 2, 1915, issued the notes set forth in the complaint, and it being alleged that at the time the indebtedness was incurred defendant held half of the capital stock of the corporation, namely, 100 shares, plaintiff by his

action seeks to hold him liable for one-half of the amount of the notes, together with interest.

In our consideration of the rights of the parties, it has become clear that Hawk and Lestrade represented that Hawk had paid $4,500 cash on the purchase price of the Pacific Coast properties, and that the business was earning $6,000 each year. Equally clear is it that the fact that the Pacific Coast company owed $2,000 to a bank in San Francisco was suppressed. The truth was that Hawk never had paid $4,500 in cash, and the business had never earned $6,000 per annum. These false representations were made by Hawk to Law, with the knowledge of and in the presence of Lestrade, Sr. Plaintiff did not call Hawk or Lestrade to contradict these facts. Law's testimony, however, was corroborated in several ways. As instances of corroboration, there is the agreement of July 31st, amending the original agreement; the amendment setting forth that $4,500 had been paid. Another instance is the letter written to Law by Hawk on July 31st, wherein Hawk wrote that he had paid $4,500 on account of the purchase price. There is also Hawk's telegram of September 18th to Schuyler Lestrade, advising him that the representations "upon which the trade was made," referring evidently in part to the profitable nature of the business, were untrue; also Hawk's telegram to Lestrade, dated September 20th, wherein he advised Lestrade that the representations to Law as to the business being profitable were untrue. But, furthermore, there is Van Doren's testimony that he had been deceived by the statement that $4,500 had been paid in cash, and his declaration that he would not have loaned the money if he had known the truth. We also have the evidence that Law, about September 18, 1915, within less than a month after he had become a stockholder, demanded a rescission of the plan and soon thereafter surrendered his stock.

[1] It is argued that it was incumbent upon Law to make independent investigations into the condition of affairs. But, if he had made such an investigation, it is doubtful whether he would have discovered that $4,500 had not been paid in cash; nor is it at all probable that he would have found from the books that $2,000 was owing to the Wells Fargo National Bank. But, aside from this, Law had the explicit letters of Hawk, written in June and July, not only stating figures, but inclosing statements of bills payable and receivable and stock on hand. Apparently he had no reason to doubt the integrity of Hawk, or to question the accuracy of the financial statements made by him. Spreckels v. Gorrill, 152 Cal. 385, 92 Pac. 1011; Macdonald v. De Fremery, 168 Cal. 189, 142 Pac. 73. Law testified very positively that he relied upon the representations, and but for them would not have gone into the transaction. As against his evidence and that in support of it, we think there was nothing of sufficient strength to justify a finding in favor of plaintiff below. Therefore, taking it as established that there was fraud and misrepresentation in the agreement, which provided for forming a corporation and executing the plan, the fact that a corporation was organized and that, when organized, the corporation issued its notes, will not prevent the court from

adjudicating rights as between the parties themselves independently of the corporation. Cornell v. Corbin, 64 Cal. 197, 30 Pac. 629; California-Calaveras Mining Co. v. Wells, 170 Cal. 285, 149 Pac. 595.

[2] But, referring again to the agreement (already set forth) of May 27, 1915, between the bank and the New Jersey company, and to the evidence, it appears that no agreement was made between the bank and the New Jersey company, after the 27th of May, which changed the agreement of that date. It will be remembered that Lestrade, president of the New Jersey company, told Van Doren of the effort the company was making to collect the money, and that J. W. Lestrade, representative of the corporation, was in California and he thought would be successful. It was after the arrangements had been made with Law on July 31st, and after the papers which were then obtained had been taken to New York that Schuyler Lestrade called upon Van Doren and showed him the amendatory agreement and the letter, went over the situation in detail, showing him the changes which had been made in the original agreement, and what the corporation would do when formed. Van Doren recommended to Lestrade that indorsements should be made upon the notes, if possible; and it was after the formation of the corporation, and the issuance of the notes, and the delivery to the New Jersey company in New York, that the New Jersey company turned the notes over to the bank, which in turn accepted the notes in place of the $8,500, which it was to have received. When the bank made the New Jersey company its agent, it but established the relation which it meant to establish. The bank held the agreement of May 17th in a pledge relationship for the payment of $8,500, and it was proper that an agent should be designated to collect the money to be due under the agreement, and, as a business matter, that there should be no cost of collection accrue to the bank.

[3] Counsel for plaintiff put stress upon the contention that the only reasonable interpretation of the instrument of assignment or pledge is that the parties did not thereby intend to vest absolute ownership of the claim for $8,500 against Hawk in the bank, but only to create a lien thereon in its favor, and that the agency provision was meant, not to create the usual conventional relationship of principal and agent, but simply to make clear the duty of the pledgor to devote payment to the satisfaction of the debt secured. We are unable to sustain this view, for it conflicts with the usual rule that the intention of the parties must be gathered from the terms of the instrument they have made. Of course, the rule is subject to qualifications, and relationships between parties may be considered as an aid to interpretation, and a transfer absolute in form may be shown to be but a security. But there is no uncertainty or ambiguity in the instrument under consideration. The language is plain and simple, and the duty of the court in construction of the instrument is to declare what, in terms and substance, is contained in the writing. We are therefore forced to the view that the New Jersey company, as agent, obtained for the bank the promissory notes here involved, and the notes were

delivered to the bank, which now holds them and would impose upon the defendant liability under the stockholders' liability statute of California, notwithstanding the fact that it had full knowledge of all the material facts surrounding the making of the notes. The position of the bank, therefore, is like that of one who, upon discovery of the facts, holds onto a contract made by his agent, and asserts such rights as he may have arising from the unauthorized act of the agent. This he cannot do, for as long as he insists and relies upon the contract he cannot escape the consequences of ratification by showing that he was not fully informed of its terms and conditions. 2 C. J. 513. In La Grande National Bank v. Blum, 27 Or. 215, 41 Pac. 659, Judge Bean, speaking for the Supreme Court, said:

"No rule of law is more fundamental than, if the principal elects to ratify any part of the unauthorized act of an agent, he must ratify the whole. He cannot accept that part which is favorable to himself, and repudiate the remainder. As said by Mr. Justice Story: 'The principal cannot, of his own mere authority, ratify a transaction in part, and repudiate it as to the rest. He must either adopt the whole or none.' Story, Agency, § 250. And 'from this maxim,' says Chief Justice Smith, 'results a rule of universal application that, where a contract has been entered into by one man as agent of another, the person on whose behalf it has been made "cannot take the benefit of it without bearing its burdens. The contract must be performed in its integrity."' Rudasell v. Falls, 92 N. C. 222. Indeed, reason, as well as authority, is all one way on this question. * * * Now, in this case, if the cashier of the bank exceeded his authority in making the contract with the defendants set up in the answer, and in accepting the note in suit, the plaintiff was not bound thereby; but it was bound to take the contract in its entirety, or not to recognize it at all. It cannot affirm that part of his act which is of advantage to it, and repudiate the rest." Johnston Harvester Co. v. Miller, 72 Mich. 265, 40 N. W. 433, 16 Am. St. Rep. 536; Wheeler & Wilson Manufacturing Co. v. Aughey, 144 Pa. 398, 22 Atl. 668, 27 Am. St. Rep. 638.

It is also argued by the plaintiff that it was error in the trial court to direct a verdict, even though the fraud pleaded by the defendant had been established as a matter of law by the proof, for the reason that, although Law was induced to enter into his contract of subscription by fraudulent statements, as alleged, nevertheless such fraudulent statements cannot constitute a defense to an action against a stockholder for a statutory liability on the notes. But, as our opinion is that the bank ratified the arrangements made by the New Jersey company by the acts done during August, 1915, we need not consider that question.

The judgment is affirmed.

WATTSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 8, 1919.)

No. 3260.

1. WATERS AND WATER COURSES ⊂=130—DRAINAGE DISTRICTS ARE OWNERS OF WATERS COLLECTED IN CANALS OR DITCHES.
Under Drainage Act of Arizona, providing for the organization of drainage districts, with power to acquire lands for canals and ditches, and expressly that the legal title to all property acquired by a district under its provisions, "including all waters collected in, controlled, or handled by means of any drainage works constructed or acquired," shall immediately vest in the district, the waters in such a canal or ditch are not subject to private appropriation under the laws of the state, but may be sold or otherwise disposed of by the district to carry out the purposes of its organization.

2. WATERS AND WATER COURSES ⊂=130—PERCOLATING WATERS NOT SUBJECT TO APPROPRIATION.
Percolating waters are not public waters subject to appropriation under the laws of a state relating to water rights, but when collected in a canal or ditch become the property of the owner of such canal or ditch.

Appeal from the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Suit in equity by the United States against Henry A. Wattson and Carroll A. Spicer. Decree for complainant, and defendants appeal. Affirmed.

Haas & Dunnigan, of Los Angeles, Cal., and Wright & Darnell, of Tucson, Ariz., for appellants.

Thomas A. Flynn, U. S. Atty., and John H. Langston, Asst. U. S. Atty., both of Phœnix, Ariz.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is an appeal to reverse a decree enjoining defendants from diverting or using any water flowing in a drainage canal of drainage district No. 1, Maricopa county, Ariz., and from interfering with the unobstructed flow of the waters in the canal.

The United States owned lands in the Gila River Indian reservation in Arizona. Drainage district No. 1, Maricopa county, Ariz., was organized in October, 1914, under the laws of Arizona. Chapter 5, title 55, pars. 5427–5509, Civil Code of Arizona, 1913. It is alleged that during February, 1916, the district began the construction of a drainage canal near a described point in Maricopa county, and continued the construction in a direction through the lands of the defendants; that the canal was completed about May, 1917; that from the time of the beginning of construction water began to accumulate in and flow in the drainage canal upon the lands of plaintiff, and that the canal was built through the lands of defendants during June and July, 1916; that prior to June and July the district bought from the defendants

and their predecessors in interest a right of way for the canal across the lands of the defendants; that such conveyances transferred title in fee for such rights of way for drainage; that the district was constructed to drain surplus overflow and percolated waters from the described lands of the defendants, and other lands owned by persons above and below the lands of the defendants; that by the laws of Arizona, heretofore cited, all the waters located in and controlled by means of the drainage canal constructed by the district were dedicated and set apart to the uses and purposes of the drainage district and that upon commencement of the construction, the drainage canal vested in the drainage district. Plaintiff further alleged that in September, 1917, the United States contracted with drainage district No. 1 and purchased and became the owner of all the water collected in, controlled, or handled by means of the drainage canal in district No. 1; that the lands of the United States were arid, and are occupied by the Pima Indians, and that some 2,500 acres have been leased; that about June, 1917, the occupants of the lands began to build ditches to convey the waters described from the drainage canal from the district to and upon the lands for purposes of irrigation, and have irrigated many acres and planted crops and used all the waters collected in the drainage canal for irrigation; that about May 1, 1918, the defendants Wattson and Spicer diverted certain of the waters flowing in the drainage canal described, and that all the land owned by the defendants and upon which the water so diverted from the drainage canal was used, is within and a part of drainage district No. 1.

The agreement between the drainage district and the United States, acting through the commissioner of Indian Affairs, after reciting that the district has constructed and is now operating a drain ditch for the purpose of draining the excess ground water from the agricultural land within the district, and that the outflow of the drain ditch is being maintained across certain lands in the Gila River Indian reservation, sets forth that whereas the District desires to secure from the United States a right in perpetuity to maintain and operate a drain ditch across the lands mentioned, with a right in perpetuity to discharge the waters collected by the drain ditch as then and thereafter constructed, and to be released from all liabilities which may arise by reason of construction and operation of the ditch across the Indian Reservation, and whereas the United States desires to control the use for irrigation of all water collected by the drain ditch, it is agreed that the district grant to the United States the right to the use of the water collected by means of the drain ditch and drainage work upon the condition that the United States will not obstruct the discharge and outflow of water from the end of the ditch at a point described in the contract. In consideration for this grant the United States granted and conveyed to the district a right of way across certain lands in the Indian reservation on which to maintain and operate the said drain ditch, and agreed to release the district from liability by reason of the construction of the drain ditch within the reservation without having obtained the necessary authority.

Defendants answered that since May 1, 1917, they had diverted water from the drainage canal, and pleaded that on the 9th of February, 1917, they filed notice of appropriation for 200 inches of the waters diverted by the drainage ditch, and again on April 20, 1917, also appropriated, pursuant to paragraphs 5837 and 5838 of the Revised Statutes of 1913 of Arizona, and claimed 200 inches additional, and used the waters for irrigation upon the lands belonging to the defendants. Defendants deny all obstruction of use by the United States.

At the hearing before the court it appeared that the Department of the Interior, through the Indian agent, also filed, claiming an appropriation of the waters, but that such filing was subsequent to the filing of Wattson and Spicer. No question is made over the fact that the lands within the drainage district had become so saturated with water that they were no longer useful for agricultural purposes until after the construction of the drain canal through them; but appellants argue that the district had no power to acquire, hold, or dispose of, or deal in water for irrigation or for any purpose other than drainage; that the water not used for drainage in the canal was open to appropriation; and that to the extent that waters in the canal were derived from the lands of the appellants, appellants could take the waters and use them.

[1] We quote the two paragraphs of the Drainage Act of Arizona (chapter 5, title 55, pars. 5452, 5440, Civil Code of Arizona, 1913) pertinent to the contentions before us:

"The legal title to all property acquired under the provisions of this chapter, including all water collected in, controlled or handled by means of any draining works constructed or acquired under the provisions of this chapter, shall immediately vest in such drainage district and shall be held by such district in trust for, and it is hereby dedicated and set apart to the uses and purposes set forth in this chapter. The board of directors are hereby authorized and empowered to hold, use, acquire, manage, occupy and possess said property as herein provided. Such board is hereby authorized and empowered to take conveyances, or other assurances, for all property acquired by it under the provisions of this chapter, in the name of such district, to and for the use and purposes herein expressed;" etc. "The board shall have the power, and it shall be their duty, to manage and conduct the business and affairs of the district; to make and execute all necessary contracts. * * * Said board shall also have the right to acquire, hold and possess, either by donation, purchase or condemnation, any land or other property, necessary for the construction, use, maintenance, repair and improvement, including extensions, of any works required for the purpose of drainage as provided herein, * * * and may perform all such acts as may be necessary to fully carry out the purposes of this chapter."

Plainly the underlying purpose of the statute is to permit organization by form of governmental corporation for the drainage or reclamation of agricultural lands in order that they may be made productive.

That the legal title to the right of way through appellants' lands was in the district is plain, for such right was acquired under the act, which provides that all property acquired shall immediately vest in the drainage district to be held in trust. All property expressly includes "all waters collected in, controlled or handled by means of any drainage works constructed or acquired" under the Drainage District Act.

Under these provisions the district held legal title to the right of way over the lands of appellants and to the waters collected or handled by means of the drainage canal constructed by the district. All such property so vested was dedicated and set apart for uses and purposes set forth in the statute. Thus the title to all waters which were collected in the canal immediately vested in the district in trust as provided. Waters, whether subterranean—that is, percolating—or surface drained, were included, provided they were collected or controlled or handled by means of the drainage works. We cannot see how there can be an exclusion of any waters that have come from the lands into the canal which have been included in the drainage district. The purpose of drainage being to take off excessive quantity of water, the landowners who are in the district have no ground of complaint that the waters which collect in the canal are no longer theirs to do with as they would.

We next look into the extent of the control passed, and whether there is power of disposal of collected waters in the drainage district board. Of course, the trust under which the title to the water vests is for drainage uses and purposes. But, to make drainage a practicable success, the works must provide for place of discharge of any quantity of collected waters. The duty of management under paragraph 5440 hereinbefore quoted, and the duty and power to make and execute all necessary contracts and to acquire other land or other property for use and maintenance of the works are conferred, and the board may perform all such acts as may be necessary to carry out fully the purposes of establishing, building, and operating the drainage system. It is obvious that, if an abundance of water is drained from land, there must be a disposition of such superfluous water. To make provision for disposition of the excess is, therefore, a matter which is absolutely necessary in carrying out the object of the law and conducting the affairs of the district. As the board has explicit right to acquire land needed for the use and maintenance of any works required, and is vested with title to all waters collected by means of the canal or works, surely the power of disposition of the waters drained is but incidental to the authority conferred. Disposition of such waters might be by sale or contract not inconsistent with the purposes of the act; and drainage being accomplished, the particular method of disposition of the drained water is not of material interest to those whose lands are drained.

[2] The waters which have been collected in the canal are not subject to appropriation. They are not natural streams subject to disposition under the law of appropriation of the state. Paragraph 5337, Civ. Code of Arizona, gives the right to appropriate any of the unappropriated waters or surplus or flood waters in the state, and paragraph 5344 declares all rivers, creeks, and streams of running water in the state public, and applicable to the purposes of irrigation and mining, as provided by law. In Howard v. Perrin, 8 Ariz. 347, 76 Pac. 460, the Supreme Court of the state, in construing the relevant statutory provisions, held that there could be no appropriation except of a running stream flowing in natural channels, between well-defined

banks, and distinguished such natural stream from filtrating or percolating waters, which ooze through the soil beneath the surface in undefined and unknown channels, and which are therefore a component part of the earth, with no characteristics of ownership distinct from the land itself. This case was affirmed in Howard v. Perrin, 200 U. S. 71, 26 Sup. Ct. 195, 50 L. Ed. 374. There is little room to doubt the general rule that percolating waters are regarded as part of the soil and belong to the owner of the soil. The Supreme Court of Nevada in Cardelli v. Comstock Tunnel Co., 26 Nev. 284, 66 Pac. 950, said:

"Such waters are not like waters running in streams on the public domain of the United States. They are produced by the capital, labor, and enterprise of those developing them, and by such developing they become the property of those engaged in the enterprise. They are in the full and complete sense artificial * * * streams."

See, also, Willow Creek Irrigation Co. v. Michaelson, 21 Utah, 248, 60 Pac. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687; Gould on Waters, §§ 280, 281; Gould v. Eaton, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201.

Appellants, not being authorized by law to make appropriation of percolating waters which were collected in the drainage ditches, and having yielded title to their lands to the drainage district to be held in trust, cannot claim any rights which are superior to those conveyed to the United States under the agreement with the drainage district.

The decree is affirmed.

UNITED STATES v. SOUTHERN PAC. CO. et al.

(District Court, N. D. California, S. D. August 28, 1919.)

Nos. 46, Civil, A-16, A-24, A-25, A-26, A-28.

1. PUBLIC LANDS ⟸120—EVIDENCE INSUFFICIENT TO SHOW FRAUD IN OBTAINING RAILROAD GRANT.
Evidence *held* not to establish fraud on the part of the Southern Pacific Company in applying for and obtaining patents to lands as agricultural lands under the grant of July 27, 1866, which lands as since developed have proved more valuable for their oil content than for agriculture; it being shown that the company at once placed the lands in the market and sold the same without reservations as occasion offered at agricultural prices, and that none of the officers or agents charged with the active fraud ever acquired any individual interest therein.

2. PUBLIC LANDS ⟸120—AGRICULTURAL LAND GRANT TO RAILROAD NOT AFFECTED BY SUBSEQUENT DISCOVERY OF MINERAL.
The discovery of mineral in lands patented to a railroad company under a grant of agricultural lands, after the patent, does not even pro tanto divest the title of the company, or entitle the government to cancellation of the patents, in the absence of fraud in their acquisition.

3. PUBLIC LANDS ⟸120—WHEN PATENTS TO RAILROAD SUBJECT TO CANCELLATION FROM MINERAL CHARACTER OF LANDS.
To entitle the United States to cancellation of patents issued to a railroad company under a grant of agricultural lands, covering lands which were so classified in the survey, on the ground that the lands are mineral, it must appear that the known conditions at the time of the proceedings for the patents were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end.

In Equity. Six suits by the United States against the Southern Pacific Company and others, consolidated for trial. Decrees for defendants.

See, also, 225 Fed. 197.

E. J. Justice, J. Crawford Biggs, and Albert Schoonover, Special Asst. Attys. Gen., for the United States.

Charles R. Lewers, Henley C. Booth, and F. W. Henshaw, all of San Francisco, Cal. (W. F. Herrin, of San Francisco, Cal., of counsel), for defendant Southern Pacific Co.

BLEDSOE, District Judge. This is final hearing of the litigation considered on motion to dismiss in (D. C.) 225 Fed. 197. The actions, six in number, consolidated upon the trial, will be considered together, as the questions presented in their substantial aspects are unitary.

The suits seek to cancel, as for fraud, certain patents issued by the government to the Southern Pacific Railroad Company in pursuance of the act of Congress approved July 27, 1866, "granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast" (14 Stat. 292, c. 278), as modified by the joint resolution of Congress of June 28, 1870 (16 Stat. 382, No. 87). The litigation, in its general aspect, is the parallel of that considered by the Circuit Court of Appeals for this Circuit in United

States v. Southern Pacific Co., 249 Fed. 785, 162 C. C. A. 19, commonly referred to as the Elk Hills Case, in the course of which opinion may be found a recital of some of the general and controlling features of the situation.

The suits herein name no less than 234 defendants, and it is asserted by defendants that 111 other persons claim interests in the lands involved and are "necessary parties" in consequence. The litigation directly challenges the title to approximately 165,000 acres of land in the "oil territory" of the west side of the San Joaquin Valley, extending from above Coalinga on the north to below Sunset on the south. The value of the land actually involved is alleged by the government in its complaints to be in excess of $421,000,000. The patents in issue aggregate 16. The first, No. 20, covering some 4,000 acres, was applied for by the railroad company in 1883, and was finally issued in 1892. Suit was brought upon it in January, 1915. Patent No. 22, covering over 60,000 acres, was applied for in May, 1892, issued July 10, 1894, and suit was brought, the earliest one filed, December 20, 1912. The other patents involved were applied for at various times between 1882 and 1900, and were issued at various dates between 1894 and 1902. It might be said, in passing, that the patent applied for in 1900, and the only one herein involved applied for after 1897, was issued in 1902, and covers 3 sections of land in the Elk Hills region, none of which as yet are shown to be oil-bearing.

During the course of the protracted hearings, many hundreds of witnesses were examined in open court, and nearly 15,000 pages of testimony thus taken. The importance and magnitude of the property rights involved have at no time been lost sight of by the court. A careful consideration of the evidence, and of the various contentions of the principal parties to the litigation, has, of course, been given. Due regard for economy, both of time and of space, however, demand that the conclusions of the court be stated with brevity.

As is set forth in the Elk Hills decision, supra, pursuant to the terms of the railroad grant, and in consequence of certain regulations promulgated by the Department of the Interior, having charge of the disposition of public lands, it was required that the railroad company, in making application for the issuance of patent to its granted lands, should cause its land agent, duly authorized in such behalf, to make affidavit that he had caused the lands applied for "to be carefully examined by the agents and employés of the company as to their mineral or agricultural character, and that to the *best of his knowledge and belief* none of the lands returned in the list are mineral lands." 19 L. D. 21. (Italics supplied.)

Jerome Madden, during all of the time mentioned herein, was the land agent of defendant company, the predecessor of C. W. Eberlein, referred to in the Elk Hills decision, supra. It is alleged in the bills of complaint, as set out more fully in the opinion on the motion to dismiss (225 Fed. 197, supra), that Madden made and transmitted the requisite affidavit, containing the positive statement that the lands applied for were "not interdicted mineral or reserved lands, and are of the character contemplated by the grant." It is then averred, at some

length, that the lands now are, and at all times mentioned were, mineral lands, without the terms of the grant; that they were so known to be by the railroad company, and by Madden in particular, "long prior" to the making of the affidavit referred to; that nevertheless, in ignorance of the truth, and in complete reliance upon the false representations sworn to by Madden in his affidavit, etc., the Secretary of the Interior was led to and did cause to be issued the patent, etc. It is also alleged, it may be added, that the fraud thus perpetrated was not only "naturally self-concealing," but was in fact, through the machinations of the railroad company and its agents, actually concealed from the government and all of its responsible officers until 1910, when certain suits were brought in this court, etc., referring, inter alia, to Burke v. Southern Pacific Co., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527.

The defendant railroad company denies with positiveness and unequivocation the intention to commit, or the actual commission, or the subsequent concealment, naturally or otherwise, of any fraud in the premises. In addition and specially, laches and the bar of the statutes of limitation (Act March 3, 1891, c. 559, 26 Stat. 1093 [Comp. St. § 4992], and Act March 2, 1896, c. 39, 29 Stat. 42 [Comp. St. § 4901–4903]), are set up as defense.

Stripped to the core, the claim of the government is that the defendant company, knowing the lands were mineral, and that therefore it was not entitled to them, nevertheless deliberately conceived and put into successful operation the fraudulent plan of acquiring such lands to its own use and benefit, and in complete disregard of the government's rights. The case, as developed by the government on the hearing and through the contentions of its counsel, is to the effect that the "Big Four" of the Central and Southern Pacific Companies, the original initiators of that great unified enterprise (Stanford, Crocker, Huntington, and Hopkins), together with several lesser lights, occupying positions of responsibility and prominence, however (Towne, general manager, Madden, land agent, Kruttschnitt, vice president, etc.), were all parties to a deliberate, long-enduring, and wide-embracing scheme to acquire from the government wrongfully vast areas lying on the west side of the San Joaquin Valley, involving some of the richest oil lands that the world has ever known; that this scheme was conceived sometime in the '70's, or possibly early '80's, and continued to flourish uninterruptedly, but all the time concealed, either naturally or through the artifices of its instigators, until its accidental discovery by the government through the filing of the Burke suit in 1910; in other words, that through a period of say 30 years some of the most prominent, most forceful, most far-seeing men that our state has produced, were engaged in the diabolical plan of consummating one of the greatest frauds of the age; and not only that, but that during the course of the perpetration of that fraud, and previous to the realization of any appreciable profit or substantial reward from its attempted consummation, practically all the original parties to the gigantic conspiracy had gone to their graves. It seems hardly within the realm of possibility that such could be the case, and I feel sure that the requisite proof of

such an enormity, "by that class of evidence which commands respect and that amount of it which produces conviction" (Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239, 34 Sup. Ct. 507, 508, 58 L. Ed. 936), has not been adduced herein.

It is to be observed at the outset, for I conceive it to be a matter of primal importance, that the defendant railroad company was in no sense a mere self-seeking applicant for the lands in question. It occupied a status much higher than that of a mere homesteader or preemptioner. Pursuant to acceptance of a definite and far-reaching offer on the part of the government for the construction of the railroad, it became entitled as a matter of right, and not of grace, to the ownership, possession, and enjoyment of every odd section, "not mineral," or not otherwise appropriated, on either side of its line of road, within certain stated primary and indemnity limits. Burke v. S. P. Co., 234 U. S. 669, 680, 34 Sup. Ct. 907, 58 L. Ed. 1527. The defendant company is not, therefore, to be considerd an object of suspicion because it applied for these particular lands. In due course it was its duty to apply for them, unless they were "mineral" or appropriated. It could not be deprived of them unless they were mineral or otherwise appropriated. Seemingly, in so far as I can determine from the record, all lands involved herein were returned by the government surveyed as agricultural, i. e., "nonmineral," and in consequence there was a prima facie showing, sufficient at least to cast the burden of proof upon a possible objector, to the effect that the lands were of the sort and kind contemplated by the grant. Tulare Oil Co. v. S. P. Co., 29 L. D. 269.

I advert to this situation, because I think it distinguishes this case, on the facts, from many other fraud cases, and particularly from the Diamond Coal & Coke Case, supra. Presumptively, all the railroad company was intending to do, in making application for these lands, was to become possessed of its own; no ulterior motive may be inferred from the mere making of the application, or subsequent claim of the lands.

The government has relied (1) upon certain information, said to have been conveyed to the parties mentioned hereinabove, or to others acting for them, to the effect that the lands were mineral lands; and (2) upon the presence of certain natural phenomena (live oil seepages, shale and oil sand outcrops, and the like), the observation of which, it is strenuously asserted, could have had no other effect than to cause defendant's agents and officers to be of "the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end" (Diamond Coal & Coke Co., supra)—i. e., that the lands were "mineral lands," as that term was known to the law.

With respect to the information said to have been conveyed to various railroad officials regarding the mineral character of the land, without specifying the particular witnesses testifying thereto, it may be said, without exception or qualification, that every statement relied upon by the government in that particular behalf is shown to have been made to an individual *deceased at the time of the trial.* It

is as obvious as it is long established that the weakest evidence that can be offered in a court of justice is evidence of an asserted conversation had with one no longer living. The lips of the unreplying dead are unavailable for rebuttal; no skill in cross-examination can adequately serve to dissect out the true from the false. The statement must, perforce, rest upon the bare word of the party testifying to it; and a due regard for the rights of property and the value of reputation would seem inexorably to demand that, before a judgment should issue upon such skeleton of fact, it should be supported in corroborative circumstance by such proof at least as to make its acceptance conscionable. Such corroborative proof is not only wanting in these cases, but on the other hand, patent and irrefutable facts point to a contrary conclusion.

In the first place, circumstantial verity is lacking in some of the narratives themselves. Improbability of some occurrences, as asseverated, confronts even the credulous mind. Inconsistency of utterance and conduct induces a rational disbelief; and on more than one occasion a positive contradiction, coming from unimpeached and apparently unimpeachable sources, serves completely to annihilate the seeming truth of the assertion.

When all of the foregoing is said in this behalf, however, there still remains that which, to my mind, constitutes incontrovertible refutation of the claim that the officials and agents of the railroad company knew, at all the times involved, that the lands in question were "mineral lands"; i. e., "more valuable" for their mineral content than for their agricultural possibilities. Barden v. Northern Pacific R. R., 154 U. S. 288, 328, 14 Sup. Ct. 1030, 38 L. Ed. 992; Davis v. Weibbold, 139 U. S. 507, 523, 11 Sup. Ct. 628, 35 L. Ed. 238. I refer to the conduct of the officials and agents themselves respecting such lands.

If the officials of the railroad company knew that these lands were more valuable for their mineral than for their agricultural possibilities when they acquired them, as is charged by the government and as its evidence undoubtedly tends to show, then they were guilty of a colossal fraud, of course, and they and their successors should now be mulcted of their ill-gotten gains. To hold them possessed of such knowledge, however, and therefore guilty of such fraud, it must be found or inferred that they intended to advantage or benefit themselves. The conception and perpetration of a fraud inevitably involves an intent unlawfully to benefit from the fraudulent transaction. The same self-interest which would inspire the fraud would seek material satisfaction in an appropriation of its fruits; and if men handle valuable property as if it had no or but little value it is almost proof positive that they are unacquainted with and have no suspicion of its real value.

Both prior, and subsequent, to the actual acquisition of some of the most valuable of the lands patented to the railroad company in the oil belt, in suit and otherwise, the company, in due course, with insistent effort and patient forbearance, made contracts for the sale of, and actually sold, these lands at mere grazing or cheap agricultural prices—from $2.50, in most instances, to $10.00 an acre. On one section, 17,

situate above Coalinga, and containing probably the then most persuasive geological and physical indications of any lands in that neighborhood, an unusually "stiff price" was put on the lands, because the land grader's "summer vacation was spoiled" in consequence of his having to appraise the land right after the application to purchase, and it was sold for $3.50 and $5 per acre. The witness Hart testified that he assured C. P. Huntington, in New York, in 1893, that "the railroad oil lands were worth more than his entire railroad." Yet, sedulously and persistently, after it is claimed such a startling statement was made to its president, the railroad company continued to offer and sell its lands to whomsoever would buy at mere grazing and agricultural prices. Lands in the Kreyenhagen Hills, Lost Hills, and Kettleman Hills, all promising oil territory according to the geologists, were thus sold, and held for sale, without reserve.

[1] During all these years, and to and until the great discoveries of oil in the Kern River field and in the McKittrick field, in 1899 and thereafter, while the railroad company was indulging in strenuous efforts to provide itself with the necessary fuel for its engines, first with coal and then later, beginning about 1897, with oil, the fact is that it was either disposing of, or offering to dispose of, at the merest fractional part of their value, lands actually containing the very fuel of which it was then so industriously in search. In addition, the men at the head of the Southern Pacific and its subsidiary corporations at that time, admittedly possessed of unusual business acumen, failed in a single instance, to which the court's attention has been directed, to become individually possessed of a single foot of producing or probable oil territory within the area in suit. Some of them at least, charged with either participation in, or knowledge of, the conspiracy, did purchase granted lands, and it is inconceivable that if they had known, or even suspected, the truth with respect to the oil content of the west side lands, they would not have reduced at least some of them to personal possession.

I repeat, as demonstrative of the unsoundness of the government's claim in this particular behalf, that self-interest alone—thievish self-interest—would have prompted the perpetration of the fraud alleged. The same or a continuing self-interest would have prompted the retention of at least some substantial portion of the real value of the thing acquired. Having sold, or offered generally to sell, all these lands for a mere pittance, considering their "mineral value," it is inconceivable that the same men should have perjured themselves originally in order to accomplish their acquisition. Their conduct is more consistent with honesty of purpose and bona fides of belief than with fraud and chicanery. The whole state of the record, viewed with unprejudiced eye, fails in my judgment to induce the conclusion that the proof of the fraud asserted is "clear, convincing, and unambiguous." Colorado Coal Co. v. United States, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182. In the absence of such degree of proof, "by that class of evidence which commands respect," the plain and instant duty of the court is to deny the relief requested.

[2] At this point attention should be called to the fact that it is not

the actual presence or subsequent discovery of oil in the lands in question which gives the government the right to recover herein. Pursuant to apparently due and regular proceedings, in accordance with law, the government has heretofore granted these lands to defendant company. Though the company was not entitled to receive "mineral lands," yet it is definitely established that a discovery of mineral in the lands, after patent, will not suffice, even pro tanto, to divest the railroad title. It is only when "fraud" has been perpetrated in the acquisition of the lands that the patent may be set aside. "When the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals." Burke v. Southern Pacific Co., supra. "If at that time [time of proceedings taken to secure patent] the land was not thus known to be valuable for mineral, subsequent discoveries will not affect the patent." Diamond Coal & Coke Co., supra.

The government, however, insists that the fraud complained of may arise from the assertion of that as a fact which the party did not know to be true (Pomeroy, Eq. Jur. § 885), when he "ought to have known" of its falsity (Bigelow on Fraud, vol. 1, p. 8), or had "no reasonable grounds" for believing it to be true (Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678). It then contends that the proper study and investigation of the physical aspects of the lands in question, required in order that the affidavit of "non-mineral" character might be made and presented, would indubitably (and therefore must) have caused the company, through its agents and investigators, to become apprised of the mineral character (oil content) of such lands.

It is sufficient, with respect to what the company actually did learn and believe as to the mineral value of the land, to refer to what has already been said concerning its conduct. From its long-continued handling of these lands, it must be held that it did not know their actual or potential value as oil lands, irrespective of the sources from which information is said to have come. But may we assert now that it "should have known," and that, because of its negligence or incredulity in this behalf, the lands now may be taken from it in virtue of the established "mineral value" of at least a part of them?

[3] The keystone of the entire arch of the government's syllogistic structure is the holding of the Supreme Court of the United States in the Diamond Coal & Coke Co. Case, 233 U. S. 239, 240, 34 Sup. Ct. 507, 509 (58 L. Ed. 936), supra, to the effect that, in a suit to cancel an agricultural patent for fraud, it will suffice if it be made to appear "at the time of the proceedings which resulted in the patent the land was known to be valuable for mineral; that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end."

That case concerned the attempt of a coal company, long engaged in the business of coal mining in the particular neighborhood in question, to acquire unlawfully and fraudulently, under agricultural en-

tries, certain lands known and believed by it to be coal lands. The difference in "mode of deposition" between coal (especially adverted to in the Diamond Coal Case, 233 U. S. 249, 34 Sup. Ct. 507, 58 L. Ed. 936, supra) and oil is not only apparent to those learned in the science of geology, but has received express consideration in the Elk Hills decision, 249 Fed. 799, 162 C. C. A. 19, supra, in connection with that court's analysis of the Diamond Coal Co. Case. In addition to what is quoted therein from the testimony of Dr. Branner, he testified in the present case that:

"We know that coal, when it forms, stays right where it is placed. * * * But in the case of petroleum, no matter where it originates, it is always trying to get away from there and go somewhere else."

Too little attention has been paid to the important word "plainly," found in the declaration of the law quoted from the Diamond Coal Co. Case. In my judgment, it is only by giving that word its appropriate emphasis and consideration that the decision does not constitute a radical departure from previous conclusions announced by the same court, and referred to and relied upon therein. Diamond Coal Co. Case, supra, 233 U. S. 240, 34 Sup. Ct. 507, 58 L. Ed. 936.

If, then, we assume the true rule to be that the "known conditions" must be such as "plainly" to engender the "belief" that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and "justify" expenditures to that end, my conclusion is that not only did the railroad officials fail to have the requisite "belief," but that the then "known conditions" were not calculated, and did not serve, "plainly" to engender such belief.

It must be remembered, as already adverted to, that all these lands, except three sections lying on the flank of the Elk Hills, were acquired by patents issued in the period between July 10, 1894, and December 2, 1897. Though there was some oil produced in and about Coalinga in 1896, the real "boom" in the fields occurred after the Kern River discovery in 1899. That discovery, marvelous in its nature, attracted great numbers of people to all "possible oil territory," and every "indication," insignificant or otherwise, as well as countless acres of outlying and "wildcat" territory, became the subject of consideration and "location"; i. e., the posting thereon of "mineral location notices," but with no precedent or concomitant "discovery." See United States v. McCutcheon (D. C.) 238 Fed. 575. All this, however, it must be remembered, occurred after all the patents, except No. 111, the subject of suit A–24, had been issued by the government.

The truth is that, though on the west side of the San Joaquin Valley, even from the '60's, there had been occasional, sporadic, and almost without exception commercially unsuccessful efforts to secure oil, maltha, and asphaltum, yet it remained for the Kern River excitement and the consequent McKittrick discoveries in 1899 and 1900, to put the oil industry of that region upon the solid footing that it possesses to-day. Early oil men, lacking greatly in experience, in initiative, in willingness to assume unwarranted risks, clung to the outcrops and territory more or less immediately adjacent, and did not go down into the "plains," where most of the lands involved herein and nearly

all of the really "rich oil territory" are situate. Under such circumstances, in my judgment, the action of the railroad company in making application for the legal title to lands which, in a sense at least, it was then equitably entitled to, is not to be considered as violative, consciously or unconsciously, of the law as laid down in the Diamond Coal Co. Case.

It should be observed again, for emphasis, that the railroad company was entitled, in virtue of a "contractual" obligation (Burke v. Southern Pacific Co., supra) wholly performed as to it, to the receipt of the legal title to these lands, except such of them as might be "mineral" or "otherwise appropriated." They had been returned by government surveyors as "nonmineral." All proceedings taken looking to their formal acquisition by the railroad company were had and taken in due course and in accordance with the existing requirements of law, as laid down by the Interior Department, and the usual publicity, by advertisement in newspapers and otherwise, was accorded.

No objection to the patenting of any of these lands on the score of their mineral content was made by anybody, in so far as I can determine, save a "blanket objection" made by one Benjamin, and passed upon in due course, adversely to his contention, by the Department of the Interior, and an objection made by the Tulare Land & Oil Company, carefully considered and allowed in part and denied in part. Tulare Oil Co. v. S. P. Co., supra. None of the lands covered by the Tulare decision, it may be said, are involved herein.

It thus appears that though, with respect to the lands applied for and awarded to the railroad company, and in suit here, the "oil people" had notice of what was going on, yet no showing was made, at the time, by anybody, to the effect that the lands were oil lands and not patentable. This to my mind is demonstrative that, at the time of their acquisition, the "known conditions" were not such as "plainly" to "engender" the "belief" that expenditures in search of oil therein would be "justified."

It must be remembered that the controlling test is, not that incautious and irresponsible individuals would be "willing" to take a chance and explore for oil, but that the conditions "should be such as would *justify* a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money." Chrisman v. Miller, 197 U. S. 313, 322, 25 Sup. Ct. 468, 471, 49 L. Ed. 770. If there were such men on the west side of the San Joaquin Valley, at the time proceedings for patent were pending, so disposed with respect to lands involved in these suits, why did they not appear and contest the railroad's claim to these lands? Why were they not then, as they have been in great numbers since 1899–1900, actually engaged in giving practical expression to their "belief," engendered by an observance of the "known conditions"? There is a homely proverb to the effect that "The proof of the pudding is in the eating." It may lack authoritativeness herein, but it is surely not without appositeness.

I am not inadvertent to the fact, of course, that the mere absence either of explorative efforts at the time, or asserted objection before the Interior Department, is not conclusive herein. It is peculiarly per-

suasive, however. Neither do I overlook the government's repeated contention that such explorative efforts, actually being carried on, within regional or even in some cases contiguous properties, taken in connection with observable physical and geological conditions, should have sufficed to "engender the belief" required. In the then state of the art of oil seeking, oil drilling and oil finding, however, I am constrained to conclude that this is a fallacious assumption. We must test men's minds as to being "justified" in the entertaining of "beliefs" from "known conditions," by a reference to the state of the art and the state of knowledge and experience and ability to drill for oil, as the same existed prior to patent, previous to 1899, and not as these factors or any of them exist to-day.

It is very easy, of course, for an eminent and scholarly geologist like Dr. Branner, of Stanford University, a man of unusual ripeness and maturity in science, to say that, if he had been asked in 1892, he would then have said that he felt it "his professional duty" to his client to include all lands involved herein, among others, as "probable oil lands"—"warranting the expenditure of money necessary to develop them with the reasonable expectation of their yielding oil." It is a very different matter, however, for this court now to say that such expression of opinion, coming even from such an acknowledged scientific authority, would, in the then practical state of the art, have "justified" (not merely made "willing") men "of ordinary prudence" in the "expenditure of their time and money" (Chrisman v. Miller, supra) in the drilling of any particular section or tract of this land, or even at all; and yet that is what this court would have to say, with respect to each and every individual government subdivision, before it could righteously and justly award the government a decree covering such subdivision.

The lands above referred to, lying in the Elk Hills, are subject, in the main, to the observations just indulged in. They were patented after the Kern River and McKittrick discoveries, but lie in such relation to them, and their succeeding history has been such, as to justify the general conclusion reached and detailed hereinabove.

Many matters of asserted moment, looking to the question of the existence of actual fraud, but occurring subsequent to the issuance of patent, have been introduced in evidence, as, for instance, the testimony in the Elk Hills Case, supra, etc. Having concluded that no fraud was committed by the railroad company in its acquisition of these lands originally, it is irrelevant now to enter into a close analysis of the conduct of some of its employés subsequent to that time. It might be suggested that the most serious challenge with respect to its good faith centers about the conduct of its land agent, Eberlein, *in 1903 and 1904,* and as to that the decision in the Elk Hills Case, supra, seems to be opposed to any conscious wrongdoing on his part.

Judge Van Fleet, now of this circuit, and formerly of the Supreme Court of California, when upon that bench, said in Truett v. Onderdonk, 120 Cal. 581, 588, 53 Pac. 26, 29:

"The presumption is always against fraud, a presumption approximating in strength to that of innocence of crime."

It is my deliberate and carefully formulated opinion that such presumption has in no wise been met or overcome in these cases. Counsel for defendants will present, and the court will sign, appropriate decrees of dismissal

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In re PEMBERTON.

(District Court, S. D. Florida. March, 1919.)

BANKRUPTCY ⊂=188(3)—CREDITORS' SUIT CREATING PRIOR LIEN.

A creditors' bill and lis pendens filed more than four months prior to bankruptcy of the debtor and at the time of commencement of an action at law, as authorized by Gen. St. Fla. 1906, § 1961, to subject property conveyed by the debtor to the judgment in the action at law, *held* to create an equitable lien on such property under the laws of the state enforceable as against general creditors in bankruptcy, where followed by a judgment at law.

In Bankruptcy. In the matter of S. L. Pemberton, bankrupt. On review of order of referee adjudging an equitable lien in favor of the American National Bank of Tampa. Affirmed.

McKay & Withers, of Tampa, Fla., for Wilson & Toomer Fertilizer Co.

Hilton S. Hampton, of Tampa, Fla., for American Nat. Bank of Tampa.

CALL, District Judge. The order of the referee adjudging the American National Bank of Tampa to have a lien by virtue of the bill of complaint filed by it July 10, 1918, is brought before me for review. The question of law to be decided is: Did the creditor, by filing its bill and notice of lis pendens, acquire an equitable lien upon the property sought to be subjected to its debt, and thereby is entitled to a preference over the general creditors of the bankrupt?

There is no question but that the bill was filed more than four months before any proceedings in bankruptcy were taken to subject the property theretofore conveyed away by the bankrupt and a lis pendens filed, an action at law commenced seeking to reduce its claim to judgment, and that said action at law subsequently resulted in a judgment in favor of the bank. Under well-recognized rules of law the filing by a judgment creditor of a bill to accomplish the object of the bill in this case, would constitute an equitable lien.

The contention in this case is that because the complainant did not at the time of filing its bill have such judgment, nor a receiver appointed, nor injunction issued, but filed its bill in the state court, pursuant to authority given in the state statute (section 1961, General Statutes of Florida), no such equitable lien exists. There can scarcely be any doubt that, had the bank procured the appointment of a receiver or the issuance of an injunction on its bill, such an equitable lien would have entitled the bank to a preference, although no judgment at law had been obtained prior to the filing of the bill. As I understand the

law, the filing of such a bill by a creditor to subject property, the title to which is not in the name of the debtor, is an equitable levy upon such property, and vests in the complainant the right to have such property first applied to the payment of his debt, if he prevails.

Under the general rules of law a creditor before judgment could not maintain such a bill, nor does the act of the Legislature of Florida vest the chancery side of this court with jurisdiction to entertain such a bill, but it does vest such jurisdiction in the state circuit court, and the bankruptcy law recognizes and enforces such liens given by state laws. Chancery was without jurisdiction to entertain such suits because no lien existed prior to the creditor obtaining judgment, but the section of the General Statutes of Florida referred to vests this jurisdiction in the state circuit courts where action at law has been commenced. It was not the lien of judgment that gave priority to the creditor, but equitable lien created by the filing of the bill. I can see no just reason why the same effect should not be given to the bill filed in the state court and the state statute.

The order of the referee is affirmed.

THE ANNA C. MINCH (two cases).

(District Court, W. D. New York. August 11, 1919.)

1. COLLISION ⊜73—BREAKING ADRIFT OF MOORED VESSEL CREATES PRESUMPTION OF FAULT.
   A vessel which breaks adrift and collides with another vessel is prima facie chargeable with negligence, and is liable in damages, unless she proves that the accident was not preventable by a proper degree of care and maritime skill.

2. COLLISION ⊜68 — VESSEL BREAKING ADRIFT NOT LIABLE WHEN MOORED WITH BEST JUDGMENT OF MASTER.
   Where the captain of a vessel has exercised his best judgment and skill in her mooring she cannot ordinarily be held liable for damages caused by her breaking adrift although the result may show that his best judgment was erroneous.

3. COLLISION ⊜68—TO SUSTAIN DEFENSE OF INEVITABLE ACCIDENT ON VESSEL BREAKING ADRIFT, REASONABLE CARE SUFFICIENT.
   To sustain the defense of inevitable accident in the breaking adrift of a vessel, it is not necessary that the highest degree of care and precaution should have been exercised, but only reasonable care to avoid danger fairly to be anticipated is required.

4. COLLISION ⊜68—VESSEL BREAKING ADRIFT BY BREAKING OF ICE JAM INEVITABLE ACCIDENT.
   The breaking adrift of a steamer moored at an elevator in Buffalo river in early spring to discharge a storage cargo of wheat *held* due to inevitable accident, and the vessel not liable for resulting collisions; it being shown that, while a freshet with running ice was to be anticipated, it was promptly guarded against by additional mooring lines, which would probably have been sufficient, but for a sudden rush of water and ice, caused by the breaking up of a jam by a fire tug.

In Admiralty. Suit for collision by the American Steamship Company, owner of the steamer Theodore H. Wickwire, Jr., against the steamer Anna C. Minch and by William M. Tashenberg and Fred C. Tashenberg, owners of the launch Tashenberg Brothers, against the same. Decree for respondent.

Brown, Ely & Richards, of Buffalo, N. Y. (John B. Richards and L. E. Coffey, both of Buffalo, N. Y., of counsel), for libelants.

Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, and Stanley & Gidley, of Buffalo, N. Y., for respondent and claimant.

HAZEL, District Judge. In these two libels in rem, which were tried together, it is alleged that the American Steamship Company, owner of the steamer Theodore H. Wickwire, Jr., and William M. Tashenberg and Fred C. Tashenberg, owners of the launch, or supply boat, Tashenberg Brothers, sustained damage because of negligence in mooring the Anna C. Minch to the dock at the Electric Elevator in Buffalo, in consequence of which she broke adrift during an ice flood, and without stopping, as it was possible for her to do, came into collision with them. The Wickwire (for short) is claimed to have sustained injury to the amount of $14,000, and the launch Tashenberg Brothers to the amount of about $5,000. The mishap occurred between 5 and 6 p. m., March 27, 1916, at a point where the channel is approximately 200 feet wide. The master, first mate, and a seaman of the Minch (for short) were aboard at the time. In anticipation of the movement of the ice, extra lines were put out during the forenoon to hold her to the dock, but she nevertheless broke adrift. The evidence shows that the Minch had been towed from her winter quarters at the Breakwall in the outer harbor, to the Electric Elevator, to unload her storage cargo of 225,000 bushels of wheat; one-half being unloaded before she broke adrift. She was a large freighter, fully 400 feet over all, 50 foot beam, draft 16 feet aft and 10 feet forward.

The answer denies negligence, and alleges inevitable accident or vis major, due to an extraordinary ice flood, and, specifically, that fire tugs, engaged in breaking the ice jam near where the steamer Minch was moored, caused unusual pressure against her bow, parting her cables and carrying her downstream; that her anchor could not be cast because when the cable was parted the anchor gear in the windlass room was injured. In no event, the amended answer alleges, could the anchor have held, or prevented the steamer from drifting after breaking away, because of the force of the current and the weight of the ice.

In his opening statement proctor for respondent requested permission to amend the answer, so as to embody an admission that the Minch came in contact with the Wickwire and Tashenberg Brothers, or, in the alternative, that she struck the Wickwire, causing her to collide with the launch or supply boat. The amendment being allowed, proctor for libelant moved to amend the libel in the Tashenberg Brothers Case, alleging that because of the collision between

the steamers the launch was caused to be set adrift. After a suggestion that a written amendment to the libel be filed, the taking of testimony proceeded. No amendment to the libel, however, was filed until nearly a year after the close of the testimony, after which an amended answer thereto was filed. Libelant at a later date moved to strike out certain parts of the amended answer, as varying from the amendment allowed at the trial. It was contended that the amendments made at the trial gave respondent the right to open and close the case, while the written amendment put upon libelants in the Tashenberg Case the affirmative of the issue. This view, however, is not acceptable, and the motion to strike out is denied.

The Minch had no steam up at the time of her accident, and when her lines parted, as the ice moved suddenly, she drifted stern first nearly 1½ miles to the foot of Main street, passing on the way through the Michigan street and Ohio street drawbridges without touching either; both bridges being hastily opened by the tenders to let her through. Before she broke adrift the fire tug Potter was engaged in breaking the ice congestion just abreast of the stern of the Minch above the Ohio street bridge while other fire tugs were similarly engaged in other parts of the river.

When the Minch in her drifting reached the Lackawanna Depot dock, about 500 feet from the Michigan street drawbridge, she struck the steamer Wickwire on her port bow, breaking her cables and causing her to drift. The launch, at the time of the collision, was fastened to the Wickwire's port quarter, and she, too, broke adrift. All three vessels then floated a short distance downstream towards the lake, when the Wickwire's port anchor took hold and her drifting was checked. Just prior to this, however, she had collided with the steamer John B. Cowles, which was moored near the foot of Main street. The Cowles and Wickwire, with the barge Constitution, lying near the Lackawanna freight sheds, completely blocked the river. The launch meanwhile had been crushed between the steamer Minch and the dock, in spite of efforts to avoid such injury. The Minch finally held fast in the ice at Main street.

Liability is attributed to the Minch on the grounds that the freshet could easily have been anticipated by her master; that she was insecurely moored, her lines and cables being badly adjusted; that she was improperly equipped for an emergency of the character specified; and that her drifting could have been stopped before inflicting the injuries in question.

[1] When a vessel breaks adrift and collides with another vessel, she renders herself liable to damages for the loss sustained, under the doctrine of The Louisiana, 3 Wall. 164, 18 L. Ed. 85, unless it appears that her breaking away was due to inevitable causes which human agency could not have prevented. The vessel breaking adrift is required to rebut any prima facie evidence of negligence by proving that the cause of the accident was not preventable by a proper degree of care and maritime skill. In the English case of The Merchant Prince, 7 Asp. 208, after stating this rule—a rule

pretty generally adopted in this country (The Edmund Moran, 180 Fed. 700, 104 C. C. A. 552)—the court says that it is necessary for the vessel proceeded against to show the cause of the accident, and also that the result was inevitable, or to show all possible causes, one or the other of which produced the effect, and that in each case the result could not have been avoided.

Although the evidence in this case shows that the freshet was something that should have been anticipated by the master of the Minch, in view of weather conditions, it is believed that the fire tug Potter, in breaking up the ice jam near the Minch, released such a volume of ice and water that the mooring lines of the vessel were broken, and that this sudden unexpected force could not have been foreseen. There was an unusual amount of ice and snow in the river in March, 1916; the ice at various places being approximately five feet above the level of the water. The Weather Bureau reports show reduction of snow and ice by melting from 20 inches to three-eighths of an inch between March 24th and 28th.

Walsh, captain of one of the fire tugs, who arrived on the scene at 6 p. m., almost an hour after the Minch broke adrift, said that it was the severest freshet he had seen in his experience of 31 years; the current at this time running from 9 to 10 miles an hour. The witness Hyland, captain of the fire tug Potter, likewise swore that the ice at the Ohio street drawbridge, where the tug operated, seemed to be holding to the bottom; that clampers about 10 feet square were standing out 5 or 6 feet above the level of the water; that he had difficulty in breaking up the ice, but that suddenly it came down swiftly against the drawbridge and he was unable to turn the tug around; and that at this time he saw the Minch drift quickly through the bridge. Other witnesses for respondent gave similar testimony as to the severity of the weather conditions and velocity of the current, both at the time of the accident and during the ensuing night.

On the other hand, there were credible witnesses for libelants, familiar with ice floods and freshets in the river in other years, who had seen fire tugs blasting out ice jams, and who testified that other freshets had been quite as severe. The witness Jackson, for instance, testified that the conditions were not unprecedented. He saw the Minch drift through the drawbridge, and said that the current was about 6 miles an hour, increasing to 8, and that he had seen ice conditions in the river quite as bad in previous years, and had assisted in breaking ice jams in the same locality. Wilson, superintendent of the Electric Elevator, testified that the ice jam was worse than any he had previously seen, though the current was not any stronger, nor the quantity of ice greater; and Fitzgerald, an employé who had lived all his life in the vicinity, and Bridge Tenders Callahan and Stanton, swore that ice gorges were not infrequent in that part of the river in the spring of the year, although there had been none for several years.

It may, however, be justly determined, considering the testimony in its entirety, that the freshet was unusually severe; but in the spring

of the year freshets should be anticipated and guarded against by steamers moored in the river. The quantities of ice and the rapidly changing temperature on several days prior to March 27th, the thaw, the moving ice mentioned in the Lake Survey Bulletin—a publication in the master's possession—should, and not improbably did, admonish him of the liability of injury to his vessel. Unquestionably he was, therefore, to exercise such care and caution as were commensurable with the circumstances.

Was the Minch securely fastened to the dock? She was originally fastened to the spile with wire cables and a manila line, such as were customarily used forward and astern in ordinary weather. At about 10 a. m., however, owing to the threatening aspect of the weather, additional lines were put out; but libelant asserts that no turns of the lines were made around the spiles, as there should have been in order to obtain greater resistance; that the loops at the ends of the lines were simply placed over the posts on the dock, and that the lines or cables became weakened and strained; that the strain was not equalized, and hence the moorings could not hold. Such claims of negligence are, however, not proven.

The evidence shows that two mooring cables and a manila line were put out at each end, a 7/8-inch wire cable forward and a 1-inch wire cable aft, and extended from two mooring engines placed forward and aft; the 6-inch manila line extending from the windlass room. Two extra lines—a harbor 8-inch tow line and a lake hawser —were used in anticipation of the freshet; such lines being suitably arranged with a bight to be used forward and aft. The mooring cables were slacked off the drum, a turn secured on the timber heads, a bight put out, and three parts extended to the dock. Lines were arranged astern and abreast in practically the same way, while the side of the vessel was close to the dock, with her stem about 25 feet therefrom. There is evidence showing that the strain on the hawser was equalized by pulling a suitable tackle of two double blocks in the windlass room, and that the 8-inch line was pulled taut on the dock—the cables with a winch and the manila line with the capstan.

The master's testimony with reference to the additional lines and the manner of arranging them finds some support in the observations of the witness Vantine; but positive testimony by a master, who tells us what he did regarding the moorings, is ordinarily more satisfactory than the testimony of a witness who had no part in the actual operations. The Fannie, 11 Wall. 242, 20 L. Ed. 114; The Morton, 17 Fed. Cas. 9864; Wilder's S. S. Co. v. Low, 112 Fed. 173, 50 C. C. A. 473. The harbor master testified that the steamer in his opinion was well moored, considering that she was at the dock discharging cargo, and not in winter quarters, and Capt. Benham also expressed the view that the moorings were good and sufficient.

[2] It is asserted, however, that hand power was inadequate for equalizing the strain on the lines and cables, but this was the common method of equalizing strains on towlines by the use of tackle, and there was apparently no difficulty for the master, mate, and the sea-

man who assisted them, in tightening the lines and cables. In my opinion, based on the evidence, the moorings were reasonably sufficient in number and quality for holding the steamer to the dock in anticipation of the freshet. In this connection it is also to be remembered that, when a captain of a vessel has exercised his best judgment and skill, as in my opinion did Capt. Kelley, he cannot ordinarily be held liable for damage sustained, although the result may show that his best judgment was erroneous. There are many adjudications in support of this principle.

[3] To sustain the defense of inevitable accident it is not necessary that the highest degree of care and precaution should have been exercised; the decisions holding that only reasonable care to avoid dangers fairly to be anticipated is required. The Grace Girdler, 7 Wall. 196, 19 L. Ed. 113.

It is also contended that the steamer Minch was negligent in failing to drop anchor after she went adrift and in having only one anchor available. It appears that a forward anchor was left at the breakwater, where the Minch had been during the entire winter, and that it is common practice to leave one anchor and chain there when vessels go into the harbor to unload, expecting to return. Hence she is not to be condemned for conforming to such custom. If the anchor had been cast, and had succeeded in penetrating the ice, it would, according to the evidence, probably not have stopped the drifting of the Minch, since the bottom of the river for a distance of about 1,600 feet downstream was of rock. The mate was ordered to let go the anchor as soon as the steamer went adrift, but could not do so, as the riding pawl had become meshed in the chain when the moorings parted, which prevented the anchor from running out. Even though in the excitement of the moment the master made a mistake and failed to instantly drop the anchor, such failure would not amount to actionable fault, as it cannot be definitely determined that such failure contributed to the collisions.

Importance is attached to The William E. Reis, 152 Fed. 673, 82 C. C. A. 21; libelant claiming that here, as in that case, the burden of proof resting upon the vessel to show that her breaking adrift was the result of vis major or inevitable accident has not been sustained. In the Reis Case the court found that the fastenings, though originally sufficient, became insufficient when the flood arose. But here, as has been pointed out, additional lines were put out in anticipation of adverse weather, which were parted by the irresistible force with which the ice and water came against the steamer when the ice jam was broken up by the fire tug Potter.

In The E. M. Peck, 228 Fed. 481, 143 C. C. A. 63, it appears that a thaw set in, breaking up the ice and creating unusual conditions, with the result that five additional lines were run out from the steamer; but the ice gorge nevertheless parted the lines. The court held that the drifting of the steamer was the result of inevitable accident. In that case, it is true, several other steamers broke adrift; but the conditions were not precisely the same here, as the other ves-

sels herein involved, which were moored in the river, had out their winter moorings (chain and boom were used on the Kongo), and they were not similarly exposed to the force of the ice congestion. However, the anchor chain of the Kongo, a wooden vessel moored on the opposite side of the river from the Minch, parted, and the anchor of the steamer Hart, farther up the stream, also failed to hold.

[4] The conclusion follows that libelants' contention that there was a lack of nautical skill in mooring the steamer Minch is not sustained; everything having been done which a careful and prudent man would do under like conditions. The movement of ice, true enough, was to be expected; but the proofs are that reasonable precautions were promptly taken to meet it, and the steamer would in all probability have remained securely fastened to the dock, if the fire tug Potter, in breaking up the ice, had not produced at the Ohio street bridge, just astern of the Minch, an unexpected rush of water and pressure of ice against the steamer's bow—a condition which the master of the Minch could not, in the exercise of ordinary care, have foreseen. In my judgment the breaking adrift of the vessel in his charge and under his control was the result of inevitable accident; nor were the injuries sustained by libelants in consequence of such accident due to his negligence.

The libel is dismissed, with costs.

PARIS v. UNITED STATES.

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

No. 5272.

1. CRIMINAL LAW ⊜371(1), 374—EVIDENCE OF SIMILAR OFFENSE TO PROVE INTENT MUST BE CONCLUSIVE.
While proof of the commission of like offenses by a defendant at about the same time that he is charged with commission of the offense for which he is on trial may be received to prove unlawful intent, such evidence of another distinct offense must be plain, clear, and conclusive, and evidence of a vague and uncertain character is never admissible.
2. CRIMINAL LAW ⊜374—EVIDENCE OF ARREST FOR PRIOR OFFENSE AND DISCHARGE INADMISSIBLE.
On trial of defendants, charged with unlawfully carrying on the business of dealers in narcotics, the admission of evidence that they were arrested for a similar offense in another district nine months before, where they were not indicted and were discharged, *held* error, under the rule that vague and uncertain evidence of other offenses is inadmissible.
3. POISONS ⊜9—EVIDENCE OF POSSESSION OF MORPHINE INSUFFICIENT TO PROVE UNLAWFUL DEALING.
Evidence that defendants, charged as unlawful dealers in narcotics, several months before in another district had a considerable quantity of morphine in their possession, *held* incompetent, where it was shown that they were habitual users of the drug.
4. CRIMINAL LAW ⊜1129(3)—ASSIGNMENT OF ERRORS CLEARLY DESIGNATING OBJECTION CONSIDERED.
An assignment of error in the admission of clearly prejudicial evidence in a criminal case will not be disregarded, where, while not technically complying with rule 11, by setting out the evidence, it accomplishes the object of the rule by clearly designating it and the ground of objection.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Criminal prosecution by the United States against L. W. Paris. Judgment of conviction, and defendant brings error. Reversed.

Giddings & Giddings and J. Q. A. Harrod, all of Oklahoma City, Okl., for plaintiff in error.

John A. Fain, U. S. Atty., of Lawton, Okl., and Frank E. Ransdell, Asst. U. S. Atty., of Oklahoma City, Okl.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. Separate indictments were found against the defendant below, L. W. Paris, and his wife, Mary Paris, for the same alleged violation of Harrison Anti-Narcotic Act Dec. 14, 1914, c. 1, 38 Stat. 785 (Comp. St. §§ 6287g–6287q). The charge against each of them was that in the county of Oklahoma, in the Western district of Oklahoma, he and she on January 12, 1918, carried on the business of a dealer in opium and cocoa leaves, and the derivatives, compounds, and preparations thereof, without first having paid the special tax therefor, and without registering with the collector of internal revenue for the district of Oklahoma. They were

tried together. There was evidence that each of the defendants was and had long been constantly addicted to the use of morphine in large quantities; that a policeman in December, 1917, took out of a handbag in their room in a hotel in Oklahoma City a bottle of morphine, and found two other small boxes of morphine and a hypodermic syringe in their bed; that in the month of January or the early part of February, 1918, another policeman saw the defendant Paris put some bottles of morphine and a hypodermic syringe on a 2x4 inside the fence near the sidewalk on which he stood in Oklahoma City; and that on the 15th day of February, 1918, Mrs. Paris sold a bottle of morphine to Daisey Allen at the latter's residence in Oklahoma City for $10, promised to bring her some more morphine, and two days later returned, when she was arrested. The defendant's witnesses admitted that the defendants were addicted to the use of morphine, but testified that they never sold any. There was other evidence in the case, but no direct evidence of any other sales by Mrs. Paris, and no direct evidence of any sale of any opium, cocoa leaves, or any derivatives, compounds, or preparations thereof, or of any other dealing therein than the purchase thereof for the personal use of himself and his wife, by the defendant Paris. The jury found the defendant Paris guilty, and his wife not guilty, and he was sentenced to imprisonment for a term of two years.

During the presentation of the evidence in chief for the government, the court below admitted, over the objections and exceptions of the defendant Paris that this evidence related to a situation and transaction without the Western district of Oklahoma, that it was incompetent, irrelevant, and immaterial, and had no bearing upon the issue in this case, testimony to this effect: At Tulsa, in the Eastern district of Oklahoma, about the 25th or 26th of March, 1917, Paris went to the railroad station, bought a ticket to Memphis, Tenn., checked his handbag, and came out of the station with his wife. Then and there a police officer arrested them, took them to the police station, took the check for his handbag from Paris, went to the station, seized and opened his handbag, and found therein 20 bottles of morphine; went to the hotel where Mr. and Mrs. Paris were boarding, and found in their rooms 6 bottles of morphine. At the trial of this case these bottles were exhibited to the jury. There was no evidence that either of the defendants ever sold any morphine at Tulsa, there was no evidence that the situation and transaction at Tulsa was connected in any way with that at Oklahoma City, there was uncontradicted evidence that Paris was taken before a commissioner and bound over at Tulsa, that he gave bail, that the Grand Jury did not indict him, that his bail was discharged, and that he was not further prosecuted on account of the Tulsa matter. At the close of the trial the court instructed the jury, relative to the evidence concerning the acts at Tulsa, that they should not consider that evidence unless they found that there was a scheme to carry on—

"this business there that was a part of, or included, Oklahoma City or county here, and the evidence of the transaction at Tulsa was simply an indication of what was going on in this district, or of a plan to carry it on in this district; but if it was just an isolated and independent matter, and had no relation with

any dealing of that character over here in Oklahoma City, then you will eliminate it entirely from your minds."

The admission of this evidence relative to the Tulsa affair is specified as error, and it is difficult to discover any rule or principle upon which its admission can be sustained.

[1] The general rule is that evidence of the admission by a defendant of an offense similar to that for the alleged commission of which he is on trial is not admissible to prove his commission of the latter offense. Boyd v. United States, 142 U. S. 454, 456, 457, 458, 12 Sup. Ct. 292, 35 L. Ed. 1077; Hall v. United States, 150 U. S. 76, 81, 82, 14 Sup. Ct. 22, 37 L. Ed. 1003; 16 C. J. 586, § 1132. To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial may be received to prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. In cases falling under such an exception to the rule, however, it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible. Baxter v. State, 91 Ohio St. 167, 110 N. E. 456; State v. Hyde, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191; 16 C. J. 592; People v. Sharp, 107 N. Y. 427, 469, 14 N. E. 319, 1 Am. St. Rep. 851; State v. La Page, 57 N. H. 245, 259, 24 Am. Rep. 69; Fish v. United States, 215 Fed. 545, 549, 132 C. C. A. 56, L. R. A. 1915A, 809. Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdicts in accordance with their views on false issues rather than on the true issues on trial. Speaking of evidence of other similar offenses, the Circuit Court of Appeals of the First Circuit, in the case last cited, well said:

"Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case."

[2] Under these rules the evidence relating to the situation and transactions of the defendant below and the police officers at Tulsa on the 24th and 25th of March, 1917, was clearly incompetent, irrelevant, and prejudicial: (1) Because it fails to prove any sale of or dealing in any narcotics at Tulsa by either of the defendants; (2) because no proof or evidence was produced at the trial that the situation or transactions at Tulsa in March, 1917, were in any way a part of or connected with the alleged sale of the bottle of morphine by Mrs. Paris to Daisey Allen in Oklahoma City on February 15, 1918; and (3) because the intent of the defendants, or either of them, was not an essential element of the offense with which they were charged in the case at bar.

From this conclusion counsel for the United States seek to escape in numerous ways. They argue that the matters in the Tulsa evi-

dence were admissible under the decision of the Circuit Court of Appeals of the Fourth Circuit in Day v. United States, 229 Fed. 534, 143 C. C. A. 602. In that case Day was tried and convicted of carrying on the business of a wholesale liquor dealer in 1910 and 1911. In the trial the government proved four sales of liquor by the defendant without a license, and the payment therefor in the district, and within the jurisdiction of the trial court, in 1909. The Circuit Court of Appeals first held this evidence incompetent and irrelevant, and directed a reversal of the judgment. 220 Fed. 818, 819, 136 C. C. A. 406. On a motion for rehearing its attention was called to the rule in Ledbetter v. United States, 170 U. S. 610, 612, 18 Sup. Ct. 774, 42 L. Ed. 1162, that under an indictment charging a forbidden sale or sales upon a day certain evidence of sales within the jurisdiction of the court previous to the day specified in the indictment and within the time fixed by the statute of limitations is admissible to prove the offense charged, and because the four sales in 1909 were previous to the day specified in the indictment, and were within the time fixed by the statute of limitations, and the evidence of them was therefore competent as direct evidence of the substantive offense charged, the Court of Appeals held the evidence of them admissible. The decision and opinion in that case, however, is neither controlling nor persuasive upon the question of the admissibility of the evidence of the Tulsa transactions in this case: (1) Because the latter transactions were not within the jurisdiction of the court below and evidence of them was not direct evidence of the offense charged in this case; (2) because the evidence of these transactions was barren of any evidence of any sale at Tulsa and hence of any similar offense, while in Day's Case there was conclusive evidence of four sales in 1909; and (3) because the evidence of the transactions at Tulsa was vague and uncertain, while that in Day's Case was clear and conclusive.

[3] Counsel for the United States contend that the evidence of the possession of the 26 bottles of morphine at Tulsa in March, 1917, was competent to prove the intent of the defendants to carry on the business of a dealer in morphine at Oklahoma City on February 15, 1918, more than nine months after the transaction at Tulsa. The evidence relative to this contention is that these defendants were addicted to the use of morphine in large quantities, sometimes to the amount of a bottle a day; that they kept with them and used this morphine constantly; that they had never been in Oklahoma City in March, 1917, when they were at Tulsa; that at that time and place they had bought their tickets for Memphis, Tenn., checked their handbag containing 20 of the 26 bottles, and left it at the railroad station; and that they had the other 6 bottles in their room at the hotel. If, upon this evidence, a jury should find that these defendants had the intent to carry on the business of a dealer of morphine in Oklahoma City, or elsewhere, it would be the duty of the judge on the receipt of such a finding to set it aside, for there would be no substantial evidence here to sustain it. This evidence was not admissible as evidence of the evil intent of the defendants in the case at bar.

[4] Counsel argue that the sixth assignment of error, on which the

challenge of the evidence relative to the Tulsa transaction rests is insufficient, because it fails to set forth the substance of the evidence erroneously admitted, as required by rule 11 of this court (188 Fed. ix, 109 C. C. A. ix). But that assignment clearly states that the error to which it is directed is the admission over the objection and exception of the defendants of the testimony of a witness that the defendant was caught with the bottles of morphine in his possession at Tulsa, in the Eastern district of Oklahoma, a long time previous to his apprehension and arrest in the Western district. This assignment may not constitute a strict technical compliance with the literal terms of rule 11, but it accomplished the object of that rule; it gave fair notice to counsel and court of the claim of error which has been discussed, for the record contained evidence concerning only one transaction, and at only one time, when at Tulsa the defendant was caught with bottles of morphine. This is an important case to the defendant. It involves his imprisonment, his deprivation of liberty, for 2 years. The counsel for the United States have not been misled regarding, or ignorant of, the claim of error to which this assignment points, and this court is unwilling to disregard it on account of the harmless defect in the assignment.

Counsel also object to the consideration of this error in the trial, because no objection was made and no exception was saved to the greater part of the testimony concerning the transaction at Tulsa. But the record disclosed the fact that, by repeated and ample objections to all the proposed evidence on this subject before any of it was introduced, the defendants challenged its admission and excepted to the ruling of the court which admitted it. They objected to its consideration because the evidence on this subject to which counsel object was afterwards admitted without objection. But counsel for the defendants more than once objected to it, and contended against its admission, and never withdrew their objections. When the court decided that it should be admitted, they took their exception. Under the rules and practice in the federal courts, this was sufficient to entitle them to a review of the ruling. It was unnecessary for them thereafter to object to any evidence relating to the Tulsa transaction on the grounds stated in their overruled objections, whether that evidence was introduced once or many times.

This evidence of the transactions and situation at Tulsa was incompetent, irrelevant, and clearly prejudicial. It was not withdrawn from, but was submitted to, the jury in the charge of the court, although there was no evidence whatever connecting the Tulsa transactions with the transaction at Oklahoma City.

The judgment below must therefore be reversed, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered.

PHILADELPHIA & READING COAL & IRON CO. v. KEVER.

(Circuit Court of Appeals, Second Circuit. April 22, 1919. On Rehearing April 28, 1919.)

No. 202.

1. PLEADING ⟸111—JUDGMENT ON PLEA IN ABATEMENT TO BE RENDERED IN CONFORMITY TO STATE PRACTICE.
In conformity with Code Civ. Proc. N. Y. § 498, which permits facts in abatement to be pleaded in the answer, together with defenses on the merits, the judgment of a federal court in that state on overruling a plea in abatement, raising an issue of fact as to the jurisdiction of the court over the person of defendant, should be that defendant answer over.

2. PLEADING ⟸339—LEAVE TO WITHDRAW ANSWER AND FILE PLEA IN ABATEMENT IN DISCRETION OF COURT.
If a defendant asks leave to withdraw his appearance and answer, and to file a plea in abatement, having had knowledge of the defect when he answered, the court may or may not grant leave, and should not if it knows that defendant had such knowledge and that the motion is made in bad faith.

3. PLEADING ⟸111—ON OVERRULING PLEA IN ABATEMENT, ERROR TO REFUSE RIGHT OF DEFENDANT TO ANSWER OVER.
After granting leave to a defendant to withdraw its answer and file a plea in abatement for want of jurisdiction over its person, it was error for the court, after overruling the plea, to refuse to permit defendant to answer over on the merits, and to enter judgment absolute on the plea to jurisdiction.

4. CORPORATIONS ⟸665(2)—SERVICE ON DESIGNATED AGENT OF FOREIGN CORPORATION VALID, THOUGH CAUSE OF ACTION AROSE IN OTHER STATE.
Under New York General Corporation Law (Consol. Laws, c. 23), requiring foreign corporations to designate an agent on whom service may be made, service on such agent is good, although the cause of action sued on arose in another state.

Manton, Circuit Judge, dissenting.

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

Action by Katherine Kever, widow of George Kever, against the Philadelphia & Reading Coal & Iron Company. Judgment for plaintiff, and defendant brings error. Reversed.

Certiorari denied 250 U. S. 665, 40 Sup. Ct. 13, 64 L. Ed. ——.

Macklin, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for plaintiff in error.

Baltrus S. Yankaus and Seabury, Massey & Lowe, all of New York City (Albert Massey, of New York City, of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a writ of error taken by the defendant, a corporation of the state of Pennsylvania, to a judgment for $19,081.04 assessed against it by a jury as upon a default, as damages for the death of George Kever, caused by its negligence, when employed by it in Schuylkill county, Pa., in favor of his widow, the plaintiff, and

his six infant children. A bitter contest was carried on between the parties for three years, the successive steps of which it will not be necessary to consider.

April 14, 1915, the summons issued. May 22, 1916, the trial began, continued for six days, and ended in the disagreement of the jury. The plaintiff having sworn at the trial that her husband was a naturalized citizen, the defendant's attorney telegraphed to the defendant in Pottsville, Schuylkill county, to investigate, and received a reply from its claim agent that Kever had taken out first papers June 7, 1902, but had never been naturalized.

August 22, 1916, on defendant's motion, it was permitted to withdraw its general appearance and answer and file a plea in abatement to the jurisdiction of the court, on the ground that the plaintiff, being an alien, could sue the defendant, an inhabitant of the state of Pennsylvania, only in the District Court of the United States of the district in which it resided, viz. in the Eastern district of Pennsylvania. January 17, 1917, the court overruled the plea; it having been shown that George Kever had been duly naturalized in Schuylkill county, Pa., June 7, 1902, no final papers being required of him under section 2167, Rev. Stat. U. S.

May 4, 1917, an order was entered, on defendant's motion, reinstating the answer which it had been given leave to withdraw and placing the case on the calendar for trial. April 13, 1918, the court entered an order vacating the order of May 4, 1917, and directing judgment absolute in favor of the plaintiff upon the defendant's plea to the jurisdiction, and directing the United States marshal to summon a jury to assess the plaintiff's damages.

The trial judge believed that the defendant's agents in Pennsylvania must have known from the records there that Kever had been naturalized June 7, 1902, and that they misled the defendant's attorney here to whom no bad faith is imputed, on that point. He said:

"It does not seem, therefore, that upon the present call of the calendar the case should be dismissed for lack of prosecution, when the defendant has, through the plaintiff's inability to prosecute, been allowed to present a defense upon the merits, which it had voluntarily abandoned and refused to urge, while the defendant could insist that the plaintiff's decedent was not a citizen. In other words, the defendant refused to accept the jurisdiction of this court so long as ground of objection thereto arose, but, upon realizing the plaintiff's lack of ability to proceed against it, it now accepts the jurisdiction of the court for the sake of asking that the action be dismissed.

"This would certainly work an unjust result, and the defendant has no purely legal right to insist upon the opening of his default and his restoration to a position from which an unjust result would proceed. Upon the circumstances, it must be held that the order reinstating the defendant's answer should be vacated, and the plaintiff given judgment, upon the defendant's plea to jurisdiction, which admitted, in effect, liability, when presented as it was in this case.

"Under these circumstances the plaintiff's application for judgment should now be granted, and a jury called to assess the plaintiff's damage, in order that the amount might be entered in said judgment."

The learned judge seems to have thought that the defendant had an election either to stand on the question of the jurisdiction of its person or to defend on the merits, and that if it insisted on the one position it

waived the other. We shall examine this question presently. Let us consider the foregoing steps in the case in succession.

The order of August 22, 1916, permitting the defendant to withdraw its general appearance and answer and file a plea in abatement, was within the discretion of the court. If, when the motion was made, the defendant knew that the plaintiff was a citizen, the motion should not have been granted. We said on this subject in Lehigh Valley Railroad Co. v. Washko, 231 Fed. 42, 46, 145 C. C. A. 230, 234:

"In the Yensavage Case the majority of the court called attention to the proposition that, when facts appeared which indicated that the plaintiff had improperly brought the action in that District Court, the court might inquire whether the defendant, when it appeared, joined issue, or went to trial, did have knowledge or information sufficient to form a belief that the action was being prosecuted in the wrong court, on which distinct issue plaintiff had the right to be heard if he so desired. Indeed, the court might properly suspend the trial to enable plaintiff to produce witnesses on this issue. This is undoubtedly correct; if defendant with such knowledge or information takes no step to put a stop to the further prosecution of the suit, he must be deemed to have waived his right. Moreover, this distinct issue is one which the judge himself may hear and determine at the trial, as he would on affidavits if it were raised before the trial. It not infrequently happens that plaintiff avers that he is a resident of a particular district, whereupon the defendant on motion shows conclusively by affidavits that the averment is untrue and dismissal follows.

"In the Yensavage opinion, however, there is a phrase which should not be broadly interpreted. It is said that the disposition of the motion to withdraw the general appearance for the cause stated would 'rest in the discretion of the court.' If this be taken as meaning that the trial judge, taking the evidence, exercises his judgment thereon, it is correct; but this court is not to be understood as holding that there is any further 'discretion' to be exercised. If it appears by the proof that at the time defendant appeared and prosecuted its defense on the merits it had neither knowledge nor information sufficient to form a belief that plaintiff's averments of citizenship and residence were untrue, it is asserting a right which it had never waived, and denial by the court of the relief to which that right entitled it would be reversible error."

The order of May 4, 1917, was right, because the only judgment that could have been entered on this plea in abatement was that the defendant should answer over, the common-law judgment of respondeat ouster. Andrews' Stephens on Pleading, § 97. The plea very properly concluded as follows:

"Wherefore defendant prays that said plea be sustained, that this cause of action be dismissed, and, if the same be overruled, the defendant have leave to answer over upon the merits."

The order of April 13, 1918, directing judgment absolute in the plaintiff's favor upon the plea to the jurisdiction, was improper. It was an interlocutory judgment, quod recuperet. No such judgment could be entered on that plea. The defendant was entitled to answer over. Its answer, formerly withdrawn, had been reinstated, and could only be got rid of by motion for judgment on it as frivolous under section 537 of the New York Code of Civil Procedure, or by motion to strike it out as sham under section 538. It was good both in form and substance, and neither frivolous nor sham.

A defendant who pleads on the merits waives his right to file a plea

in abatement; but he does not, by filing a plea in abatement, waive his right to plead on the merits, and he cannot be deprived of this right by the court. Upon incongruities of pleading in this connection Mr. Justice Daniel said in Sheppard v. Graves, 14 How. 505, 510 (14 L. Ed. 518):

"The incongruities in practice, which mark the progress of this case in the court below, are much to be regretted, as having a tendency to confound the proceedings in courts of justice; proceedings calculated to define and distinguish the rights of parties litigant, and to conduct the courts to a correct adjudication upon those rights; proceedings indeed founded upon, and as it were sanctified by, an experience of their usefulness, and even of their necessity. Thus it has ever been received as a canon of pleading that matters which appertain solely to the jurisdiction of a court, or to the disabilities of the suitor, should never be blended with questions which enter essentially into the subject-matter of the controversy, and that all defenses involving inquiries into that subject-matter imply, nay admit, the competency of the parties to institute such inquiries, and the authority of the court to adjudicate upon them. Hence it is that pleas to the jurisdiction or in abatement, are deemed inconsistent with those which appertain to the merits of a cause; they are tried upon different views as to the relations of the parties, and result in different conclusions. A striking illustration of the mischiefs flowing from the departure from the rule just stated is seen in the practice attempted in the case before us. If it could be imagined that the plea to the jurisdiction and the plea to the merits could be regularly committed to the jury at the same time, the verdict might involve the following absurdities: Should the finding be for the plaintiff, the judgment would, as to the defendant, be upon one issue that of respondeat ouster, and upon the other that he pay the debt, as to the justice of which he was commanded to answer over. Should the finding be for the defendant, the judgment upon one issue must be that the debt was not due, and upon the other that the court called upon so to pronounce had no authority over the case. So that in either aspect there must, under this proceeding, be made and determined one issue which is incongruous with and immaterial to the other. A practice thus fraught with confusion and perplexity, and one endangering the rights of suitors, it is exceedingly desirable should be reformed, and we are aware of no standard of reformation and improvement more safe and more convenient than that which is supplied by the time-tested rules of the common law; and by one of those rules, believed to be without an exception, it is ordained that objections to the jurisdiction of the court, or to the competency of the parties, are matters pleadable in abatement only, and that if, after such matters relied on, a defense be interposed in bar and going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial, and are waived."

[2, 3] If a defendant asks the court for leave to withdraw his appearance and answer and file a plea in abatement, having had knowledge of the defect he proposes to plead before he appeared and answered, the court may or may not give leave. If the court knows that he had such knowledge, and that the motion is made in bad faith, it should certainly refuse the leave. Now in this case there was nothing to show any bad faith on defendant's part when the court permitted the general appearance and answer to be withdrawn; but after the trial of the plea in abatement the court did know as much as it ever learned on the subject of the defendant's bad faith. Still there was nothing then that could be done but to permit the defendant to answer over and proceed to trial. It was error to enter the judgment absolute on the defendant's plea to the jurisdiction.

[4] The plaintiff in error has asked us, in case the cause comes back for a new trial, to decide whether the service of process upon the agent

designated by it under the law of the state of New York (general Corporation Law [Consolidated Laws, c. 23] § 16) was good. The contention is that, it being a foreign corporation engaged in interstate commerce, service on the designated agent here is good only in case of suits for causes of action arising in New York, whereas the cause of action sued on arose in Pennsylvania. Judge Learned Hand has decided to the contrary in the District Court for the Southern District in the case of Smolik v. Philadelphia & Reading Ry. Co., 222 Fed. 148, as has the Court of Appeals of the state of New York in Bagdon v. Philadelphia & Reading Ry. Co., 217 N. Y. 432, 111 N. E. 1075, L. R. A. 1916F, 407, Ann. Cas. 1918A, 389. We concur in this conclusion.

The judgment is reversed.

MANTON, Circuit Judge (dissenting). The defendant in error has judgment for $19,081.04 assessed by a jury pursuant to an order entered April 13, 1918, vacating an order of May 4, 1917, which latter order was granted upon motion of the plaintiff in error reinstating the answer which it had previously filed. This answer the plaintiff in error had withdrawn upon its own motion.

The action was commenced on April 14, 1915, and after several dilatory pleas a trial was had on May 22, 1916, when the jury disagreed. The various pleas interposed by the plaintiff in error were as follows:

Its first plea was served as a plea to the jurisdiction on June 15, 1915, which was returned by the defendant in error because it was not served within 20 days after the service of the summons and complaint. This plea was alleged to be an "invasion of the defendant's rights under the Constitution of the United States, particularly section 1 of the Fourteenth Amendment to the Constitution," in compelling the plaintiff in error to respond in suit. This plea was finally considered and overruled.

The plaintiff in error then filed its answer, a plea to the merits, and a trial was had as aforesaid. At this trial, the defendant in error testified that her husband was a citizen; that his naturalization papers were in their home in Pennsylvania. The plaintiff in error, suspicious of the truth of this statement, had its investigators make inquiry at Pottsville, Pa., to find the truth or falsity of this claim. Through mistake, or ignorance, or willful conduct, it was said to have been reported to counsel for the plaintiff in error that the intestate was not a citizen. The plaintiff in error then moved to withdraw its general appearance and filed a plea in abatement of the jurisdiction of the court, on the ground that the intestate, being an alien, could sue inhabitants of Pennsylvania only in the District Court of the United States in the district in which he resided, namely, the Eastern district of Pennsylvania. Upon the trial of this issue, it was shown that the intestate was a naturalized citizen, and had been one since June, 1902. The public records in Pottsville indicated this.

Thereafter, and on May 4th, on motion of the plaintiff in error, the answer was reinstated and the cause placed on the calendar for trial. The case was reached for trial on January 7, 1918. On the call of the calendar, defendant in error moved for judgment against the plaintiff in

error upon the record including the former motions, and asking for a jury to assess the damages. The plaintiff in error moved to dismiss the complaint. The court disposed of this application by stating that, if the defendant in error was not ready or unable to go on with the trial, the plaintiff in error was entitled to a dismissal for lack of prosecution, but not on the merits. Promptly, then, on January 15, 1918, the plaintiff in error moved to dismiss for lack of prosecution. The defendant in error made a counter motion for leave to reargue, on additional facts, the motion made on December 27, 1916, for judgment by default. The defendant in error's theory was that upon the trial of the plea it was demonstrated that the certificate and affidavit upon which the plea to jurisdiction, based upon the alienage of the intestate was made, were false, and that the court was thus imposed upon, and should therefore deny the application previously made to file the plea to the merits upon a reconsideration.

Because of these dilatory tactics and pleas, which were without merit, it appears that the defendant in error, who had expended some $2,000 in cash disbursements for the prosecution of this action, found herself without funds, and, worse still, without witnesses, because of this long delay. The witnesses had scattered about the country, and the defendant in error was no longer in a position to present the case as she did when it was first tried. A widow and six children, who had, at least, made out a prima facie case, were to be deprived of just compensation for the loss of a husband and father, if the motion of the plaintiff in error to dismiss for lack of prosecution prevailed. These conditions were not of the making of the defendant in error, but were due to the course of conduct of the plaintiff in error.

The plaintiff in error was doing business in the state of New York for years prior to the death of the intestate, selling coal and maintaining coal yards in various places in this state. It had an agent designated upon whom service might be made. The law was settled for the guidance of the District Judge when this first plea was interposed, and this, in an action against the same plaintiff in error, in which the same attorneys appeared for it. Smolik v. Phila. & Reading C. & I. Co. (D. C.) 222 Fed. 148.

When the trial took place in May, 1916, the same plea was urged. The Court of Appeals of the state of New York had then decided against the same contentions of this plaintiff in error. Bagdon v. Phila. & Reading C. & I. Co., 217 N. Y. 432, 111 N. E. 1075, L. R. A. 1916F, 407, Ann. Cas. 1918A, 389. The opinions of these two cases were cited with approval in the Supreme Court of the United States (Penn. Co. v. Gold Issue Mining Co., 243 U. S. 93, 37 Sup. Ct. 344, 61 L. Ed. 610). That process served under the circumstances existing in the case at bar is valid has been held uniformly by the courts in litigations in which both the plaintiff in error and its counsel participated. Phila. & Reading C. & I. Co. v. Gilbert, 245 U. S. 162, 38 Sup. Ct. 58, 62 L. Ed. 221; Same v. Saccripante, 247 U. S. 522, 38 Sup. Ct. 583, 62 L. Ed. 1247; Tauza v. Susquehanna C. & I. Co., 220 N. Y. 259, 115 N. E. 915; Pomeroy v. Hocking Valley Ry. Co., 218 N. Y. 530, 113 N. E. 504; Smolik

v. Phila. & Reading C. & I. Co. (D. C.) 222 Fed. 148; Bagdon v. Phila. & Reading C. & I. Co., 217 N. Y. 432, 111 N. E. 1075, L. R. A. 1916F, 407, Ann. Cas. 1918A, 389.

With this wealth of authority against the plaintiff in error, and with a direct repudiation of its contention by the Supreme Court of the United States, it still pressed upon the District Judge these contentions, and now, in this court, seriously asks us to overrule these authorities and say that this foreign corporation, engaged in interstate commerce, which has designated an agent upon whom service might be made, can be sued in New York only if the cause of action arises here, and cannot be sued where the cause of action arises in the state of Pennsylvania. Such a plea could not be interposed in good faith, and should be treated as tantamount to an abandonment of the defense upon the merits. This court said, in Lehigh Valley Coal Co. v. Yensavage, 218 Fed. 547, 550, 134 C. C. A. 275, 278:

"We do not, therefore, wish to be understood as deciding, where the plaintiff alleges residence in the district in suit, and the defendant traverses the allegation only by denying any information about it, that if, during the proceedings, it appears that the plaintiff cannot prove his allegation, the defendant's general appearance has bound him. All we wish to lay down is that, when once the truth appears, then at least the defendant must choose between his plea in abatement and his plea to the merits. Assuming that it is not bad to couple the two positions before the defendant is informed, there can be no justification in allowing him to proceed thereafter in the alternative."

Where the defendant appears and pleads to the merits, as it did here, it waives any rights to challenge thereafter the jurisdiction of the court on the ground that the suit has been brought in the wrong district. St. Louis & San Francisco R. Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; Western Loan Co. v. Butte & Boston Mining Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101.

Upon the trial in May, 1916, an issue was raised as to the citizenship of the deceased, for the defendant in error testified that she was a citizen, because her husband was. Immediately counsel for the plaintiff in error wired to a representative in Pennsylvania and received a return answer—a telegram from the plaintiff in error to its counsel, showing its knowledge of the intestate's application for citizenship and his admission to citizenship. How could the plaintiff in error thereafter interpose a plea to the jurisdiction of the court because of the alienage of the intestate, in view of this information? Indeed, the plaintiff in error produced an affidavit of one Morgan and a certificate of a prothonotary that there was no record of the naturalization of George Kever at Pottsville. Attempt is made now to escape from the public record upon the claim that the "v" in the word "Kever" looked as if it were an "r." This cannot help the plaintiff in error, for it did not see the certificate until the trial of the plea, and therefore the plea could not have been interposed in reliance thereon. What appeared on the records as to naturalization was sufficient to satisfy section 2167 of the United States Revised Statutes.

In my opinion, this conduct justifies the conclusion that the defense of want of jurisdiction on the question of service was frivolous, and that the plea upon the ground of alienage was sham. The dismissal of

the sham plea left the plaintiff in error in default, since it had voluntarily withdrawn its answer over the objection of the defendant in error. This was an intentional default. It now complains of the failure of the District Judge to dismiss the action for want of prosecution and in refusing to open a default to again permit it to litigate upon the merits.

Judge Chatfield says that, if he had known these facts when he granted the motion reinstating the defendant's answer on May 14, 1917, he would have refused to do so. This order was still within his power, and he had a right to vacate because he became acquainted with these facts subsequently, which, if known at the time, would have prevented him from making it. His ruling, therefore, was a refusal to open a default which the plaintiff in error had intentionally and obstinately suffered. It differs from defaults due to negligence or oversight, which are promptly opened. The plaintiff in error has been obstinate in its position that it cannot be sued in the New York courts by a resident of the state, or in the jurisdiction of the District Court for the Eastern District of New York. It endeavors to support the claim upon the theory that "living is higher and money correspondingly cheaper in New York than in the mining districts of Pennsylvania." Of course, such reasons find no support in the law.

There is no federal statute governing the opening of defaults in actions at law, and the practice under the Conformity Act is governed by the state statute. Wylie v. Lynch, 195 Fed. 386, 115 C. C. A. 288. Defaults, occurring under circumstances as here disclosed, are not opened by the state courts. City of New York v. Smith, 138 N. Y. 676, 34 N. E. 400; Wight v. Bennett, 55 Hun, 610, 8 N. Y. Supp. 808; Herbert Land Co. v. Lorenzen, 113 App. Div. 802, 99 N. Y. Supp. 937; Thorburn v. Gates, 177 App. Div. 474, 164 N. Y. Supp. 307. The withdrawal of the answer by the plaintiff in error justified the entry of a judgment by default after jurisdiction of the court has been acquired. Craighton v. Kerr, 87 U. S. (20 Wall.) 8, 22 L. Ed. 309; The Last Chance Co. v. Tyler Mining Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859.

The judgment should be affirmed.

On Rehearing.

WARD, Circuit Judge. [1] We fell into error, so far as common-law pleading is concerned, in saying in our original opinion that the only judgment that could have been entered on the defendant's plea in abatement was that of respondeat ouster and that therefore the District Judge erred in entering under it a judgment quod recuperet. This would have been so if the defendant's plea had raised an issue of law, but as it raised an issue of fact, viz., that the plaintiff was not a citizen, but an alien, the judgment of quod recuperet was right at common law. The theory is that the defendant, by setting up the defense of personal immunity from suit in the particular court, admitted that it had none other. The weight of authority is to this effect. Haight v. Holley, 3 Wend. (N. Y.) 258; Jewett v. Davies, 6 N. H. 518; Trow v. Messer,

32 N. H. 361; National Accident Society v. Spiro, 78 Fed. 774, 782, 24 C. C. A. 334.

Rev. Stat. U. S. § 914 (Comp. St. § 1537), provides:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

We do not understand that this absolutely restricts the federal courts to all the provisions of the state law as to pleading in civil actions at law. In this circuit and in the federal courts generally it has been the rule, as at common law, that a defense on the merits waives any objection as to jurisdiction over the person of the defendant. It could not as to the general jurisdiction of the court; e. g., so as to maintain a suit between citizens of the same state where general jurisdiction depends upon citizenship. No consent could do so in such case, and the court would be bound sua sponte, the moment that appeared, to dismiss the action under section 5 of the Act of March 3, 1875, c. 137, 18 Stat. 472, which provides (section 37, Judicial Code [Act March 3, 1911, c. 231, 36 Stat. 1098, Comp. St. § 1019]):

"That if in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just. * * *"

This practice is worth maintaining, because it may save the parties the time and labor of preparation for trial on the merits, when the cause is liable to be dismissed without prejudice on the preliminary objection. It does not, however, conform to the system of pleading prescribed by the laws of the state of New York, which permits this objection to be made in the answer, which may also contain defenses on the merits. Code Civ. Proc. N. Y. § 498.

The burden of proving the jurisdictional condition alleged in the complaint that the action is between citizens of different states, or between an alien and a citizen, is upon the plaintiff, if the allegation is denied in the answer. Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579. But where the issue is proposed by the defendant upon a plea in abatement the burden of proof is upon him. Sheppard v. Graves, 14 How. 505, 14 L. Ed. 518. This was also held as to the jurisdictional condition in respect to the amount in controversy in Hunt v. New York Cotton Exchange, 205 U. S. 322, 333, 27 Sup. Ct. 529, 51 L. Ed. 821.

If the plea is sustained, there will be a judgment dismissing the complaint without prejudice; but there is no case in this circuit deciding

what the judgment shall be if the plea be decided in favor of the plaintiff. At common law, as we have seen, it should be quod recuperet. This, however, does not conform to the law of the state of New York, which permits the objection to be taken in the answer at the same time with defenses upon the merits.

If we follow the common law with respect to the judgment to be entered, a defendant will rarely dare to make the preliminary objection, at the risk of being deprived of his right to defend upon the merits. Therefore we prefer to hold in conformity with the state system of pleading, that the judgment for the plaintiff upon an issue of fact as to the jurisdiction of the court over the defendant's person upon a plea in abatement should be that the defendant answer over.

This leaves our original conclusion unaltered and therefore the judgment is reversed.

MANTON, Circuit Judge, dissents.

In re LETERMAN, BECHER & CO., Inc.

(Circuit Court of Appeals, Second Circuit. May 28, 1919.)

No. 187.

1. BANKRUPTCY ⟸440—ORDER AS TO PRIORITY OF CLAIM APPEALABLE AS "CONTROVERSY IN BANKRUPTCY PROCEEDING."

An order allowing priority to one allowed claim over another allowed claim is not an order in a bankruptcy proceeding proper, reviewable by petition to revise under Bankruptcy Act, § 24b (Comp. St. § 9608), but is an order made in a controversy in a bankruptcy proceeding, and as such subject to the appellate jurisdiction of the Circuit Court of Appeals under section 24a, authorizing appeal in such a case.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Controversy Arising in Bankruptcy Proceedings.]

2. FRAUDULENT CONVEYANCES ⟸145—RETENTION OF POSSESSION AS AGENT OF CHOSE IN ACTION ASSIGNED NOT FRAUDULENT.

An assignment of accounts is not invalidated because they are left in possession of the assignor for collection, as agent of the assignee.

3. COURTS ⟸372(1)—FEDERAL COURTS NOT BOUND BY STATE DECISIONS AS TO PRIORITY BETWEEN ASSIGNEES.

The question which of two assignees of the same thing from the same assignor is entitled to priority is one of general law, on which the federal courts are not bound by state decisions.

4. ASSIGNMENTS ⟸85—ASSIGNEE FIRST GIVING NOTICE TO DEBTOR PRIOR IN RIGHT.

Under the rule of the federal courts, as between two assignees of a chose in action from the same person, the one who first gives notice to the debtor of his assignment has the better right.

5. NOTICE ⟸14—ACTUAL NOTICE PROVABLE BY ALL DEGREES OF EVIDENCE.

Actual notice is a fact to prove which all grades and degrees of evidence may be used, from the most direct and positive proof to the slightest circumstances from which a jury would be warranted in inferring notice.

6. NOTICE ⟸1—MUST BE ACTUAL WHERE NO STATUTE AUTHORIZES CONSTRUCTIVE NOTICE.

Notice being necessary, that notice must be actual, in the absence of a statute providing for constructive notice.

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7. EVIDENCE ⟸71—NOTICE ⟸10—PRESUMPTION OF RECEIPT OF NOTICE SENT BY MAIL.

In the absence of a statute authorizing service of a notice by mail a notice so served is ineffective, unless it is received; but where it has been properly mailed its receipt will be presumed, in the absence of evidence to the contrary.

8. ASSIGNMENTS ⟸57—NOTICE SENT BY MAIL TAKES EFFECT WHERE RECEIVED.

Notice of an assignment deposited in the mail by an assignee does not become effective as against the holder of the fund assigned or the debtor until it is actually communicated to him.

9. ASSIGNMENTS ⟸137—RECEIPT OF UNREGISTERED LETTER BEFORE REGISTERED ONE ESTABLISHED.

Where two assignees of the same choses in action each sent notices of his assignment to the debtors by mail at about the same time, one by registered and the other by unregistered mail, the unregistered notices *held* under the evidence to have been first received.

Petition to Revise and Appeal from Order of the District Court of the United States for the Southern District of New York.

In the matter of Leterman, Becher & Co., Incorporated, bankrupt. From an order awarding priority to the claim of Coleman & Co., the Tawas Company, Incorporated, appeals. Reversed.

Certiorari denied 250 U. S. 668, 40 Sup. Ct. 14, 64 L. Ed. —.

Gettner, Simon, & Asher, of New York City (Herman Asher, of New York City, of counsel), for appellant.

J. S. Rosenthal and Jacob J. Lesser, both of New York City, for appellees.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. [1] The order which is brought here for our consideration is not an order in a bankruptcy proceeding proper, as the claims of the two petitioners against the bankrupt have been allowed. But this is a controversy between two claimants as to the priority of their respective claims, which is the only question involved. It is therefore a controversy in a bankruptcy proceeding, and as such is subject to the appellate jurisdiction of this court under section 24a of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. § 9608]). The petition to revise which under section 24b gives a right to review as to matters of law where facts are not in controversy will be disregarded. In re Doran, 154 Fed. 467, 83 C. C. A. 265.

This controversy arises out of the failure of an assignee of choses in action to give notice to the debtors at the time of the assignment. The result is that a subsequent assignee who claims to have first given notice is seeking priority of payment out of the proceeds of assigned choses in action now in the hands of the trustee of the bankrupt assignor.

It appears that Coleman & Co. were engaged in business as commercial bankers and factors, and that on October 15, 1915, they entered into an agreement with the bankrupt, which it is alleged has ever since continued in force, whereby Coleman & Co. were to acquire certain accounts receivable of the said bankrupt by advancing thereon 80 per

cent. of the net face value subject to a commission charge of 1¼ per cent., plus 6 per cent. interest on sums advanced until paid. At the time of the hearing there was owing to Coleman & Co. the sum of $9,314.48, for which they had held accounts receivable having a face value of $11,720.74.

The contract between Coleman & Co. and the bankrupt contained the following clauses among others:

"The company [Coleman & Co.] shall have a general banker's lien on all moneys, property, or other collateral in its possession or under its control for any and all indebtedness from the customer [Leterman, Becher & Co.] to the company. The word 'debtor' in this agreement refers to the customers of the customer mentioned in the assigned accounts.

"The title to all merchandise which any debtor may not receive or return or refuse to accept is in the company. Should the customer have any merchandise returned to it, or not accepted on any account assigned to the company, or should information be received by the customer of such return or non-acceptance, the customer shall immediately give notice to the company, and the company shall thereupon have the option either to retain its title to the merchandise so returned or not accepted, or to surrender the same to the customer upon receiving payment therefor in cash or receive possession of such merchandise.

"This agreement shall be construed according to the law of the state of New York."

In November and December, 1917, the Tawas Company advanced to the bankrupt $2,750 in three installments, for which they received the promissory notes of the bankrupt. At the time the Tawas Company made these advances the bankrupt assigned to it various accounts receivable, all of which accounts had been previously assigned to Coleman & Co. But at the time of the assignment of these accounts the Tawas Company had no information or knowledge of the previous assignment of the accounts to Coleman & Co., and it at that time was given an affidavit by the bankrupt, for the purpose of inducing the loans, in which it was recited that the bankrupt was then in a solvent condition and was the sole owner of the accounts, and that the same had not been assigned or transferred.

No notice of the assignment of the accounts was given to the debtors of the bankrupt at the time of the respective assignments by either Coleman & Co. or the Tawas Company. But a few days before the bankruptcy and on January 11, 1918, Coleman & Co. sent letters of notification to all the debtors, informing them that the accounts had been assigned to Coleman & Co. and were payable only to them. The Tawas Company on the same day also sent notices of the assignment and that payment should be made to them.

The finding of the referee as to the facts concerning these notices was as follows:

"The evidence showed that Coleman & Co.'s [notices] went by registered letters calling for receipts of the addressees. These letters were mailed at the Madison Square branch post office on January 11, 1918, 'not later than 8 p. m.' The exact hour when they were mailed was not shown. After the letters were delivered to the post office, they were entered on 'descriptive sheets.' Receipts were made out for each letter; that each letter was numbered and postmarked, and then entered on bills to dispatch them to the terminal.

"The Coleman registered letters were dispatched at 1:10 a. m. January 12, 1918; that is, at that hour they were sent to the Pennsylvania Railroad ter-

minal to be sent forward by trains carrying registered mail. All mail trains do not carry registered mail. Mail not registered goes by any mail train, and there are more mail trains carrying mail not registered than there are trains carrying registered mail. Registered mail calling for receipts must be delivered to the addressee, or to some one usually receiving the mail for the addressee, and the person to whom the registered mail is delivered must sign a receipt therefor. Mail not registered may be left in a letter box, or at the address of the addressee, and no receipt is taken therefor. In the ordinary course of business a registered letter is not delivered as promptly as an unregistered letter.

"The Tawas notices were put in envelopes, duly addressed, postage prepaid, and deposited in the 116th Street branch post office, Manhattan borough, at 6 p. m. on January 11, 1918. The envelopes had printed on the outside 'Gettner, Simon & Asher, 299 Broadway.' None of these letters came back. The Tawas letters were not registered. Unregistered letters for the South and extreme West dropped into the post office in the afternoon go earlier than midnight of that day. There is a mail from New York to the south at about 10:30 p. m. * * *

"The fair inference from the testimony of McEachron, an employé of the New York post office for 24 years, is that the unregistered letters containing notices to debtors mailed by the Tawas Company at the 116th Street branch post office on January 11, 1918, at 6 p. m., were received by the debtors in due course of the mails before the notice mailed by Coleman & Co. at the Madison Square branch post office on January 11, 1918, at an unascertained hour, but not dispatched from that office until 1:10 a. m. January 12, 1918."

His conclusion of law was that the proceeds of the accounts assigned to the Tawas Company should be first applied to the satisfaction of the claim of the Tawas Company, and that the balance so far as required should be applied to the payment of the claim of Coleman & Co.

The District Judge reversed the referee. In his opinion he said:

"Nothing more can be called proven than that both these claimants gave notice on the same day, and the day is not split up or divided into fragments by any persuasive evidence. It follows that both stand on exactly the same bottom, except as to priority in time of assignment, and there Coleman has the advantage, and the fund is awarded to him, reversing the finding of the referee."

[2] The accounts assigned apparently were not delivered by the bankrupt either to Coleman & Co. or to the Tawas Company. The intention evidently was that the bankrupt should collect the assigned accounts as agent for the assignee, and as collected from time to time pay over to the assignee the amounts collected, either at the time of collection or when demanded. As between assignor and assignee and the creditors of the assignor, the validity of the assignment is not affected by the fact that the accounts to be collected were allowed to remain in the assignor's possession. It has been held that the Personal Property Law of New York (Consol. Laws, c. 41), declaring sales or mortgages of goods and chattels not followed by an actual and continued change of possession presumptively fraudulent and void as against creditors, does not relate to choses in action. Booth v. Kehoe, 71 N. Y. 341; Young v. Upson (C. C.) 115 Fed. 192. And the Supreme Court of the United States has held it not unlawful to allow the accounts to remain in the possession of the assignor for collection. In making the collection he acts in a fiduciary capacity, and the money, when collected, becomes the specific property of the assignee or pledgee. Clark v. Iselin, 21 Wall. 360, 368, 22 L. Ed. 568.

[3, 4] In Methven v. Staten Island, 66 Fed. 113, 13 C. C. A. 362, this court had before it the question whether an assignee who first gives notice to the debtor has the prior right though the assignment to him is later in date than that to the other assignee. The court held that as between two assignees the one who first gives notice has the better right. In so deciding this court declared that the question is one of general jurisprudence and that the decisions of the highest court of the state are not controlling. We adhere to that ruling in this case. The clause found in the agreement between Coleman & Co. and the bankrupt, that "this agreement shall be construed according to the law of the state of New York," if binding as between assignor and assignee, is not binding as against a subsequent assignee, who was not a party to it. It is not decisive in this court of the question now presented that the courts of the state of New York have laid down the rule that, as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, although he has given no notice of such assignment to either the subsequent assignee or the debtor. Fortunato v. Patten, 147 N. Y. 277, 283, 41 N. E. 572. In this respect the rule in New York differs from the rule in the federal courts, and from that which prevails in England and in the courts in many of the states.

The leading case on this subject is the well-known case of Dearle v. Hall, 3 Rus. 1, which held that a third assignee who had given notice was entitled to priority over a first and second assignee who did not give notice. That case and the cases which have followed it have gone upon the theory that personal property passes by delivery of possession, and that if one who acquires the right to take possession does not take it he is responsible for the consequences. A chose in action does not admit of tangible actual possession, but the assignee who gives notice to the legal holder of the fund does that which is tantamount to obtaining possession by placing the holder of the fund under an obligation to treat it as his property; and if he omits to give that notice he is guilty of the same neglect as he who leaves a personal chattel to which he has acquired a title in the actual possession and under the absolute control of another person. See Leading Cases in Equity, vol. 2, pt. 2, pp. 1581, 1582.

[5] Notice is a fact, the existence of which is to be established by evidence in the same manner as the existence of any other fact is established; and actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstances from which a jury would be warranted in inferring notice. Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 438, 12 Sup. Ct. 239, 35 L. Ed. 1063.

[6] Notice being necessary that notice must be actual in the absence of a statute providing means for constructive notice. In Burck v. Taylor, 152 U. S. 634, 654, 14 Sup. Ct. 696, 703 (38 L. Ed. 578), the court, in referring to the necessity of notice, said:

"If notice was essential to charge them, actual notice should have been given, at least in the absence of a statute providing some means for constructive notice."

The notice must be actual. Must it also be personal? In Beakes v. Da Cunha, 126 N. Y. 293, 297, 27 N. E. 251, the action was upon a guaranty, and the contract made it necessary to give notice on the 20th day of each month, if payment for the previous month had not been made. The court in construing this agreement said:

"Where any statute or the terms of any contract require notice to be given, and there is nothing in the context of the statute or the contract, or in the circumstances of the case, to show that any other notice was intended, a personal notice must always be given. But the context or the circumstances of the case may be such as to show that a personal notice was not intended, and in such a case a notice by mail, which is the ordinary mode of giving notices in business transactions, is authorized."

[7] In Rogers v. Burr, 105 Ga. 432, 446, 31 S. E. 438, 70 Am. St. Rep. 50, which was an action on contract the court held, actual notice being required, that the requirement was not met by simply mailing the notice to the defendants, where the defendants denied that they received the notice; it not being shown that the written notice was in fact received. And in Huntley v. Whittier, 105 Mass. 391, 7 Am. Rep. 536, the court held that in the absence of a statute authorizing the service of a notice by mail, a notice so served is ineffective unless it is received. But the courts hold that, where the notice has been properly mailed, its receipt will be presumed, in the absence of evidence to the contrary. Bickerdike v. Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782; Casco National Bank v. Shaw, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319; Huntley v. Whittier, supra.

In the instant case the evidence shows that notices were mailed both by the Coleman Company and by the Tawas Company. There is no evidence that the notices so mailed were not received. On the contrary, there is affirmative evidence that the notices mailed by the Coleman Company were received; and there is evidence that the notices mailed by the Tawas Company were not returned. So that the conclusion is that the two claimants each gave proper notice to the debtors of the assignment.

[8] The court below stated that in his opinion the referee had committed error in that he had assumed that the priority of "giving notice" depended upon the order of time in which the notices of conflicting parties probably actually reached the person to be notified. The opinion of the court was that the party, whose duty it was to give the notices gave them, and completed them when it put the proper paper in the United States mail. We are unable to agree with that view of this case. The courts hold that, where acceptance by mail of an offer is expressly or impliedly authorized and the answer is duly posted, the acceptance is communicated, and the contract is completed from the moment the letter is mailed. Burton v. United States, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392. But they also hold that a letter revoking an offer is not effective until it is actually communicated to the referee. It is operative from the time it is received, and not from the time it is put into the mail. Patrick v. Bowman, 149 U. S. 411, 13 Sup. Ct. 811, 866, 37 L. Ed. 790. Whether a communication transmitted by mail is operative from the time it is mailed or from the time it is received clearly depends upon the nature of the

transaction. And we think it plain that a notice of an assignment deposited in the mail by an assignee does not become effective as against the holder of the fund assigned or the debtor until it is actually communicated to him. If that were not so, and the debtor or the trustee paid the assignor between the time of the mailing of the notice and the time of its receipt, he would be bound to pay twice, which, of course, cannot be the law.

[9] The question, then, is whether the notices Coleman & Co. sent, and which went forward as registered mail, reached the debtors before or after those sent by the Tawas Company, and which were deposited in the post office on the same day and were forwarded as unregistered mail. The evidence, if it is to be believed, shows that the Tawas Company deposited its notices at 6 p. m. All that appears as respects the hour of mailing of the notices of Coleman & Co., is that they must have been mailed some time prior to 8 p. m. The referee, who saw and heard the witness who testified that the notices sent by the Tawas Company were put into the post office at 6 p. m., believed him. The District Judge, who did not see or hear the witness, did not believe him, thinking him too exact and positive as to a matter which happened six months prior to the time of his giving the testimony. It is not incredible, as it seems to us, that the witness should have remembered the hour as well as the day on which he mailed notices of importance; and not having seen and heard the witness we are not disposed to accept his testimony as to the day and reject it as to the hour. The witness for Coleman & Co. remembered the day when he mailed the Coleman notices, but could not fix the hour. It is not, however, important to know the hour when the Coleman registered notices were mailed, for it definitely appears that all mail trains do not carry registered mail, and that there are more mail trains carrying mail not registered than there are trains carrying registered mail, and the authorities of the post office testified that the registered mail was not sent to the Pennsylvania Railroad Terminal to be sent forward by train until 1:10 a. m. of the next day. There was, therefore, not only a delay at the New York post office in dispatching the Coleman notices, but there was also delay at the offices to which the notices were sent, in the delivery of them to the parties for whom they were intended, after they reached their destination. In the ordinary course of business a registered letter is not delivered as promptly as an unregistered one. The inference is irresistible that the Tawas Company's notices were received by the debtors before those sent by Coleman & Co.

The order of the District Court is reversed.

WESTINGHOUSE ELECTRIC & MFG. CO. v. BROOKLYN RAPID TRANSIT CO. et al.

(Circuit Court of Appeals, Second Circuit. July 2, 1919.)

No. 245.

RECEIVERS ⊂=128—MORTGAGE NOT SUBJECT TO DISPLACEMENT BY RECEIVERS' CERTIFICATES.

A mortgage executed to secure bonds of a holding company for stock of street railroad companies, but which at the time did not own or operate any lines, *held* not subject to displacement in favor of receiver's certificates subsequently issued, only a small portion of the proceeds of which was to be expended on the mortgaged property.

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

Suit in equity by the Westinghouse Electric & Manufacturing Company against the Brooklyn Rapid Transit Company and others. From an order of the District Court authorizing the issuance of receiver's certificates, the Central Union Trust Company of New York appeals. Modified.

Larkin & Perry, of New York City (H. V. Poor, John M. Perry, and C. B. Hughes, all of New York City, of counsel), for appellant.

W. F. Taylor, of New York City, for plaintiff.

I. R. Oeland, of New York City, for defendant.

Carl M. Owen, of New York City (Lindley M. Garrison, Carl M. Owen, and Harold J. Gallagher, all of New York City, of counsel), for receiver.

Cravath & Henderson, of New York City, for committee of note holders.

Rushmore, Bisbee & Stern, of New York City, for committee stockholders of Brooklyn Rapid Transit Co.

Scott, Gerard & Bowers, of New York City (Francis M. Scott, of New York City, of counsel), for Corn Exchange Bank.

William P. Burr, Corp. Counsel, of New York City (Edgar J. Kohler and Robert L. Stanton, both of New York City, of counsel), for city of New York.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. This is an appeal from an order of the District Court authorizing the issue of certificates to an amount not exceeding $20,000,000 by the receiver of the Brooklyn Rapid Transit Company, which shall displace, among other liens, that of the Brooklyn Rapid Transit Company's first refunding gold mortgage, dated July 1, 1902. Less than $4,000,000 of the proceeds are to be expended upon real estate covered by that mortgage, and $16,000,000 are to be used in the purchase of the joint and several certificates of the receivers of the New York Municipal Railway Corporation and New York Consolidated Railroad Company, the proceeds to be applied to those properties.

Consideration of the whole complicated system and the many details

connected with the constituent companies would require a long opinion, not necessary to the parties, who are familiar with every phase of the subject. Therefore we will briefly state the reasons which lead us to conclude that the order should be modified, so as to maintain the lien of this mortgage unimpaired.

At the outset we may say that the issue of receiver's certificates having priority over existing liens as far as possible is unquestionably a necessity, if the Brooklyn Rapid Transit system is to be continued as a going concern. July 1, 1902, the Brooklyn Rapid Transit Company, a corporation organized in 1896 under the Business Corporations Law, executed to the Central Trust Company, as trustee, its first refunding gold mortgage to secure payment of its four per cent. bonds.

At that time the company was purely and simply a financing and holding company, owning practically all the capital stock of the separate surface and elevated railroad corporations which then constituted what is generally known as the Brooklyn Rapid Transit system. This is now a closed mortgage, and bonds of the face value of $27,621,000 are now outstanding as follows:

In the Brooklyn Rapid Transit treasury	$5,092,000
Pledged to secure bank loans	7,079,000
Pledged to secure Brooklyn Rapid Transit five per cent. secured gold notes	10,000,000
Pledged in the Brooklyn City Railroad Company guaranty fund	250,000
Owned by the Nassau Electric Railroad Company, one of the subsidiaries of the Brooklyn Rapid Transit Company	1,761,000
Outstanding in the hands of the public	3,449,000

The Central Union Trust Company, successor of the Central Trust Company, trustee, on behalf of bonds outstanding in the hands of the public and banks holding bonds as collateral security for loans, appeals from the order.

The after-acquired property clause of the mortgage is, "All and singular the property and franchises of the said Transit Company, whether now owned by the Transit Company or hereafter acquired by the Transit Company with the proceeds of said bonds, including particularly the property hereinafter described," but no real estate is described. Down to August 1, 1918, the Transit Development Company, also organized under the Business Corporations Law in 1902, supplied the greater part of the electric power for the whole system.

March 29, 1907, the Brooklyn Rapid Transit Company and the Transit Development Company and the Central Trust Company, as trustee, entered into and executed an agreement, which is to be treated as a mortgage of all the property of the Development Company to the trustee, with the exception of certain real estate described by metes and bounds, to secure the payment of certificates of indebtedness of the Development Company amounting to $20,000,000 issued or to be issued to the Brooklyn Rapid Transit Company and by it deposited or to be deposited with the Central Trust Company, as trustee under the first refunding gold mortgage.

July 24, 1918, the Development Company executed a mortgage to the Central Union Trust Company, trustee, including certain real estate described by metes and bounds which had been purchased by moneys

paid by the Brooklyn Rapid Transit Company for certificates of indebtedness of the Development Company exceeding in amount $11,000,000, to secure bonds issued under the first refunding gold mortgage. August 1, 1918, the Transit Development Company merged into the Brooklyn Rapid Transit Company, from which date the latter began for the first time and has since continued to supply electrical power to the various railroad corporations constituting the system.

The mortgage must as matter of law give the same protection to all the bonds issued under it, irrespective of the date of issuance. Purchasers of those bonds have a right to rely upon the fact that when the mortgage was executed the Brooklyn Rapid Transit Company was a mere holding company, neither operating the roads which constituted the system nor supplying them with power. In our opinion the business of the Brooklyn Rapid Transit Company was a private one from 1902 to 1918, not affected with a public interest, and there is nothing to justify displacing the lien of such a mortgage in favor of persons who advance money, most of which is to be applied to the benefit of other parts of the system.

It has been suggested by the corporation counsel as amicus curiæ that the Brooklyn Rapid Transit Company has by virtue of section 5, subd. 4, art. 1, of the Public Service Commissions Law (Consol. Laws, c. 48), because of its stock control of the constituent companies, become a common carrier, and that it has become a street railroad corporation within the purview of section 2, subd. 7, art. 1, of the same law. The first section was added in 1910, and the second section under an act becoming a law June 6, 1907, and taking effect July 1, 1907; so that we do not think the bondholders, with rights accruing under mortgages dated July 1, 1902, and March 29, 1907, are affected by either amendment of the law, whatever may be the character of the corporation in its relations to the city. It may be that by virtue of these statutory provisions the Brooklyn Rapid Transit Company after July 1, 1907, became subject to the supervision of the Public Service Commission, and it may also be that at least from August 1, 1918, because of the character of its business, it has been so affected with a public interest as to become a public utility corporation; but these questions are not before us.

It is sought, however, to justify the order on the ground that the advances are really intended to preserve the property, and therefore may be given priority on this account, even if the business of the Brooklyn Rapid Transit Company, as conducted at the date of receivership, is not to be treated as affected with a public interest. The proofs do not sustain this contention. The moneys are not to be used to prevent waste or destruction, or to continue the system as a going concern, until it can be sold out and its assets divided among its creditors. No foreclosure proceeding has been instituted, except of the "consolidated" mortgage of June 1, 1918, and the plain purpose of the creditors' bill and of the original order appointing the receivers, and of the order appealed from, is to enable the system to continue permanently, after being completed out of the proceeds of these certificates.

Coming, now, to the joint and several certificates in the sum of

$16,000,000 to be issued by the receivers of the New York Municipal Railway Corporation and the New York Consolidated Railroad Company, and sold to the receiver of the Brooklyn Rapid Transit Company, we note that the two former companies are public utility corporations incorporated under chapter 4 of the Laws of 1891 and its amendments, known as the Rapid Transit Act, and that the Consolidated Company owns the whole capital stock of the Municipal Company, and has guaranteed payment of its bonds, principal and interest, by indorsement thereon.

January 31, 1913, an agreement was entered into between the Municipal Railway Corporation and the New York Consolidated Railroad Company whereby the former undertook to operate the latter's railroads and the latter agreed to acquire the entire capital stock of the former as issued from time to time. This arrangement was made in view of the contemplated contract between the Municipal Company and the city of New York known as "contract No. 4," which was executed March 9, 1913. Under this contract the Municipal Company agreed to contribute $13,500,000 toward the cost of construction by the city of a rapid transit railroad connecting the existing elevated railroads of Brooklyn and New York and also to reconstruct the New York Consolidated Railroad Company's roads, so as to adapt them for operation in connection with the city's rapid transit road and to equip and operate the latter, when constructed, as lessee of the city. March 25, 1913, the Municipal Company assigned its right of operation under contract No. 4 with the city to the Consolidated Company, which assumed its duty thereunder.

It is contemplated to apply under the order appealed from about $8,500,000 of the proceeds of these joint and several certificates to the necessities of the Municipal Railway Corporation, and they are given priority over about $14,000,000 of certificates of indebtedness of the New York Consolidated Railroad Company and a large amount of its common and preferred stock, as well as the entire capital stock of the Municipal Corporation, all of which are pledged to the Central Union Trust Company, as trustee, as collateral for payment of obligations of the Brooklyn Rapid Transit Company. This collateral, however, was that of public utility corporations, and we think that, in view of the inseparable connection between the Municipal Corporation and Consolidated Company, though separate entities, and of the absolute necessity of maintaining, if possible, the transportation system of which they are a part, the trustee pledgee cannot complain, either of the priority given the receiver's certificates or of the application of their proceeds, subject hereafter to adjustment between the companies as directed by the order.

Accordingly, the order, modified in accordance with this opinion in respect to the lien of the first refunding gold mortgage of the Brooklyn Rapid Transit Company, is affirmed.

THE O. L. HALENBECK.

(Circuit Court of Appeals, Second Circuit. June 17, 1919.)

Nos. 63–70, 132, 133.

ADMIRALTY ⊂=28—DUMPING IN NEW YORK HARBOR—LIABILITY OF VESSEL TO PROCEEDING IN REM.

Under Act June 29, 1888, § 4 (Comp. St. § 9937), imposing a penalty on any person dumping outside designated grounds in New York Harbor, and further providing that any vessel used in violating its provisions "shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against summarily by way of libel in any District Court" having jurisdiction, such suit in rem may be maintained and the penalty recovered independently of any criminal prosecution against the owner or master.

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

Suits in admiralty by the United States against the steam tug O. L. Halenbeck, Peter Cahill, claimant, and the scows 34–S, 9–S, and S–34, P. Sanford Ross, Incorporated, claimant; against the steam tug Juniata, the Forsyth Towing Line, claimant, and the scows S–39 and S–11, P. Sanford Ross, Incorporated, claimant; against the steam tug Joshua Lovett, the Taylor Dredging Company, claimant, and the scow 6–S, P. Sanford Ross, Incorporated, claimant; against the steam tug Bismarck, Peter Cahill, claimant, and the scow S–20, P. Sanford Ross, Incorporated, claimant; against the steam tug Imperial, the Cahill Towing Line, Incorporated, claimant, and the scow 11–S, P. Sanford Ross, Incorporated, claimant; and against the steam tug Anna W., Peter Cahill, claimant. Decrees for libelant against the scows, and their claimant appeals. Affirmed.

A decree in favor of the libelant in the sum of $250 was granted in each case, and the claimant appeals.

Everett, Clarke & Benedict, of New York City (A. Leo Everett, of New York City, of counsel), for appellant.

Francis G. Caffey, U. S. Atty., of New York City (John Hunter, Jr., Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before ROGERS, and MANTON, Circuit Judges, and KNOX, District Judge.

MANTON, Circuit Judge. These libels have been filed, and in each case there has been a decree for libelant; but, since the same question is involved in each appeal, we shall treat the questions presented in one opinion.

These causes are maintained in admiralty to recover a penalty pursuant to the provisions of Act June 29, 1888, c. 496, § 3, 25 Stat. 209, entitled "An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City, by dumping or otherwise, and to punish and prevent such offenses," as amended by further acts of Congress, to wit, on August 18, 1894 (28 Stat. 360, c. 299, § 3), and May 28, 1908 (35 Stat. 426, c. 212, § 8), being Comp. St. §

9935. The libels allege that the offending tugs dumped the load, or part thereof, of mud contained in the scows while bound for the dumping ground at some point without the dumping ground, contrary to the statute in such case made and provided.

The answers admit the facts, but set up as defense:

"That no proceeding, criminal or otherwise, has been instituted against the owner or master or person acting in the capacity of master of the scow or the owner or master or person acting in the capacity of master of said steam tug, and that since no conviction has been had of them or any of them, the District Court sitting in admiralty has no power to sit and determine the controversy or decree any penalty in the premises."

Thus the claimant contests the jurisdiction of the court in admiralty to proceed. Upon motion for judgment, moved by the libelant, the libels were dismissed as against the tugs and a penalty fixed at $250. The claimant further insists that the minimum penalty is $100 and not $250.

Section 4 of the Act of June 29, 1888 (Comp. St. § 9937), provides:

"Any boat or vessel used or employed in violating any provision of this act shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against summarily by way of libel in any District Court of the United States, having jurisdiction thereof."

The act provides two methods of punishment, one by criminal information and indictment, and the other by way of libel in admiralty. It may therefore be considered both as a criminal and civil statute. Congress has provided protection and preservation for the navigable waters of the United States in the River and Harbor Act, approved March 3, 1899, c. 425, 30 Stat. 1121, 1151–1155, c. 425. It provides it to be unlawful—

"to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind * * * any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States." Section 13 (Comp. St. § 9918).

Section 16 of this act (section 9921) provides for pecuniary penalties for violation, which may be calculated by proceeding summarily by way of libel in any District Court of the United States having jurisdiction thereof, and the same section also provides that a fine may be imposed as a punishment for crime. This method of providing for the guilty making his amends to society for violations of the laws of the United States is not unusual. Illustrations may be found in the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, where it was sought to prevent the landing of aliens at any time or place other than as designated by immigration officers, and requires those in charge of the vessel carrying such aliens to comply with this requirement, and a failure thereof may be punished by a conviction with fine or imprisonment, or if, in the opinion of the Secretary of Labor, it is impracticable or inconvenient to prosecute, a penalty of $1,000 shall be a lien upon the vessel whose owner, master, officer or agent has violated the provisions of the act, and the vessel shall be libeled therefor in an appropriate proceeding in the United States court. Other sections of the Immigration

Act illustrate this permissible punishment in both criminal and civil proceedings, and by way of lien upon a vessel in rem in the admiralty court. This statute fixes a pecuniary liability of a minimum and maximum fixed amount for its violation, and when a definite and fixed amount is imposed, as a fine or penalty, suit may be maintained as an action for debt. Hepner v. U. S., 213 U. S. 103, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960; Stockwell v. United States, 80 U. S. (13 Wall.) 531, 20 L. Ed. 491. The same right of action lies when the amount can be readily liquidated or is of easy calculation. Stockwell v. United States, supra; Carrol v. Green et al., 92 U. S. 509, 23 L. Ed. 738. This court recently held that a civil proceeding in personam may be maintained for the collection of an unliquidated penalty. United States v. Atlantic Fruit Co., 206 Fed. 440, 124 C. C. A. 322.

Some of the earlier cases seem to support the doctrine that a civil suit in the form of an action for debt may be maintained, even though the pecuniary liability is indefinite and uncertain as to the amount. United States v. Allen, 24 Fed. Cas. No. 14,431; United States v. Colt, 25 Fed. Cas. No. 14,839. But the language of the statute here provides that the vessel may be proceeded against "summarily" in any District Court of the United States having jurisdiction. If it be conceded that Congress had the power to provide this method of procedure and create a lien by statute, the natural and legal meaning of the phrase would give the right of proceeding in admiralty, irrespective of a precedent requirement that a criminal prosecution was successfully maintained. The language of the statute is plain, and we must accept it as granting the right to proceed immediately and directly without the delay incident to a previous prosecution under it. The purpose is plain to be, that the vessel be charged with a penalty with the right to proceed summarily as soon as the violation of the law appears.

In The Strathairly, 124 U. S. 558, 8 Sup. Ct. 609, 31 L. Ed. 580, the language of the Supreme Court indicates, without deciding, that a criminal prosecution was required as a condition precedent to successfully maintaining a libel to enforce a lien granted by the statute (section 4270, Rev. Stat.) as security for a fine, and that no libel could be maintained until it had been assessed. The court there decided that the fine imposed upon the master of the vessel was made a lien upon the vessel by the statute which may be recovered by a proceeding in rem and that it was the same penalty which is to be judged against the master himself in a criminal prosecution, saying further, that payment by either is a satisfaction of the whole liability.

This authority must be considered in light of the language of section 4 (Comp. St. § 9937), which is more specific and provides both a lien upon the vessel and the procedure for its enforcement. This construction, involving similar phraseology in statutes of the United States, has met the approval of judges of other districts. The Missouri, 9 Fed. Cas. No. 9652; United States v. The Queen, Fed. Cas. Nos. 16,107, 16,108; Scow 36, 144 Fed. 932, 75 C. C. A. 572; No. 6 (D. C.) 247 Fed. 348.

Section 3 of the statute (section 9935) further provides that any person violating the provisions of this section shall be liable to a fine of not

more than $500 or less than $100. It is clear that Congress had in mind fixing the penalty for any of the acts forbidden as provided for in the five paragraphs. No penalties were fixed anywhere for violation of these paragraphs except by this provision. Undoubtedly, it was intended that the word "section" in the sentence quoted above was intended for "paragraph."

After the writing, and before the filing of this opinion, the Supreme Court of the United States in P. Sanford Ross, Inc., v. United States, 250 U. S. 269, 39 Sup. Ct. 452, 63 L. Ed. —— (decided June 2, 1919), held against the contentions of the appellant which are urged upon us in these appeals. There the court said:

"The act of Congress here in question imposes a direct liability upon the vessel for the pecuniary penalties prescribed, and declares that it may be proceeded against summarily by libel in any District Court of the United States having jurisdiction thereof. This precludes the idea that the proceeding by libel is to be deferred to await the possibly slow course of criminal proceedings against the person individually responsible. It treats the offending vessel as a guilty thing, upon the familiar principle of the maritime law, and permits a proceeding against her in any court of admiralty 'having jurisdiction thereof'—meaning any court within whose jurisdiction she may be found."

The decrees are affirmed.

ANDERSON v. UNITED STATES.

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

No. 5281.

1. CONSPIRACY ⊂=43(6)—INDICTMENT INSUFFICIENT AS NOT SUFFICIENTLY IDENTIFYING OFFENSE.
   An indictment for conspiracy "to steal from a certain railroad freight car certain goods then and there moving as and constituting a part of an interstate shipment of freight" *held* fatally defective in not sufficiently identifying the offense which was the object of the conspiracy.
2. CONSPIRACY ⊂=43 (2)—INDICTMENT NOT AIDED BY AVERMENT OF OVERT ACTS —INDICTMENT.
   In an indictment for conspiracy under Penal Code, § 37 (Comp. St. § 10201), the conspiracy must be sufficiently charged, and it cannot be aided by averments of overt acts done by one or more of the conspirators in furtherance of the object of the conspiracy.

Stone, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

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

J. Q. Mahaffey, of Texarkana, Tex., for plaintiff in error.

J. S. Holt, Asst. U. S. Atty., of Ft. Smith, Ark. (Emon O. Mahony, U. S. Atty., of El Dorado, Ark., on the brief), for the United States.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. [1] Anderson was convicted and sentenced on an indictment, the charging part of which was as follows:

"That R. Q. Ayers, W. C. Dabney, Melvin Anderson, Gene Johnston, E. L. Edwards, George Booker, Leon Harris, and Leonard Riddick, on the 8th day of November, in the year 1917, in the said division of said district, and within the jurisdiction of said court, did then and there unlawfully, willfully, and feloniously conspire, confederate, and agree among themselves to commit an offense against the United States; that is to say, to steal from a certain railroad freight car certain goods then and there moving as and constituting a part of an interstate shipment of freight, with the intent then and there to convert said goods to their own use."

He demurred to the indictment for the reason that the offense which it was alleged he had conspired to commit was not sufficiently identified, so that he was sufficiently informed as to the crime with which he was charged, or so that he could plead his acquittal or conviction in bar to any future prosecution for the same offense. The demurrer was overruled and this action of the trial court is assigned as error.

In Williamson v. United States, 207 U. S. 447, 28 Sup. Ct. 171, 52 L. Ed. 278, it is said:

"But in a charge of conspiracy the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy."

The general rule is that where conspiracy is made a statutory offense, when entered into for the purpose of committing a certain specified offense, the offense may be described in the words of the statute which creates it, if the statute sets out fully and without uncertainty or ambiguity the elements necessary to constitute the offense. If, however, the statute employs broad and comprehensive language descriptive of the general nature of the offense denounced, the use of such language is insufficient. 12 C. J. 615; Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; United States v. Britton, 108 U. S. 205, 2 Sup. Ct. 531, 27 L. Ed. 698. As the conspiracy is the gist of the offense, it is undoubtedly true that the offense which it is charged the defendant conspired to commit need not be stated with that particularity that would be required in an indictment charging the offense itself. Brooks v. United States, 146 Fed. 223, 76 C. C. A. 581; Lemon v. United States, 164 Fed. 953, 90 C. C. A. 617; Brown v. United States, 143 Fed. 60, 74 C. C. A. 214; Gould v. United States, 209 Fed. 730, 126 C. C. A. 454; Hyde v. United States, 198 Fed. 610, 119 C. C. A. 493. Still, as was said in Williamson v. United States, supra, the offense which the defendants conspired to commit must be identified.

Standing alone, we are of the opinion that the above-quoted language from the indictment wholly fails to comply with the rules of criminal pleading. To illustrate: The words "certain railroad freight car" might apply to any one of the vast number of freight cars in existence in the United States, or in the world, for that matter; and for the same reason the words "certain goods" might apply to any kind of the thousand varieties of property. The car of goods might be moving in interstate commerce on any railroad in the United States

and between any two of the great number of towns existing in different states. The kind and character of the goods are not stated. The word "steal," as used in the statute, is used as equivalent to the word "larceny." In order to constitute the crime of stealing, several elements must be established. The defendant, if convicted or acquitted on this indictment, could not plead the conviction or acquittal in bar, as far as the indictment is concerned, if he was again indicted for the same offense, because the offense is not identified. We are therefore clearly of the opinion that the charge of conspiracy is fatally defective when standing alone.

[2] The question now arises how far the conspiracy charged can be aided by the allegations of the indictment which set forth the overt act. In United States v. Britton, supra, Pettibone v. United States, supra, Dealy v. United States, 152 U. S. 539, 547, 14 Sup. Ct. 680, 38 L. Ed. 545, and Bannon v. United States, 156 U. S. 464, 468, 469, 15 Sup. Ct. 467, 39 L. Ed. 494, it was established as a rule of criminal pleading under section 5440, R. S. U. S., now section 37, Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]), that the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. The rule of criminal pleading being as stated, Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, was decided. In this case it was said:

"It is true that the conspiracy, the unlawful combination, has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act; but section 5440 has gone beyond such rigid abstraction, and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an 'act to effect' its object, and provides that when such act is done 'all the parties to such conspiracy' become liable. Interpreting the provision, it was decided in Hyde v. Shine, 199 U. S. 62, 76 [25 Sup. Ct. 760, 50 L. Ed. 90], that an overt act is necessary to complete the offense. And so it was said in United States v. Hirsch, 100 U. S. 33 [25 L. Ed. 539], recognizing that while the combination of minds in an unlawful purpose was the foundation of the offense, an overt act was necessary to complete it. It seems like a contradiction to say that a thing is necessary to complete another thing, and yet that other thing is complete without it. It seems like a paradox to say that anything, to quote the Solicitor General, 'can be a crime of which no court can take cognizance.' The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy, and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals; such tribunals only then acquiring jurisdiction."

One might be justified in concluding from this language that the overt act was such a part of the conspiracy as to allow the conspiracy charged to be aided by the allegations in reference to the overt acts, but in Joplin Mercantile Co. v. United States, 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. 705, the Supreme Court had under consideration the sufficiency of an indictment for conspiracy, and after referring to Hyde v. Shine, 199 U. S. 62, 76, 25 Sup. Ct. 760, 50 L. Ed. 90, and Hyde v. United States, supra, said:

"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.' For this reason, among others, it seems to us that where, as here, the averment respecting the formation of the conspiracy refers to no other clause for certainty as to its meaning, it should be interpreted as it stands."

And the court again cited United States v. Britton, supra. We think therefore that, so far as the rule of criminal pleading is concerned, it was not changed by Hyde v. United States, supra, which did not involve a question of pleading. It is undoubtedly true that a conspiracy to steal generally goods moving in interstate commerce might be entered into, but the pleader narrowed the scope of the conspiracy to a certain railroad freight car, without in any way identifying the car, the railroad on which it was moving, the goods which it contained, or the point of origin or destination. According to the language quoted above from Joplin Mercantile Co. v. United States, it would seem to be allowable for the pleader, in charging the conspiracy, to refer for particulars to the allegations concerning the overt act; but no such reference appears in the indictment before us. The indictment is bad, and the trial court erred in not sustaining the demurrer thereto.

For this reason the judgment below is reversed.

STONE, Circuit Judge (dissenting). Where the statute requires an overt act, I think allegations in the indictment concerning the overt act may be used to identify the subject of the conspiracy charged. This is on the theory that the overt act is a necessary element of the offense, as held in Hyde v. U. S., 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, which I think remains, in this respect, unmodified by Joplin Mercantile Co. v. U. S., 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. 705. With this help the present indictment is in my judgment clear and definite.

BOOKER v. UNITED STATES.

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

No. 5282.

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

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

See, also, 260 Fed. 557, — C. C. A. —.

J. Q. Mahaffey, of Texarkana, Tex., for plaintiff in error.

J. S. Holt, Asst. U. S. Atty., of Ft. Smith, Ark. (Emon O. Mahony, U. S. Atty., of El Dorado, Ark., on the brief), for the United States.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

PER CURIAM. Booker was jointly tried and convicted upon the same indictment as Anderson, whose conviction has this day been reversed. 260 Fed 557, — C. C. A. —.

It follows that the same judgment must be entered in this case.

STONE, Circuit Judge, dissents.

LAMAR et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 4, 1919.)

No. 232

1. MONOPOLIES ⇐29—EVIDENCE OF CONSPIRACY TO RESTRAIN TRADE.
   A conspiracy to restrain interstate or foreign commerce, in violation of Sherman Anti-Trust Act July 2, 1890, § 1 (Comp. St. § 8820), is proved by proving the forbidden meeting of minds, like a common-law conspiracy, and proof of an overt act is not essential.
2. MONOPOLIES ⇐29—INSTIGATING STRIKES AS CONSPIRACY TO RESTRAIN FOREIGN COMMERCE.
   On a charge of conspiracy to prevent the manufacture and export of munitions of war, in violation of the Sherman Act (Comp. St. § 8820 et seq.), it is no defense that the end was sought to be accomplished by instigating strikes among workmen, which, if conducted for legitimate purposes, would have been lawful.

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

Criminal prosecution by the United States against David Lamar, Henry B. Martin, and others. Judgment of conviction, and defendants Lamar and Martin bring error. Affirmed.

Certiorari denied 250 U. S. 673, 40 Sup. Ct. 16, 64 L. Ed. —.

The plaintiffs in error, together with one Rintelen, and with also Monett, Buchanan, Taylor, Schultheis, and Fowler, were indicted under the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. §§ 8820–8823, 8827–8830]), in December, 1915, for a conspiracy "to restrain foreign trade and commerce," and to "restrain, hinder, and prevent the transportation (of munitions of war manufactured in

the United States) in said foreign trade and commerce." The sufficiency of indictment was considered in United States v. Rintelen (D. C.) 233 Fed. 793.

On April 27, 1917, all the above-named defendants were brought to trial. Indictment was dismissed as to Monett, the jury disagreed as to Buchanan, Taylor, Schultheis, and Fowler. Rintelen and these plaintiffs in error were convicted and sentenced. Rintelen sought no review; Lamar and Martin did so, promptly so far as taking writ is concerned, but then delayed until November 18, 1918, to procure the settlement of a bill of exceptions, and did not file the record in this court until January 3, 1919, and after a motion to dismiss had been made on December 28, 1918.

Both plaintiffs in error addressed the court personally, and they jointly filed a printed brief prepared for them by counsel.

I. R. Oeland and Raymond H. Sarfaty, Sp. Asst. Attys. Gen., for the United States.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The indictment (in a form long used, and approved, among other cases, in Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232), sets forth that there are many persons in the United States engaged in the manufacture, sale, and export of what are generally known as "military and naval stores" and "munitions of war," that such occupation or business is lawful, and that defendants conspired to stop the business; i. e., stop manufacture, transportation, and distribution, by certain proposed "means and methods," which may be summarized as "instigating" strikes on the part of all employés concerned in such making and distribution, and so "instigating" both by written and printed exhortation and by distribution of money among "officers and persons in charge and control of various labor organizations."

Of the facts revealed by testimony it is enough to say that the jury were amply warranted in believing that Rintelen was a German who came to the United States in possession of large funds (over $500,000), with the purpose of stopping or trying to stop the great and increasing flow of war material, which by 1915 was setting from America to Europe, and practically all going to the nations allied against Germany. If he did not bring the money aforesaid for this sole purpose, he was certainly willing to use large sums to secure his end. He met these plaintiffs in error, and with them agreed to do, or have them do (as active agents), the very things charged in the indictment. It is true the evidence shows practically no fruit, no substantial result, from a very ambitious plan, except that Rintelen was relieved of a considerable portion of his funds; but if the formation of the plan, the formulation of purpose, the meeting of minds in an agreement to stop a trade, always lawful, however repugnant temporarily to Germans and to pacifists always, be a crime, the judgments complained of are right.

It does not militate against this conclusion, to urge (as has been done) that the object of the statute of July 2, 1890, was not to prevent agitation against a trade believed by defendants to be both impolitic and immoral, or to assert (what is true) that defendants failed in effecting any hindrance of trade, or (what we may assume as true) that no one of the defendants had any suspicion that the Sherman Act stood in the way of either forming or performing their scheme for stopping war in Europe through lack of supplies, and keeping the United States out of war by inability to make or deal in the means thereof.

So far as the statute is concerned, the object or intent of the Sherman Act must, like that of every other written law, be gathered from its four corners as far as possible, and always if the words employed are clear and apt. Such is the case here, and no department of lawful commerce is left to be restrained or hindered by those who, for reasons that have not yet appealed to the Legislature, think it worthy of suppression.

[1] So far as the lack of success of the plaintiffs in error is relied on, it is enough to point out, what was specifically held in the Nash Case, supra, that conspiracy under the Sherman Act is proved by proving the forbidden meeting of minds; it is like a common-law conspiracy, not like those denounced by section 37, Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]), where an overt act is a necessary ingredient of crime. Likewise any lack of intent to violate the statute cannot be relied on here. Personal intent usually, and certainly here, means no more than an intention to do what was done; therefore, if (as the jury found) defendants intended to hinder and restrain export trade in war munitions, the fact that they had no suspicion of thereby violating the Sherman Act is a matter of no importance, and is immaterial.

[2] It is further contended that, assuming everything covered by the evidence as proven and all the legal rules above adverted to as correct, it still remains true that the only suggested means or method of restraining trade was to strike—to induce laborers to peacefully quit work; and such acts are lawful under the statute of October 15, 1914, commonly known as the Clayton Act (38 Stat. 730, c. 323). It is said to follow that, if doing this lawful act should produce restraint of trade, the later statute prevents the operation of the earlier.

Whether the Clayton Act has to the extent indicated nullified the Sherman Act is a question that need not be discussed; but we do hold it as clear that no change has been wrought in the law of conspiracy as applicable to this case. It may be that, where the intent of those who foment strikes or themselves quit work after and as a result of agreement with their fellow workmen is to advance their own wage interests, or otherwise improve their conditions of life, the Clayton Act produces legality by forbidding legal interference with their doings. This may be admitted for argument's sake, without expressing opinion. But we do hold that where it is charged (as here) that the intent was solely to restrain foreign trade, and where it is proved (as here) that the proposed instigation of strikes bore no relation what-

ever to the welfare of the strikers, then at most and best the strike becomes nothing more than an instrument or means, legal in itself, but used only for an illegal end.

The argument for plaintiffs in error confounds the means with the end. The end or object of the proven conspiracy was not to call strikes, but to restrain or rather suppress foreign trade. That object is as illegal as ever; the Clayton Act assuredly does not legalize it. If that be granted, the elementary rules of law apply, and legality of means cannot excuse illegality of purpose or object.

This cause was tried below by counsel of skill for all the defendants. Those who took this writ delayed hearing for a time, not in our opinion capable of excuse, and were finally heard in person. They profess lack of time and means to procure local counsel on appeal; the brief submitted for them is stated to be the work of a member of the bar of another circuit. That time enough was afforded, or rather taken, is plain; the asserted lack of means has induced us to scan with particularity the whole record, whether adverted to in brief or argument or not; after doing so we are unable to discover error, and order the judgments affirmed.

SILVERMAN v. GILCHRIST, City License Com'r.

(Circuit Court of Appeals, Second Circuit. July 10, 1919.)

No. 241.

THEATERS AND SHOWS ⊂=3—CITY CHARTER GIVEN POWER TO REVOKE LICENSE OF MOVING PICTURE SHOWS.

Greater New York Charter, § 641, as amended by Laws N. Y. 1914, c. 475, in connection with Code of Ordinances of New York City, c. 3, art. 2, vests in the commissioner of licenses full authority to grant and revoke licenses of moving picture theaters, and his action in revoking a license is not reviewable by the courts, except for failure to fairly and honestly exercise his discretion.

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

Suit in equity by Isaac Silverman against John F. Gilchrist, as Commissioner of the Department of Licenses, New York City. Decree for complainant, and defendant appeals. Reversed.

William P. Burr, Corp. Counsel, of New York City (William B. Carswell, of New York City, of counsel), for appellant.

Charles H. Griffiths, of New York City (Raymond H. Sarfaty, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is an appeal from the final decree of the District Court for the Southern District of New York enjoining the defendant, as commissioner of the department of licenses of the

city of New York, from revoking the license of any theater in this city on the ground that such theater is exhibiting or means to exhibit the photo play called "Fit to Win." The subject of the play is the great danger to the public of the spread of venereal diseases, results of which are displayed in the pictures. It is proved that the defendant has threatened to revoke the license of the Grand Opera House in Brooklyn, where the film is being exhibited, if the exhibition is continued, and has notified the licensees of all other motion picture theaters in the city of New York that their licenses will be revoked if the play is exhibited in them.

The plaintiff is not the licensee of any theater, nor has he contracted with the Grand Opera House for the privilege of exhibiting it there; but he is the owner of the film and interested in the profits of the exhibition of it by his licensees. We shall assume for the purpose of decision that he has a standing to complain. The direct question raised is the power of the license commissioner to revoke the license of a theater; the plaintiff denying that he has it.

The charter of Greater New York as amended by chapter 475, Laws 1914, provides in section 641:

"The commissioner of licenses shall have cognizance and control of the granting, issuing, transferring, renewing, revoking, suspending and canceling: * * *

"2. Of all licenses and permits now issued by the bureau of licenses attached to the mayor's office. * * *

"4. Of all licenses in relation to theaters and concerts now issued under the provisions of sections 1473, 1474, 1475 and 1483 of the Greater New York Charter, by the police commissioner. * * *

"The commissioner of licenses is hereby vested with all the powers and functions now exercised in relation to licenses by (1) the mayor pursuant to the code of ordinances of the city; (2) by the bureau of licenses attached to the mayor's office; (3) by the commissioner of licenses appointed by the mayor under the provisions of article 11 of the General Business Law; (4) by the police commissioner in relation to theaters and concerts. * * *"

The act gives the license commissioner in express terms the power to revoke, and in conformity with it the bill alleges that he has "full power and authority to grant and revoke and in other manner regulate the issuance of licenses to theaters in the city of New York."

The Court of Appeals of the state of New York has not passed upon the question, but the Appellate Division for the First Department has done so. In Message Photo Play Co. v. Bell, Com'r, 179 App. Div. 13, 166 N. Y. Supp. 338, the lower court had enjoined the commissioner from revoking or threatening to revoke the license of any theater in which the plaintiff's photo play called "Birth Control" should be exhibited. The Appellate Division reversed the judgment, finding the power to revoke in the provision of the charter above mentioned confirmed by sections 31 and 41 of article 2 of chapter 3 of the Code of Ordinances of the City of New York adopted in 1916. By chapter 382, Laws 1917, amending section 1556 of the charter, all courts of the city of New York are required to take judicial notice of city ordinances. While we doubt whether this provision is binding on the federal courts, inasmuch as both parties have referred to the ordinances, we may say that we think the licensing of moving picture

theaters is regulated by article 2 of chapter 3 of the Code of Ordinances, which, read together with section 641 of the charter, imposes no limitation upon the license commissioner's power to revoke. Article 1 covers provisions applying to theaters generally. Article 2 covers the moving picture theaters in which the seating capacity does not exceed 600 persons and which have no stage or scenery specifically. Article 2 covers common shows specifically. Section 4 of article 1 provides for the revocation of licenses by any judge or justice of a court of record for violation of the provisions of that article, which are such as to prevent fire and panic, Sunday performances, sale of liquors, etc. No such violation is relied upon by the license commissioner in this case, and therefore the section does not apply. Except for these violations the authority is conferred upon him to grant and revoke licenses for moving picture theaters, subject to no limitation. This must have been the view of the Appellate Division in the Message Photo Play Case, supra, because any want of power in the commissioner to revoke without such judicial proceeding could not have been overlooked by court and counsel.

Yet the license commissioner, like all such officials, must exercise his discretion fairly, honestly, upon correct information, and with a view to the moral and physical welfare of the public. There was no evidence in the case cited, and there is none in this case, that the commissioner has not honestly concluded that the exhibition of the film to mixed audiences will be injurious to decency and morality. The proofs show, and we may take judicial notice of the fact, that intelligent persons, deeply interested in the welfare of the community, especially of youth, entertain diametrically opposite opinions as to the effect of public discussions of sex questions. Under these circumstances the fair and honest judgment of the official primarily charged with the duty of deciding should not be interfered with by the courts, especially by a federal court in the case of a state official.

The motion to dismiss an appeal heretofore taken under section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. § 1121]) from an interlocutory injunction is granted, because it came to an end when the final injunction issued.

The decree is reversed.

GREENVILLE STONE & GRAVEL CO. v. GREENE et al.

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

No. 5262.

MASTER AND SERVANT ⟸288(5)—ASSUMPTION OF RISK OF DEFECTIVE APPLIANCE QUESTION FOR JURY.

In an action for death of an employé, killed by the falling of a boiler which had been raised on jacks, the questions whether it fell by reason of a defective jack, and whether deceased had knowledge of the defect and assumed the risk, *held* properly submitted to the jury under the evidence.

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

Action at law by Lydia A. Greene, administratrix of the estate of David A. Greene, deceased, and others, against the Greenville Stone & Gravel Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

C. L. Marsilliot, of Memphis, Tenn., and Samuel M. Casey, of Batesville, Ark. (Richard C. Busby, of Memphis, Tenn., and David L. King, of Hardy, Ark., on the brief), for plaintiff in error.

Lyman F. Reeder, of Batesville, Ark. (John B. McCaleb, of Batesville, Ark., William R. Chesnut, of Commerce, Okl., and Arthur Sullivan, of Hardy, Ark., on the brief), for defendants in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. To reverse a judgment against it in a personal injury case the gravel company has sued out a writ of error. On January 18, 1917, David A. Greene was in its employ as steam shovel fireman, and was engaged with other workmen in moving a steam boiler back into place after having been repaired. In order to perform this work, the boiler had been raised by means of ratchet jacks. While the boiler was in a raised position, it fell or rolled over and killed Greene. The trial court charged the jury that there were only two questions of negligence for them to consider, and in so doing used the following language:

"Whether the jacks which were used for the purpose of moving this boiler were defective; and whether the defects of these jacks caused the accident."

At the close of all the evidence, counsel for the gravel company moved the court to direct a verdict in its favor, which motion was denied. The questions for decision as stated by counsel in this court are as follows:

(1) There was no evidence that the jacks were defective.

(2) The defects in the jacks, if any, did not cause the injury.

(3) If the jacks were defective, Greene knew this fact and assumed the risk.

We have carefully read the evidence in the record, and are satisfied that there was substantial testimony tending to show that the boiler

fell over because the jacks, or one of them, gave way; that a flat piece of iron had been placed in one of the jacks to hold the cogs, so the cogs would hold; this piece of iron was loose; one jack did not hold, and fell; the jack stripped and fell over; the jacks were in bad condition. The witness Oates on direct examination testified for the plaintiff as follows:

"Q. What caused that jack to strip and let the boiler down? A. That jack sets up and down this way (indicating), and there is a ratchet that bolts in here, and a dog fits in here, and there's notches upon this, and that is supposed to fit up tight, but it didn't. I could stick my finger down in there, and that left that loose enough, and that got stuck and went back against that, and that got started, and this dog didn't have but about that much hold (indicating).

"Q. About how much of a hold? A. Well, it wasn't but about a half an inch.

"Q. Had you been familiar with that jack before that time? A. Yes, sir.

"Q. Did you know anything about it being defective at the time they began to use it, or not? A. Yes, sir.

"Q. What condition was it in before? A. It was in bad condition; ready for the junk pile, I would call it."

On cross-examination the witness testified:

"Q. It was a well-known fact that these jacks were in very bad order? A. Yes, sir; every one of the boys around the plant.

"Q. You say all the boys around the plant; had there been any complaint? A. No; everybody around the plant, or anybody knew it that had any dealings with them, knew they were no good."

On redirect examination the witness further testified:

"Q. Had Greene ever handled these jacks, so far as you knew? A. Not to my knowing; he never did handle them; it was not in his line of business. When he was firing, he didn't fool with them.

"Q. You don't know, then, whether Mr. Greene had ever worked with these jacks before in his life? A. No, sir; he hadn't.

"Q. As far as your knowledge is concerned? A. As far as my knowledge, he hadn't."

The general manager of the gravel company on cross-examination testified as follows:

"Q. Now, I want to get this thing so we can get the jury to understand it. When this was raised—when this firebox was raised up here clear, there was nothing to prevent this boiler rolling then, was there? A. Oh, yes; it couldn't roll.

"Q. It couldn't roll? A. No, sir.

"Q. But it did, if it went down. We know it did roll. A. I can't tell how it got down. It must have been in the operation of the jacks."

It was shown that Oates had made statements contrary to his testimony at the trial, and we are asked to disregard his testimony. We are of the opinion that the credibility of the witness Oates and the weight to be given to his evidence was clearly a matter for the jury, and not for this court. There was evidence in our opinion from which the jury might properly find that one of the jacks at least was defective, which caused it to strip, which we gather from the testimony would be the failure of that part of the jack which held the weight of the boiler to remain in place, causing the screw to fall back into the jack frame, and there was also evidence from which

the jury might find that the defective condition of the jack caused the boiler to fall. So far as the question as to whether Greene assumed the risk of the defective jack is concerned, we cannot say it clearly appears that Greene knew of the defective condition, or that it was plainly obvious. It does not appear that Greene was working with the jack that stripped; on the contrary, he was performing other work. The testimony of Oates that everybody knew that the jacks were defective cannot be used to charge Greene with knowledge of the condition of the jacks. The question of assumption of risk was properly left to the jury under a charge that was not excepted to by the defendant.

The trial court did not err in refusing to direct a verdict, and the judgment below must be affirmed; and it is so ordered.

THE HOKKAI MARU.

(Circuit Court of Appeals, Ninth Circuit. September 8, 1919.)

No. 3244.

1. MASTER AND SERVANT ⚖120 — SHIP LIABLE FOR INJURY TO WATCHMAN USING ROPE LADDER.
   A ship *held* liable for injury to a watchman employed by its agent, who while attempting to board the vessel from the pier by means of a Jacob's ladder, by direction of an officer, fell and was injured by reason of the moving of the vessel and the negligence of the crew in drawing up the ladder.
2. MASTER AND SERVANT ⚖200—WATCHMAN ON SHIP NOT FELLOW SERVANT OF OFFICERS AND CREW.
   A watchman, employed to guard a ship lying at a pier, *held* not a fellow servant of the officers or crew.

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

Suit in admiralty by W. C. Hubbard against the steamship Hokkai Maru; Mitsui & Co., Limited, claimant. Decree for libelant, and claimant appeals. Affirmed.

The appellee was employed by the steamship Hokkai Maru as night watchman; the ship being at the time docked at the Port Commission dock, South Cove, Seattle, Wash. He was so employed through one Davis, who acted in that behalf for the ship. The latter, it appears from the record, was in the regular employ of agents of other ships in the matter of securing such watchmen, but at times rendered like service for other agents, as in the instant case. The duty of such watchman was to see that none of the Japanese on board escaped from the ship to enter this country illegally. When employed for the purpose stated, the appellee was told to go to the dock to which the Hokkai Maru was tied, to relieve a watchman then on the ship, called Richie, but whose true name, it appears from the evidence, was Kemnitz. When the appellee reached the dock, the ship was about to be moved, by means of tugs, to the other side of the dock; it having at the time no steam.

It was not loaded, and therefore stood high in the water; the only then means of getting off or going aboard being the ordinary work ladder, called Jacob's ladder, made of rope, and hanging loosely down the side of the ship, and being in this instance about 30 feet long, with 8 rungs. It was by means of that ladder that the appellee undertook to go aboard the ship, and being an old man, and the ladder being very greasy, he was unable to reach the deck of the ship, and in the effort of its officers and crew to haul the ladder up with the appellee on it, the latter fell into the water, from which he was later rescued, suffering the injuries and losses for which he libeled the vessel and its owner.

Daniel B. Trefethen and Howard Findley, both of Seattle, Wash., for appellants.

M. L. Longfellow and John L. Fitzpatrick, both of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] The appellee alleged in the libel his employment as night watchman, and his endeavor to board the ship by means of the ladder that has been mentioned, and further alleged in substance that when he had ascended the ladder about 10 feet, the agents and officers of the ship moved it without signal or warning of any kind, the libelant continuing to ascend the ladder while demanding that the officers and agents of the ship "come to his assistance by returning said ship to the dock, or giving him a rope or net, sending a man down the ladder, or lashing this libelant to the ladder," which they failed to do, but "carelessly and negligently drew up the ladder until this libelant was near the top of the ship, when an agent and employé of said ship carelessly and negligently broke the hold of this libelant and caused him to fall into the water," a distance of about 40 feet; that the libelant was boarding the ship for the purpose of performing his duties as night watchman, and was directed by the officers and agents of the ship to do so by going up the ladder, which swung to and fro, having no attachment at the lower end, and there being no weight fixed to it; that the ladder was the only means provided by the ship for getting aboard, and that the libelant's fall and the length of time he remained in the water before being rescued resulted in certain alleged specified injuries and in certain alleged losses of specified personal property, aggregating $10,000.

It is contended on the part of the appellant that Davis was an independent contractor, for whom the libelant was working, and that the latter had no contractual relations with the ship or its owner. We are quite familiar with the well-known rule that one who has contracted with a competent independent contractor to perform a lawful service for him cannot be held liable for negligence committed by such contractor or his servants in prosecuting the work he had agreed to do. But that rule has no application to the present case, for we do not understand, even from the testimony so much relied upon by the appellant, that Davis contracted to watch the ship, or in any

way bound himself to answer in damages for any negligence or carelessness on the part of any watchman he should send to the ship; he being, as we think the evidence clearly shows, the mere instrumentality through which the ship procured the watchmen it needed, and for whose services it, through its agents, paid.

There is very substantial conflict in the evidence regarding the circumstances under which the libelant got upon the ladder in his endeavor to go upon the ship, and as to whether it was his duty to go on the latter, as well as in respect to the exact cause of his falling from the ladder into the water. The testimony in behalf of the libelant is to the effect that after he reached the dock several persons came down the ladder from the ship, including the watchman called Richie, whom he was to relieve, and that after Richie came down he (libelant) was told by an officer of the ship to go up the ladder onto the ship, which he undertook to do by stepping on the ladder from the dock, after which the ship began to move, with the results that have been stated.

Among the witnesses for the claimant, who testified to the effect that the libelant got on the ladder after the ship began to move from the dock, was an inspector of United States customs, a man named Edwards, who was questioned, and answered, among other things, as follows:

"Q. Now, I will ask you if you saw Mr. Hubbard just prior to that accident, and, if you did, state the circumstances under which you saw him, and what was said and done? A. I was detained at the dock that night, because I had to go back after supper to work. As I came back—I had charge—I walked alongside where the boat laid, and as I came around the Hokkai Maru, they were casting off the lines. Q. Had they cast off the forward lines? A. They had cast off the forward lines, and there was only one way of getting aboard, and that was by the Jacob's ladder, over the side. Q. Was the boat drifting out then? A. Yes; she was out probably a good step from the dock. Q. About three or four or six feet? A. Three or four feet further than they usually had, when they got to get aboard the Jacob's ladder. Q. Where was Hubbard? A. He was on the dock. Q. What was said and done? A. He says, 'How am I going to get aboard the boat; she is pulling out?' I said, 'I would not get aboard of her, because she is going to the opposite side of the dock and tie up again.' And he said, well, he would stay with his boat; that he didn't know where she was going. I told him they told me they were going to put the boat on the other side, and I was to be around there when they loaded, and I knew she would be around there. Q. You did not see him any more? A. I did not see him any more."

There was other testimony in behalf of the claimant tending to show that the ship was moving away from the dock when the libelant undertook to board her; but we think, from the evidence taken as a whole, that the conclusion of the court below that the libelant's version of the fact is correct is not only far more reasonable, but that it is also conclusive upon us, since the evidence on the point is in irreconcilable conflict. We add, however, that if it be conceded to be possible for an old man to step three or four feet from a dock to the rung of a rope ladder hanging loosely down the side of a ship, while the latter is in motion, it is altogether unreasonable to conclude that such a man in his senses would undertake to do so.

The contention of the appellant that the case is not within the jurisdiction of an admiralty court is, in our opinion, without any merit. The Plymouth, 3 Wall. 20, 18 L. Ed. 125; The Strabo, 98 Fed. 998, 39 C. C. A. 375.

[2] Equally clear is it, we think, that the libelant cannot be properly regarded as a fellow servant of any of the officers or crew of the ship, for the reason, if for no other, that they were not engaged in the same general employment. See Sansol v. Compagnie Générale Transatlantique (C. C.) 101 Fed. 390; The Terrier (D. C.) 73 Fed. 265; 26 Cyc. 1360.

A careful examination of the evidence satisfies us that the court below was right in its conclusion that the moving of the ship after the libelant had been directed by one of its officers to go upon the ladder, and before he had ascended it, was, under all of the circumstances of the case, negligence on the part of the ship, which negligence was added to by those of its officers and crew in the handling of the ladder in the endeavor to hoist the libelant; and finding, from the record, that the evidence justified the amount of the award to the libelant, the judgment is affirmed.

ALVEY-FERGUSON CO. v. JOHN F. TROMMER EVERGREEN BREWERY.

(District Court, E. D. New York. September 22, 1913.)

1. PATENTS ⟸328—VALIDITY—INFRINGEMENT.
   The Alvey patents, Nos. 790,811 and 881,042, relating to conveyors for boxes, etc., *held* valid and infringed.
2. PATENTS ⟸82—EXPERIMENTAL USE AND EXHIBITION.
   Where the use of a device exhibited at a world's fair was only experimental, and tests then made were unsuccessful, there was no public use or sale, constituting an abandonment, so as to invalidate a patent application made over two years later.

In Equity. Suit by the Alvey-Ferguson Company against the John F. Trommer Evergreen Brewery. Decree for complainant.

See, also, 245 Fed. 762.

This is a suit by the Alvey-Ferguson Company against the John F. Trommer Evergreen Brewery for infringement of claims 1 to 7 and 12 of letters patent No. 790,811, granted May 23, 1905, and claims 1 to 12 of letters patent No. 881,042, granted March 3, 1908, to the complainant as assignee of Benjamin H. Alvey. This complainant also brought suit in Louisville, Ky., against the Falls City Brewing Company for infringement of the same patents, and during the taking of the testimony in the present case it was stipulated that certain parts of the testimony taken in that case should be read into this case. Although there was no appearance for the defendant at the hearing, its contentions were ably and elaborately considered in its expert testimony.

The complainant's patent No. 790,811 is clearly described by complainant's counsel substantially in the language of its expert witness Freeman, as follows:

"The Alvey patent, No. 790,811, relates to a conveyor system for automatically transferring boxes, barrels, and the like from place to place. While the boxes or similar articles are mainly transferred by their own gravity

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

along the system, it is frequently necessary or desirable that they be automatically elevated from one level to another, either for storage or in order that they may continue their travel by gravity to some distant point or points. The patent in suit, No. 790,811, relates more particularly to an automatic elevator mechanism adapted to co-operate with the gravity sections of such system.

"Generally speaking, the elevator comprises approximately horizontal end portions *40* and *50* (Fig. 2) and an intermediate portion *70* inclined with respect to the end portion and gradually merging into the end portions, which end portions are adapted to co-operate with the gravity sections *30* and *31*, to automatically receive the boxes or articles from the lower section *30* and automatically deliver them to the upper section *31* without undue shock and without requiring the services of an attendant; the whole being combined with a track or way or floor for properly supporting the boxes or articles, and with traveling means for conducting or propelling the boxes or articles along the track or way to elevate them from one gravity section to the other.

"In the particular embodiment disclosed in the patent, the elevator comprises a frame formed by transverse bars or straps *1*, having upwardly extending or bent ends *2*, and rigidly fastened to certain longitudinally extending angle irons. One pair of these angle irons, numbered *3* in the drawings, is secured directly to the transverse members, while another pair *4* is secured to the upwardly extending portions *2*. A third pair of angle irons 7 is secured beneath the transverse members *1* by means of angle pieces or brackets *5*, which are secured to the under sides of the transverse members *1*. The track or way or floor of the elevator is composed in part of rollers *11* journaled at their opposite ends in the upwardly extending portions of the first-mentioned pair of angle irons *3*, and in part of a relatively stationary portion *75*, composed of longitudinally extending bars *76*, which, as illustrated, are secured to transversely extending members *77*, which are illustrated as being supported upon the angle irons *3*. For the purpose of moving the boxes or articles over the floor of the elevator from the lower gravity section to the upper gravity section, traveling means in the form of a pair of chains *15* are provided, these chains being mounted upon pairs of sprocket wheels *16* and *17* arranged at opposite ends of the elevator; the upper stretches of the chains being guided upon the upper pair of angle irons *4*, and the lower stretches upon the lower pair of angle irons 7.

"In order that the motion of the chains may be transmitted to the boxes in such manner as to reliably propel them over the floor of the elevator, the chains are connected at suitable intervals by transverse members *18a*, which, in the embodiment illustrated, are provided with rollers *18*. These transverse connections between the chains are termed 'flights' in the patent. The stationary portions *75* of the floor of the elevator are arranged at the point where the lower horizontal portion of the elevator gradually merges into the intermediate inclined portion, thus facilitating the change in the direction of the movement of the boxes or articles from the horizontal place of the lower section to the inclined plane of the intermediate section.

"For the purpose of properly guiding the chains with relation to the line of movement of the boxes or articles over the floor of the elevator, the lower sections *4a* of the upper pair of angle irons *4* are reversely arranged with relation to those sections which are opposite the inclined and upper portions of the elevator, so that the horizontal members of the sections *4a* are adapted to overlie the chains *15* and keep them down at the proper elevation with relation to the lower horizontal portion of the elevator, and the horizontal members of the angle irons *4* are adapted to underlie the chains and sustain them at the proper elevation with relation to the inclined and upper horizontal portions of the elevator. Similarly, the lower sections *7a* of the lower pair of angle irons are reversely arranged with relation to the upper sections of this pair of angle irons to properly guide and control the lower stretches of the chain.

"It will be understood that the chains are continuously driven from a suitable source of power, so that, whenever a box traversing the lower gravity

section of the conveyor arrives at the lower horizontal portion of the elevator, it will be automatically engaged by one of the transverse connections or flights carried by the chains, which will cause it to travel along and up the conveyor and then deliver it to the upper gravity section, and this without requiring the services or attention of an operator.

"While the object of the invention is generally stated in the second paragraph of the specification as 'the provision of certain improvements in elevators adapted to be used in systems for handling packages, whereby packages may be most expeditiously and safely elevated from one floor to another of a warehouse, for example,' the co-operation of the device with a gravity conveyor system is more particularly set forth as follows:

"In order that this elevator may be best adapted to form part of a conveying system wherein the packages are conveyed to it by a gravity conveyor, (indicated at *30* in Fig. 2), which runs around or through the room, and delivered by it to a similar gravity conveyor *31*, which runs around or through the room above, its end portions *40* and *50* extend at an angle with its intermediate part *70*, gradually merging from the horizontal to the angle of inclination of the said intermediate part, whreby the articles may be delivered to and discharged from the elevator without shock, and the portion of the elevator at the junction of its approximately horizontal bottom and inclined intermediate part is provided with a floor *75*, comprising stationary members *76*, instead of rollers, which preferably constitute the remainder of the floor of the elevator."

The claims of this patent which are alleged to be infringed are:

"1. An elevator comprising a frame having approximately horizontal end portions and its intermediate part arranged at an inclination with its said end portions and gradually merging into the same, rollers constituting a portion of the track or way, a stationary portion arranged at the junction of an end and intermediate portion of the frame, and traveling means for conducting the articles upward along said track or way.

"2. An elevator comprising a frame having approximately horizontal end portions and its intermediate part arranged at an inclination with its said end portion and gradually merging into the same, rollers constituting a portion of the track or way, a stationary portion arranged at the junction of an end and intermediate portion of the frame, means for conducting the articles upward along said track or way, and conveying means for conducting said articles to and from said elevator.

"3. An elevator comprising a frame having approximately horizontal end portions and its intermediate part arranged at an angle with its said end portions and gradually merging into the same, a frame arranged at the junction of an end portion and said intermediate part and forming part of the track or way, rollers arranged to form a part of said track or way, a pair of connected endless belts for conducting the articles along said track or way, and means for holding said belts down adjacent to the junction of said end and intermediate portions.

"4. An elevator comprising a frame having a series of members extending transversely thereof and provided with upwardly-bent ends, a pair of angle irons extending longitudinally of the frame at the sides thereof and secured to said series of members and a second pair of angle irons, extending longitudinally of the frame and secured to the bent end portions of the first-mentioned frame members, means supported by the first-mentioned pair of angle irons and forming the floor of said elevator, and a connected pair of traveling endless belts for conducting the articles along said floor, said belts engaging said second pair of angle irons.

"5. An elevator comprising a frame composed of a series of members extending transversely thereof and having upwardly-bent ends, a pair of angle irons extending longitudinally of the frame at the sides thereof and secured to said series of members, a second pair of angle irons extending longitudinally of the frame and secured to the bent end portions of the first-mentioned frame members, a series of angle irons each secured at one end to the said lower portion of the respective first-mentioned frame members and depending therefrom, and a third pair of angle irons extending longitudinally of the frame

and secured to the last-mentioned angle irons, means supported by the first-mentioned pair of angle irons and forming the floor of said elevator, and a connected pair of traveling endless belts for conducting the articles along said floor, said belts engaging said second and third pairs of angle irons.

"6. An elevator comprising a frame having a series of members extending transversely thereof and provided with upwardly-bent ends, angle irons secured to the upwardly-bent ends of said transverse members at each side of the device and so arranged that the horizontal portion at one end or place in the length of the frame will be inverted with respect to the horizontal portions of the angle irons at the other end or place in said length, a connected pair of endless belts the upper runs of which are held in proper plane of operation by said horizontal members, a pair of angle irons extending longitudinally of the frame at the sides thereof, and a floor supported by the same.

"7. An elevator comprising a frame composed of a series of members extending transversely thereof and having upwardly-bent ends, a pair of angle irons extending longitudinally of the frame at the sides thereof and secured to said series of members, a second pair of angle irons, extending longitudinally of the frame and secured to the bent end portions of the first-mentioned frame members and so arranged that the horizontal portions at one end of the frame will be inverted with respect to the horizontal portions at the other end of said frame, a series of angle irons each secured at one end to the said lower portion of the respective first-mentioned frame members and depending therefrom, and a third pair of angle irons extending longitudinally of the frame and secured to the last-mentioned angle irons, means supported by the first-mentioned pair of angle irons and forming the floor of said elevator, and a connected pair of traveling endless belts for conducting the articles along said floor, said belts being held in the proper plane of operation by the horizontal members of said second and third pairs of angle irons."

"12. An elevator comprising a frame having its sides provided with angle irons extending longitudinally thereof and each formed of sections located end to end in relatively reverse positions, a traveling conveying means comprising endless belts which are guided by said angle irons, and a track or way located between the upper and lower runs of said belts."

The complainant's patent No. 881,042, as described by the complainant's expert Freeman, is as follows:

"The Alvey patent, No. 881,042, as stated therein, 'relates to certain improvements in carriers or conveyors, and particularly to the type thereof shown, for example, in my patent No. 790,811 granted May 23, 1905.' In the automatic elevator mechanism described in the prior Alvey patent referred to, the flights of the conveying means will sometimes engage the under surfaces of the boxes or other articles, and carry them along over the lower horizontal portions of the elevator, and start them up the inclined portion, whereupon the boxes thus improperly engaged will slip off the flight and fall back against the succeeding flight, or a box propelled thereby, with some danger of injuring the contents of the box or boxes. The improvements of the later patent, No. 881,042, are mainly directed to the provision of means for preventing the boxes from being improperly conveyed or advanced by the flights to a point where there is any danger of injuring the contents of the boxes by falling back in the manner stated."

The patentee points out the nature of these improvements as follows:

"My present invention therefore contemplates the provision of a conveyor with means which project into the path of travel of packages so as to be engaged by said packages, and as a principal function thereof are adapted to retard or resist the movement of packages which are not properly engaged with the propelling means of the conveyor, sufficiently to hold such packages against movement with the propelling means, and are further adapted to permit movement with the propelling means of packages which are properly engaged by the latter."

The particular embodiment of these improvements disclosed in the patent is aptly described in general terms by the patentee as follows:

"The means referred to, as herein shown and as preferred, comprise a pair of arms which project toward each other diagonally into the way or path of

travel of the packages from opposite sides of the way and control the movement of packages on the way. They have sufficient rigidity to resist direct onward movement of packages which are not properly positioned on the track or way, and are improperly engaged with the propelling means, while they are sufficiently elastic to yield to the pressure of suitably positioned packages which by reason of a proper engagement with the propelling means are being forcibly propelled along the way, such yieldability thereby permitting the packages to pass between the arms."

This embodiment is represented as being applied to the lower horizontal portion of an automatic elevator of the type illustrated in patent No. 790,811, previously considered. As shown, the spring arms *26* and *27* are rigidly secured at their forward ends near the front end of the elevator frame and at opposite sides thereof, and they extend rearwardly or in the direction of movement of the boxes or packages from their rigidly secured forward ends and in diagonal directions across the lower horizontal part of the track or floor of the elevator so that the arms converge toward each other at their rear or free ends which terminate near the base of the inclined portion of the elevator. These arms are formed of spring metal, and, while they are sufficiently rigid to prevent a box which is improperly engaged by the elevator flights from passing beyond them, they will yield to permit the box or packages to pass between them when it is squarely engaged by one of the flights of the conveyor."

The claims of this patent involved in suit are:

"1. In a conveyor, a package propelling means having traveling devices to engage the packages and force the same along the conveyor, and means for retarding the movements of packages which are improperly engaged by said propelling means, and to permit the movement of such packages as are properly engaged therewith.

"2. In a conveyor, a package propelling means comprising endless traveling chains and devices extending transversely of the conveyor and connecting the chains with each other and adapted to engage the packages, and means for retarding the movement of packages which are improperly engaged by said devices, and to permit the movement of such packages as are properly engaged therewith.

"3. In a conveyor, a package propelling means having traveling devices to force the packages along the conveyor, and yieldable arms extending toward each other into the path of the packages and adapted to prevent movement of packages which are improperly engaged by said devices and to permit movement of such packages as are properly engaged therewith.

"4. In a conveyor, a frame comprising sides formed to provide guide ways, endless chains which travel in said ways, package engaging devices carried by said chains, and arms extending diagonally into the path of the packages, and adapted to prevent movement of such packages as are improperly engaged with said devices, said arms being yieldable to permit movement of packages which are properly engaged with said devices.

"5. In a conveyor, a carrier way provided with spring arms, extending inwardly from the sides thereof, and means for conveying the packages along said way and between said arms.

"6. In a conveyor, a carrier way having an inclined portion, means for conveying packages along said way, and yielding retarding means for the packages, arranged at or near the base of the incline.

"7. In a conveyor, a carrier way, having an inclined portion, means for conveying packages along said way, and yieldable arms extending toward each other end into the path of the packages, at or near the base of the incline.

"8. In a conveyor, a track or way, and arms arranged in the path of movement of packages on said track or way, said arms extending diagonally inward beyond the lateral boundaries of the track or way from opposite sides of the same and in the direction of movement of the packages.

"9. In a conveyor, a track or way, an endless traveling means arranged over the track or way and having devices to engage the packages and control the movement of the same on the track or way, and arms between which

the packages travel, said arms extending from opposite sides of the track or way, inward beyond the lateral boundaries thereof in the direction of the movement of the packages on the track or way.

"10. In a conveyor, the combination with a means for supporting packages, and devices traveling relatively to said means and controlling the movement of packages thereon, of means adopted to restrain the movement of packages until the traveling devices are in position properly to engage the same.

"11. In a conveyor, the combination with a means for supporting packages, and devices traveling relatively to said means and controlling the movement of packages thereon, of spring arms projecting into the path of the packages and adapted to restrain the movement of the same until the traveling devices are in position properly to engage the same.

"12. In a conveyor, a track or way, an endless traveling means arranged over the track or way and having devices to engage the packages and control the movement of the same on said tracks or way, and arms arranged in the path of movement of packages on said track or way, said arms extending inward into the track or way from the sides of the same and yieldable to permit packages to pass there between which are being forcibly propelled by said traveling means."

William A. Megrath, of New York City, for complainant.

VEEDER, District Judge (after stating the facts as above). [1] A comparison of the defendant's construction with that of the complainant leaves no doubt in my mind that the claims sued on are responded to substantially, and in most instances literally, by the defendant's construction. The differences pointed out by the defendant in the framework, in the substitution of a slide for rollers at the receiving end of the elevator, and the use of rollers *59* in the defendant's construction, are all immaterial changes, and do not depart from the substance of the complainant's invention, if there be such. The defendant's contention that the spring arms of its elevator are merely centering arms is not well taken. The spring arms employed by the defendant are identical with those illustrated in complainant's patent No. 881,042, and are correlated with the same elements essential to the production of the result obtained. The proof shows that the defendant's spring arms serve to prevent the movement upon the inclined section of the elevator of boxes riding upon the flights, retarding their movement until properly engaged by the succeeding flight.

Nor has the defendant succeeded in its direct attack upon the complainant's invention. None of the many prior patents and structures in evidence seems to me to anticipate the substantial advance in the art embodied in the claims in suit. Some of the elements of the patented structure may be old, but the result obtained by the combination and correlation was new and efficient beyond anything that had been known before. The evidence clearly establishes the utility and commercial value of the complainant's invention. The old method of handling heavy packages by hand trucks and straight lift or plat form elevators was slow, ruinous to floors, involved much breakage, and required a great deal of manual labor and attendance. The complainant's structure overcame these disadvantages. Prior gravity carrier systems were limited in range to situations where packages were to be transferred to a lower level. The complainant's structure

eliminated such restriction. By its use packages are automatically transferred to points at the same or a higher or a lower level, irrespective of the distance between the delivery and receiving points, and this result is accomplished automatically by a single and simple mechanism, which is operated with a minimum of labor or attendance. It co-operates with the gravity conveyor sections without manual aid to receive packages without shock or jar from the lower sections, and without the necessity of any times relation between the periods of arrival of the packages at the elevator and the phases of movement of the propelling devices of the elevator. The elevator is always ready to perform its function as a part of the system. The complainant's structure is not to be dissected in an effort to discover anticipation in old and often crude devices designed for different purposes, and which are similar to the complainant's mechanism only in that they may be broadly termed inclined endless conveyors for elevating freight.

[2] Finally, the defendant raises an issue of abandonment by reason of alleged public use and sale for more than two years prior to the date of the application for patent No. 881,042. It is claimed that the spring arms covered by the patent had been used on a machine exhibited and put on sale by the complainant at the St. Louis World's Fair in 1904. I find from the evidence that the complainant's exhibit at the World's Fair included the elevator forming the subject-matter of patent No. 790,811 in suit, and that during part of the time it was exhibited with spring arms. But such use was experimental, and the tests then made were not successful. The elevator thus used was not on sale. At the close of the Fair this elevator was dismantled, shipped back to the complainant's factory, and was not again erected. It was not until January, 1906, that further experiments with spring arms were made, when, proving successful, an application for a patent therefor was filed on October 6, 1907. The construction covered by complainant's patent cannot, therefore, be said to have been in public use or on sale for more than two years prior to the date of application. The printed circular containing a reproduction of a photograph of the complainant's exhibit shows the spring arms; but inasmuch as they can hardly be discerned with the aid of a magnifying glass, and the circular contains no description of their construction and operation, it is clearly not such a publication as will invalidate the patent in suit.

The complainant may have a decree.

UNITED STATES v. LUTHER.

(District Court, E. D. Oklahoma. September 20, 1919.)

No. 3418.

1. INDIANS ⊂=35—CARRYING INTOXICATING LIQUORS INTO INDIAN COUNTRY AN OFFENSE.
The provision of Act March 1, 1895, § 8 (Comp. St. § 4136b), making it an offense to carry or have carried intoxicating liquors into Indian Territory, *held* not repealed by implication by Act March 3, 1917, § 5 (Comp. St. 1918, §§ 8739a, 10387a–10387c), and to be still in force in that part of Oklahoma then comprising Indian Territory.
2. INDICTMENT AND INFORMATION ⊂=86(3)—FOR HAVING POSSESSION OF LIQUOR IN INDIAN COUNTRY NEED NOT STATE PLACE OF OFFENSE.
An indictment for having possession of liquor in the Indian country, in violation of Act May 25, 1918, § 1 (Comp. St. 1918, § 4137aa), *held* not subject to demurrer, because it did not specifically designate the particular location in the Indian country within the named district.
3. INDICTMENT AND INFORMATION ⊂=129(1)—JOINDER OF COUNTS FOR CARRYING LIQUOR INTO INDIAN TERRITORY AND HAVING IT IN POSSESSION PROPER.
Under Rev. St. § 1024 (Comp. St. § 1690), a count for unlawfully carrying liquor into the Indian country and one for there having it in his possession may be joined in the same indictment.

Criminal prosecution by the United States against William Luther. On demurrer to indictment. Overruled.

W. P. McGinnis, U. S. Atty., and H. T. Church, Asst. U. S. Atty., both of Muskogee, Okl.

Frank Lee and J. C. Denton, both of Muskogee, Okl., for defendant.

WILLIAMS, District Judge. The indictment contains two counts; the first charging the defendant with the introduction of intoxicating liquors into the Eastern district, in that portion of the state of Oklahoma which was formerly Indian Territory, from without the state, in violation of section 8 of the act of March 1, 1895 (28 Stat. 697, c. 145 [Comp. St. § 4136b]). The second count charges the defendant with having possession, custody, and control of intoxicating liquors in Indian country, in violation of Act May 25, 1918, c. 86, § 1, 40 Stat. 1045 (16 Supp. Fed. St. Ann. 37 [Comp. St. 1918, § 4137aa]).

Defendant has demurred on the following grounds: (1) No violation of any law of the United States charged; (2) the Indian country in which the defendant is alleged to have had possession of said liquor is not sufficiently described or designated; and (3) indictment is duplicitous, in that two separate and distinct offenses are charged.

[1] (a) The first ground is directed to the first count, on defendant's theory that section 8 of the act of March, 1895, so far as it relates to the introduction of intoxicating liquors by means of interstate commerce into what was formerly Indian Territory, has been repealed by section 5 of the act of March 3, 1917 (39 Stat. 1069, c. 162 [Comp. St. 1918, §§ 8739a, 10387a–10387c]; sections 9 and 10, Supp. Fed. Stat.

Ann. 62). The act of March 1, 1895, entitled "An act to provide for the appointment of additional judges of the United States Court in the Indian Territory, and for other purposes," contains 13 sections:

(1) Indian Territory divided into three judicial districts; (2) two additional judges; (3) clerks and deputies; (4) United States commissioners, and extensions of certain criminal law of Arkansas and procedure to the Indian Territory, and appeals; (5) constables; (6) jurors; (7) venue as to criminal and civil suits; (8) "that any person, whether an Indian or otherwise, who shall, in said territory, manufacture, sell, give away, or in any manner, or by any means furnish to any one, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said territory, any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to any one, or *carrying into said territory any of such liquors or drinks* [italics mine], shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years;" (9) jurisdiction in civil and criminal cases; (10) provision for courtroom, custody of prisoners, and (11) appellate procedure; (12) fees; and (13) "that none of the provisions of any other acts, or of any of the laws of the United States, or of the state of Arkansas, heretofore put in force in said Indian Territory, except so far as they come in conflict with the provisions of this act, are intended to be repealed, or in any manner affected by this act, but all such acts and laws are to remain in full force and effect in said territory."

All of said act of March 1, 1895, except that portion of section 8 which relates to "carrying into said territory any of such liquors or drinks," was repealed or superseded by virtue of the Enabling Act of the state of Oklahoma (Act June 16, 1906, c. 3335, 34 Stat. 267), when it was admitted pursuant thereto as a state on November 16, 1907. Ex parte Webb, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248; United States v. Wright, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. 1160; Joplin Mercantile Co. v. United States, 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. 705; Id., 213 Fed. 926, 131 C. C. A. 160, Ann. Cas. 1916C, 470.

Congress in the Enabling Act (section 3) had required:

"That the manufacture, sale, barter, giving away, or otherwise furnishing * * * of intoxicating liquors within those parts of said state now known as the Indian Territory and the Osage Indian Reservation and within any other parts of said state which existed as Indian reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said state into the Union, and thereafter until the people of said state shall otherwise provide by amendment of said Constitution and proper state legislation. * * *"

Section 5 of the act of March 3, 1917 (39 Stat. 1069, c. 162; section 8352, Barnes' Fed. Code), entitled:

"An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes"

—is as follows:

"Sec. 5. That no letter, postal card, circular, newspaper, pamphlet, or publication of any kind containing any advertisement of spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind, or containing a solicitation of an order or orders for said liquors, or any of them, shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster

or letter carrier, when addressed or directed to any person, firm, corporation, or association, or other addressee, at any place or point in any state or territory of the United States at which it is by the law in force in the state or territory at that time unlawful to advertise or solicit orders for such liquors, or any of them, respectively.

"If the publisher of any newspaper or other publication or the agent of such publisher, or if any dealer in such liquors or his agent, shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of the provisions of this section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than $1,000 or imprisoned not more than six months, or both; and for any subsequent offense shall be imprisoned not more than one year. Any person violating any provision of this section may be tried and punished, either in the district in which the unlawful matter or publication was mailed or to which it was carried by mail for delivery, according to direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed. * * *"

Said section deals primarily with postal matters and the use of such agencies in furtherance of the sale and purchase of intoxicating liquors, closing with the following paragraph:

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory *the laws of which state or territory prohibit* [italics mine] the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: Provided, that nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state: Provided further, that the Postmaster General is hereby authorized and directed to make public from time to time in suitable bulletins or public notices the names of states in which it is unlawful to advertise or solicit orders for such liquors."

Congress provided in the Wilson Act (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [Comp. St. § 8738]) for state control over liquor after its delivery in interstate commerce to the consignee. The Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699 [Comp. St. § 8739]) prohibited the shipment in interstate commerce of liquor, where the same was to be used in violation of the laws of the state into which it is transported. The act of March 3, 1917, was another step under the authority of Congress in aid of the policy of the states. It was not within the power of the states by state law to limit the control of Congress over interstate commerce. But Congress may regulate interstate commerce in aid of state policy. United States v. Hill, 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. 337.

Defendant's contention is that the special act of March 1, 1895, is repealed by implication in toto by the general act of March 3, 1917. That such repeals by implication are not favored is a rule of construction firmly established. Sections 2139, 2140, and 2141, Revised Statutes of the United States, and the subsequent amendatory acts of July 23, 1892 (27 Stat. 260, c. 234), and of January 30, 1897 (29 Stat. 506, c. 109), and of May 18, 1916 (39 Stat. 124, c. 125 [Comp. St. §§ 4136a, 4137, 4141, 4144, 4144a]), comprise legislation prohibiting the introduction under any pretense in the Indian country and the disposal or sale of any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any

kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom an allotment of land has been made, while the title to the same shall be held in trust by the government, or to any Indian or ward of the government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship.

Said act of Congress of May 18, 1916 (39 Stat. 124, c. 125 [Comp. St. § 4144a]), provides that:

"The provisions of sections twenty-one hundred and forty and twenty-one hundred and forty-one of the Revised Statutes of the United States shall also apply to beer and other intoxicating liquors named in the act of January thirtieth, eighteen hundred and ninety-seven (Twenty-Ninth Statutes at Large, page five hundred and six), and the possession by a person of intoxicating liquors in the country where the introduction is prohibited by treaty or federal statute shall be prima facie evidence of unlawful introduction."

By Act Cong. June 30, 1919, c. 4, it is provided that:

"On and after July 1, 1919, possession by a person of intoxicating liquors in the Indian country, or where the introduction *is or was prohibited by treaty or federal statute* [italics mine] shall be an offense and punished in accordance with the provisions of the acts of July 23, 1892 (27 Stat. 260), and January 30, 1897 (29 Stat. 506)."

By Act March 2, 1917, c. 146, 39 Stat. 969, entitled:

"An act making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and eighteen"

—Congress in making appropriation, "For the suppression of the traffic in intoxicating liquors among Indians, $150,000," added the proviso [Comp. St. 1918, § 4141a] that:

"Automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the *Indian country, or where the introduction is prohibited by treaty or federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section twenty-one hundred and forty of the Revised Statutes of the United States.*" (Italics mine.)

Beginning with June 21, 1906 (34 Stat. 328, c. 3504), and continuing to the present time, Congress has made provision for the suppression of intoxicating liquors among Indians. See United States v. One Seven-Passenger Paige Car (D. C.) 259 Fed. 641. These acts of Congress relating to such matter are a legislative construction that the act of March 1, 1895, was not intended to be repealed in toto by the act of March 3, 1917. Tiger v. Western Investment Co., 221 U. S. 309, 31 Sup. Ct. 578, 55 L. Ed. 738. See, also, United States v. One Seven-Passenger Paige Car (D. C.) 259 Fed. 641; United States v. One Cadillac Eight Automobile (D. C.) 255 Fed. 173; United States v. One Buick Automobile (D. C.) 255 Fed. 793. Besides, the act of March 3, 1917, in aid of the policy of the states, covered only intoxicating liquors "transported in interstate commerce," while the act of

March 1, 1895 includes every manner of carrying into what was formerly the Indian Territory from without the state of Oklahoma. United States v. Simpson (D. C.) 257 Fed. 860.

I conclude that section 8 of the act of March, 1895, as to the introduction of intoxicating liquors from without the state of Oklahoma into what was formerly the Indian Territory, is not repealed in toto by the act of March 3, 1917.

[2] (b) For his second ground, defendant contends the indictment does not inform him of the nature or cause of the accusation, as required by the Fifth Amendment to the United States Constitution, and particularly in that the second count does not sufficiently describe the particular Indian country in Ottawa county in which the defendant is alleged to have had the possession, custody, and control of the intoxicating liquors. The act of May 25, 1918 (1918 Supp. Fed. St. Ann. 264 [Comp. St. 1918, § 4137aa]), provides:

"* * * That on and after September first, nineteen hundred and eighteen, possession by a person of intoxicating liquors in the Indian country where the introduction is or was prohibited by treaty or federal statute shall be an offense and punished in accordance with the provisions of the Acts of July twenty-third, eighteen hundred and ninety-two (27 Stat. at Large, 260), and January thirtieth, eighteen hundred and ninety-seven (29 Stat. at Large, 506)."

Indian country as defined by Act Jan. 30, 1897, includes:

"Any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States."

See, also, Clairmont v. United States, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. Ed. 1201; Evans v. Victor, 204 Fed. 361, 122 C. C. A. 531.

The general rule is that an indictment is sufficient which charges the offense in the language of the statute creating same, or acts coming within the statutory description in the substantial words of the statute, without further expansion of the matter. Pounds v. United States, 171 U. S. 35, 18 Sup. Ct. 729, 43 L. Ed. 62; Ledbetter v. United States, 170 U. S. 610, 18 Sup. Ct. 774, 42 L. Ed. 1162; United States v. Simmons, 96 U. S. 362, 24 L. Ed. 819; Tapack v. United States, 220 Fed. 447, 137 C. C. A. 39. In Joplin Mercantile Co. v. United States, 213 Fed. 929, 131 C. C. A. 163, Ann. Cas. 1916C, 470, it is said:

"If an indictment was returned which charged a defendant with introducing liquor into the Indian country, upon the trial a question of fact would at once arise as to whether the place to which they were imported remained Indian country under the acts of 1892 and 1897; but, if the charge was under the act of 1895, the sole question would be whether the liquor had been carried into a geographical location fixed and determined."

In Malcolm v. United States, 256 Fed. 363, —— C. C. A. ——, it is said:

"In our judgment it would have been sufficient merely to charge, in the language of the statute, the transportation of the whisky in question into the state of West Virginia, without naming the particular place, or even the state, from which it was transported. Omission of the point of origin might have entitled defendant to a bill of particulars, but it would not have served to render the indictment demurrable."

In Williams v. United States, 158 Fed. 30, 88 C. C. A. 296, the indictment charged the defendant with removing certain spirits to a place not authorized by law, without setting out the place to which the same were removed, and the indictment was challenged both on demurrer and by motion in arrest of judgment. One of the objections raised was that the indictment did not specify the place to which said liquors were removed, nor describe the same. In the opinion it is said:

"It is not essential to specify in the indictment the name of the person to whom, or the place where, the casks were sent. That was mere matter of evidence, and not of the substance of the offense. Of all men the defendant knew to whom and where he had sent the casks; and, if he desired information from the prosecution, he could have protected himself against surprise at the trial by demanding in advance a bill of particulars. The indictment was sufficient."

Here the gravamen of the offense is the possession "of intoxicating liquors in the Indian country or where the introduction is or was prohibited by treaty or federal statute." As to the particular location in the Indian country in the Eastern district, that is a matter of evidence, and not of the substance of the offense. If the defendant desires this information from the prosecution, so as to fortify himself against surprise at the trial, he may secure same by demanding in advance a bill of particulars. See, also, section 1025, Rev. Stat., Comp. St. § 1691 (1429, Barnes' Fed. Code; 194 Byrne's Fed. Crim. Proc.).

[3] (c) As to third ground of defendant's demurrer as to duplicity, it seems that such question may not here be raised by demurrer. Pooler v. United States, 127 Fed. 509, 62 C. C. A. 307; Chambliss v. United States, 218 Fed. 156, 132 C. C. A. 112. However, section 1024, Rev. Stat., Comp. St. § 1690 (1428, Barnes' Fed. Code; Byrne's Fed. Crim. Proc.) provides:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions, connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

See, also, Dillard v. United States, 141 Fed. 305, 72 C. C. A. 451; Pointer v. United States, 151 U. S. 400, 14 Sup. Ct. 410, 38 L. Ed. 208; Pierce v. United States, 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454; Williams v. United States, 168 U. S. 390, 18 Sup. Ct. 92, 42 L. Ed. 509.

An order will be entered overruling defendant's demurrer.

MORGAN v. HINES, Director General of Railroads, et al.

(District Court, E. D. Oklahoma. September 20, 1919.)

No. 3123.

REMOVAL OF CAUSES ⊂=49(3)—JOINT ACTION FOR TORT NOT A SEPARABLE CONTROVERSY.

Where the petition alleges that plaintiff's husband, while riding in an automobile, was killed at a railroad crossing through the concurrent negligence of the railroad company and the driver of the automobile, a joint action for the death may be maintained against them, and in such action there is no separable controversy which entitles the railroad company, a nonresident, to remove the cause.

At Law. Action by Fannie A. Morgan against Walker D. Hines, Director General of Railroads, and others. On motion to remand to state court. Motion granted.

L. P. Kay and E. K. Robinett, both of Tulsa, Okl., and Roy F. Ford, of Oklahoma City, Okl., for movants.

C. O. Blake and R. J. Roberts, both of El Reno, Okl., contra.

WILLIAMS, District Judge. This action was brought in the district court of Pittsburg county, Okl., by the plaintiff, for herself and others as surviving widow and children of Louis K. Morgan, deceased, who was killed in a crossing accident. Under the allegations of plaintiff's petition, the defendant Carroll Johnson, the owner and driver of an automobile, with the plaintiff's intestate as a passenger therein, negligently drove same in front of the defendant railroad's train, as it was passing over a certain crossing. Long prior thereto defendant's railroad track immediately adjacent to each side of said crossing was located and maintained in a cut some 8 or 10 feet deep, below the general surface of the surrounding country. On its banks were then growing weeds more than 10 feet in height, on account of which persons traveling on the highway over said crossing were unable to see trains from the direction from which the train approached which struck said automobile, occasioning intestate's death. By the proper exercise of care by either the railway company's employés or the said Carroll Johnson said accident would not have occurred; said accident being caused by the concurrent and commingled negligence of both of said defendants. Said actions should not be remanded, unless a separable controversy is presented.

In Chicago, Rock Island & Pacific Railroad Co. v. Durand, 65 Kan. 380, 69 Pac. 356, it was held that the driver of a hack carrying passengers, who negligently drives in front of an approaching train of cars at a street crossing, may be joined with the railroad company as a defendant for injuries received by their concurring negligence.

In Sternfels v. Metropolitan Street Railway Co., 73 App. Div. 494, 77 N. Y. Supp. 309, which was affirmed by the Court of Appeals in a memorandum opinion (174 N. Y. 512, 66 N. E. 1117), the court said:

"Where a passenger was killed in a collision between a street car and a brewery wagon, caused by the concurrent negligence of both, a joint cause of

action could be maintained against the street railroad company and the brewery company, notwithstanding the different degrees of care owed deceased by the two defendants."

See, also, Colegrove v. N. Y. & N. H. R. Co., 20 N. Y. 492, 75 Am. Dec. 418.

In Abb v. N. P. Ry. Co., 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864, the plaintiff, a passenger on a street car, sustained injury in a collision between the car, on which he was a passenger, and the defendant railroad's train. The two companies were held to be joint tort-feasors.

In Field v. Spokane, Portland, etc., R. Co., 64 Wash. 445, 117 Pac. 228, it was held that the negligence of a stage driver, in failing to stop, look, and listen at a railroad crossing, and that of the engineer of the railroad company, who failed to give a signal of the train's approach, was joint and concurrent.

In Matthews v. Delaware, L. & W. R. Co., 56 N. J. Law, 34, 27 Atl. 919, 22 L. R. A. 261, plaintiff was injured by a collision between a locomotive of the defendant railroad company and a car (in which he was a passenger) of a street railway company. Held, that a joint action could be maintained against both companies, if the collision was produced by the neglect of the railroad company to give notice of the approach of the locomotive, concurrent with the neglect of the street railway company to observe proper care in crossing the railroad track. In the opinion it is said:

"If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles each, any, or all of the tort-feasors may be held. But when each of two or more persons owe to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the negligence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tort-feasors are subject to a like liability."

In Tompkins v. Clay Street Hill R. Co. et al., 66 Cal. 163, 4 Pac. 1165, a car of the Clay Street Hill Company collided at a crossing with a car of the Sutter Street Railroad Company. Plaintiff, a passenger in the car of the latter company, was thrown from her seat and injured. The complaint charges negligence on the part of both companies. Plaintiff recovered damages, and on appeal the judgment was affirmed. Held that, if the negligence of the managers of both vehicles contributed to the injury, the party injured may recover from the proprietors jointly or severally.

In Central Passenger Ry. Co. v. Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Am. St. Rep. 309, Kuhn, in an action against the Central Passenger Railway Company, a passenger on the cars of said railroad company was injured by being thrown out of such car by reason of a collision between the cars of that company and those of the Louisville & Nashville Railroad Company, caused by the joint negligence of the employés of each company. The question of negligence being submitted to the jury, the finding was that the injury was caused by the concurrent negligence of both companies, which judgment, on appeal, was affirmed.

In Cuddy v. Horn, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 179, it was held:

"A passenger on a public steamboat, injured by its collision with another, in consequence of the negligence of the officers of both, may hold both owners liable."

In Carterville v. Cook, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248:

"The evidence given upon the trial tended to prove that the plaintiff, a boy some 15 years of age, while in the observance of ordinary care for his own safety, passing along a much-used public sidewalk of the defendant, was, by reason of the inadvertent or negligent shoving by one boy of another boy against him, jostled or pushed from the sidewalk at a point where it was elevated some 6 feet above the ground, and was unprotected by railing or other guard, and thereby seriously injured in one of his limbs."

In the opinion the court said:

"It is not perceived how, upon principle, the intervention of the negligent act of a third person, over whom neither the plaintiff nor the defendant has any control, can be different in its effect or consequence in such case from the intervention therein of an accident having a like effect. The former no more than the latter breaks the causal connection of the negligence of the city or village with the injury. The injured party can no more anticipate and guard against the one than the other, and the elements which constitute the negligence of the city or village must be precisely the same in each case, and we have accordingly held that, when a party is injured by the concurring negligence of two different parties, each and both are liable, and they may be sued jointly or separately."

In Holzab v. New Orleans & C. R. Co., 38 La. Ann. 185, 58 Am. Rep. 177, plaintiff sued to recover damages for injury to his wife, caused by a collision of the trains of the New Orleans & Carollton Railroad Company and the Illinois Central Railroad Company, both being made codefendants. The collision and injury was occasioned at a crossing. On appeal a judgment against both defendants was affirmed.

In McDonald v. Louisville & C. R. Co., 47 La. Ann. 1440, 17 South. 873, it was held that a collision of railroad trains brought about by the concurrent negligence of the two companies would render them jointly liable.

In Stone v. Dickinson, 87 Mass. (5 Allen) 29, it was held:

"If several different creditors, acting separately, without concert, and without knowing that they were employing a common agent, have wrongfully caused their debtor to be arrested on their several writs, by the same officer, who served the writs simultaneously, and by virtue thereof committed the debtor to jail, where he was confined upon all of them at the same time, they are to be regarded as joint trespassers, and full satisfaction received by the debtor from one of them in a bar to an action by him against the others."

In Northup et al. v. Eakes et al. (Okl.) 178 Pac. 266, the following excerpt from 38 Cyc. 488, is quoted with approval:

"Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it. It has been said that 'to make tort-feasors liable jointly there must be some sort of community in the wrongdoing, and the injury must

be in some way due to their joint work, but it is not necessary that they be acting together and in concert, if their concurring negligence occasions the injury.'"

See, also, St. Louis & S. F. R. Co. v. Bell, 58 Okl. 84, 159 Pac. 336, L. R. A. 1917A, 543.

The general rule, as stated in 29 Cyc. 565, is as follows:

"Where the injury is the result of the concurring negligence of two or more parties, they may be sued jointly or severally. All may be sued jointly, notwithstanding different degrees of care may be owed by the different defendants. Where, however, there is no joint duty or concert of action between two or more negligent persons, they cannot be joined; but they may be joined where there is a joint duty, although without concert of action."

This rule prevails, save in a few jurisdictions, where the rule of imputed negligence originally declared in Thorogood v. Bryan, 8 C. B. 115, obtains. However, this case appears to have been overruled in England (The Bernina, L. R. 12 P. D. 58), never to have been followed in Scotland, and to have taken foothold in only a few states in this country. The Supreme Court of the United States expressly rejected the same. Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652. See, also, Union Pacific Ry. Co. v. Lapsley, 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800. In footnotes in 36 L. R. A. 597, and Corley v. A., T. & S. F. Ry. Co., Ann. Cas. 1915B, 767, the holdings of the various jurisdictions are traced in minute detail.

In Beckwith et ux. v. Chicago, M. & St. P. Ry. Co. (D. C.) 223 Fed. 859, plaintiff's intestate was a passenger in an automobile operated by two of the defendants, which was struck by the engine of the defendant railroad company, upon which the other defendant was injured. Held, that the facts sufficiently charged joint and concurrent negligence on the part of the several defendants, so as to prevent a removal of the action by the railway company on the ground that a separable controversy was involved.

In Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131, at page 137, 21 Sup. Ct. 67, 70 (45 L. Ed. 121), it is said:

"The federal court will follow the state rule as to whether a cause of action is entire."

An order will be entered, sustaining the motion to remand.

PRENTISS v. EISNER, Collector of Internal Revenue.

(District Court, S. D. New York. September 22, 1919.)

INTERNAL REVENUE ⊂⊃7—AMOUNT OF STATE TRANSFER TAX CANNOT BE DEDUCTED FROM INCOME TAX.

A transfer tax upon a legacy or distributive share of an estate imposed by the laws of New York is not an imposition upon either the property passing or the right to receive it, but a deduction from the estate of the decedent, and may not be deducted from the net income of the legatee or distributee under Income Tax Act U. S. § 2, B.

At Law. Action by Elizabeth S. Prentiss against Mark Eisner, Collector of Internal Revenue, Third District of New York. On demurrer to complaint. Demurrer sustained.

Sullivan & Cromwell, of New York City (Max Shoop, of New York City, of counsel), for plaintiff.

Francis G. Caffey, U. S. Atty., of New York City (Julian Hartridge, Asst. U. S. Atty., of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. This is a demurrer to a complaint whereby the plaintiff seeks to recover income taxes for the year 1913, paid under protest. The objection urged is that the Commissioner refused to allow as a deduction transfer taxes which were paid to the state of New York on December 12, 1913, upon an inheritance which vested June 25, 1913.

Paragraph B, section 2, of the Act of October 3, 1913 (38 Stat. 167, c. 16), provides:

"That in computing net income for the purpose of the normal tax there shall be allowed as deductions: * * * Third, all national, state, county, school, and municipal taxes paid within the year, not including those assessed against local benefits. * * *"

The Commissioner of Internal Revenue has ruled that:

"A collateral inheritance tax levied under the laws of the state of New York being, as it is, a charge against the corpus of the estate, does not constitute such an item as can be allowed as a deduction in computing income tax liability to either the estate or a beneficiary thereof."

The plaintiff contends that the New York transfer taxes are excise taxes imposed by the state upon the right to receive an interest in a decedent's estate, and as such are within the deductions allowed by statute. The government, on the other hand, says that these taxes are an appropriation by the state of a portion of the decedent's estate before the remainder vests in the legatee. This latter contention is in accordance with the decision in United States v. Perkins, 163 U. S. 625, at page 630, 16 Sup. Ct. 1073, at page 1075 (41 L. Ed. 287), where the court said:

"The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the Legislature assents to a bequest of it."

This decision, which so far as I know has not been questioned, cannot be reconciled with any theory that the tax is based on a right of succession already vested in the legatee.

At the outset we have the important fact that property inherited or transmitted by will is not treated as income in the Income Tax Act, but, on the contrary, is not only not included, but specifically exempted. In other words, in the hands of the legatee, devisee, heir, or distributee such property is capital and not income. Under these circumstances, it would seem inconsistent if charges against this capital, which accrued prior to, or simultaneously with, the devolution of it, could be deducted from income tax returns. Notwithstanding this, the language of the act would apparently make the transfer taxes a necessary deduction, if they are charges against the person receiving the property, or against either the property or the right accruing to him.

The cases are extremely confused and their reasoning is unsatisfactory. It is admitted by them all that the tax is not upon the property itself which is transmitted. To avoid the unconstitutionality of a direct tax upon the property itself which was not apportioned among the states, the Court of Appeals of New York said as to the federal tax of 1898, in Matter of Gihon, 169 N. Y. 443, 62 N. E. 561:

"* * * The full amount of the legacy is in law paid to the legatee, and the deduction made from it and paid to the state or federal government is paid on account of the legatee from the legacy which he receives."

It is argued that the personal liability of the executor or administrator under the New York law for the payment of the tax makes the view taken by the foregoing case erroneous; but, as Judge Cullen there said, the obligation of the executor or administrator to pay the tax is a mere rule of administration to insure its payment, and the imposition of such an obligation affords no proof that the tax is either on the right to transmit or upon the property itself.

I do not think it follows, because the right to transmit or the right to receive the property of a decedent is a privilege granted by the state, and not a common right, that the tax is imposed upon either right. Judge Gray's statement in Matter of Swift, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709, is an accurate description of what occurs:

"What has the state done, in effect, by the enactment of this tax law? It reaches out and appropriates for its use a portion of the property at the moment of its owner's decease, allowing only the balance to pass in the way directed by the testator, or permitted by its intestate law."

To say that the legatee, devisee, heir, or distributee receives the property without any deduction and then pays the tax is really a most artificial way of viewing the transaction. In the case of personal property he really only gets the balance, with a credit as a matter of convenient bookkeeping to the amount of the tax. In the case of real estate he receives properly speaking an equity. He can pay the tax and get the land freed from the incumbrance, or the state can foreclose the lien and he will receive the balance. In either case the only natural way to treat him is as a recipient of a net amount. The condition of the devolution of the property is the receipt of the transfer tax by the state.

In United States v. Perkins, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L.

Ed. 287, the testator bequeathed his property to the United States. The Supreme Court held that the New York transfer tax was upon the testator's right to dispose of his property, and thus sustained the tax for, if it had been treated as upon any right of succession of the United States, the tax could not have been lawfully imposed. This case has been cited with approval in New York decisions, both under the old and new transfer tax acts.

I have carefully examined the interesting briefs submitted by counsel, and am convinced that the tax cannot properly be regarded as an imposition upon either the property or the right to receive a gross amount of the property of a decedent represented by a legacy, devise, or distributive share, but that the property and the right to receive it passed, reduced by the amount of the tax measured by a percentage of the value of the gross share. It is impossible to reconcile the conflicting expressions in judicial opinions; but this treatment of the situation will, I think, accord with the results reached by the various cases. I can see no substantial difference between the New York Transfer Tax Act (Consol. Laws, c. 60, §§ 220–245) in operation in 1913, and the earlier act, and I do not regard any of the acts as imposing a tax upon the plaintiff's right of succession which is deductible in her income tax return.

The demurrer is sustained.

In re STUBBLEFIELD.

(District Court, W. D. Texas, Waco Division. March, 1919.)

BANKRUPTCY ⊂=444—ORDER OF REFEREE GRANTING DISCHARGE NOT REVIEWABLE.

Where, after entry of an order by a referee recommending discharge, no further action was taken by an objecting creditor by filing a petition for review, as required by General Order 27 (89 Fed. xi, 32 C. C. A. xxvii), and no question or evidence is certified by the referee, there is nothing reviewable by the District Court.

In Bankruptcy. In the matter of George G. Stubblefield, bankrupt. On application for review of order of referee. Dismissed.

G. W. Smith, of Waco, Tex., for petitioning creditors.
Alva Bryan, of Waco, Tex., for bankrupt.

WEST, District Judge. The Cooper Grocery Company, creditor, contested bankrupt's petition for discharge, by specifications of grounds of objection filed with the referee, who, after full hearing, taking voluminous testimony, and careful consideration, held that the specifications in opposition were not sustained by the facts, and recommended that the bankrupt be discharged. The Grocery Company and the bankrupt appeared by attorneys in open court at Waco, Tex., on March 14, 1919, and by oral argument presented the question of the correctness of the ruling of the referee. Upon conclusion, the

court directed that the record be forwarded for further consideration and decision. This record is now before me.

The issue orally made by the Grocery Company was that the referee's order, in failing to sustain its specifications of grounds in opposition to the bankrupt's discharge, and recommending his discharge, was error, and should be reviewed by the court. The attorney for the bankrupt stated to the court that no exceptions had been taken to the referee's order, and no steps taken as required by law, by the creditor, where review is sought. General Order 27 (89 Fed. xi, 32 C. C. A. xxvii) provides that a creditor who desires to review any order made by the referee—

"shall file with the referee his petition therefor setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

The record submitted consists of (1) bankrupt's petition for discharge; (2) order setting down for hearing before referee; (3) publication of notice of hearing; (4) Cooper Grocery Company's original specifications in opposition to discharge; (5) bankrupt's exceptions thereto; (6) amended specifications; (7) stenographic report of testimony of witnesses taken upon the hearing; (8) referee's findings and rulings against the specifications in opposition, and recommending discharge. Consequently it discloses no action taken by the contesting creditor in exception to the order or ruling of the referee looking to its review. (a) There is no petition for review setting forth the error complained of, nor (b) does the referee certify the question presented for review together with a summary of the evidence relating thereto, and his findings and order made thereon, as required by the provisions of General Order 27.

The record discloses that the Grocery Company has not followed its contest beyond the referee's ruling and order recommending discharge. No action subsequent thereto has been taken. This condition necessarily obliges the court to hold that there is no issue of record before it, and no matter of which it has cognizance. Accordingly the record is returned to the clerk, who will notify the parties of the failure of the court to further consider or decide the questions submitted on oral presentation in open court at Waco, above referred to.

JEFFERSON STANDARD LIFE INS. CO. v. WILSON.

(Circuit Court of Appeals, Fifth Circuit. October 15, 1919.)

No. 3355.

1. INSURANCE ⊂⊃400—LIFE INSURANCE POLICY INCONTESTABLE AFTER ONE YEAR FROM DATE.
Where life policy, providing that, "after one year from date," if premiums have been duly paid, it shall be incontestable, and by its concluding clause reciting that it had been caused to be signed November 15, 1916, was on June 16, 1916, delivered to insured, with a receipt for premium for interim insurance from June 1, 1916, to November 15, 1916, and a receipt for first premium on the policy, reciting, "which is hereby rendered in force from the date of this payment" to November 15, 1917, the year for contest began to run then, and not from date of policy.

2. ESTOPPEL ⊂⊃68(4)—BY CLAIM OR POSITION IN JUDICIAL PROCEEDING.
An insurance company, which, after death of insured, brings suit to enjoin action on a life policy, alleging as ground for equitable relief that the policy would become incontestable a year from its date, and that action on the policy was being delayed till expiration of the year, is estopped to claim in that suit that the running of the year for contest was suspended by insured's death.

Appeal from the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Suit by the Jefferson Standard Life Insurance Company against William Rodney Wilson, individually and as represented by his guardian. From a decree for defendant on his cross-action, complainant appeals. Affirmed.

Richard C. Kelly, of Greensboro, N. C., and Sam S. Bennet, of Albany, Ga., for appellant.

E. K. Wilcox, of Valdosta, Ga., and Clifford E. Hay, of Thomasville, Ga., for appellee.

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

WALKER, Circuit Judge. On November 8, 1917, the appellant, Jefferson Standard Life Insurance Company, a North Carolina corporation, brought in the court below a suit in equity against the appellee, a citizen of Georgia, the beneficiary named in a life insurance policy issued by the appellant to Walter Cross Culpepper, who died in December, 1916. The bill prayed that the appellee be enjoined from bringing suit on the policy, and from transferring or otherwise changing in any way the status of it, and that the policy be canceled because of the alleged falsity of mentioned statements and representations made by Culpepper in his written application for insurance as to matters material to the risk incurred by the policy. By cross-action the appellee sought to recover the amount called for by the policy in the event of the death of the insured, resulting from bodily injury effected solely through external, violent, and accidental means. The appeal is from a decree in favor of the appellee on his cross-action.

The allegations of the bill as to the falsity of statements or repre-

sentations contained in the application for insurance were put in issue. The granting of the relief sought by that bill also was resisted on the ground that, when the suit was brought, the policy in question was incontestable as a consequence of the following provision of it:

"*Incontestability.*—After one year from date, if premiums have been duly paid, this policy shall be incontestable for any cause, except military or naval service in time of war when the double indemnity provisions on face of this contract shall not apply."

The facts of the case do not bring it within the exception stated in the just-quoted provision. It is not claimed that the decree appealed from is subject to be reversed, if at the time the appellant's bill was filed its right to contest the policy was barred by reason of the above-quoted incontestability clause. In behalf of the appellant it is contended that its right to contest the policy had not expired at the time its bill was filed. That contention is based on the circumstance that November 15, 1916, is the date stated in the concluding clause of the body of the policy, which is quoted below. In passing on that contention the following facts are to be considered:

Culpepper's written application for insurance was made in May, 1916. On June 16, 1916, the appellant's agent delivered to him the policy, to which was attached a written instrument of which the following is a copy:

"Jefferson Standard Life Insurance Company, Greensboro, North Carolina.

"Received thirty-six and 90/100 dollars, being the interim term premium on policy No. 46412, on the life of Walter R. Culpepper, to which policy this interim term receipt is supplementary, required to render in force this term insurance from June 1, 1916, to November 15, 1916, on which date the initial term of this policy begins. By acceptance of this receipt it is agreed:

"(a) That the conditions of said policy become the conditions of this interim term insurance.

"(b) That in the event of a claim arising during the period covered by this receipt, and provided the first annual premium under this policy has not been paid, the company will deduct from this amount payable a full year's regular annual premium under the form applied for at age of issue.

"C. C. Taylor, Secretary."

At the same time the agent delivered to Culpepper a receipt, of which the following is a copy:

"Jefferson Standard Life Insurance Company, Greensboro, N. C.

"Received one hundred eighty-nine and 35/100 dollars, being the first premium on Policy No. 46412 on the life of Walter Ross Culpepper, which is hereby rendered in force from the date of this payment to the 15th day of November, 1917, and no longer.

"This receipt will not be valid, or in any way binding on this company, unless the premium be paid in full while the insured is in good health, and this receipt be countersigned by a duly authorized agent.

"C. C. Taylor, Secretary.

"First Premium Receipt.

"Received the within named amount this 16th day of June, 1916.

"R. S. Roddenberry, Agent."

At the same time the agent collected from Culpepper the amounts of the interim term premium and of the first annual premium. The following is a copy of the concluding clause of the policy:

"In witness whereof, the Jefferson Standard Life Insurance Company has caused this contract to be signed by its president and secretary, at its home office in the city of Greensboro, N. C., on this the 15th day of November, one thousand nine hundred and sixteen."

It was disclosed that the insured was a farmer. It may be inferred that it was for his convenience that the contract was so framed that the annual premiums subsequent to the one paid would be payable in the fall, instead of in the spring.

[1] The policy, the paper attached to it, and the receipt for $189.35 were all parts of one transaction. By the express terms of the last-mentioned receipt the policy was "rendered in force" from the date of that receipt "to the 15th day of November, 1917." The paper called "Interim Term Receipt" shows that it was the purpose to make the insurance contracted for effective prior to the date stated in the concluding clause of the body of the policy. The time limit fixed by the provision in question was disclosed by the words "after one year from date"; the date there referred to not being specifically stated. The object of the provision in question being to limit the time within which the contract of insurance could be contested by the insurer, there is ground for inferring that it was intended that that time was to run from the date when the contract became subject to contest. It was subject to be contested as soon as it was in force.

The papers evidencing the transaction disclosing the date when the policy became effective, it well may be inferred that that date, and not another one several months later, stated in one of the instruments evidencing the transaction, was the one intended. It was made plain that the dates when the annual premiums subsequent to the one presently paid would be due were to correspond with the date stated in the concluding clause of the body of the policy. The contract as a whole did not show that the time allowed for contesting the policy was intended to begin on a date several months subsequent to the date on which the policy became effective and subject to contest. Considering together the several papers evidencing the transaction, the conclusion is that the provision in question had the effect of making the policy incontestable for any cause, other than the excepted one, after one year from the date of the policy becoming effective. As the policy had been in force for more than a year when the insurer undertook to contest it by suit, the asserted right to contest it on the grounds relied on was barred by the expiration of the time allowed for a contest.

[2] There was a suggestion in the argument of the counsel for the appellant that the running of the time stated in the incontestability clause was suspended by the death of the insured within that time. We do not understand that it is claimed in behalf of the appellant that it is entitled to rely on that proposition, assuming its correctness. We think it has estopped itself to do so. The averments of the appellant's bill show that it took the position that the time allowed for contesting the policy continued to run after the death of the insured, and that it would end with the 15th day of November, 1917. After the death of the insured, the grounds of contest stated in the bill were available to the appellant by way of defense to an action against it on the policy.

This being true, the appellant was not entitled to equitable relief, in the absence of special circumstances showing that it might suffer irreparable injury unless such relief was granted. Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501.

The bill alleged as special circumstances calling for the equitable relief sought that the appellee was threatening and preparing to wait until after the 15th day of November, 1917, and then to institute an action on the policy, and that if the appellee should so wait the appellant would be deprived of the benefit of the alleged grounds of contest, by reason of the incontestability clause of the contract. Having, on the grounds stated, invoked the equitable jurisdiction of the court and obtained the exercise of that jurisdiction by the granting of the preliminary injunction sought, the appellant precluded itself from contending that the incontestability clause was suspended by the death of the insured within the time stated in that clause. It cannot get an equitable remedy by representing that the claimed right to contest the policy was not affected by the insured's death and that it was about to expire, and in the same suit contend that the provision in question was suspended by the insured's death, and that the right to contest the policy was not about to expire when the suit was brought. A party who, for the purpose of maintaining a suit, has deliberately represented a thing in one aspect, cannot be permitted to contradict his own representation by giving the same thing another aspect in the same case. Iron Gate Bank v. Brady, 184 U. S. 665, 22 Sup. Ct. 529, 46 L. Ed. 739; Davis v. Wakelee, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578; Hodges v. Winston, 95 Ala. 514, 11 South. 200, 36 Am. St. Rep. 241.

The right of the appellant to contest the contract sought to be canceled having been barred, under a provision of that contract, when the suit for its cancellation was brought, and the decree appealed from not being questioned upon a ground other than the denial of the asserted right to have that contract canceled, that decree is affirmed.

DE FOUR v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919.)

No. 3312.

1. CRIMINAL LAW ⊜1032(5)—OBJECTION TO INDICTMENT NOT MADE BELOW NOT REVIEWABLE.

   Any objection because information for keeping a house of ill fame within five miles of a military post, in violation of Act May 18, 1917, § 13 (Comp. St. 1918, § 2019b), and an order of the Secretary of War, did not aver that the offense was committed knowingly, is unavailing; no objection having been made below, and the evidence showing defendant knew the purpose for which the house was used.

2. WAR ⊜4—EVIDENCE SUSTAINING CONVICTION OF KEEPING HOUSE OF ILL FAME.

   Evidence under indictment for violation of Act May 18, 1917, § 13 (Comp. St. 1918, § 2019b), and an order of the Secretary of War, *held* to justify jury's finding that defendant was keeping a house of ill fame.

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

*Rehearing denied January 5, 1920.

3. CRIMINAL LAW ⊂⊃370—EVIDENCE OF OTHER OFFENSES ADMISSIBLE TO SHOW GUILTY KNOWLEDGE.

Defendant, having testified that she did not know of any practice of prostitution in the building, and did not receive the impression that such was the case from certain incidents which occurred in her presence, evidence that she had previously conducted houses of ill fame was admissible, under the rule allowing proof of distinct offenses to rebut an inference of mistake, want of guilty knowledge, wrongful purpose, or innocent intent.

4. INDICTMENT AND INFORMATION ⊂⊃3—INFORMATION PERMISSIBLE FOR KEEPING HOUSE OF ILL FAME.

Keeping a house of ill fame not being an infamous crime, necessitating indictment, prosecution therefor on an information is allowable, under Rev. St. § 1022 (Comp. St. § 1686).

5. CRIMINAL LAW ⊂⊃15—PROSECUTION AFTER REPEAL OF STATUTE.

After repeal of Act May 18, 1917, there may be prosecution for a prior keeping of a house of ill fame near a military post, contrary to section 13 of that act (Comp. St. 1918, § 2019b), and an order of the Secretary of War; the repealing statute (Act July 9, 1918 [Comp. St. 1918, § 2019b, appendix]), not indicating a contrary intention by express declaration or necessary implication, as is necessary under Rev. St. § 13 (Comp. St. § 14), to prevent the repealed statute continuing in force for purpose of such prosecution.

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

Emily De Four was convicted of keeping a house of ill fame, contrary to Act May 18, 1917, and an order of the Secretary of War, and brings error. Affirmed.

Marshall B. Woodworth, 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.

GILBERT, Circuit Judge. [1] It is contended that the information under which the plaintiff in error was convicted is fatally defective in that it contains no averment that the offense was committed knowingly. It charges, among other things, that the plaintiff in error during the months of March, April, and May, 1918, and particularly on or about May 31, 1918, in violation of Act May 18, 1917, c. 15, § 13, 40 Stat. 83 (Comp. St. 1918, § 2019b), and the order of the Secretary of War made and issued on January 17, 1918, did keep a house of ill fame at a certain designated place in San Francisco, within five miles from a military post and fort, to wit, the presidio and Ft. Mason, which were used for military purposes.

"It has been held that in an indictment under an ordinance declaratory of the common law, for keeping a common disorderly house, no scienter need be alleged, for the specific charge of the offense contains within its terms the knowledge of the purpose." 14 Cyc. 497.

Said the Supreme Court of Missouri, in State v. Malloch, 269 Mo. 235, 190 S. W. 266:

"The charge presumes and includes such knowledge on the part of the defendant. To keep a house for such purposes certainly means that he had knowledge of the purpose for which the house was used."

Other cases so holding are Brown v. Toledo, 5 Ohio S. & C. P. Dec. 210; Commonwealth v. Davis, 9 Ky. Law Rep. 494.

The evidence in the case shows knowledge on the part of the plaintiff in error of the purpose for which the house was used. No objection to the form of the indictment was made in the court below, and we hold that the objection cannot now avail the plaintiff in error.

[2] The contention that there was no evidence that the premises were used as a house of ill fame cannot be sustained. The plaintiff in error was keeping a lodging house for men. In the house for a considerable portion of the time was a well-known prostitute, Raymonde Chauvigney. In the presence of the plaintiff in error the Chauvigney woman was seen to solicit a man and take him to one of the rooms in the house which the former kept. The defendant herself, prior to taking charge of the premises, had been a keeper of houses of ill fame, and she and the Chauvigney woman had been associated in that business. There was evidence to show that the Chauvigney woman paid to the plaintiff in error a portion of her earnings. The evidence was, we think, sufficient to justify the jury in finding that the plaintiff in error was keeping a house of ill fame.

[3] Error is assigned to the admission of evidence that the plaintiff in error had previously conducted houses of ill fame. We are of the opinion that such evidence was admissible under the rule that proof of distinct offenses may be received to rebut an inference of mistake, want of guilty knowledge, wrongful purpose, or innocent intent. Golden v. State, 72 Tex. Cr. R. 19, 160 S. W. 957; Guthrie v. State, 80 Tex. Cr. R. 127, 189 S. W. 256; State v. Price, 115 Mo. App. 656, 92 S. W. 174; State v. Mack, 41 La. Ann. 1079, 6 South. 808; Howard v. People, 27 Colo. 396, 61 Pac. 595; State v. Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666. The plaintiff in error testified that she did not know of any practice of prostitution in the building, and did not receive the impression that such was the case from certain incidents which occurred in her presence, one of which was the solicitation of a man by the Chauvigney woman, and that she did not know that the Chauvigney woman was a prostitute.

[4] We find no merit in the contention that the offense here involved could not lawfully be prosecuted upon information. At common law an information will lie for any misdemeanor, but not for a felony. 4 Blackstone Com. 310. The Constitution provides that infamous crimes shall be punished upon a presentment or indictment of a grand jury. Where there is no constitutional provision in the way Congress may authorize any crime to be prosecuted upon information. Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89. Section 1022, Rev. Stat. (Comp. St. § 1686), provides:

"All crimes and offenses committed against the provisions of chapter 7, title 'Crimes,' which are not infamous, may be prosecuted either by indictment or by information filed by a district attorney."

The offense for which the plaintiff in error here is prosecuted is not an infamous crime, and while it is not one of those which are defined in chapter 7 of the Revised Statutes, section 1022 is evidently intended to include all offenses which are not infamous. It is so held in Ex parte Wilson and in Weeks v. United States, 216 Fed. 295, 132 C. C. A. 436, L. R. A. 1915B, 651, Ann. Cas. 1917C, 524; United States v. Waller, Fed. Cas. No. 16,634, 1 Sawy. 701; United States v. Block, Fed. Cas. No. 14,609, 4 Sawy. 211; United States v. Lindsay Wells Co. (D. C.) 186 Fed. 248.

[5] Nor do we find merit in the contention that the judgment is void for the reason that section 13 of the act of May 18, 1917 (40 Stat. 83, c. 15 [Comp. St. 1918, § 2019b]) and any order rule or regulation of the Secretary of War made and issued thereunder, have been repealed by virtue of the ending of the war and the cessation of the "present emergency," and by the enactment of the amendatory act of July 9, 1918 (40 Stat. 885, c. 143, subc. 14 [Comp. St. 1918] § 2019b, appendix). The plaintiff in error is charged with violation of the order of the Secretary issued under the Act of May 18, 1917. Section 13, Rev. Stat. (Comp. St. § 14), provides:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

The offense of which the plaintiff in error was accused is alleged to have been committed on June 3, 1918. Notwithstanding the act of July 9, 1918, the former statute remains in force for the purpose of sustaining prosecutions for offenses committed thereunder. It is true that section 13 has only the force of a statute of Congress, and as observed by the court in Great Northern R. Co. v. United States, 208 U. S. 462, 28 Sup. Ct. 313, 52 L. Ed. 567:

"Its provisions cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment."

In that case the court held that the provisions of section 13 are to be treated as if incorporated in and as a part of subsequent enactments of Congress, and that, under the general principle of construction requiring effect to be given to all parts of a law, that section must be enforced as forming a part of such subsequent enactments, except in those instances where either by express declaration or necessary implication such enforcement would nullify the legislative intent. Legislative intent to disregard section 13 is not to be found in the mere fact that in Act July 9, 1918, it is provided that "all acts or parts of acts inconsistent with the provisions of this act are hereby repealed." Such a repeal as that is expressly contemplated by section 13. In brief, it is the purpose of that section not to place a limit upon the power of succeeding Congresses, but to prescribe a rule of construction which shall be binding upon the courts, in substitution of the common-law rule in all cases where the repealing statute does not express a contrary intention.

United States v. Lair, 195 Fed. 47, 115 C. C. A. 49; United States v. Delaware, L. & W. R. Co. (C. C.) 152 Fed. 269; Lang v. United States, 133 Fed. 201, 66 C. C. A. 255; United States v. N. Y. Cent. & H. R. Co. (D. C.) 153 Fed. 630; United States v. Standard Oil Co. (D. C.) 148 Fed. 719.

We find no error. The judgment is affirmed

GRAYSONIA-NASHVILLE LUMBER CO. v. GOLDMAN.

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

No. 5298.

1. MORTGAGES ⊜196—PROCEEDS OF TIMBER CUT PENDING FORECLOSURE APPLIED ON DEBT.

An order, in a suit to foreclose a mortgage on timber land, applying on the mortgage debt stumpage accruing from the cutting of timber pending the suit, by a purchaser from a grantee of the mortgagor, impounded by the court in lieu of the appointment of a receiver, *held* proper, where the property was insufficient to pay the debt and the mortgagor insolvent.

2. APPEAL AND ERROR ⊜1234(7)—LIABILITY ON SUPERSEDEAS BOND POSTPONING FORECLOSURE SALE.

Where a supersedeas bond given on appeal by a defendant in a foreclosure suit operated to postpone a sale of the mortgaged property, which had been advertised, the court properly allowed as damages on the supersedeas bond, after affirmance, interest on the amount of the proceeds of the property when sold during the time of delay and the cost of advertising.

Appeal from the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Suit in equity by Alvin D. Goldman, trustee, against the Nashville Lumber Company and others. From orders of the District Court, the Graysonia-Nashville Lumber Company appeals. Affirmed.

George T. Priest, of St. Louis, Mo. (Boyle & Priest, of St. Louis, Mo., on the brief), for appellant.

George B. Rose, of Little Rock, Ark. (W. E. Hemingway, D. H. Cantrell, and J. F. Loughborough, all of Little Rock, Ark., on the brief), for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. On March 12, 1917, a decree of foreclosure was rendered of the mortgage of January 1, 1908, made by the Nashville Lumber Company, the owner of about 40,000 acres of timber land in the state of Arkansas, to Alvin D. Goldman, as trustee for the bondholders, and for the sale thereof to pay the sum of $471,945.30, adjudged to be a lien thereon, due to the holders of the bonds of the Memphis, Paris & Gulf Railroad Company under that mortgage. In this suit and decree Alvin D. Goldman, the trustee, was the plaintiff. The mortgagor, the Nashville Company, the Graysonia Lumber Company, a corporation, to which the Nashville Company on May 10, 1911, conveyed the mortgaged land subject to the mortgage, James

H. Allen, with whom on February 15, 1915, the Graysonia Company had made a contract to sell the timber on the mortgaged land for a stumpage of $3 per 1,000 feet, and the Allen Lumber & Box Company, a corporation, to which Allen had assigned the contract, were defendants. Pursuant to the decree, the master had advertised the property described in the decree for sale, to be made on July 10, 1917, when the Graysonia Company appealed from the decree to this court, and on July 2, 1917, stayed proceedings under the decree by means of a supersedeas bond in the sum of $15,000, signed by the Graysonia Company and the Ætna Casualty & Surety Company. Upon consideration of the questions presented by the appeal, this court affirmed the decree below. 247 Fed. 423, 159 C. C. A. 477. Thereupon the master again advertised the sale, and on April 29, 1918, he sold the property to Lewelling & Price-Williams Company for $250,000, and that sale was subsequently confirmed.

On April 24, 1918, the plaintiff filed a motion in the District Court for a judgment on the supersedeas bond. On May 13, 1918, the Graysonia Company filed a petition in that court for an order that the funds paid into the registry of the court by the Allen Company during the pendency of the suit, pursuant to an order of the court made on October 24, 1916, be paid over to it. On July 15, 1918, after due notice and hearing, the court below decreed that the petition of the Graysonia Company for the funds in the registry of the court be denied, and that those funds be applied first to the payment of costs and allowances in the foreclosure suit, and that the remainder be paid to the plaintiff or his solicitor and credited upon the plaintiff's decree. It also ordered that the Graysonia Company be forever restrained from taking up or removing any steel or iron rails from any of the tram roads on any of the lands described in the complaint. It found that the plaintiff sustained damages by reason of the supersedeas to the extent of the expenses of the master in advertising the sale a second time, $500.50; to the extent of the taxes on the property paid in 1918 for the year 1917, $4,020.21; and to the extent of the interest that would have been received by it during the stay at 6 per cent. per annum on the $250,000 for which the lands were sold, but which was not earned or received by the plaintiff on account of the postponement of the sale from July 10, 1917, to April 29, 1918, in the sum of $12,040, amounting all together to $16,560.71. It therefore adjudged that the complainant recover of the Graysonia Company and the Ætna Casualty & Surety Company $15,000, the amount of the penalty of their bond and interest thereon from the date of that decree. These decrees of July 15, 1918, are now challenged by this appeal of the Graysonia Company.

The first and the most important question presented is the just and equitable disposition of the funds paid into the registry of the court by the Allen Lumber & Box Company during the pendency of the foreclosure suit. Those funds accumulated under and pursuant to an order of the court below, made on October 24, 1916, to the effect that the Allen Company, which had contracted with the Graysonia Company to purchase all the merchantable timber on the mortgaged lands

and to pay $3 per 1,000 feet stumpage therefor, and also to pay certain rentals in addition, and which was in possession of the mortgaged property, cutting and removing the timber therefrom under this contract, was restrained from paying the agreed price of the timber, as it should be cut, to the Graysonia Company, was directed to deposit it in the registry of the court, there to be held until the final decree herein, was made the custodian of the court, and commanded to hold all timber that should be cut from said lands and all lumber manufactured therefrom for the court, and was restrained from shipping any of it until it should have first paid into the registry of the court the agreed price of the sale of this timber, $3 per 1,000 feet. That order, also, until the further order of the court, restrained the Allen Company from paying to the defendants, or either of them, the rentals specified in its contract, and directed it to pay such rentals also into the registry of the court. Under this order the Allen Company paid into the registry of the court $36,968.13, and out of this fund the court paid the Lesser-Goldman Company for the taxes on the property $2,506.58, and it paid to the plaintiff as trustee, to reimburse him for the payment of the taxes for the year 1917, $4,020.21, leaving in the registry $30,441.34 on May 21, 1918, which the court directed to be applied, first, to the payment of the costs and allowances in the foreclosure suit, and then to the payment of the unpaid balance of the $471,495.30 remaining after the application thereto of the $250,000 realized from the sale.

The record fully convinces that the $36,968.13 paid into the registry consisted principally of the purchase price of the timber which the Allen Company cut and removed from the land between October 24, 1916, and May 21, 1918, and of some relatively small amounts of rentals which the Allen Company agreed to pay by its contract with the Graysonia Company. The record, however, has been searched in vain to discover what the amount of these rentals was. At the time when the order of October 24, 1916, was made, and at the time when the decree of July 15, 1918, here challenged, was made, these facts were established by the record. The complainant had a paramount lien to secure the payment of more than $450,000, superior to the title and claim of the Graysonia Company on the 40,000 acres of mortgaged land and the timber standing thereon. That security was inadequate to pay that debt. The Nashville Company, which made the mortgage to the plaintiff, and the Graysonia Company, which took the title to the land and timber subject to the mortgage, were insolvent. Default had been made in material terms and conditions of the mortgage, so that by its express provisions the plaintiff was authorized to protect and enforce his rights thereunder by a suit or suits in equity, and among these rights was the right expressly granted to him by the mortgage to take possession of the mortgaged property and operate it himself, and to have a receiver appointed to take possession of and operate it.

In this situation the plaintiff gave due notice in the foreclosure suit of an application to the court for a receiver of the mortgaged property, of the proceeds of the timber the Allen Company was removing, and of the rentals it was paying under its contract. That

application came on for hearing on October 24, 1916. Counsel for the plaintiff deemed the order of that date, making the Allen Company the court's custodian of the timber and requiring it to pay the agreed price of that timber which it should cut and the rentals into the registry, sufficient to impound those funds without the service and expenses of another receiver, and they consequently took that order and did not ask for another receiver. In this state of the case the order of October 24, 1916, and the decree of May 21, 1915, do not appear at first blush to have been inequitable. The merchantable timber standing on the mortgaged land was a part of the body of the mortgaged property, and as the mortgagor and its grantee were insolvent and the security for the payment of the money owing was inadequate, it is difficult to perceive why the plaintiff had not the clear equitable right to the immediate and constant preservation and final application of it and its proceeds to the payment of the debt it was mortgaged to secure.

Counsel for the Graysonia Company argue that this order and decree were erroneous, because the plaintiff had no right to the possession and no actual possession of the mortgaged property. They contend that rents and profits are incidents of the right of possession, that where there is no right to the possession, and also where there is no actual possession by the mortgagee, there is no right to the rents and profits of the mortgaged premises, and the plaintiff was therefore without any equitable right to this fund. They also claim that the rents and proceeds of the mortgaged property may not be impounded, except by means of the application for and the appointment of a receiver. The correctness of these contentions is not conceded. It is believed that neither actual possession of the mortgaged premises, nor the right to the possession thereof, nor the appointment of a receiver, is indispensable to the impounding of the rents of mortgaged property by an order of a court of equity upon the suitable petition or application of a mortgagee plaintiff in a foreclosure suit who has a paramount equitable lien thereon, and that, even if the appointment of a receiver had been necessary, the practical effect of the order of October 24, 1916, making the Allen Company the court's custodian of the timber, the lumber from it, the proceeds thereof, and the rentals, and commanding it to pay those proceeds and rentals into the registry of the court, was the appointment of that company a receiver thereof. But these questions are not, in the opinion of the court, controlling in this case, and therefore it is unnecessary to discuss them at length.

[1] The standing timber on this mortgaged land and the proceeds of its sale were not rents and profits; they were a part of the corpus, a part of the mortgaged res. The decree of foreclosure, which was affirmed by this court, expressly adjudged that the plaintiff had a lien thereon paramount to any claim or title of the Graysonia Company. The appropriation to itself of that security or any part of it by the insolvent Graysonia Company, when the mortgagor was insolvent and the entire security was inadequate, was inequitable, and the attempt so to do imposed upon the court below the moral and the legal duty on

the proper application of the plaintiff to prevent it, and to apply the proceeds of this timber to the payment of the debt it secured. Nor has any decision or rule or principle in conflict with this conclusion been discovered in the opinions in the cases cited by counsel in their brief or argument.

While the record indicates that some small part, not over 15 per cent. of the $36,968.13, and probably not as much as the amount of the costs and allowances in the foreclosure suit, may have been derived from the rentals, it does not disclose more accurately what the amount of the rentals paid into the fund was, and upon this question the testimony is too confused and uncertain to base any finding or decree upon. If there was any error in the court below in the disposition of that part of this fund which was derived from the rentals, the burden was upon the Graysonia Company to prove the error and the extent of the injury resulting therefrom, so that this court, which on an appeal tries the case de novo, could correct the error, settle the final decree, and thus end the litigation. It has not borne this burden. It has not presented evidence sufficient to enable this court to separate the comparatively small amount of the rentals from the proceeds of the timber, which composed the great bulk of the fund. Moreover, neither in the assignment of errors, nor in the argument, nor in the brief of counsel, has the claim been made that the disposition of this fund was erroneous in part, though correct in part; that it was erroneous as to the rentals, though just as to the proceeds of the timber. On the other hand, the ground on which the decree has been assailed has been and is that the equitable right and title to the entire fund was in the Graysonia Company. In view of these considerations, the right of the Graysonia Company to the rentals, if any, has not been so presented to this court, either by evidence or by assignment of error and argument, that this court can consider or determine it.

Another contention of counsel for the Graysonia Company is that, because the order of October 24, 1916, provided that the moneys owing for the cutting and removal of the timber should be deposited in the registry, and should be there held until the final decree of the court, and because that decree was rendered on March 17, 1917, and it made no provision regarding this fund or the proceeds of the timber cut and removed thereafter, the decree of July 15, 1918, is erroneous, so far as it relates to this part of the fund. But this part of the fund was paid into the registry, as equity required that it should be, it was in the custody of the court when it rendered the decree, and the court's disposition of it was just and equitable. The result is that the Graysonia Company has failed to convince either by evidence or argument that the court below fell into any error of law or made any mistake of fact in its disposition of the fund in the registry of the court by its decree of July 15, 1918.

[2] The next question for consideration is the amount of damages which the plaintiff was entitled to recover on the supersedeas bond. When that bond was given the sale under the foreclosure decree had been advertised to take place on July 10, 1917. The supersedeas bond

caused the postponement of that sale until April 29, 1918, when the property was sold for $250,000, which was but little more than half of the amount due on the bonds which the property was mortgaged to secure. If the sale had been on July 10, 1917, the plaintiff could and probably would have obtained interest on this $250,000 at 6 per cent. per annum during this delay. The court accordingly allowed him interest during this time as a part of his damages for the delay. The bond is in the usual form, and is conditioned that the Graysonia Company shall answer all damages and costs, if it fails to make its appeal good. It was given and approved under rule No. 13 of this court, which specifies just damages for delay, costs, and interest on the appeal among the matters to be secured by such bonds. Why was not this interest among the damages the plaintiff suffered by the delay?

Counsel for the Graysonia Company answer because plaintiff received about $26,000 above costs and disbursements out of the rents and profits of the mortgaged property which accrued during this stay, and therefore he lost nothing, but gained much, thereby. But this $26,000 was a part of the fund deposited in the registry under the order of October 24, 1916. It was the proceeds of the sale of the merchantable timber cut and purchased by the Allen Company, and there is no evidence that any of this $26,000, or, if any of it, how much of it, was derived from the rentals. The record makes it probable that none of it was—that the rentals were less than the amounts paid out of the fund for allowances and disbursements. As, therefore, this $26,000 must be deemed to have been the proceeds of the timber cut and removed, the plaintiff gained nothing therefrom. This sale and removal of the timber presumptively diminished the value of the mortgaged property by the amount paid for the timber. Presumptively the mortgaged property would have sold for $26,000 more on July 10, 1917, before this $26,000 worth of timber was removed therefrom, than it did sell for on April 29, 1918, after its removal, and the result is that the plaintiff lost the interest on the $250,000 by the delay.

It is said that it was error to allow this interest, because interest is never allowed on any decree that is not for a sum of money or is silent as to interest, and that there was no judgment for money against the Graysonia Company, and no provision for interest in the decree of foreclosure. But this $12,040 is not interest on any judgment, or on the decree, or on the amount thereof. It is the legal damages the plaintiff sustained because the Graysonia Company delayed his receipt of the $250,000 derived from the sale from June 10, 1917, to April 29, 1918. Other arguments against this allowance are that interest is never allowed on an unliquidated amount, and that the Supreme Court in Kountze v. Hotel Co., 107 U. S. 391, 2 Sup. Ct. 911, 27 L. Ed. 609, held that interest on the debt adjudged due by the decree, which accrues pending the appeal, is not properly assignable as damages caused by the appeal bond, but that such damage as arises from the delay incident to the appeal is such damage. This $12,040, however, is not interest on any unliquidated amount. The amount was liquidated by the sale, and this $12,040 is the amount

which the court below found to be the damage resulting from the postponement of the plaintiff's receipt of the $250,000 produced by the sale from July 10, 1917, to April 29, 1918. In making this finding it undoubtedly measured this damage, as it lawfully might in the absence of other pertinent evidence, by the legal and prevalent rate of interest commonly paid for the use of money. Nor was this $12,040 the interest on the debt held inadmissible as the measure of the damages on the supersedeas bond in the Kountze Case. The debt was $471,495.30. It was not interest on that amount. On the other hand, it was one of the damages for delay incident to the appeal held to be allowable by the court in the Kountze Case, and there was no error in its allowance.

It is specified as error that the court below allowed as damages for delay $4,020.21, which was paid out of the fund in the registry on account of the taxes of 1917. This specification rests on the mistaken theory that the Graysonia Company had the equitable right and title to the fund in the registry as against the plaintiff, and the court rightly allowed the amount of these taxes, because upon the record that fund must be held to have been the proceeds of the sale of the timber in which the plaintiff had the superior equity and the delay caused by the supersedeas necessitated the payment of these taxes, which neither the plaintiff nor his fund would have been required to pay, if the bond had not been given.

The only other item challenged in the assessment of damages resulting from the supersedeas bond is the sum of $550.50 paid for readvertising the sale of the property. This expense was rendered necessary by the stay of proceedings caused by the bond, and was therefore properly allowed. There was no error in the assessment of damages resulting from the delay caused by the supersedeas bond, nor in the decree thereon.

Finally, it is contended that the decree of the court that the Graysonia Company be restrained from taking up or removing any of the steel or iron rails from any of the tramways on the mortgaged lands is too broad, in that it covers its right to about 6 miles of steel rails added by the Graysonia Company after its purchase of the property to the 11½ miles there were on the property at the time of that purchase; but a careful perusal of the evidence in the record on this subject has failed to convince that there was proof therein sufficient to sustain this claim of error or mistake in the order of the court.

Let the decrees of the court below, made on July 15, 1918, challenged by this appeal, be affirmed.

E. I. DU PONT DE NEMOURS & CO. v. McCULLEN.

(Circuit Court of Appeals, Fourth Circuit. April 29, 1919.)

No. 1654.

1. MASTER AND SERVANT ⟸264(4)—PLEADING AND PROOF.
   A declaration charging employer's failure to keep its promise to provide additional electric lights, and failure to have its building in any other way sufficiently lighted, does not authorize admission of evidence regarding failure to furnish flash lights.
2. MASTER AND SERVANT ⟸265(9)—PERSONAL INJURY—BURDEN OF PROOF—SAFE PLACE TO WORK.
   An injured servant, whose suit is based on employer's alleged failure to keep its promise to provide additional lights at a place hazardous under normal conditions, must show that it would have been safe and helpful to install them, especially where the making of the promise is denied.
3. MASTER AND SERVANT ⟸278(3)—PERSONAL INJURY—SUFFICIENCY OF EVIDENCE.
   In a servant's personal injury action, based on alleged failure to comply with a promise to provide additional electric lights over dangerous troughs, frequently obscured by steam, evidence *held* insufficient to warrant recovery; it appearing that such lights would not have been of material benefit, and could not have been safely installed.
4. MASTER AND SERVANT ⟸258(11)—PERSONAL INJURY—PLEADING.
   Allegations that defendant employer failed to have its building "in any other way sufficiently lighted," etc., *held* too vague and general.
5. TRIAL ⟸252(11)—INSTRUCTION—APPLICABILITY TO EVIDENCE.
   In a servant's personal injury action, an instruction authorizing recovery if defendant employer could have supplied lights, other than those requested, which would not have been dangerous, and were necessary to make the place of work reasonably safe, *held* erroneous, because unsupported by proof.

Connor, District Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Charles A. Woods, Judge.

Action by George L. McCullen against E. I. Du Pont de Nemours & Co. Judgment for plaintiff, and defendant brings error. Reversed.

J. Gordon Bohannan, of Petersburg, Va., and Robert H. Talley, of Richmond, Va., for plaintiff in error.

Bernard Mann and J. M. Townsend, both of Petersburg, Va., for defendant in error.

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

KNAPP, Circuit Judge. As a part of its extensive plant at Hopewell, Va., plaintiff in error, defendant below, operates what is known as "No. 4 Tub House," where cotton is boiled for use in the manufacture of certain products. In this building were 10 rows of large tubs, each row having 13 tubs. Cotton was brought in from the "nitrating house" through a trough partially filled with water. Inside the building was a series of smaller troughs, provided with gates, by means of which the cotton and water were conveyed to the various

tubs. The employé in charge of this distribution was called a gateman. After the cotton had been properly boiled in the tubs, the water was drawn off through openings near the bottom into other troughs, by which it was taken out of the building. These troughs were about 18 inches wide and approximately 18 inches above the floor in front of the tubs. Above the troughs for carrying off the water was a platform extending all the way around the building, and from this platform there were steps leading down between the tubs to the floor level, on which the troughs and tubs rested. This arrangement permitted an employé serving the tubs to go from a tub on one side of a trough to a tub on the other side, or from a tub in one row to a tub in another row, without stepping across or jumping over a trough, which was dangerous and strictly forbidden. The space between the bottom of the steps and the side of the trough was some 3 or 4 feet. Each tub was fitted with a plug, driven in with a mallet, which was loosened by the use of a stick, when the water in a tub was to be changed, and thus the boiling water discharged into the trough. The tubs were emptied at frequent intervals, several tubs at a time, and whenever this occurred steam was formed in large quantities, like a dense fog, so that the tubs and troughs could scarcely, if at all, be seen even by a person close to them. The building was lighted with windows over the aisles on each side and with rows of arc lights, suspended from the ceiling, some 15 to 18 feet above the troughs.

McCullen began work for defendant in April, 1916, in the beater house. Two or three weeks later he was made gateman of No. 4 tub house, and continued in that service most of the time until the 18th of the following December, when he received the injuries for which he sues. His duties were mainly to attend the gates and regulate the flow of nitrated cotton and water into the various tubs, to insert plugs in the openings of the tubs when they were to be filled, and to remove the plugs when the tubs were to be emptied. In the 7 months and upwards before the accident he became expert in a kind of work which required no particular skill, and was of course perfectly familiar with the premises.

Coming, now, to the way he claims to have been injured, we quote his own testimony. After stating that he had occasion to go to tub No. 2 in the first aisle, to put in a plug, he says:

"I went down to No. 2 tub, down the steps. When I went down the steps, I had to turn to the right to fit my plug, and I walked along carefully, and I could not see anything, and I got a little too far, and I ran against that trough with my left leg, and then I fell and caught on each side of the trough with my hands, and my legs went in up to my knees in the hot water."

We have great difficulty in believing that plaintiff was hurt in the manner thus described. If, as he asserts, the steam was so dense that he could not see the trough, and so ran against it and was thrown from his balance, it is certainly remarkable that he happened to fall across it or over it in such a way that his hands grasped its invisible edges, some 18 inches apart, and still more remarkable that somehow his feet and legs up to the knees, and no other part of his body, got into the scalding water. In short, his account of the accident is far from con-

vincing, and the effort to visualize it or imagine it serves only to strengthen the impression of its improbability. But as the record shows that plaintiff, using a section of the trough for the purpose, made or attempted a demonstration of the occurrence in the presence of the jury, which they apparently accepted, and as it cannot perhaps be affirmed with certainty that what he says happened to him is physically impossible, we are not prepared to reverse the judgment on that ground, and turn therefore to other questions raised by the assignments of error.

The suit is based on alleged failure to provide plaintiff with a reasonably safe place in which to work. More specifically it is averred that he continued in a hazardous occupation in reliance upon a promise to remove or materially reduce the danger to which he was exposed, as will presently be explained. It is not claimed that the building and appliances therein used were in any respect improperly designed or constructed; nor is it a case where anything broke, or gave way, or got out of order. In a word, the hazard incurred by the plaintiff was a necessary condition or incident of the work in which he was engaged, as that work was originally planned to be carried on, and as it was in fact carried on, as respects this particular tub, up to the time of the accident. Moreover, there was no lack of proper rules, which employés were enjoined to observe for their own safety. In these rules plaintiff was fully instructed at the outset, and he understood them thoroughly. Indeed, he admits on cross-examination that "there was not much danger in working there, if you were particular, and kept from crossing the trough, and obeyed the rules." It will thus be seen that the case narrows down to and turns solely on the alleged promise to supply additional lights, and that contention will now be examined.

The testimony of plaintiff and his fellow workman, Page, is to the effect that they were talking together some 10 days or so before the accident, and came to the conclusion "that it was dangerous to continue doing work that way in that light"; that they "thought flash lights would be a big help to us"; that Page said he was going to ask for them, and plaintiff said, "Ask for me, too;" that accordingly he spoke to Saunders, the foreman, about flash lights and told him "that I thought it would help us"; that Saunders said he would take it up with the supervisor; that shortly afterwards he was informed by Saunders that "a row of lights would be put above the trough in a few days, that there was a contract"; and that he reported to plaintiff what Saunders had said. This is the promise on which plaintiff relies. Now, assuming that notice to this foreman was notice to defendant, which seems to us at least doubtful, it does not appear that Page, in talking with Saunders, made mention of plaintiff, or referred to him in any way, unless by the use of "us"—and there were a number of other employés in the building—and certainly said nothing which apprised Saunders that plaintiff was complaining of inability to see or asking for additional lights, much less that he had in mind to quit his job if such lights were not provided. In other words, there is at best but a shadow of proof that defendant is chargeable with knowledge of any request by plaintiff for more light, or that it ever made a promise in that regard of which he

can claim the benefit. Especially is this so in view of Saunders' denial that he made the alleged promise or had any authority to make it.

[1] We disregard the testimony relating to flash lights for several reasons. In the first place, we think it inadmissible under the pleadings. The sole negligence charged in the declaration is the failure of defendant "to comply with its said promise to provide rows of electric lights over said troughs," and its failure "to have said building in any other way sufficiently lighted." But this carries no suggestion that plaintiff should have been furnished with flash lights, which we suppose to be hand lights of some sort, in no way connected with any provision for properly lighting the building. In effect, therefore, the testimony brought in a new and distinct charge of negligence, which defendant had not been called upon to meet, and which it was apparently unprepared to meet; for the deposition of Saunders, the only person who could contradict Page, was taken in advance of the trial, because he had left defendant's employ and gone to another state, and naturally he was not interrogated at all on the subject of flash lights.

In the second place, it is not claimed that any promise was made to furnish flash lights. On the contrary, plaintiff understood from Page that flash lights would not be furnished, and manifestly he did not remain at work because he expected that lights of that kind would be provided. The gravamen of his cause of action is defendant's failure to keep a definite promise, namely, to place "rows of electric lights over said troughs," and his suit is not aided by the conceded refusal to do something entirely different. Moreover, there was no showing that the use of flash lights was either feasible or safe. The mere belief of plaintiff and Page that such lights "would be a big help to us" was not enough. This nitrated cotton, which was passing through the building in large volume, was quite harmless so long as it was kept wet, but highly inflammable and dangerous in a dry state. It was therefore incumbent upon plaintiff, if his declaration had so permitted, to prove not only that flash lights would have been of material benefit, but also that they could have been used with reasonable safety, and this he failed to do. In short, we are of opinion that the entire testimony in regard to flash lights should be left out of account.

[2, 3] This brings us to the question whether negligence can be predicated on the fact that defendant did not do what Page says the foreman promised; that is, put electric lights over the troughs. As above observed, this is not the ordinary case of work, or place to work, becoming more unsafe, and the employé's risk increased, because some appliance was defective or got out of order; it is rather the less frequent case of work, or place to work, of such inherent character as to involve a degree of hazard under normal conditions and with every appliance operating according to its design. In such case, we apprehend, the injured employé, whose suit depends on an alleged promise of betterment, must show that it would have been practicable and substantially useful to do what he claims was promised. Especially so where, as here, the making of the promise is denied, for surely in that case there can be no presumption of feasibility.

Plaintiff was, therefore, bound to give proof which would justify

the jury in finding that it would have been safe and helpful to place electric lights over the troughs, as he says he expected would be done; but careful study of the record satisfies us that no such proof was presented. It is true that a witness for defendant is reported as saying near the close of his cross-examination, "that if those lights had been dropped so that they were right over the trough, then anybody who came down the steps would have seen the lights before they got to the troughs." But this apparently had reference to the arc lights suspended from the ceiling, for the witness had previously said, also on cross-examination:

"That if they had had drop lights at intervals, * * * so that they would have come right down over the lower trough, they could not have seen this lower trough when the steam came on; that they might have seen the lights if you could have gotten right at the lights; * * * that while you are walking along the platform, with the 100-watt light shining up there, you could not see the light; * * * that a man standing on the platform could not see the 100-watt light right at him practically."

In short, so far from any showing that the lights here in question would have been efficient and usable, the testimony of this witness, taken as a whole, is of distinctly opposite import.

The situation we are dealing with is described by defendant's safety engineer as follows:

"That lights over trough would not have been effective in illuminating trough to a man standing beside it, as steam was too dense to be penetrable; could not see the trough; that the lights over this trough, which were put down after the accident, were removed, as they did not give the benefit anticipated; became impracticable because of the fumes arising from the hot water; steam and fumes combined eat out the wiring and made short circuits, making a greater hazard; that the cotton in the trough has all the explosive qualities of gun cotton; that if kept wet it will not burn, being unconfined, and if confined it will explode; that cotton sometimes gets dry, and a short circuit might cause a flash extending the entire distance of the house, if there were little particles of cotton on the tubs, and that even if it should strike a remote part of the building it would fire and explode. * * * That there is no practicable way of getting rid of the steam more than is done."

Of all this, as well as the testimony of other witnesses to the same effect, there is no attempt at contradiction and nothing to show that the facts were otherwise. Not only, therefore, has plaintiff failed to furnish the proof which we deem essential to his recovery under the circumstances here disclosed, but it seems to be convincingly established that such lights as he says were promised would not have been of material benefit and could not have been safely installed.

[4, 5] What has thus been said regarding defendant's alleged promise, on which plaintiff appears mainly to rely, applies with still greater force to his further charge of failure "to have said building in any other way sufficiently lighted." Taking into account the nature of his work and the conditions under which it was necessarily performed, we are clearly of opinion that he cannot maintain an action on any such vague and general allegation of negligence. Under his complaint that he was not provided with a reasonably safe place in which to work, the burden was upon him to show with some degree of definiteness and certainty

what the defendant could have done, safely and effectively, for the better lighting of the building; and so, as we think, it was error to charge the jury that plaintiff could not recover, "unless * * * or unless the defendant could have supplied lights other than those requested that would not have been dangerous, and that were necessary to make the place of work reasonably safe;" for such a qualification but opened the door to conjecture and permitted a verdict wholly unsupported by proof.

On the record before us there is no evidence which would warrant the jury in charging the defendant with negligence, and it must therefore be held that plaintiff's injury was caused by his own carelessness, or resulted from risks which he voluntarily assumed.

Reversed.

PRITCHARD, Circuit Judge (concurring). While I heartily concur in the opinion of the majority of the court in this instance, nevertheless there is an additional reason why I think the judgment of the court below should be reversed. Under all the circumstances, I am clearly convinced that the accident could not, in human probability, have happened in the manner or under the circumstances as narrated by the plaintiff. The physical facts clearly indicate that plaintiff's injury was due to a failure to observe the rules of the company. The trough being 18 inches above the floor level, the plaintiff, by striking his foot against the side of the same, could not have fallen in as he states. It would have been a physical impossibility to have fallen in in the manner he describes. He was undoubtedly trying to cross the trough in utter defiance of the rules, and, making a miscalculation as to the distance to be covered, stepped inside with one foot, and, being bent on going in the direction he had started, he took another step, which necessitated putting the other foot in the trough. The burns on his legs clearly show that he must have been standing up in the trough and that his legs were not lying down at the time he was burned, as he contends. The character of the burns clearly indicates that this is the way the accident occurred.

CONNOR, District Judge (dissenting). I regret my inability to concur in the conclusion reached by the court in this case. No error is found in the instruction given by the learned judge who presided at the trial, respecting the measure of duty imposed upon the plaintiff in error to furnish the defendant in error a reasonably safe place in which to work. That the conditions under which he discharged the duty imposed upon him were hazardous is, I think, manifest. That such condition could have been remedied by lighting the place at which he was required to work is, I think, equally clear. The danger was apparent to the defendant in error, and, unless he called upon some employé, or agent, of the plaintiff in error, authorized, or held out and, upon reasonable ground, believed by the employé to be authorized, to receive notice and remedy such condition to furnish lights, he assumed the risk incident thereto. This rule, or principle of law, was clearly stated to the jury, and the duty imposed upon defendant in error to show

that he had complied therewith. No error is found in the instruction in this respect.

The testimony relied upon by defendant in error, and found by the jury to be true, is with the uniform accuracy of the learned Circuit Judge set out in the principal opinion. It was deemed by the judge presiding, sufficient to be submitted, and to sustain the conclusion of the jury. While not material, I am unable to concur in the opinion that this testimony was contradicted by Saunders, the foreman. Reference to his evidence discloses, at the best, an evasion of direct answers to the questions in regard to the request for lights.

While it must be conceded that the evidence is not so full and satisfactory as might be desired, I think that it was sufficient to be submitted to the jury, under the carefully guarded instruction of the trial judge. The jury had the benefit of hearing the evidence as illustrated by a model showing the conditions under which the defendant in error worked and of the tub into which he fell. While, as contended, sitting on the bench, it is difficult for us to understand how the accident occurred, as testified by the defendant in error, experience teaches that there are few incidents in life more difficult to explain after the event than a fall by a human being.

It is, for this reason among others, that such questions are submitted to the judgment of 12 intelligent jurors, whose opportunity for observation and experience is deemed of more value in reaching conclusions than those of appellate courts.

HELD v. CROSTHWAITE et al.

(Circuit Court of Appeals, Second Circuit. July 7, 1919.)

No. 195.

CORPORATIONS ⇐336—LIABILITY OF OFFICERS ON CONTRACTS AFTER REPEAL OF CHARTER FOR NOT PAYING TAXES.

Under Act N. J. June 3, 1905, § 2 (P. L. p. 509), providing that, where a corporation shall fail for two years to pay state taxes, its charter shall be repealed by proclamation by the Governor, and that "all powers conferred by law upon such corporations shall thereafter be deemed inoperative and void," and section 7 of said act, authorizing the Governor, upon settlement with such a corporation, by a second proclamation to reinstate its charter, whereupon the secretary of state shall issue his certificate "entitling such corporation to continue its said business and its said franchises," where, after the issuance of a repealing proclamation, but without knowledge of the fact, the officers of a corporation continued its business in good faith, and persons dealt with them with the understanding that they were acting for the corporation, which was afterwards reinstated, such officers cannot be held personally liable on contracts so made.

Rogers, Circuit Judge, dissenting.

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

Action at law by Gustave Held, trading as Gustave Held & Co. against Burwell M. Crosthwaite, John L. Crosthwaite, and William

H. Brearly, trading under the name of the Crosthwaite & Cannon Company. Judgment for defendants, and plaintiff brings error. Modified and affirmed.

A. L. Pincoffs, of New York City, and J. Edward Ashmead, of Newark, N. J., for plaintiff in error.

William Otis Badger, Jr., of New York City, for defendant in error Burwell M. Crosthwaite.

Joseph T. Weed, of New York City, for defendant in error Brearly.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is an action to recover damages in the sum of $52,000 against the defendants, alleged to be trading together as copartners under the name of the Crosthwaite & Cannon Company, insurance brokers, for negligence in obtaining for the plaintiff from Morgan, Lyons & Co., insurance brokers of London, agents of underwriters of Lloyds, a marine policy upon 3,000 bags of coffee, of the value of $96,000, New York to Havre, which did not cover, as they had undertaken it should, losses resulting from hostilities and warlike operations. The vessel carrying the shipment of coffee was torpedoed and sunk en route on the high seas, and the plaintiff's coffee became a total loss.

The defendant John L. Crosthwaite was not served, and it was stipulated between the parties that the answer of the defendant Burwell M. Crosthwaite should stand as the answer of the defendant William H. Brearly.

The contract was made by the plaintiff with the Crosthwaite & Cannon Company, a corporation of the state of New Jersey, on or about June 25, 1917.

The first count of the complaint alleges that on January 26, 1915, because of its failure to pay for two successive years taxes due the state of New Jersey for 1912, the Governor of the state issued a proclamation declaring that the charter of the corporation was void, and all powers conferred upon it by law inoperative and void, in accordance with the act of June 3, 1905 (P. L. p. 508), amended by the act of March 11, 1914 (P. L. p. 27), which provides:

"1. If any corporation created under any act of this state shall for two successive years neglect or refuse to pay the state any tax which has been or shall be assessed against it under any law of this state and made payable into the state treasury, the charter of such corporation shall be declared void as in section two of this act provided, unless the Governor shall, for good cause shown to him, give further time for the payment of such tax, in which case a certificate thereof shall be filed by the Governor in the office of the comptroller, stating the reasons therefor.

"2. On or before the first Monday in January in each year the comptroller shall report to the Governor a list of all corporations which for two years next preceding such report have failed, neglected or refused to pay the taxes assessed against them under any law of this state as above, and the Governor shall forthwith issue his proclamation, declaring under this act of the Legislature that the charters of these corporations are repealed, and all powers conferred by law upon such corporations shall thereafter be deemed inoperative and void.

"3. The proclamation of the Governor shall be filed in the office of the secretary of state."

The complaint further alleges:

"(9) That thereafter, and until March 5, 1918, the said defendants continued to carry on the business of the Crosthwaite & Cannon Company, then nonexistent, consenting and allowing themselves to be made directors, and to be held out to the public as such, and the business of said company to be carried on under their authority and management as such directors."

The second count charges the defendants with liability because holding themselves out as agents of the Crosthwaite & Cannon Company:

"(22) That the said defendants thereafter, and until March 5, 1918, continued to carry on the business of the Crosthwaite & Cannon Company, then nonexistent, and consented and allowed themselves to be held out to the public as agents of said company, and the business of said company to be carried on under their authority and management as such agents."

The third count charges them with liability for representing that the Crosthwaite & Cannon Company, then nonexistent, was the duly authorized agent of Morgan, Lyons & Co., with power to deliver to plaintiff a binding receipt against marine and war risks to cover the said shipment of coffee, whereas the company had no such power.

The fourth count charges the defendants with liability for representing themselves as agents of the Crosthwaite & Cannon Company and for representing that company as agent for Morgan, Lyons & Co.

After several denials, the defendants set up three separate defenses as follows:

First. That on March 5, 1918, the Governor of New Jersey revoked his proclamation of January 26, 1915, by a second proclamation reinstating the Crosthwaite & Cannon Company; that the plaintiff contracted with the corporation, having knowledge or means of knowledge of the statutes of New Jersey and of the Governor's proclamation of January 26, 1915.

Second. That the Crosthwaite & Cannon Company was both a de jure and a de facto corporation.

Third. That the Crosthwaite & Cannon Company had full authority as agent to issue the binding receipt for Morgan, Lyons & Co., which is in full force and effect.

The plaintiff demurred to the three defenses "on the ground that they and each of them are insufficient in law upon the face thereof."

Judge Augustus N. Hand thought that the complaint was itself demurrable, but instead of dismissing it he overruled the demurrer, without giving the plaintiff leave to withdraw it, and entered judgment for the defendants.

No charge of fraud is made against the defendants, and the real question is one of law, as to the defense that on March 5, 1918, the Governor, pursuant to the powers conferred upon him by the statutes of New Jersey, by a second proclamation revoked and annulled his first proclamation of January 26, 1915, and reinstated the corporation as of that date. The statute (Chapter 259, Laws 1905) is not set out or pleaded by title, but section 7 is as follows:

"If the charter of any corporation organized under any law of this state shall hereafter become or shall have heretofore become inoperative or void by proclamation of the Governor or by operation of law, for nonpayment of

taxes, the Governor, by and with the advice of the Attorney General, may, upon payment by said corporation to the secretary of state of such sum in lieu of taxes and penalties as to them may seem reasonable, but in no case to be less than the fees required as upon the filing of the original certificate of incorporation, permit such corporation to be reinstated and entitled to all its franchises and privileges, and upon such payment as aforesaid the secretary of state shall issue his certificate entitling such corporation to continue its said business and it said franchises. * * *"

If the defendants rightly state the effect of the second proclamation, it is a defense to the whole complaint, because all four counts proceed upon the theory that the defendants as matter of law acted as individuals; the Crosthwaite & Cannon Company being nonexistent.

There is difficulty in reconciling the language of sections 1 and 2 of the act of June 3, 1905, providing for the Governor's proclamation declaring the repeal of charters for nonpayment of taxes for two years, with the language of section 7, providing for a subsequent proclamation reinstating the charter. The question has not been passed upon by the courts of New Jersey.

We think it clear that the charter may be and by the statute is repealed by the Governor's proclamation without the necessity of any application to the courts. It seems to us equally clear that the Legislature cannot have intended by section 7 that upon payment of taxes by the corporation the Governor should create a new corporation. The Legislature alone can grant corporate franchises, and no intention should be imputed to it to delegate the power to the Governor. Indeed, such a delegation would be invalid. "Delegatus non potest delegare." Therefore the second proclamation of reinstatement must be held to relate to the first proclamation of repeal, and the corporation must be regarded as having continuously existed so far as the state is concerned. This is in accordance with the certificate which the secretary of state is required to issue, entitling the corporation "to continue its said business and its said franchises."

It is noteworthy that the statute in question is not a part of the general act of 1896 entitled "An act concerning corporations," but is a supplement to the act of 1884 entitled "An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof." The plain object of the act was the collection of revenue for the state. It was held in American Surety Co. v. Great White Spirit Co., 58 N. J. Eq. 526, 43 Atl. 579, that the act was entirely consistent with the provisions of the General Corporation Act of 1896 (P. L. pp. 295, 296), section 53 of which provides:

"All corporations, whether they expire by their own limitation or be annulled by the Legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established."

We took the same view in Re Munger Tire Co., 159 Fed. 901, 87 C. C. A. 81. There is great force in saying that vested rights obtained by individuals in the period between the two proclamations should not be disturbed; but were any rights vested? Persons dealing with in-

dividuals as agents or directors of a corporation between a proclamation repealing and a proclamation reinstating the charter must be taken to know that by the law of the state the corporation could be reinstated and continued as to all its franchises as if the charter had never been repealed and its powers declared void. It must be confessed that the language used as to the repealing proclamation is very strong, but unless the provision for the reinstating proclamation is a nullity it must be held to relate to the repealing proclamation and completely validate the corporation and the acts of persons dealing as its directors and agents from that date.

If the defendants had acted fraudulently, or if they had acted innocently, the corporation itself being a fraudulent concern, they might be held liable (Wonderly v. Booth, 36 N. J. Law, 250); but it is not pretended that either party was actually aware of the Governor's proclamation repealing the charter. The plaintiff acted upon the supposition that he was dealing with the defendants, not individually, but as representing the Crosthwaite & Cannon Company, and the defendants acted upon the same understanding. Indeed, the complaint itself states facts in articles 9 and 22, hereinbefore quoted, which show that during the interval between the two proclamations the corporation was at least a de facto corporation.

It seems to us that the statutes construed as above and applied to the facts in this case leave the plaintiff with a remedy against the corporation only, and that this is a just and fair result. It cannot be considered a hardship that the parties should be held to their common understanding.

But we think the plaintiff should have leave to withdraw his demurrer, if he wishes to do so, and, modified in this respect, the judgment is affirmed.

ROGERS, Circuit Judge (dissenting). As I do not concur in the conclusion reached by the majority of the court, I shall state at length the view I entertain as to the law applicable to the facts which the record discloses. The case presents several important questions in the law of corporations. The damages which the plaintiff claims it has suffered are considerable in amount. And the court below in dismissing the complaint stated that he was "inclined" to believe that it stated no cause of action. This court is called upon to determine whether the complaint states a cause of action.

The theory of complainant's suit is:

(1) That the Crosthwaite & Cannon Company was dissolved by the Governor's proclamation.

(2) That after its dissolution its directors continued to carry on its business as before, representing that the company, then nonexistent, was the duly authorized agent of Morgan Lyons & Co. in London, England, the latter being agents for the underwriters at Lloyds, and that in consideration of $8,937.50 to them paid they agreed with the plaintiff to negotiate through Morgan Lyons & Co. for the plaintiff's benefit a policy of insurance against all adventures and perils of the sea, including all loss resulting from hostilities and warlike operations, and that the directors informed plaintiff that the policy had been effected, and that in fact no such policy was effected.

(3) That the defendants, having carried on the business for a nonexistent principal, became personally liable.

The first question which arises is whether at the time the contract was made the Crosthwaite & Cannon Company was nonexistent. It is alleged that plaintiff on June 25, 1917, requested defendants to negotiate the policy of insurance, and that on July 6, 1917, the defendants as representing the aforesaid company delivered to the plaintiff a binding receipt and agreed that the receipt should insure against war and marine risk. This was after the Governor had issued his proclamation repealing the charter, that proclamation having been issued on January 26, 1915; and the contract was also entered into prior to the issuance of the Governor's second proclamation which purported to reinstate the corporation, which proclamation was issued on March 5, 1918.

Did the proclamation of June 25, 1917, dissolve the corporation and make it nonexistent? The New York Court of Appeals in the Matter of N. Y. & Long Island Bridge Co., 148 N. Y. 540, 547, 42 N. E. 1088, 1089 (1896), refers to "the undoubted power of the Legislature to provide that corporate existence shall cease by the mere fact of failure of the corporation to perform certain acts imposed by the charter." It adds that it however requires strong and unmistakable language to authorize the court to hold that it was the intention of the Legislature to dispense with judicial proceedings on the intervention of the Attorney General. If the Legislature has undoubted power to provide that corporate existence shall cease by the failure to perform certain specified acts, then the power of the Legislature of New Jersey to enact the particular statute herein involved must be also undoubted, for the language used is strong and unmistakable. The Governor is directed to declare the charter "repealed," and thereafter all the powers of the corporation are to be deemed "inoperative and void." There can be no doubt as to what was the legislative intention.

The question presented does not seem to be so free from doubt that the courts have all reached a like conclusion.

Mr. Justice Blackstone declares that a corporation may be dissolved by forfeiture of its charter through negligence or abuse of its franchise, in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the corporation is void; "and the regular course," he says, "is to bring an information in nature of a writ of quo warranto, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings." Blackstone's Commentaries, vol. 1, p. 485.

Chancellor Kent's statement is that the charter of a corporation cannot, against its consent, be forfeited "without the default of the corporation judicially ascertained and declared." Kent's Commentaries, vol. 2, p. 305.

In Morawetz on Corporations, vol. 2, § 1015, that writer says:

"* * * The franchises continue in full force until the penalty of forfeiture is claimed by the state granting the franchises; and this can be done

only through a proper legal proceeding, by which the cause of forfeiture is judicially ascertained."

In Cook on Corporations, § 637, that writer says:

"As a rule no one is allowed to assert that the corporation is dissolved, or its franchise forfeited, or its incorporation illegal, until after such a result has been decreed by a court in a proceeding instituted for that purpose by the state."

Mr. Justice Story, writing for the court in Terrett v. Taylor, 9 Cranch, 43, 51, 3 L. Ed. 650 (1815), said:

"A private corporation created by the Legislature may lose its franchises by a misuser or a nonuser of them; and they may be resumed by the government under a judicial judgment upon a quo warranto to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation."

In Atchafalaya Bank v. Dawson, 13 La. 497 (1839), the bank's charter provided that in case of a suspension of specie payment for more than 90 days the charter should be ipso facto forfeited and void. The court held that the happening of the contingency merely gave the state the right to enforce a forfeiture in a proper judicial proceeding. The Civil Code of the state (article 438) provided that a corporation becomes "extinct" by the effect of the violation of the conditions of the act of incorporation, and the act of incorporation of the bank provided as above stated that on suspension of specie payments the charter should be, ipso facto, forfeited and void. The court thought that the only difference between the text of the Code and that of the act was the difference between Latin and English. And it was held that until a forfeiture had been judicially decreed the existence of the corporation could not be questioned. "I am of opinion," said Judge Rost, "that, notwithstanding the words 'ipso facto,' the only effect of the suspension of specie payments by the plaintiffs was to give the state the right to claim the forfeiture, in an action instituted for that purpose."

The Supreme Court had the question before it in 1860 in Lessee of Frost v. Frostburg Coal Co., 24 How. 278, 16 L. Ed. 637. In that case an act of incorporation passed in 1845 provided that the corporation thereby created should be subject to all the restrictions imposed by the general incorporation law of 1838, one of which was that when the capital stock became concentrated in the hands of less than five persons all the corporate powers and privileges granted "shall cease and determine." It was held that the courts were bound to regard the corporation as in existence so far as third persons are concerned until it should be dissolved by a judicial proceeding on behalf of the government that created it. I do not regard that case as decisive of the question involved here; the case being distinguishable from the one now before the court. In that case the Supreme Court passed upon a Maryland statute, the validity of which had not been sustained by the Maryland courts. In this case this court is passing upon a New Jersey statute, which, as will be seen, the highest court in that state has decided is valid. In Lessee of Frost the court does not point out that the statute violates any provisions of the Constitution of the United

States; neither is it intimated that the statute is unconstitutional. The case goes upon the theory that a forfeiture is involved, and that a private party cannot take advantage of the forfeiture. "That is a question for the sovereign power, which may waive it, or enforce it, at its pleasure." That is the sole reason assigned for the decision, and it is without application to the instant case. In the pending case the state, which has the power "to waive or enforce at its pleasure," has made known its pleasure through the proclamation of the Governor declaring the charter repealed and its powers void. This comment is equally applicable to certain other cases of a like character cited herein.

In La Grange, etc., R. R. Co. v. Rainey, 7 Cold. (Tenn.) 432 (1870), it is said:

"If the act of incorporation fixes a definite time in which the charter shall expire, as, for instance, in 20 years, there can be no doubt that when that period of time expires the corporation is dissolved. But when the continuance of the corporation beyond a fixed time is made to depend upon the performance of a given condition, there can be no doubt that the nonperformance of the condition is a mere ground of forfeiture. This, however, can be taken advantage of only by the state in the proceeding in the nature of a quo warranto, and the existence of the corporation can never be collaterally called in question."

In Ahrens v. State Bank, 3 S. C. 401 (1871), it was held that, where a statute declares a forfeiture of a corporate franchise as the consequence of a failure of legal duty on the part of a corporation, the statute is to be regarded as penal in its nature, and the act of wrong must be judicially ascertained in a direct and proper judicial proceeding, before the penal consequences imposed by the statute become operative.

In Shand v. Gage, 9 S. C. 187 (1877), an act of incorporation made it the duty of the president and treasurer, on the first day of every month, to transmit a sworn statement to the state comptroller general, showing certain specified matters, and it provided that in case such report was not made for two consecutive months it should be the duty of the comptroller general to report that fact to the Governor, "who shall forthwith issue his proclamation declaring the charter of such association forfeited." The court held that a Governor's proclamation declaring a corporation dissolved because of its failure to file its report as required did not of itself forfeit the charter. It held that the fact which caused the forfeiture must first be judicially determined. "We are," said the court, "clearly of opinion that the proclamation of Governor Orr did not work an actual dissolution."

In Wallamet Falls Canal, etc., Co. v. Kittridge, 5 Sawy. 44, Fed. Cas. No. 17,105 (1877), the court passed upon the corporation law of Oregon, which provided that if any corporation neglected and ceased to carry on its business for any period of six months its corporate powers should cease. The court held that such neglect and cessation did not, ipso facto, terminate the existence of the corporation, but simply constituted a ground of forfeiture enforced by the state in a proper proceeding.

In Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71 (1884), the charter provided that, if at least $25,000 was not expended in the actual construction of the canal within four months from the passage

of the act, "this corporation shall thereupon cease to exist." This provision was not complied with. The court held that the question whether the corporation has ceased to exist could be judicially determined only in a suit to which the commonwealth was a party. This the court declared "is too well settled to admit of discussion."

In Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227 (1887), it appeared that an act of that state imposed certain taxes upon corporations, and provided that if any corporation failed to pay its taxes on or before a certain day it "shall because of such failure forfeit its charter to the state." The act also directed that the state auditor should publish in two newspapers "a list of such corporations as have forfeited their charters under this provision of this section within the preceding year." A corporation which was in default under this law, commenced an action against the defendants, who filed a plea that the plaintiff was not a corporation, its charter having been forfeited, and the certificate of the secretary of state was brought in, stating that it appeared from the records in his office that the company had forfeited its charter under the legislative act referred to, and that due publication of such forfeiture had been made by the auditor as required by law. The plea was sustained, and the suit dismissed in the court below. The Supreme Court of Appeals reversed the judgment and said:

"In the case before us the Greenbrier Lumber Company has never been dissolved, as a forfeiture of its charter has never been judicially ascertained and declared in a proceeding for the purpose by the state."

In New York & New England R. R. Co. v. New York, New Haven & Hartford R. R. Co., 52 Conn. 274 (1884), the charter of a railroad declared that, if the company did not do certain things within a defined period, "then the rights, privileges and powers of said corporation shall be null and void." The court declared that, if the company had not performed as required, "we do not think that the plaintiffs can take advantage of it in this case, notwithstanding the unqualified language of the provision. * * * The forfeiture is to be asserted by the state, by proceedings to which the corporation is a party." And the court quoted from the opinion in Pahquioque Bank v. Bethel Bank, 36 Conn. 334, 4 Am. Rep. 80, where it was said:

"It is a well-settled principle that a dissolution by forfeiture can only be effected by judicial proceedings against the corporation taken for that purpose, a hearing or an opportunity for a hearing had, and a judgment of forfeiture rendered thereon."

In Galveston, etc., R. R. Co. v. State, 81 Tex. 596, 17 S. W. 67 (1894), the statute provided that upon a certain contingency the charter of the company should be forfeited. It was held that this prescribed the ground of forfeiture, but not the manner, and that the manner must be by a judicial proceeding instituted directly for that purpose.

A statute of the state of Illinois required certain corporations annually at a specified time to file a sworn report with the secretary of state, giving certain information, and it declared that the failure to file such report was prima facie evidence that the corporation was out of business, and that it should work a forfeiture of the charter of such

corporation. The act made it "the duty of the secretary of state to enter upon the records of his office, as soon as practicable after default in making such report, the cancellation of the charters of all corporations failing to make said report at the time and in the manner herein provided." It also authorized, on the payment of a specified fee, the secretary of state to reinstate a corporation which had failed to make the report required. The act involved thus resembled, in these particulars, the statute of New Jersey in the instant case. In that case the question came before the court on a petition for a mandamus to the secretary of state compelling him to cancel the forfeiture of the cancellation he had placed on the records of his office, and to reinstate the petitioning corporation upon the records of the secretary of state on the payment of the fee. It was alleged that some 25,000 charters had been canceled under this act prior to the time the suit was commenced to test the validity of the act. The constitutionality of the act was attacked upon the ground that the Legislature had no power to dissolve a corporation or to declare a forfeiture of its franchise, nor the power to prescribe a state of facts under which this could be done under an administrative officer, because such an act involved the exercise of judicial power, which under the Constitution of the state and of the United States is vested in the judicial, and denied by implication to the legislative, department. The Supreme Court of the state, recognizing the force of the argument, held that the cancellation which the secretary of state was required to enter upon his records did not of itself work a forfeiture of the corporation's charter, but that it was simply prima facie evidence of nonuser, which might be availed of by the Attorney General in a proceeding to forfeit the charter. In the course of its opinion in this case the court said:

"To give to this statute the meaning contended for by petitioner is to say that the purpose of the Legislature was to make the failure to report conclusive evidence that a forfeiture has taken place, although the statute expressly says it shall be prima facie evidence merely. This construction of petitioner finds support, it is true, in the fact that the statute provides that the failure to report shall work a forfeiture of the charter, thereby attempting to give to the evidence, which it says is prima facie, the effect of evidence that is conclusive. The provisions of this statute are in that respect inconsistent with each other, and the meaning of the act must be determined by the construction placed thereon by the courts. To say that it merely provides wnat shall be prima facie evidence of nonuser, and for recording that evidence, is to uphold it; to say that the act of the secretary of state, which it directs, absolutely forfeits the charter of the defaulting corporation, is to destroy it."

Judge Magruder, who filed a separate opinion dissenting in part from the conclusion of the majority, denied the power of the Legislature to provide for the cancellation of the charter without a judicial investigation, and in referring to the failure of the corporation to file the required report he said:

"If this failure be regarded as 'misconduct,' it could not so far forfeit the right of the petitioner to be a corporation, that that right could be taken from it without judicial proceedings, declaring the forfeiture in due form. The Legislature cannot declare a forfeiture of property by an act of its own, and, if this is so, it cannot confer the power to declare such forfeiture upon a ministerial officer, like the secretary of state." People v. Rose, 207 Ill. 352, 69 N. E. 762.

In People v. Rose the corporation involved was organized in 1900 under a general incorporation act passed in 1872 (Laws 1871–72, p. 296), and the statute empowering the secretary of state to cancel for failure to report was passed in 1901 (Laws 1901, p. 124). The act of 1872 provided in section 9 that the Legislature should at all times "have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act." And the court held that the act of 1901 is within the terms of section 9 and must be deemed to be a part of the charter of every corporation organized under the act of 1872.

In the case now before the court the corporation was organized in 1908 and the statute empowering the Governor to cancel for failure to pay taxes assessed against it was passed in 1905, three years prior to the taking out of the charter. But People v. Rose is not distinguishable on that ground, for, as I have said, the court treated the act of 1901 as a part of the charter of the corporation, although it was organized under the law of 1872.

In Matter of N. Y. & Long Island Bridge Co., supra (1896), an act incorporating a bridge company provided that the bridge should be commenced within two years from the passage of the act and continued without unreasonable delay until completed; "or this act and all rights and privileges granted hereby shall be null and void." Counsel contended that this act was self-executing, and that as the bridge was not commenced within two years from the passage of the act the bridge company ipso facto ceased to exist. The court held otherwise. "It cannot be said," said the court, "that the words 'shall be null and void' disclose the legislative intent to make this clause self-executing. The words 'null and void,' as used in this connection clearly mean voidable. The word 'void' is often used in an unlimited sense, implying an act of no effect, a nullity ab initio; in the case at bar it was not so employed, but rather in its more limited meaning. We think these words mean no more than if the Legislature had said, in case of default the corporation 'shall be dissolved.' The Attorney General was authorized to treat the charter of the bridge company as voidable, and by appropriate legal proceedings to have terminated its corporate existence." In that case, however, as has been already pointed out in this opinion, the court stated its belief that the Legislature might provide for the termination of corporate existence by the failure to perform certain specified acts, if the Legislature indicated its intention by unmistakable language.

In Cook on Corporations, vol. 2, § 638 (7th Ed.), that writer, speaking of provisions in charters of railroads declaring that upon a failure to complete the road within a specified time the corporate powers and existence shall cease, says:

"There is a strong line of decisions to the effect that such a provision as this forfeits the charter absolutely upon noncompliance, and that no decree of a court is necessary to effectuate that forfeiture. But this drastic and dangerous construction does not commend itself to law and justice. It adds one more to the perils which are attached to all great corporate enterprises. Even

in New York, where the above doctrine seems to have had its origin, the courts are inclined to limit its application."

The courts in a number of cases have held that upon the failure of a railroad to comply with the requirement within the specified time its corporate existence ipso facto ends without any judicial proceeding. Matter of Brooklyn, etc., Ry. Co., 72 N. Y. 245; Brooklyn Steam Transit Co. v. City of Brooklyn, etc., R. R., 185 N. Y. 171, 77 N. E. 994; Millcreek Township v. Erie Rapid Transit Street Railway Co., 209 Pa. 300, 58 Atl. 613; In re Philadelphia & M. Ry., 187 Pa. 123, 40 Atl. 967; Maine, etc., R. R. v. Maine, etc., R. R., 92 Me. 476, 43 Atl. 113. In the above class of cases the words used are regarded as fixing a time for the expiration of the charter, so that when the time named arrives the corporation loses its power to act, or to do any business beyond such as is necessary in the process of winding up. It is regarded as not so much a case of forfeiture as of loss of legal entity. At the end of the time limited the corporation comes to an end, as if that were the time limited in its charter for its corporate existence. See Bybee v. Oregon & California R. R. Co., 139 U. S. 663, 667, 11 Sup. Ct. 641, 35 L. Ed. 305.

In Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 Pac. 341 (1909), the court passed upon a statute which imposed on corporations the duty of paying a license tax each year, and required the secretary of state to report to the Governor a list of all corporations in default, and provided that the Governor should forthwith issue his proclamation declaring forfeited the charter of the delinquent domestic corporations unless payment was made on a specified day. The act also declared it to be unlawful for any corporation, domestic or foreign, which had not paid the tax as prescribed, to transact any business thereafter. The question was considered whether a failure to pay the tax as provided ipso facto worked a forfeiture of the charter, or whether it simply made the charter liable to forfeiture by the decree of a court of competent jurisdiction. The court said:

"All the cases agree upon the proposition that, although a forfeiture at common law does not operate to divest the title of the owner until by a proper judgment in a suit instituted for that purpose the rights of the state have been determined, a statute prescribing a forfeiture may be self-executing. Upon this point the language of the act is so clear and unmistakable in meaning that we should be obliged to hold that it was intended that such failure should ipso facto work a forfeiture, even if the result thereof should be, as claimed, that the act so providing must be held unconstitutional on the ground that it violates the due process of law clauses of the federal and state Constitutions. We concede the claim that the act should be construed against such ipso facto forfeiture if the language used is fairly susceptible of such interpretation, but we are satisfied that it is not so susceptible. * * * The language used is irreconcilable, under the decisions in this state, with any other theory than that of ipso facto forfeiture."

And the court held that the act was not in violation of the due process of law provisions of the federal and state Constitutions.

The New Jersey statute, now before this court, came before the New Jersey Court of Errors and Appeals in 1899 in American Surety Co. v. Great White Spirit Co., 58 N. J. Eq. 526, 43 Atl. 579. In that

case the bill was filed by creditors of the Great White Spirit Company and prayed for the appointment of a receiver upon two grounds: (1) Because of the insolvency of the company; and (2) because of the dissolution of the company under the statute because of the Governor's proclamation declaring the charter void. The court considered the act valid in so far at least as it provided for the dissolution of the corporation by proclamation of the Governor, remitting the case with instructions to appoint a receiver. The constitutionality of the statute was assailed on the ground that its object was not accurately recited in its title. A large part of the opinion related to that question, which was the only constitutional question considered. The court announced its conclusion upon that matter by saying:

"The result is that the act in question is not lacking in validity."

The question raised in People v. Rose, supra, was not mentioned in the opinion and does not appear to have been suggested by counsel; and the court did not decide as to the effect to be given to the clause authorizing the Governor by a second proclamation to renew the corporate existence. It alluded to the subject, saying:

"The legislative purpose disclosed by this act is to permit for a limited period the revival and renewal of corporate functions and powers which have become, under previous legislation, inoperative and void, by the mere permission of the Governor, advised by the Attorney General. Whether that purpose has been effected by this act is a question not argued and not necessary to decide. If there is a possibility of such revival of a dissolved corporation, it is open to question whether the provisions of section 66 are not applicable to it."

The important fact is that the court regarded the corporation dissolved by the proclamation of the Governor. As the question presented to us is whether a New Jersey corporation was dissolved by the proclamation of the Governor of that state acting under a statute of that state, I agree that we must decide that question in the affirmative upon the authority of the American Surety Company's Case declaring the statute valid. This court is concluded by that decision, unless there is something in the statute which violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The provision relating to due process of law was introduced into our American Constitutions, federal and state, as a protection to the individual against the arbitrary exercise of governmental power by any of its agencies, legislative, executive, or judicial, and to secure him against an arbitrary deprivation of the right to life, liberty, or property; and a corporation is a person within the meaning of the constitutional provision which declares that no person shall be deprived of life, liberty, or property without due process of law. The franchises of a corporation, being property, are as much under the protection of the constitutional provision referred to as is the property of a natural person.

Under ordinary circumstances due process of law implies a formal judicial proceeding, but such a proceeding is not invariably required. The Supreme Court in Reetz v. Michigan, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563, said:

"We know of no provision in the federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not necessarily judicial process."

In Title Guaranty & Surety Co. v. State of Idaho, 240 U. S. 136, 36 Sup. Ct. 345, 60 L. Ed. 566, the court held that the due process provision does not prevent a state from placing upon a bank commissioner the duty of closing a bank found upon examination to be insolvent without first instituting proceedings and obtaining an award.

In Lieberman v. Van De Carr, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305, the plaintiff was engaged in selling milk in the city of New York. Under the Sanitary Code no person could sell milk in the city without a permit from the board of health. The plaintiff had obtained such a permit, which the board afterwards revoked. He continued to sell without a permit, and was arrested, and his defense was that he had been deprived of his permit, of his liberty and property, without due process of law. There was nothing in the record to show upon what ground the action of the board was taken. The court said:

"For aught that appears he may have been conducting his business in such wise, or with such surroundings and means, as to render it dangerous to the health of the community, or his manner of selling or delivering the milk may have been objectionable. There is nothing in the record to show that the action against him was arbitrary or oppressive and without a fair and reasonable exercise of that discretion which the law reposed in the board of health. We have, then, an ordinance which, as construed in the highest court of the state, authorizes the exercise of a legal discretion in the granting or withholding of permits to transact a business, which, unless controlled, may be highly dangerous to the health of the community, and no affirmative showing that the power has been exerted in so arbitrary and oppressive a manner as to deprive the appellant of his property or liberty without due process of law."

In the instant case the corporation was granted a franchise by the state of New Jersey, and its right to exist was under its contract with the state conditioned upon its paying into the state treasury the taxes assessed against it, and if for two successive years it failed to do so it was made the duty of the Governor to revoke its charter. The proclamation of the Governor did not deprive the corporation of its property without due process of law. The period of corporate existence was fixed by its charter, which provided for its termination upon the issuance of the Governor's proclamation under the conditions specified. There is nothing in this to suggest an arbitrary, oppressive, or unjust exercise of governmental power. As said by Mr. Justice Brown in Bybee v. Oregon & California R. R. Co., supra, the legislative act did not avoid the grant upon the nonperformance of a condition subsequent. But it fixed a time for the expiration of the charter, and when that time arrived the corporation lost its power to act or to exist. And I may add that it is a well-settled general rule that a corporation cannot attack the constitutionality of statutes existing at the time of its creation, to which it is made subject. Grand Rapids & Indiana Ry. Co. v. Osborn, 193 U. S. 17, 29, 24 Sup. Ct. 310, 48 L. Ed. 598; 7

R. C. L. 614. And if a corporation is estopped, its board of directors is equally estopped. In my opinion, the provision authorizing the Governor to declare the charter repealed does not violate the Fourteenth Amendment.

This brings me to inquire whether the plaintiff, having contracted with the Crosthwaite & Cannon Company as a corporation, can now be heard to allege that it was not a corporation at the time of the making of the contract. If this must be answered in the negative, the complaint was properly dismissed. The District Judge appears to have been under the impression that the plaintiff could not deny the corporate existence. He says:

"The statement so often made that those dealing with a de facto corporation are estopped to deny its existence is inaccurate for no case of genuine estoppel exists; but it is established by an overwhelming weight of authority that, where persons attempting to exercise corporate authority have taken bona fide steps to organize, those contracting with them must rely upon the corporate responsibility and not upon that of individuals with whom they never intended to contract. The validity of the exercise of corporate functions is a matter for the state, and cannot be questioned by others."

Now it is undoubtedly true that corporations which are not corporations de jure, but are corporations de facto, are liable on contracts into which they enter, and that the courts on grounds of public policy will not allow the question to be raised between the corporation and private parties as to whether the corporation was rightfully in existence. But to make this principle applicable the corporation must be a de facto corporation. We think it clear that a corporation which continues to do business after its charter has been repealed cannot be regarded as a corporation de facto. In order to constitute a de facto corporation there must be at least an organization under some existing charter or law, and such organization must be in good faith; and when the charter or law has been repealed upon which existence depended, there can be neither existing law nor good faith to support the claim that it is a de facto organization.

In Clark and Marshall on Private Corporations, vol. 1, p. 247, it is laid down that a corporation cannot after the expiration of its charter be a corporation, either de jure or de facto, and thereafter its rights to exercise corporate powers may be questioned collaterally. And see Supreme Lodge Knights of Pythias v. Weller, 93 Va. 605, 25 S. E. 891; Sturges v. Vanderbilt, 73 N. Y. 384; Marysville Ins. Co. v. Munson, 44 Kan. 491, 24 Pac. 977; Asheville Division No. 15, Sons of Temperance, v. Aston, 92 N. C. 578; White v. Campbell, 5 Humph. (Tenn.) 38; Guaga Iron Co. v. Dawson, 4 Blackf. (Ind.) 202. See, also, Cook on Corporations, vol. 2, p. 1964, note 1.

I may in passing note that the American doctrine that there may, under any circumstances, be de facto corporations, has never received recognition in England. See Machen on Corporations, vol. 1, § 284. The doctrine in this country rests, not upon the principle of estoppel, but on that of public policy, which is thought to prohibit the right of any one but the state to annul corporate acts because of some technical flaw in incorporation proceedings. To hold otherwise would impose great hardship upon corporations.

Then there is the doctrine of estoppel. It is said that one who deals with a corporation as such is estopped to deny corporate existence, and that the plaintiff dealt with the Crosthwaite & Cannon Company as a corporation. In reply it is to be said that the doctrine of estoppel is based on equitable grounds. The doctrine is to be applied only where there are equitable reasons for applying it. Clark on Corporations (3d Ed.) p. 118. If a person deals with a body as a corporation, which holds itself out as such, and which he believes to be a corporation, and he borrows money or purchases goods from it, to allow him, when sued by it, to deny its corporate existence in order to escape liability, would be so contrary to equity that no court would recognize it as a defense. But it is another matter when it is invoked to relieve from liability persons who have wrongfully held themselves out as the agents of a nonexistent corporation. To apply the doctrine to such a state of facts is not equitable, and is contrary to public policy. An equitable estoppel operates only in favor of him who has been misled to his injury, and he alone can set it up. Ketcham v. Duncan, 96 U. S. 659, 24 L. Ed. 868; Strong v. Ellsworth, 26 Vt. 366. The defendants who invoke the doctrine in this case have not been misled. They are the ones who misled the plaintiffs. The plaintiffs did not mislead them.

After the charter of Crosthwaite & Cannon Company was repealed, the directors held out the corporation as still in existence and entered into contracts in its name. The allegation of the complaint is that after the repeal of the charter, and until March 5, 1918, the defendants allowed "themselves to be made directors, and to be held out to the public as such, and the business of said company to be carried on under their authority and management as such directors."

Where persons hold themselves out as a corporation and contract as such, without having acquired even a de facto corporate existence, they are held by most courts liable as partners, if the facts are not such as to work an estoppel to deny corporate existence. This rule is supported by the weight of authority. See Machen on Corporations, vol. 1, § 293. And in Wonderly v. Booth, 36 N. J. Law, 250 (1873), the directors were in such a case held liable as partners. That case is decisive of the question of the liability of the directors of this New Jersey corporation, the defendants in this case, unless circumstances next to be considered relieve them of their personal liability. In that case, as in this, the so-called corporation was neither de jure nor de facto. A fire insurance company was by its charter authorized to be established at Trenton, but it in fact established itself at Jersey City, and it issued a policy of insurance on property in the state of Pennsylvania. The court held that this amounted to a fraud on the act, and that the corporation had no existence, either de facto or de jure. The court declared that there were two principles of law which justified holding the two defendants who were directors personally liable. "One is," said the court—

"that if an agent contracts, although as agent without a legally responsible principal to whom resort may be had, the law presumes that he contracts on his personal responsibility, and intends to bind himself, and so holds him, for in no other way could the contract have any validity. Story on Agency, §§ 280, 281, 282; 2 Kent, Com. 630; Dinlap's Paley on Agency, 374; Kelner v.

Baxter, L. R. 2 C. P. 174; Furnivall v. Coombes, 5 M. & G. 736; Bay v. Cook, 2 Zab. [22 N. J. Law] 343. * * * The other principle is the familiar one that, when one of two innocent parties must suffer by the fraud of a third, he who gave the occasion for the fraud or the means of credit should bear the loss. * * * In England, when a joint-stock company is in the preliminary stages of formation, before an act of incorporation is had, or complete registration effected under the companies clauses acts, and where there is a preliminary board of directors, those who have consented to become directors, or knowingly allowed themselves to be held out to the world as directors, are responsible, as principals or partners, for all contracts, express or implied, within the scope of the business of the direction. Fox v. Clifton, 9 Bing. 115; Maddick v. Marshall, 16 C. B. (N. S.) 387; s. c. in Exch., 17 C. B. (N. S.) 828; Collingwood v. Berkeley, 15 C. B. (N. S.) 145; Bell v. Francis, 9 C. & P. 66; Collyer on Part. § 1086. The liability is that of partners, and the doctrine of these cases, as they stand, is applicable to this kind of an operation and all other kindred schemes of speculation, adventure, or fraud."

I come now, in conclusion, to consider what effect the reinstatement of the corporation by the Governor's second proclamation had in releasing the directors from this personal liability which they incurred by what they did. On that question I find myself wholly unable to agree with the conclusion reached by my Associates. The provision in the statute relating to reinstatement is found in the margin.[1] The Legislature by this statute empowered the Governor to reinstate a corporation not at the time in existence.

In England by the common law corporations could be created by a charter granted by the crown or by an act of Parliament. In this country corporations are not created by the executive, but by the legislative, department of the government. In England power to create corporations can be delegated, and has been. Under our constitutional system power conferred upon the Legislature cannot be delegated by that department to some other. Where the sovereign power has located the authority there it must remain. Delegata potestas non potest delegari. A general power to confer corporate franchises cannot be delegated. It is, however, a well-established principle that where the Legislature has enacted that corporations may be formed upon compliance with certain conditions, it is no objection that ministerial duties, such as the issuing of a certificate or charter are to be performed by some officer before the incorporation takes effect. See Morawetz on Corporations, vol. 1, sec. 15; Re New York Elevated R. R. Co., 70

[1] "7. If the charter of any corporation organized under any law of this state shall hereafter become or shall have heretofore become inoperative or void by proclamation of the Governor or by operation of law, for nonpayment of taxes, the Governor, by and with the advice of the Attorney General, may, upon payment by said corporation to the secretary of state of such sum in lieu of taxes and penalties as to them may seem reasonable, but in no case to be less than the fees required as upon the filing of the original certificate of incorporation, permit such corporation to be reinstated and entitled to all its franchises and privileges, and upon such payment as aforesaid the secretary of state shall issue his certificate entitling such corporation to continue it said business and its said franchises: Provided, however, that the provisions of this section shall in no wise apply to any gas, electric light, telephone * * * company: * * * And provided further, that nothing in this section contained shall relieve any such corporation from the penalty of forfeiture of its franchises in case of failure to pay future taxes imposed under the act. * * *" Laws of New Jersey 1905, p. 511.

N. Y. 327, 343. The act of the New Jersey Legislature in authorizing the Governor on certain specified conditions to "re-instate" corporations previously created by the Legislature devolves upon him a merely ministerial duty. Corporations so reinstated derive their powers from the Legislature and not from the Governor. He simply performs an administrative or ministerial act in carrying into effect and applying a law enacted by the Legislature. In doing this he is not enacting a law or creating a corporation and defining its powers. The act is not unconstitutional—as involving a delegation of legislative power.

The power of the Governor in the matter is derived solely from the provision already cited. It does not expressly authorize a reinstatement nunc pro tunc and it does not legalize and make effective all or any transactions and contracts made in the name of the corporation after its existence was terminated. There is nothing in the act which authorizes reinstatement as of the date when its charter was repealed. The proclamation of the Governor reinstating the corporation is not in the record. If that proclamation contains anything more than the statute provides for it is to that extent of no validity and is to be disregarded.

In the opinion below the District Judge said: "The reinstatement of the corporate franchise by the Governor could not deprive the plaintiff of a cause of action against the individual defendants if he ever acquired one which was not conditional upon reinstatement and thus destroy vested rights." In his opinion persons contracting under the circumstances existing in this case contract under an agreement implied by law that a corporate liability may be substituted by a reinstatement of the corporate franchises for the personal liability of the directors, and reinstatement works a novation which is a defense to individual liability.

I am unable to accept this conclusion. I find nothing whatever in the act which indicates any intention that any contract made in the corporate name to any one after the repeal of the charter is to be assumed by the corporation after it is reinstated, or that any one who enters into such a contract does so with any such understanding. So far is the act from assuming that such contracts will be made which may later become valid by reinstatement of the corporation that the statute contains a provision found in the margin which expressly imposes a criminal liability upon directors who assume to make such contracts.[2]

Novation is the substitution by mutual agreement of one debtor or of one creditor for another. It extinguishes the old obligation and substitutes another in its place. It involves a new contractual relation. It implies a prior valid obligation, and a subsequent agreement of all parties to a new contract. In this case there was but one agree-

[2] "Any person or persons who shall exercise or attempt to exercise any powers under the charter of any such corporation after the issuing of such proclamation shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment not exceeding one year, or a fine not exceeding one thousand dollars, or both, in the discretion of the court." Laws of New Jersey 1905, p. 509, § 4.

ment; no new contract was ever made. A novation involves a second contract between three or more parties, whereby a debtor, in consideration of being discharged from his liability to his original creditor contracts a new obligation in favor of a new creditor or whereby a creditor in consideration of the promise of a new debtor to pay the debt releases the original debtor from his obligations. In the Civil Law novation took place only when the contracting parties expressly disclosed their intention. Sherman's Roman Law in the Modern World, vol. 2, p. 306. Under our law novation may be inferred from circumstances without proof of express agreement. In re Dixon (C. C.) 13 Fed. 109; Hard v. Burton, 62 Vt. 314, 20 Atl. 269. But there are no circumstances here from which it can be inferred. In order that one liability may be replaced by another, by agreement, it is essential that the person in whom the correlative right resides should show by some act of his own that he accedes to the substitution. Barnes v. Boyers, 34 W. Va. 303, 307, 12 S. E. 708; Jones v. Austin, 26 Ind. App. 399, 405, 59 N. E. 1082. A novation exists if the creditor accepts the new debtor's promise to perform, or the performance of it, and not the promise itself. In this case the plaintiff accepted neither, and neither has ever been offered, so far as this record discloses. The party alleging a novation must prove it. Hard v. Burton, supra. It has not been proven in this case.

My Associates think that the reinstating proclamation completely validates any contract which the former directors of the extinguished corporation may have entered into after the charter was forfeited and prior to the reincorporation. In this conclusion I certainly do not concur. It is impossible to reinstate a corporation which has gone out of existence and ceased to be under a charter which the state has declared to be void except by reincorporation. The second proclamation reincorporated the old corporation; the Governor being authorized to perform the ministerial duty of "reinstatement" upon the payment of the back taxes. In the performance of that duty the Governor is not clothed with any discretion, and he performs an administrative act which it was within the right of the Legislature to authorize. Thereafter the revived or reinstated corporation became possessed of all its former franchises as if the charter had never been repealed. But it is a non sequitur that contracts during the period of its nonexistence, and which the law made it a penal offense for the directors to enter into, ipso facto become valid and binding on the corporation the moment the corporation is revived or reinstated or reincorporated by the second proclamation. The statute plainly does not say so, and it plainly does not contemplate that any contracts shall be made in the name of the corporation after the first proclamation issues; and a sound public policy, it would seem to me, requires that directors who, without authority and in defiance of a penal statute forbidding it, presume to continue to make contracts in the name of their nonexistent corporation, should not be relieved against the personal liability they thereby incurred. If A. subscribes to the stock of B. corporation, not then in existence, when B. corporation comes into existence, it cannot hold A. on his subscription, because it was not in existence

when the subscription was made. And if A. contracts with the directors of B. corporation, which is not at the time in existence, but which it is supposed may possibly subsequently come into existence, the contract is not binding upon the corporation if it later does come into existence, but does no act which recognizes in any way the contract previously made in its name without any authority whatsoever from it.

I am unable to believe that, when the Legislature made it a criminal offense for the directors of an extinguished corporation to enter thereafter into a contract in the name of such corporation, it nevertheless contemplated that such contracts would be made, and intended that when made they should become valid obligations of the corporation itself in case it should happen to be "reinstated." And it is well to remember that "reinstated" means under the circumstances nothing less than "reincorporated." The doctrine advanced by my Associates would seem to me more plausible if the statute, instead of making the corporation void, had simply suspended its right to do business during the period of its default in the payment of its taxes. But it seems wholly inapplicable to such a statute as the one now under consideration. To impose upon a corporation a contract made in its name when it was not in existence, the legislative intent certainly should be unmistakable. No such intent can be spelled out of a provision which simply says that the corporation may be reinstated with the same powers as before. The reinstatement of a corporation does not relieve directors either from a criminal or a civil liability incurred by the making of a contract in violation of the terms of the statute.

I think the complaint states a good cause of action.

POLLOCK et al. v. NATIONAL CITY BANK OF CHICAGO.

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

No. 5303.

1. GUARANTY ⟸59—EFFECT OF TRANSFER OF INSTRUMENT AS DISCHARGE OF GUARANTORS.

A transfer of bonds of a corporation, with three guarantors, on the day of their maturity, by their then holder, to plaintiff bank as collateral to a draft drawn in its favor by one of the guarantors, which was discounted by plaintiff and the money paid to such holder, and on payment of which the bonds were to be delivered to the drawee, *held* not to operate, contrary to the intention of the parties, as a payment of the bonds, or as a transfer of title to the drawer, which released the other guarantors.

2. GUARANTY ⟸60½—GUARANTORS NOT DISCHARGED BY AGREEMENT AFFECTING SECURITY.

When by express provision of a trust deed securing bonds of a corporation that, in case of extension of any of the bonds by agreement between the holder and maker, they should be subordinated in lien to the later maturing bonds, guarantors, whose guaranty was subject to the terms of the trust deed, *held* not released by a transfer of the first maturing bonds on the day of their maturity by a transaction to which the vice president and executive officer of the corporation was a party, and in which the bonds were stamped to show such subordination.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Action at law by the National City Bank of Chicago against Robert M. Pollock and others. Judgment for plaintiff, and defendants bring error. Affirmed.

This is an action by the National City Bank of Chicago on the written guaranty of the defendants, Robert M. Pollock, M. Kittel, and R. C. Kittel, to pay bonds of the Northern Trading Company, a corporation, aggregating $10,000, on which $4,000 had been paid. R. C. Kittel was not served with process. Robert M. Pollock and M. Kittel, hereafter called the defendants, answered that all the bonds of the Trading Company amounting to $100,000, of which those in this action were a part, were as a part of the same transaction as their guaranty, secured by a trust deed or mortgage upon land in North Dakota; that they signed their guaranty in consideration of a simultaneous promise of R. C. Kittel that he would pay the bonds at maturity and save them harmless from the guaranty; that on February 1, 1915, when the bonds in this action matured, R. C. Kittel paid Peabody-Houghteling & Co., a corporation, the holder of these bonds, the full amount due thereon, and induced it to surrender them to him without cancellation upon an agreement indorsed thereon without their knowledge or consent that the bonds should be subordinated in security and payment from the mortgaged lands to all the other bonds and coupons secured thereon; that the mortgaged lands have been sold under a decree of foreclosure and all the proceeds of the sale have been applied to the payment of the other bonds, so that nothing has been or can be derived from the security to pay the bonds upon which their guaranty here in suit was indorsed.

A jury was waived, and the case was tried by the court, which made specific findings of the facts, stated its conclusions of law, and rendered judgment against the defendants for the $6,000 and interest. At the close of the evidence the defendants requested the court to find that the undisputed evidence established ten specific statements of fact. The court declined so to do, and the defendant excepted to that ruling, and to each of the findings of fact which the court made, and to each of the conclusions of law it stated. They also excepted to the exclusion by the court of the evidence of the agreement of R. C. Kittel with the defendants to pay the bonds and save them harmless from their guaranty.

The court's findings of facts 6, 6½, and 9 read in this way:

"(6) That on February 1, 1915, $10,000 par value of said bonds were due and were on said date in the hands of Peabody-Houghteling & Co., at Chicago, Ill., for collection; that said bonds were due according to the terms of the same and of said trust deed on February 1, 1915, and were payable at the office of Peabody-Houghteling & Co., Chicago, Ill.; that on said date, the defendant R. C. Kittel, who was also the manager and vice president and active executive officer of the maker, the Northern Trading Company, and who was also a member of the copartnership of R. C. Kittel & Co., requested the plaintiff, in its banking house in Chicago, Ill., during banking hours, and in due course of business, to advance the sum of $10,000 upon a draft for $10,000 to be drawn by R. C. Kittel upon R. C. Kittel & Co., at Casselton, N. D., payable through the First National Bank of Casselton, N. D., said bonds in the sum of $10,000 to be attached to said draft, said R. C. Kittel then and there stating and representing to the plaintiff that said bonds had been sold to parties residing at or in the vicinity of Casselton, N. D., and that said draft would be paid and said bonds taken by said purchasers upon said bonds arriving at Casselton, N. D.; that thereupon, and on said 1st day of February, 1915, at its banking house in Chicago, Ill., during banking hours, and in due course of business, and in the presence of a representative of said Peabody-Houghteling & Co., who then and there had in his possession and presented to the plaintiff said bonds of the par value of $10,000, there was delivered to plaintiff a certain draft, dated February 1, 1915, payable on demand to the order of the plaintiff in the sum of $10,000 drawn by R. C. Kittel on R. C. Kittel & Co., Casselton, N. D., payable through the First National Bank

of Casselton, N. D., which said draft was, pursuant to the instructions hereinafter named by the plaintiff, in the usual course of business sent to the First National Bank of Casselton, with instructions to the First National Bank of Casselton to deliver any one or all of the bonds upon payment of face plus 6 per cent. interest from February 1, 1915, and to report each delivery and remit to plaintiff; that at the same time, and simultaneously with the delivery of said draft to the plaintiff, there was delivered a certain cashier's check, dated February 1, 1915, payable to the order of R. C. Kittel in the sum of $10,000, which said check was signed by the plaintiff, and then and there simultaneously with the other said transactions said cashier's check was indorsed by R. C. Kittel to Peabody-Houghteling & Co., and delivered to the representative of Peabody-Houghteling & Co., who thereupon delivered said $10,000 par value of bonds to the plaintiff, to be, and which were, attached to said draft; that said cashier's check was thereafter, and on February 3, 1915, through the medium of the Chicago Clearing House, duly paid by the plaintiff to the order of the said Peabody-Houghteling & Co.; that at the time of the delivery of said $10,000 par value of said bonds, there was stamped upon same by Peabody-Houghteling & Co. the following: 'The within bond is sold to and purchased by R. C. Kittel & Co. on the distinct agreement that as to the lien of the trust deed securing the same it is subordinate to all the other bonds and coupons thereby secured, maturing after February 1, 1915.'"

"(6½) All the foregoing transactions between the plaintiff, Peabody-Houghteling & Co., and R. C. Kittel, with respect to said $10,000 of bonds, maturing February 1, 1915, were had without knowledge of either of the defendants, Robert M. Pollock or Martin G. Kittel."

"(9) The plaintiff took and acquired said bonds in good faith, for full value, and before maturity, and without notice or knowledge of the agreement with R. C. Kittel alleged in the answer of the defendants Robert M. Pollock and M. Kittel."

As conclusions of law the court found: (1) That the plaintiff acquired and holds the bonds to the amount of $6,000 as innocent bona fide purchaser, and has a lien thereon for $6,000 and interest from February 1, 1915: (2) that these bonds were not canceled or paid by the payment of the $10,000 to Peabody-Houghteling & Co.; and (3) that there have been no extensions, alterations, or modifications of the obligations guaranteed that were not within the terms of the contract of guaranty, the bonds, and the trust deed, and that were not consented to and agreed to by the plaintiffs.

Edward Engerud, of Fargo, N. D. (Engerud, Divet, Holt & Frame and James W. Pollock, all of Fargo, N. D., on the brief) for plaintiffs in error.

A. W. Cupler, of Fargo, N. D. (Ed. Pierce and B. G. Tenneson, both of Fargo, N. D., and G. L. Wire, of Chicago, Ill., on the brief), for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). [1] The first reason why counsel for the defendants argue that the judgment below should be reversed is that the court below failed to find that the transaction of February 1, 1915, described in its findings was not, as to the defendants, a payment and discharge of the bonds by R. C. Kittel or R. C. Kittel & Co. Their contention is that either R. C. Kittel or R. C. Kittel & Co. by this transaction paid or bought the bonds on which as collateral they borrowed $10,000 of the bank; that, as R. C. Kittel was the coguarantor with the defendants of the obligation of the bonds, neither he nor R. C. Kittel & Co. could maintain any action on the guaranty against the defendants, and as the bank

derived all its rights from either Kittel or Kittel & Co., it cannot do so. If R. C. Kittel, or R. C. Kittel & Co., had paid the bonds, and the bonds had been surrendered to one of them, it may be conceded that their remedy against the defendants would have been an action for contribution, that they could not have maintained this action on the guaranty, and that, if the bank had derived its right exclusively from them under such circumstances, it would have been in a like situation.

But the court below has found in its second conclusion of law that the bonds were not paid or canceled by the transaction in which they were transferred to the bank for the $10,000 which the bank paid to Peabody-Houghteling & Co. Repeated readings of the findings of fact and of the evidence relative to the transaction have left no doubt of the correctness of this conclusion. They have convinced that the intention of the parties to it, and the legal effect of it, was to preserve intact the obligation of all the guarantors to pay the bonds, as well as that of the mortgagor, and to transfer them to and vest them in the bank. The facts that R. C. Kittel drew his draft for $10,000 on R. C. Kittel & Co., payable to the bank, and delivered it to the latter, and that the bank drew and delivered its cashier's check to the order of R. C. Kittel for $10,000, which he immediately indorsed and delivered to Peabody-Houghteling & Co., have been thoughtfully considered.

But the findings and the evidence alike persuade that these acts were the mere means of accomplishing that transfer intact of the obligations of the guarantors and the Trading Company from Peabody-Houghteling & Co. to the bank, which all the parties, before these drafts were drawn or delivered, had agreed to, and which, when they drew and delivered the draft and check, they intended to make. It is the province and duty of the court to look through the mere machinery used by parties to effect their intention, and, if that intention was innocent, if its fulfillment is lawful and just, while the failure to fulfill it will result in injustice or unintended loss to some of the parties, to effectuate their intention by its judgment, if there is no insuperable legal obstacle to the accomplishment of that result. No such obstacle is found here. There was no error in the conclusion of the court that the bonds were not paid by the transaction of February 1, 1915. Ketchum v. Duncan, 96 U. S. 659, 24 L. Ed. 868; Hirsch v. People's Bank of Plaquemine (La.) 240 Fed. 661, 153 C. C. A. 459.

Counsel assert, however, that, if the bonds were not paid, yet the guarantors were discharged from liability because R. C. Kittel became a holder of the bonds and the guaranty. They quote section 7004 of the Compiled Laws of North Dakota of 1913, which is section 119 of the Uniform Negotiable Instruments Law, which reads:

"A negotiable instrument is discharged * * * (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right"

—and they argue that R. C. Kittel was the principal debtor in the guaranty, that by the transaction of February 1, 1915, he became the holder in his own right of the bonds and the guaranty, and by reason of that fact the defendants, who were coguarantors, were discharged.

But in reality R. C. Kittel never became the holder of the bonds nor of the guaranty. Peabody-Houghteling & Co. held them until it delivered them to the bank, and they never came into the actual possession or passed through the hands of R. C. Kittel. This was in accordance with the intention of the parties to keep the obligations of the Trading Company and of the guarantors alive, and to transfer them intact to the bank. Their acts were appropriate and effectual to accomplish this purpose. The right which R. C. Kittel or R. C. Kittel & Co. had to the bonds and the guaranty before the transaction was to receive the bonds and the guaranty upon the payment by them of $10,000 to the holder thereof and on no other terms. Peabody-Houghteling & Co. was the holder thereof.

At the same time that Kittel delivered his draft on R. C. Kittel & Co. to the bank, and the bank delivered its cashier's check indorsed by Kittel to Peabody-Houghteling & Co., that company delivered the bonds and the guaranty directly to the bank. The result was that the right of Peabody-Houghteling & Co. to the enforcement of the obligation of the bonds and of the guaranty vested in the bank at the instant of their delivery to it, subject only to the right of Kittel or Kittel & Co. to them on condition that they paid the $10,000 on account of them. Neither Kittel nor Kittel & Co. ever became the holder or holders of them in his or their own right, or in any right, because neither ever paid the $10,000, the payment of which was the indispensable condition of the right of either Kittel or Kittel & Co. to become the owner or owners, or holder or holders, of either the bonds or the guaranty. There was therefore no error in the conclusion of the court that the defendants were not released from their guaranty, either by a payment or by a purchase of the bonds or the guaranty by R. C. Kittel or R. C. Kittel & Co.

[2] Defendants claim that they were released by the fact that at the time of the transfer of the bonds to the bank they were by an agreement of the parties to the transaction of February 1, 1915, subordinated as to the security of the mortgaged lands to all the other bonds and coupons secured by the trust deed without their knowledge or consent. The evidence satisfies that the subordination was made without the knowledge of the defendants. The court below held, notwithstanding, that they had previously consented and agreed thereto by the provisions of their guaranty and of the bonds and trust deeds securing them.

By the guaranty on each of the bonds the defendants "unconditionally" guaranteed to the holder thereof its payment, expressly accepted all the provisions of the bond and of the trust deed, authorized the holder of the bond, without notice to either of them, to grant an extension or extensions of time of payment thereof, agreed that no dealing by such holder with the Trading Company, except by way of cash payment, should release them, and that in case of nonpayment of principal or interest when due suit might be brought by the holder of the bond against either of them, with or without the joinder of the Trading Company, at the option of the holder. The ninth article of the trust deed provides that, in the event that the time of payment of

principal or interest of any bond or bonds shall be extended by an agreement between the maker and the legal holder, the lien and security of the trust deed should as to such bond or bonds "be postponed and subordinated and made subject to its lien and security in favor of all the other bonds outstanding and unpaid, and the interest thereon." Thus it appears by these provisions of the guaranty and the trust deed that these defendants expressly agreed that they should not be released from the obligation of their guaranty by any extension of time of payment agreed upon by the Trading Company and the holder of the bonds, although that extension would subordinate the bonds as to the mortgaged security to the other bonds secured thereby, nor by any dealing by the holder with the Trading Company, except by way of cash payment, and that they unconditionally guaranteed the payment of the bonds.

The rule that a contract of guaranty should be strictly construed, and that it should not be extended by interpretation beyond its express terms, is invoked, and the defendants insist that the transaction by which these bonds were subordinated was not an extension of time of payment agreed upon by the Trading Company and the holder of the bonds, and was not a dealing by the holder of the bonds with the Trading Company, and that therefore this subordination falls under the general rule that a material modification of the contract guaranteed without the knowledge or consent of the guarantors releases them. But R. C. Kittel was the vice president and the active executive officer of the Trading Company. These bonds fell due on February 1, 1915—the day of the transaction. As such officer of the Trading Company, he must have been anxious to avoid a suit which might follow a default, unless the bonds were in the hands of a friend of the company. It was to the interest of that company that they should be placed in such hands. Peabody-Houghteling & Co. made it a condition of the transfer that these bonds should be subordinated. The vice president and the active executive of the Trading Company was present and participated in the entire transaction, and knew, as did his company, that this subordination was a condition of the trade, and that it was made. While the name of the corporation was not used in the writings which effected this result, there can be little doubt that it was for the benefit of the corporation, in its interest, and pursuant to the exertions of its active officer that the transaction was had. The court below was of the opinion that, in view of the unconditional guaranty and the express provisions thereof that no agreed extension or dealing between the holder and the Trading Company, except by way of cash payment, should release the guarantors, they must be held to have excluded themselves from a release on account of this subordination of the bonds, and this court is not persuaded that there was any error in that conclusion.

Finally, it is suggested that the court erred in refusing to receive evidence that when the guaranty was made R. C. Kittel agreed with the defendants that he would pay the bonds and keep the holder of them harmless on account of their guaranty. There was, however, no evidence, and there was no offer to prove, that the bank had any notice

of this agreement when it paid the $10,000 for the bonds and they were delivered to it to secure the payment of Kittel's draft. The evidence offered was therefore immaterial, and rightly rejected. The bank was a bona fide purchaser of the bonds for value, before their maturity, without notice of any defense of the guarantors, and the judgment in its favor must be affirmed.

It is so ordered.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. CONSOLIDATED FUEL CO.

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

No. 5351.

APPEAL AND ERROR ⟸1208(2)—PROCEDURE BELOW ON REVERSAL OF ORDER.

A court, which by an interlocutory order made on complainant's motion has required a defendant to deliver property to complainant under a contract, although its order has been reversed, as not within its equity jurisdiction, has power to compel complainant to pay for the property in accordance with the terms of the contracts.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by the St. Louis Southwestern Railway Company of Texas against the Consolidated Fuel Company. From an order of the District Court, complainant appeals. Affirmed.

Daniel Upthegrove, of St. Louis, Mo. (E. B. Perkins and W. B. Hamilton, both of Dallas, Tex., and Clifford L. Jackson, of Muskogee, Okl., on the brief), for appellant.

Ephraim H. Foster, of Muskogee, Okl. (Edward R. Jones, of Muskogee, Okl., on the brief), for appellee.

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

CARLAND, Circuit Judge. This case is here both on appeal and writ of error. So far as our right to review the questions properly presented, it is immaterial which is the proper remedy. Section 1649a, Comp. Stat. 1918 (Act Sept. 6, 1916, c. 448, § 4, 39 Stat. 727). An appeal, however, was the proper remedy, and the writ of error No. 5352 will be dismissed.

So far as the filing of the record is concerned the allowance of a second appeal was a compliance with rule 16 of this court (198 Fed. xxiii, 115 C. C. A. xxiii). The order appealed from was a final order. What is called in the record a bill of exceptions may be treated as a statement of the case, as there is no claim that it does not correctly set forth the proceedings which resulted in the order appealed from. Equity Rule 77 (198 Fed. xli, 115 C. C. A. xli). There was no evidence to be reduced to narrative form under rule 75 (198 Fed. xl, 115 C. C. A. xl). The material facts appearing from the record are as follows:

June 13, 1917, the appellant filed its original bill in the court below for the specific performance of an alleged contract with appellee for the sale and delivery of coal during the period from August 1, 1916, to July 31, 1918, at the price of $1.77½ per ton f. o. b. cars Dewar, Okl., payment to be made on or about the 20th day of each month for coal delivered and accepted during the preceding month. Pursuant to the prayer of the bill the court on July 30, 1917, made an order, the material portion of which is as follows:

"It is therefore by the court ordered, adjudged, and decreed that the defendant, Consolidated Fuel Company, be and it is hereby enjoined and restrained, until the further order of this court, from selling or disposing of its output of coal to such an extent as will render it unable to comply with the terms of the contract in controversy herein, entered into between complainant and defendant, and bearing date of October 12, 1916, and from refusing to deliver coal to complainant, according to the terms of said contract, upon complainant's order therefor."

Appellee appealed to this court, but the injunction was not suspended. April 2, 1918, this court reversed the above order, with instructions to transfer the cause to the law docket, there to be proceeded with under section 274a, Judicial Code (Act March 3, 1915, c. 90, 38 Stat. 956 [Comp. St. § 1251a]), subject to the right of the present appellant to dismiss without prejudice. The mandate of this court was filed in the court below July 27, 1918. April 29, 1918, appellee filed in said court an application for an order requiring the appellant to show cause why it should not comply with the order of the court made when the temporary injunction was issued, and why it should not be punished for a failure to comply with the same. This application was verified, and alleged, among other things:

"That defendant, though at all times denying the existence of the alleged contract and under compulsion of the order of injunction issued by this court, has faithfully complied with said order and has since the issuance thereof, and up to and including the week ending April 6, 1918, filed complainant's orders for coal, and delivered to complainant coal from its mines at Dewar, Okl., in quantities aggregating an average of 20,000 tons per month, and has from time to time rendered statements to complainant for the coal so furnished at the then prevailing market price for said coal, f. o. b. cars Dewar, Okl.

"That complainant has refused to pay for said coal at the market price, but has insisted that, under the orders of the court, it was only required to pay for the coal so furnished at the rate of $1.77½ per ton, which amount defendant, under compulsion of said order of injunction, was forced to accept and did accept, but in each instance notified complainant that upon the dissolution of said injunction it would demand the full market price for said coal.

"That complainant, on or about the 20th day of each and every month, subsequent to the issuance of said preliminary injunction, except as hereinafter stated, issued and delivered to defendant its voucher for the coal furnished it during the preceding month at the rate of $1.77½ per ton, which said vouchers were accepted by defendant under compulsion of said order of injunction, and the amount used to defray in part the expense of producing and loading said coal. * * *

"That prior to said decision (April 2, 1918, reversal) defendant had, in compliance with the orders of this court, been furnishing coal to complainant as therein provided, and during the month of March, 1918, furnished and delivered to defendant on board cars at Dewar, Okl., 20,203.25 tons of coal, which at the price of $1.77½ per ton would amount in the aggregate to $35,860.76.

"That under said order of this court complainant was required to issue to defendant its voucher for said amount on or before the 20th day of April, 1918;

but defendant alleges that said voucher has not been issued, and complainant has wholly failed and refused to comply with the order of this court, whereby it was required to remit on or before the 20th day of April, 1918, $1.77½ per ton for all of the coal furnished and delivered it during the preceding month.

"Defendant is informed and believes, and upon such information and belief states the fact to be, that complainant does not intend to comply with the order of this court or to remit the amount which is required by said order for the coal so furnished it by defendant."

On the filing of such application an order was made directing the appellant to show cause May 13, 1917, why the prayer of appellee should not be granted. Appellant appeared and filed an answer. A hearing was had, and the court took the matter under advisement until July 31, 1918, when it issued a notice for counsel to appear on August 7, 1918. A hearing was had on the date last mentioned, and the court found that appellant had received from appellee coal for the months of March and April, 1918, which at contract price amounted to $40,379.54, and ordered the appellant to pay said amount to appellee within 10 days, whereupon appellant appealed from the order thus made. It is first claimed that the lower court had no jurisdiction to make the order, as this court had decided (250 Fed. 395, 162 C. C. A. 465) that it had no jurisdiction as a court of equity over the cause, and therefore no power existed to do anything more than to transfer the same to the law docket. This contention, however, ignores an important principle of law. The lower court, on request of appellant, had unlawfully compelled the appellee to deliver the appellant coal which at the contract price amounted to the sum heretofore stated, and this action of the court was induced on the statement of appellant that it was willing to pay the contract price. It would be a grave reproach to the administration of justice if, when a court has wrongfully taken the property of one party and given it to another, it should be powerless to make restitution. The law is otherwise. In Northwestern Fuel Co. v. Brock, 139 U. S. 216, 11 Sup. Ct. 523, 35 L. Ed. 151, it was stated:

"But here the jurisdiction exercised by the court below was only to correct by its own order that which, according to the judgment of its appellate court, it had no authority to do in the first instance; and the power is inherent in every court, whilst the subject of controversy is in its custody and the parties are before it, to undo what it had no authority to do originally, and in which it therefore acted erroneously, and to restore, as far as possible, the parties to their former position. Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal. * * * We are of the opinion that the proceeding to enforce the restitution in the cases mentioned is under the control of the court, and that all needed inquiry can be had to guide its judgment in a summary proceeding, upon motion of the parties; the only requisite being that the opposite party shall be heard, so that in directing restitution no further wrong be committed. The restitution is not made to depend at all upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction."

This rule was affirmed in the recent case of Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134, 39 Sup. Ct. 237, 63 L. Ed. 517, and cases cited. The contention made has no merit. On the

day of the last hearing appellant admitted that it had received from appellee coal for the months of March and April, which at the contract price amounted to the aggregate sum of $40,379.54, and asked the court, if it should be refused the right to retain said sum, for permission to pay the same into the registry of the court, to be there held as security for the payment of any damages appellant might recover from appellee in an action at law for its failure to comply with its contract. Under the circumstances this was a remarkable request, and wholly ignored the rights of the appellee. It would have been beyond the power of the court to make any such order, and the request is so far wanting in merit that discussion fails for want of a subject.

It is next contended that the order of the court was an unlawful interference with the possession, use, and control by the United States government of the property of the railway company. It is sufficient to dispose of this contention by observing that, if the United States themselves had filed the original bill and obtained the injunction, they could not be heard to object to the payment of this money. The objection is also somewhat inconsistent with the offer to deposit the money in court. No one representing the United States Railroad Administration appears to object. Moreover, section 10 of the Act of March 21, 1918, c. 25, 40 Stat. 456 (Comp. St. 1918, § 3115¾j), providing for the operation of transportation systems while under federal control, reads in part:

"Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government."

It is next contended that the trial court erred in refusing to allow the appellant to file its supplemental answer. The statement of the case shows what that answer alleged, and no point is made therein other than those that have been discussed. As these have no merit, no error was committed in refusing permission to file the same.

The order below is affirmed, with costs.

MUTUAL LIFE INS. CO. OF NEW YORK v. HURNI PACKING CO.*

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

No. 5365.

1. INSURANCE ⟸291(6)—STATEMENTS IN APPLICATION OMITTING SLIGHT AFFECTIONS NOT FRAUDULENT.

An applicant for life insurance is not chargeable with fraudulent misstatements in his application, because he omitted from his statement of previous illnesses or diseases temporary affections such as colds, from which he recovered, where his answers were made in good faith.

2. INSURANCE ⟸292—FALSE STATEMENTS AS TO MEDICAL TREATMENT INVALIDATING POLICY.

A statement by an applicant for life insurance that he had not consulted nor been treated by a physician during the previous five years, when in

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

*Certiorari denied 250 U. S. —, 40 Sup. Ct. 178, 64 L. Ed. —.

fact he had been treated or prescribed for each year for supposedly temporary ailments, *held* a material misrepresentation, which under the terms of his contract invalidated the policy.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action at law by the Hurni Packing Company against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant brings error. Reversed.

R. L. Read, of Des Moines, Iowa, and G. T. Struble, of Sioux City, Iowa (Read & Read, of Des Moines, Iowa, and Jepson & Struble, of Sioux City, Iowa, on the brief), for plaintiff in error.

Edwin J. Stason, of Sioux City, Iowa, for defendant in error.

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

MUNGER, District Judge. In this case Hurni Packing Company, the beneficiary of a life insurance policy issued in Iowa to Rudolf Hurni by the Mutual Life Insurance Company of New York, brought suit against the insurer for the amount of the policy. The answer alleged that the policy was not in force, because Hurni made fraudulent and false representations in his application for the policy, and thereby obtained the policy and the prerequisite certificate of health from the insurance company's medical examiner.

There was a trial to a jury, but at its close each of the parties asked the court for a directed verdict. The court directed a verdict for the plaintiff for the amount of the policy, and from the judgment thereon the insurer prosecutes this writ of error. The errors assigned relate to the direction of the verdict in favor of the plaintiff. There is very little dispute as to the facts.

To obtain the policy the insured made a written application, and he also signed a written statement, which he made to the medical examiner of the insurer on September 3, 1915. This statement contained the following questions and answers:

"18. What illness, diseases, injuries, or surgical operations have you had since childhood?

"Pneumonia, one attack; fall 1899; duration 3 weeks; severity moderate; results, good; don't remember date of recovery.

"19. State every physician or practitioner who has prescribed for or treated you, or whom you have consulted in the past five years.

"None consulted.

"20. Have you stated, in answer to question 18, all illnesses, diseases, injuries, or surgical operations which you have had since childhood?

"Yes.

"21. Have you stated, in answer to question 19, every physician and practitioner consulted during the past five years and dates of consultation?

"Yes.

"22. Are you in good health?

"Yes."

Hurni died in July, 1917, aged 47 years. He had resided at Sioux City, Iowa, since 1885, and had been engaged in the meat-packing business for many years before his death. He was the principal own-

er of this business and gave it his personal attention, regularly devoting long days of service to its demands. In 1899 Hurni had an attack of pneumonia, but recovered. After that he was subject to what his wife called "colds" two or three times a year, sometimes confining him to his house for a day. Dr. Clingan was Hurni's regular family physician, and he testified that he made one professional visit to see Hurni in 1911 and prescribed for him; that Hurni consulted him at his office on February 21, and also on April 24, 1912, and he then gave him medical treatment; that he visited and prescribed for Hurni at his home on October 4, 1913; and that Hurni consulted him and he prescribed for him twice thereafter during that year; that Hurni came to his office once in 1914, and obtained a prescription; and that in 1915 and prior to September 2 (which was the date of Hurni's statement to the insurance company's examiner) he had professionally visited Hurni on March 9 and also on May 31. Dr. Clingan testified that most of Hurni's illnesses were of an influenza nature, and all resulted from overwork. Hurni spent the greater part of June, July, and August, of 1913, at the health resort of Excelsior Springs, Mo. Dr. Clingan had examined him before he made this trip, had advised that he go there, and had told him that if he did not get away from his work he would collapse. At Excelsior Springs, Hurni consulted Dr. Bogaard, and then consulted Dr. Prather, was examined by him for half an hour, and thereafter, during his stay at Excelsior Springs, Hurni went to Dr. Prather's office for serum treatments, of which he took a number, which his wife estimates as a dozen, although she said it might have been 30. These treatments were given to Hurni by hypodermic injections.

The medical examiner for the insurance company, in addition to taking the statement referred to, also made a physical examination of the applicant, and then recommended him to the insurance company as a fit subject for insurance. In doing so he relied upon the truth of Hurni's statements, as well as upon the results of his observations, in making the physical examination.

The questions involved in this case are somewhat narrowed by reason of the provisions of section 1812 of the Iowa Code of 1897, which reads as follows:

"In any case where the medical examiner, or physician acting as such, of any life insurance company or association doing business in the state shall issue a certificate of health or declare the applicant a fit subject for insurance, or so report to the company or association or its agent under the rules and regulations of such company or association, it shall be thereby estopped from setting up in defense of the action on such policy or certificate that the assured was not in the condition of health required by the policy at the time of the issuance or delivery thereof, unless the same was procured by or through the fraud or deceit of the assured."

As construed by the Supreme Court of Iowa, the estoppel provided by this statute extends, not only to the assured's condition of health at the time the policy is issued, but relates to all matters inquired about, so far as they bear on the health and physical condition of the applicant as affecting the risk. Peterson v. Des Moines Life Association, 115 Iowa, 668, 87 N. W. 397.

Applying this statute, the question presented in this case is whether the evidence produced was such that it was the duty of the court to declare as a matter of law that the medical examiner's report was not obtained by the assured's fraud and deceit.

[1] The particular issues disclosed by the contentions of the parties are whether these statements by the assured were material and knowingly false. These statements related to the illnesses or diseases suffered by applicant, and to consultations, treatments, and prescriptions by physicians in the preceding five years. The evidence does not show the existence of any undisclosed illness or disease suffered by Hurni, unless it can be said that the colds to which he was subject were such illnesses. The existence of such colds may have been material for the medical examiner's purposes, but neither Hurni nor his physician regarded them as more than casual disturbances, and complete recovery followed each attack. His answer to these questions was only the expression of his opinion as to whether such colds amounted to disease or illness, and good faith in stating this opinion was all that was required of the applicant. Moulor v. American Life Ins. Co., 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447; Ley v. Metropolitan Life Ins. Co., 120 Iowa, 203, 94 N. W. 568; Lakka v. Modern Brotherhood of America, 163 Iowa, 159, 143 N. W. 513, 49 L. R. A. (N. S.) 902; Joyce on Ins. § 2003; Connecticut Mutual Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708; Fidelity Mutual Life Ass'n v. Miller, 92 Fed. 63, 34 C. C. A. 211.

[2] The evidence showed that Hurni's reiterated statement that he had consulted no physician within five years was untrue, and that it was believed and relied upon by the medical examiner, and was a material inducement to the making of a favorable report and the issuance of the policy. It is not contended that Hurni did not know the statement to be false, nor could it be possible that he should have forgotten the repeated visits and treatments of his family physician, both at his home, when he was confined to his bed, and when he had called at the physician's office. Nor could he have forgotten that in the three months' absence at a health resort, following his physician's advice to go there, as he was in danger of collapse, that he had consulted with two physicians, and had taken a dozen or more hypodermic injections of serum treatment. The contention that is made is that these representations were not of a material fact, and were therefore not fraudulent, and the trial court evidently adopted this view in directing a verdict for the plaintiff.

In Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70, Judge Taft, for the Court of Appeals, used this language:

"Materiality of a fact, in insurance law, is subjective. It concerns rather the impression which the fact claimed to be material would reasonably and naturally convey to the insurer's mind before the event, and at the time the insurance is effected, than the subsequent actual causal connection between the fact, or the probable cause it evidences, and the event. Thus, it is by no means conclusive upon the question of the materiality of a fact that it was actually one link in a chain of causes leading to the event. Watson v. Main-

waring, 4 Taunt. 763; Jones v. Insurance Co., 3 C. B. (N. S.) 65; Rose v. Insurance Co., 2 Ir. Jur. 206; Insurance Co. v. Schultz, 73 Ill. 586. And, on the other hand, it does not disprove that a fact may have been material to the risk because it had no actual subsequent relation to the manner in which the event insured against did occur. A fair test of the materiality of a fact is found, therefore, in the answer to the question whether reasonably careful and intelligent men would have regarded the fact, communicated at the time of effecting the insurance, as substantially increasing the chances of the loss insured against."

A chief part of any insurance company's business is a discrimination in selecting risks lest the natural and average losses may be exceeded. The purpose of the inquiries made as to prior consultations or treatments by physicians is to furnish to a life insurance company the information, either that the applicant has had continuous prior good health or the names of the practitioners consulted, so that the company may decide what further inquiries should be made in view of such disclosures. That such consultations were for what seemed to the applicant or his physician but trivial ailments is beside the question. It is the materiality to the company's investigation and decision as to acceptance of the risk that is involved. Inquiries as to prior attacks necessitating the attendance of physicians may disclose information not to be found by the medical examiner's own efforts. The history of the patient may be quite essential to supplement a physical examination.

In this case Hurni as a part of his application stipulated that he made the truth of his statements an inducement to the company to issue the policy. The testimony is undisputed that the medical examiner relied upon these statements, and would not have reported him favorably as a risk, if he had known of his consultations with physicians. The taking of serum injections, as a physician's treatments, presumably to overcome an infection, during a prolonged sojourn at a health resort, was a significant fact that an insurance company might not wish to ignore. It is a material inquiry, as to which reasonable minds cannot differ, and therefore for the court to decide as a matter of law, when an applicant for life insurance falsely answers whether or not he has had other applications for insurance which were not granted, or were canceled. Ætna Life Ins. Co. v. Moore, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356; Prudential Ins. Co. v. Moore, 231 U. S. 560, 34 Sup. Ct. 191, 58 L. Ed. 367; American Temperance Life Ins. Ass'n v. Solomon, 233 Fed. 213, 147 C. C. A. 219; Maryland Casualty Co. v. Eddy, 239 Fed. 477, 152 C. C. A. 355; Equitable Life Assur. Society v. Keiper, 165 Fed. 595, 91 C. C. A. 433; Home Life Ins. Co. v. Myers, 112 Fed. 846, 50 C. C. A. 544.

It is likewise a material inquiry whether such applicant has consulted or been prescribed for by a physician within a limited period, such as five years, before the application, when such consultations have occurred once or more annually for several years, or when such consultations have been followed by prolonged treatment by serum injections. Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613, 622, 36 Sup. Ct. 676, 60 L. Ed. 1202; Metropolitan Life Ins. Co. v. McTague, 49 N. J. Law, 587, 9 Atl. 766, 60 Am. Rep. 661.

The answer having been untrue, and the matter material, and the maker of the statement necessarily knowing that it was untrue when he made it, the intention to deceive the insurer is necessarily implied as the natural consequence of such act. Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 3 Sup. Ct. 507, 28 L. Ed. 706; Northwestern Mut. Life Ins. Co. v. Montgomery, 116 Ga. 799, 43 S. E. 79; Boddy v. Henry, 126 Iowa, 31, 101 N. W. 447; Kerr on Fraud, p. 55.

On the evidence as presented, the court should have directed a verdict for the defendant. The judgment of the lower court is therefore reversed, and a new trial ordered.

ELMER v. UNITED STATES.

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

No. 5386.

1. ARMY AND NAVY ⟸40—RESPONSIBILITY FOR SEDITIOUS PUBLICATIONS.
In prosecution for willfully obstructing the recruiting and enlistment service of the United States by writing and causing to be printed and published a certain article, evidence *held* insufficient to warrant jury finding that article was intentionally published or caused to be published by defendant, who was not the owner, editor, or publisher of the paper.

2. CRIMINAL LAW ⟸730(14)—REMARKS BY COUNSEL PREJUDICIAL WHERE JURY NOT INSTRUCTED TO DISREGARD.
Remarks made by counsel for the government in a prosecution for sedition, in his argument to the jury, that he would kill a man who made similar statements, etc., was prejudicial, where the jury was not instructed to disregard them, although the court stated that the remarks were improper.

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

Criminal prosecution by the United States against William P. Elmer. Judgment of conviction, and defendant brings error. Reversed.

Chester H. Krum, of St. Louis, Mo., for plaintiff in error.

Vance J. Higgs, Sp. Asst. Atty. Gen., for the United States.

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

CARLAND, Circuit Judge. [1] The plaintiff in error, hereafter called defendant, was convicted and sentenced upon the second count of an indictment which charged that defendant on February 21, 1918, in the county of Dent, state of Missouri, had willfully obstructed the recruiting and enlistment service of the United States, by then and there writing and causing to be printed and published in a newspaper called the Republican, printed and published at Salem, in said county and state, the editorial and article set forth in said count. At the close of all the evidence counsel for defendant moved for a directed verdict in his favor. In response to this motion the court said:

"I do not think I can agree with you, Judge Krum. The evidence is sufficient, I think, on the question of authorship, to require a jury's interposition rather than the court's declaration as to who should be believed."

The motion was thereafter formally denied, and this ruling is assigned as error. In view of the response of the court, it is pertinent to remark that authorship alone would not constitute the offense charged against the defendant. The important question is: Did the defendant intentionally cause the article to be printed and published? The evidence on the part of the United States upon this point was as follows:

After the publication of the article, a warrant was issued for John W. Roberts, the owner of the newspaper, whereupon the defendant visited the office of the United States Attorney for the Eastern district of Missouri, on two or three different occasions, in the interest of Roberts. Mr. B. L. White, Assistant United States Attorney, testified that on one or more of these occasions the defendant told him—

"that he had written and published the article himself, and that he desired to assume all responsibility for it, and to relieve Mr. Roberts from all possible blame for it."

The defendant and two other witnesses, Babler, who was present on one occasion, and Farris, who was present on another, when it was claimed the above statement was made, denied the same. M. F. Roberts, a witness for the United States testified as follows:

"Q. State your name. A. M. F. Roberts.
"Q. Where do you live? A. At Salem, Mo.
"Q. Mr. Roberts, do you know this defendant, William P. Elmer? A. Yes, sir.
"Q. Do you remember, at any time after the 28th day of February of this year, hearing any statements made by this defendant in the post office building at Salem, with respect to the writing of the editorials in connection with some charge made against Mr. Roberts? A. Yes, sir.
"Q. Will you state to the jury what it was that you heard this defendant say on that occasion? A. I heard Mr. Elmer say in the post office building that he had written those articles, and was responsible for it himself, and not John Roberts; it was a well-known fact that John Roberts had been in Oklahoma since early in December."

As the testimony of Roberts related only to authorship and responsibility, it has little, if any, value upon the question of publication, as authorship would not constitute the crime charged, and responsibility is a legal conclusion which might be incorrect. This was all the evidence offered by the United States upon the question of publication. The undisputed evidence as to just how the article came to be published came from the defense, and is as follows:

The defendant is a lawyer, residing at Salem, Mo., engaged in the practice of his profession in that vicinity. The Republican newspaper was a weekly paper, issued on Thursday of each week. Seven or eight years prior to the trial of defendant he had been the owner thereof. At the time of the publication of the article in question it was owned by one John W. Robers, who was its editor, but who was absent from Salem. Curtis & Grosse were its publishers, as lessees from Roberts. The defendant was writing editorials for the paper in February, 1918,

as an accommodation to Roberts. The original letter or paper, of which the article published was a part, was received by the newspaper through the mail. The defendant corrected and remodeled the same, and wrote the words "Pray or Bray" as a heading. The paper was then typed by Miss Pugh, a stenographer in the employ of defendant, and after it was typed it was hung on a hook in the law office of defendant, either by the stenographer or the defendant. The law office of defendant and the newspaper office are different offices, and as we understand the testimony are not located in the same building.

Defendant had no personal knowledge, as to how the article got out of his office. He never directed any one to take it from the hook and deliver it to the newspaper office, never directed anybody to publish it, and did not know that it had been published until some time after its publication. Defendant left Salem on February 10th, and went to Kansas City to attend a banquet given to celebrate Lincoln's birthday. When coming back from Kansas City, he met Mr. Stevens at Cuba, and they both went on to St. Louis, and remained there the remainder of the week. The article was taken from defendant's office in some way during his absence. When Mr. Roberts was running the paper himself, defendant wrote editorials for him. He would write them, and give them to Mr. Roberts, and if he (Roberts) wanted to publish them it was all right, and if he did not he would throw them into the waste basket. Defendant had two hooks in his own office; one was called the live hook, and the other the dead hook. Roberts and defendant had an understanding that nothing should be taken from the dead hook. The article in question was placed upon the dead hook.

Miss Pugh, the stenographer heretofore referred to, testified:

> That the article in question was laid on her desk by the defendant himself, and that she typed it and hung it on the copy hook. There were two hooks, following the fashion of a newspaper office—one called the live hook, and one the dead hook. On the live hook was the matter to be published in the paper, and on the dead hook was kept matter that was for reference, or that might be used later on; but the dead hook, at the time the defendant was away from the office, was the only hook that was on the inside of the office. Outside in the hall was another hook, that was called the live hook. The printers could come and get matter from the live hook when the defendant or witness were out of the office. "If the doors were locked, they could come upstairs into the hall and take what we called live matter from the live hook. The article in question as typewritten by me was placed on the dead hook, which was on the inside of the office in the inner hall. At the time the defendant was away, I handed the copy of the article in question out of the office myself."

Witness had never received any direction from the defendant to hand the article to any one for publication. The witness further testified:

> That, when the defendant left for the Young Republican Club, the usual meeting in Kansas City, he handed or caused to be handed to the paper all the editorial copy he thought they would need for that issue of the paper, and he thought he would be back in time to prepare the other for them before the next issue; but he did not come home as he expected from Kansas City and stayed longer than had been planned. The boys at the office—"newspaper office"—after the paper was off the press on Thursday, February 14, "came to me to know if there was any copy. They like to begin Friday and Saturday.

days they are not busy, on editorial matter, and they keep the days before publication for local and more timely matter. So, without thnking that I had not asked the defendant if he had left any extra copy for the boys, I went to the hook, and, knowing that I had typed this article, I thought that I would just turn over the matter that I had typed, and I took off perhaps a half dozen of these typed sheets from that dead hook and handed them to the boys. I thought that, if there was anything that ought not to be published, the defendant would be back in time to look it over; but he did not come back until too late to do anything. I made no statement to him that I turned the copy over."

On March 14, 1918, the defendant hearing that a warrant had been issued for Roberts, wrote the latter that he (Elmer) had written the article complained of, and that he was going down to St. Louis and tell the district attorney that Roberts had no knowledge or information concerning its publication, and take the whole responsibility of it upon nimself. There is no evidence in the record which contradicts the testimony of the defendant and the stenographer in any material way as to the manner in which the article came to be published, except the evidence of Mr. White, to the effect that the defendant admitted that he had published the article. This admission, taken in connection with the defendant's interest in relieving Roberts of any responsibility, and the testimony, uncontradicted, as to how the article came to be published, we do not think is sufficient to sustain the charge that the defendant intentionally caused the article to be published. As the defendant was not the editor, owner, or publisher of the paper, we cannot say there was substantial evidence to authorize the jury to find that he intentionally caused the article to be published.

[2] During the closing argument to the jury on behalf of the United States, the Assistant Attorney General used the following language:

"I want to say this to you: If I had a boy, and a man should come to him and say: 'My boy, you are shackled; you are manacled; you are being sent to certain slaughter. You are not a free American at all. You are the slave of a system that is vicious and wrong.' If a man said that to my boy in my presence, if I could kill that man with my naked hands, I would do it."

Counsel for the defendant objected to the use of such language, and in answer to the objection the court said to the Assistant Attorney General:

"I think that is an improper statement. The question involved here is not what any individual would do, but whether there was an obstruction of the recruiting and enlistment service—"

We do not think that the remarks of the trial court were sufficient to remove the effect upon the jury of the language used. The jury should have been instructed to disregard the language complained of and to give it no effect in arriving at their verdict. The trial was had on November 6 and 7, 1918. In Hall v. United States, 256 Fed. 748, — C. C. A. —, the Court of Appeals of the Fourth Circuit, in reversing a judgment for improper remarks of counsel, said:

"In a time like this, when patriotism is at a high pitch, and many people have to a certain extent lost their mental poise, courts and jurors should be extremely cautious, when required to pass upon the rights of an individual charged with an offense affecting the welfare of the government."

This court, in the case of August v. United States, 257 Fed. 388, —— C. C. A. ——, reversed a judgment for improper remarks of counsel for the United States. The defendant in the case at bar was not being tried for an offense punishable with death, and the remarks complained of, coming from a high official of the United States, would naturally inflame the passions and prejudices of the jury to such an extent as to prevent a fair trial.

Upon the whole record we are of the opinion that the judgment below should be reversed; and it is so ordered.

THE BAKER BROS.

(Circuit Court of Appeals, Second Circuit. June 10, 1919.)

No. 184.

1. COLLISION ⟸70, 71(2)—STATE STATUTE AS TO VESSEL LYING AT END OF PIER NOT BINDING ON COURTS OF ADMIRALTY.

While Greater New York Charter, § 879, making it unlawful for a vessel to lie at the end of a pier, except at her own risk of injury from vessels entering or leaving adjacent slips, is not binding on federal courts of admiralty, it affords ground for imputing fault to a vessel violating it, but does not prevent her recovery for a collision caused by the failure of a vessel entering or leaving an adjacent slip to exercise reasonable care.

2. COLLISION ⟸71(2)—TUG LIABLE FOR COLLISION WITH VESSEL AT END OF PIER.

A tug backing from a slip in East River in daytime, with a strong ebb tide, *held* in fault and liable in half damages for collision with another tug, lying with others at the end of the pier below, against which she was swung by the tide, where she knew the risk, but made no effort to have the other vessels moved.

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

Suit in admiralty for collision by the Southern Transportation Company against the steam tug Baker Bros.; the Baker Towing Company, claimant. Decree for respondent, and libelant appeals. Reversed.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and George W. P. Whip, both of New York City, of counsel), for appellant.

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

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. The libelant appeals from a decree dismissing the libel. The cause of action arose out of a collision, on September 29, 1916, between the tug Augustine, owned by the libelant, and the steam tug Baker Bros. At the time of the collision the tug Augustine was lying moored outside of one or two other boats at the end of Pier 5, East River, Manhattan, city of New York. Outside the Augustine was the tug John Hughes. In the slip between Pier 5 and Pier 6 a number of canal boats were lying moored. About 2:15 p.

m., and when the tide was strong ebb and the weather clear, the tug Baker Bros., which was lying in the slip between Piers 5 and 6, backed out, and in passing the end of Pier 5 collided with the stern of the Augustine, whereby the latter tug is alleged to have been damaged in the sum of $1,000.

The Baker Towing Company, owners of the tug Baker Bros., filed an answer, in which they prayed that the libel be dismissed. Among the reasons assigned for asking that the libel be dismissed, it was stated that in lying moored at the end of Pier 5 the Augustine violated the statutes of the state of New York. The case was heard in open court, and after testimony had been taken the court below dismissed the libel on that ground, and held that vessels so moored do so at their own risk, and without claim for damages caused by vessels entering or leaving an adjacent pier. The court concluded that the Augustine was at least a contributing, if not the sole, cause of the damage, and declared that the only question in the case is whether the Baker is liable for any part of the damage caused by the collision.

In reaching the conclusion that the Augustine was alone liable, the court relied on The Saratoga (D. C.) 180 Fed. 620, and The Stadacona, 242 Fed. 624, 155 C. C. A. 314. In the latter case the principle was applied that, where danger has been created by the fault of one vessel, the other will not also be condemned, unless her fault appears clearly and satisfactorily. Had the Augustine not been a stationary vessel, and the Baker not been subject to the rule that it is the duty of a moving vessel not to injure one which is stationary in a crowded slip, there would have been no difficulty in the case. But the court did not think that the contributing fault of the Baker was sufficiently established by the evidence to overcome the principle that in such cases the contributing fault must be shown clearly.

[1] The charter of the city of New York (Laws 1901, c. 466) in section 879 declares that—

> "It shall not be lawful for any vessel * * * or tug to obstruct the waters of the harbor by lying at the exterior end of wharves in the waters of the North or East River, except at their own risk of injury from vessels entering or leaving any adjacent dock or pier."

The section goes on to declare that a vessel, boat, or tug violating the provision shall not be entitled to claim damages for any injury caused by any vessel entering or leaving an adjacent pier; and while this statute is not binding upon the federal courts sitting in admiralty, this court has held that it affords grounds for imputing fault to a vessel violating it. The Allemania, 231 Fed. 942, 146 C. C. A. 138; The Chauncey M. Depew, 139 Fed. 236, 71 C. C. A. 362. But this court in an admiralty case does not enforce the provision that a vessel or tug lying at the end of wharves shall not be entitled to demand damages for any injury caused by any vessel entering or leaving any adjacent pier. Fred E. Jones v. Steam Tug Amanda Moore, 257 Fed. 405, —— C. C. A. ——, decided February 14, 1919.

[2] The fact that the Augustine was moored at an improper place, and was consequently primarily at fault, did not release the tug Baker

Bros. from the obligation to exercise reasonable care in leaving the adjacent slip. The Augustine was at rest, in full view, in clear weather, and in broad daylight. The tug Baker Bros., being in the slip between Piers 5 and 6, which it had entered that day, backed out of the slip at full speed; the slip being so filled with canal boats that the tug could not turn around. The tide at the time was ebb and strong. The following excerpt from the testimony of the master of Baker Bros. sheds light on the situation:

"Q. How is the strength of the tide at this particular place? A. It is very strong; the tide comes in, flood tide, from the bay; the ebb tide as it comes in sets from the Brooklyn shore over towards the New York piers.

"Q. That would have a tendency of swinging you down towards Pier 5? A. Yes; because, on account of Governor's Island, the tide runs strong between Governor's Island and the New York shore. * * *

"Q. In that position, just tell us what happened. A. Why, as I backed out, I didn't have room enough to work up the river; always I back out full speed, and as soon as the ebb tide got my stern it started setting me down the river, and of course, before I could clear the Augustine's bow about 30 feet from our stern, our guard fetched up against his stern iron, the guard on the port side.

"Q. * * * I mean, under what bells do you move? A. We have to come out full speed, because, if not, coming out slowly, the tide would set us down against anything on the end or against the corner of the pier. * * *

"Q. And you back out faster? A. Yes, sir.

"Q. And the tide pulled you down against the Augustine? A. Yes, sir.

"Q. Before backing out, you did not request any one to move those boats? A. No, sir.

"Q. And you backed down—you knew that strong tide was there? A. Yes, sir.

"Q. And you knew that the tendency of the tide was to set you down toward Pier 5? A. Yes, sir. * * *

"Q. Is it the custom in the slip there to have boats which are placed that way removed, or do you just take a chance in getting up? A. As a rule, it is a good deal of taking a chance, because there are so many boats at a time like that, and you ask them to move, and they say, 'The captain's in the street,' or 'The engineer isn't here,' or 'You can get out without moving.' * * *

"Q. You were in a tight place, and knew it? A. Yes, sir.

"Q. You knew you had a close shave to get out, didn't you? A. Yes, sir; but it is customary that you work around those piers in very close quarters."

The testimony shows that the master of the Baker Bros. knew in beginning his maneuver that he had only a chance of success; that he took that chance and failed. He knew the strength of the tide and the position of the Augustine, which projected 15 or 18 feet beyond the pier, and that the tide would pull him towards the Augustine with great force. If he knew that he had only a chance, and it was necessary that he should go out, it was not prudent for him to attempt to go out without making an effort to get the Augustine moved. The fact that he had never succeeded in having a boat shifted when he had requested it did not in law excuse him from making the attempt in this case. In Jones v. Amanda Moore, supra, we held that the tug No. 18 was at fault for close shaving, and not attempting to get the Amanda Moore to remove herself and scow from their position at the end of the pier. We think that case is decisive of this.

In The Clarita and The Clara, 23 Wall. 1, 14 (23 L. Ed. 146), the court said:

"Undoubtedly, if a vessel anchors in an improper place, she must take the consequences of her own improper act; but whether she be in a proper place or not, and whether properly or improperly anchored, the other vessel must avoid her, if it be reasonably practicable and consistent with her own safety."

In the instant case it was the duty of the Baker Bros. to avoid the Augustine, if it was "reasonably practicable and consistent with her own safety." This duty, under all the circumstances, she did not perform.

The decree is reversed, and the cause remanded, with directions to divide the damages and the costs below equally between the Augustine and the Baker Bros. Costs in this court are awarded to the appellant.

CLELAND v. IOWA LOAN & TRUST CO.

In re CLELAND.

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

No. 5359.

BANKRUPTCY ⊂=407(5)—FALSE STATEMENT TO BANK GROUND FOR REFUSING DISCHARGE.

Where a financial statement made by bankrupt to his bank at the bank's request, and relied upon in extending further credit, omitted an indebtedness of several thousand dollars to relatives, and understated the amount due on open accounts more than 50 per cent., it must be presumed to have been intended to deceive the bank, and warrants refusal of a discharge.

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

In the matter of Charles B. Cleland, bankrupt. Bankrupt's petition for discharge was resisted by the Iowa Loan & Trust Company. From an order refusing discharge, the bankrupt appeals. Affirmed.

S. G. Van Auken, of Des Moines, Iowa, for appellant.

George F. Henry, of Des Moines, Iowa (Ward C. Henry and Phineas M. Henry, both of Des Moines, Iowa, on the brief), for appellee.

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

CARLAND, Circuit Judge. This is an appeal from a judgment refusing appellant a discharge in bankruptcy. The questions for decision are purely those of fact. The denial of a discharge was based upon the fact that the appellant had obtained money from appellee on credit upon a materially false statement in writing, made for the purpose of obtaining such credit. Section 14b(3), Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. § 9598]). The clear preponderance of the evidence shows, in our opinion, the following facts:

On May 22, 1916, appellant presented to appellee at its request a statement in writing of his financial condition for the purpose of pro-

curing credit, which was false in regard to two items under the head of "Liabilities." The two items were "Bills payable" and "Open accounts." These items were false, in that under the former a note due to appellant's brother for $2,500 and a note due his wife for $1,890 were not included, and the amount of the open accounts was said to be $4,200, when it should have been $9,000. On the day the statement was delivered to appellee the appellant obtained a loan from it for $1,000, giving his promissory note therefor. Appellee believed the statement was true and relied upon it in making said loan. The appellant before the special master gave testimony tending to show that the financial statement was not delivered to appellee until after appellant had been given credit for $1,000 on his passbook and he had signed and delivered his promissory note. This seems to be the only substantial conflict in the evidence.

We are of the opinion that the conclusion reached by the District Judge, to the effect that the financial statement was delivered to appellee prior to the making of the loan, is correct. Opposed to the testimony of the bankrupt upon this point is the testimony of Mr. Aldridge, assistant secretary, Mr. McKee, vice president, and Mr. Hippe, president, of appellee. The testimony of appellant, given at the first meeting of creditors, when presumably the importance as to the time the financial statement was delivered did not appear to him, shows that at that time he was unable to say whether the statement was given before or after the loan was made. Appellant already owed appellee, at the time the statement was given, $7,500, which was stated correctly in the financial statement. The cash balance on deposit was also given in the financial statement as $50, when at the time the loan was made appellant was credited with $1,000 cash and about $800 of a deposit made that day. This fact strongly supports the contention that the statement was given before the loan was made.

The special master was of the opinion that a discharge should be granted, for the reason that he was unable to believe that the appellant intended by the false statement made to deceive the appellee, and appellant testifies himself that the omissions were inadvertent, and that he had no intention to deceive. But the statement was made for the appellee to act upon, and the appellant must be held to have intended the natural and ordinary results which would flow from his false statements. There is nothing in the evidence which shows that appellant was by reason of physical or mental disability unable to fully comprehend the purpose of a financial statement and to prepare the same intelligently. There was also evidence tending to show that appellant was overdrawing his account at about the time the financial statement was given, and that said statement had been requested by Mr. Aldridge and a blank form left with appellant to be filled out. There is also evidence that appellee would not have made the loan of $1,000 if the statement had shown the omitted items.

The fact that appellant gave appellee a general lien upon his deposit, and also assigned to it a certain option on real estate, about four days prior to the day of the financial statement, does not alter the facts with reference to the financial statement. The appellee had a right to rely

upon them all. The granting of a general lien upon appellant's deposits did not give appellee anything that it did not already have under well-known principles of law. The assignment of the option contract, which called for the payment of $50,000 before anything could be realized upon it, could not, in the very nature of things, have been very much relied upon. The omission from the statement of the amounts owing to relatives bears strongly upon the question of fraudulent intent. In re Brener (D. C.) 166 Fed. 930; In re Miller (D. C.) 192 Fed. 730; In re Koelle (D. C.) 171 Fed. 257; In re Augspurger (D. C.) 181 Fed. 174; In re Simon (D. C.) 201 Fed. 1004, 1009.

Without discussing the case farther, we are satisfied that the District Judge reached the right conclusion, and the judgment is affirmed.

THE J. J. HILL.*

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919. Rehearing Denied September 24, 1919.)

No. 2648.

COLLISION ⟸85—ALLEGATION OF FAULT ON STEAMERS MEETING IN FOG NOT SUSTAINED.

Allegations by libelant of fault causing a collision between meeting steamers on Lake Superior at night in a fog *held* not sustained by the evidence.

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

Suit in admiralty for collision by J. R. Smith and others against the steamer J. J. Hill. Decree for respondent, and libelants appeal. Affirmed.

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

G. W. Cottrell, of Cleveland, Ohio, for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. On the night of June 26, 1916, in Whitefish Bay, Lake Superior, in a heavy fog, appellant's wooden steamer Panther, down-bound via the Soo, collided with appellee's up-bound steel steamer J. J. Hill, without cargo, causing the sinking and total loss of the Panther and her cargo of wheat. The joint libel by the ship and cargo owners charges the Hill with sole fault for the collision, and seeks recovery for the damage. The answer denies fault on the part of the Hill, placing the entire blame on the Panther. The Hill sustained no damage and filed no cross-libel. The District Court dismissed the libel.

Assuming that the collision was the result of accident, without admixture of deliberate intent to cause it, it is plain there was a serious mix-up in the exchange, understanding, or observance of signals between the boats, involving at best egregious blundering on the part of one or both.

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

*Certiorari denied 250 U. S. —, 40 Sup. Ct. 119, 64 L. Ed. —.

It was testified for the Panther that the Hill gave her a one-blast passing signal, to which the Panther responded with a one-blast signal, thus establishing, under rule 1 of the Pilot Rules of the Great Lakes, an understanding between the boats to direct their courses starboard, so they would pass port to port. It was testified for the Hill that the two-blast passing signal was exchanged between the boats, whereby under the rule they agreed to direct their courses to port, passing starboard to starboard. After interchange of passing signals, whatever they were, it seems both boats starboarded, resulting in their then moving on converging lines, coming into view of each other too late to avoid the collision which followed.

The burden is upon the libelant to show by preponderance of the evidence that fault of the Hill contributed to causing the collision. The Clara, 102 U. S. 200, 26 L. Ed. 145; The Minnie, 225 Fed. 36, 140 C. C. A. 362. The masters, who were directing the movements of their respective boats, testified positively, the one to the exchange of one-blast passing signals, and the other to the exchange of two-blast passing signals. Apart from other members of the crews who corroborated their respective masters, there is practically nothing in the record in further support of either contention, and one cannot well read the record and weigh the evidence adduced on the respective sides without reaching the conclusion that the libelants have failed to sustain their burden of proving fault on the part of the Hill.

It was testified that the Hill, about the time it heard the Panther's fog signal, checked its normal speed of about 13 miles an hour to approximately half, and then to dead slow, 2 or 3 miles an hour, and that very shortly before the collision it had scarcely steerageway, making it necessary to give a kick ahead, the effect of which had hardly been felt before the collision occurred. It is contended for the Panther that the speed of the Hill must have been much greater to account for the stem of the Hill cutting several feet into the port side of the Panther just forward of her boilers. This is explained on behalf of the Hill by the contention that, as the Hill came within view of the Panther, the latter swung sharply to starboard, toward and against the stem of the Hill, which, having reversed her engines, was then almost if not quite at a standstill.

But the movement of the Panther is reconcilable neither with the Pilot Rules nor with ordinary prudence. Rule 15 provides:

"Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rain storms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other."

As to her speed, her master testified that she was moving practically at her full speed of about 8 miles an hour from the time she started until the collision occurred. He contended that this was a moderate rate, albeit approximating her full speed; but to this we cannot accede, particularly as in those waters there converged and passed a traffic larger than anywhere on the Great Lakes. But in view of her master's testimony that he had heard the Hill's signals apparently

not more than four points from right ahead, it would seem that failure to reduce speed at all, to say nothing of bare steerageway as provided in the rule, involves the Panther in a palpable violation of rule 15, contributing directly to the collision.

The decision of the cause depends wholly on matters of fact, and where, as here, the controlling facts must be determined upon irreconcilably contradictory testimony of witnesses, the court before whom they testified possessed an added advantage in passing upon their credibility, and the weight to be accorded their testimony, and we would be even less warranted in disturbing the conclusion of facts which that court reached.

The decree of the District Court is affirmed.

FORD v. UNITED STATES.

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

No. 5331.

1. COURTS ⊜356—IN ACTION TRIED TO COURT, WHERE FACTS ARE NOT STIPULATED SUFFICIENCY OF EVIDENCE NOT REVIEWABLE.
Where an action at law is tried by the court, but without a written waiver of a jury, as provided by Rev. St. § 649 (Comp. St. § 1587), and the facts are not stipulated, the sufficiency of the evidence to sustain the judgment cannot be considered on a writ of error (Rev. St. § 700 [Comp. St. § 1668]).

2. INDIANS ⊜35—SEIZURE OF VEHICLES USED FOR INTRODUCTION OF INTOXICATING LIQUORS INTO INDIAN COUNTRY AUTHORIZED.
Act March 2, 1917, § 1 (Comp. St. 1918, § 4141a), providing for the forfeiture of vehicles used in introducing liquor into Indian country, or where prohibited by federal statute, applies to that part of Oklahoma which was formerly Indian Territory, as to which Act March 1, 1895, § 8 (Comp. St. § 4136b), prohibiting the introduction of liquor into such territory, is still in force.

3. COURTS ⊜503—SEIZURE OF VEHICLE IN FEDERAL COURT TRANSPORTING LIQUOR INTO INDIAN TERRITORY NOR AFFECTED BY REPLEVIN IN STATE COURT.
The seizure of an automobile under Act March 2, 1917, § 1 (Comp. St. 1918, § 4141a), as having been used in the unlawful introduction of liquor vests the federal court with exclusive jurisdiction over the machine for the purpose of forfeiture proceedings against it, which is not affected by its subsequent seizure under a writ of replevin from a state court.

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

Action by the United States against One Maxwell Automobile; Tom Ford, claimant. Judgment for the United States, and claimant brings error. Affirmed.

See, also, 259 Fed. 552, — C. C. A. —.

Guy H. Sigler, of Ardmore, Okl., for plaintiff in error.

Cliff V. Peery, Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

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

CARLAND, Circuit Judge. [1] Writ of error to reverse a judgment forfeiting one Maxwell automobile for being used in introducing intoxicating liquor from without the state of Oklahoma, into the eastern part of said state, formerly Indian Territory, in violation of section 8, Act of Congress of March 1, 1895 (28 Stat. 697, c. 145 [Comp. St. § 4136b]). The case was tried by the court, which found the facts and entered a judgment of forfeiture.

There is no claim that the facts found do not support the judgment, but it is assigned as error that the evidence does not support the same. If a jury had been waived in writing, this assignment could not be considered, as the question was in no wise raised at the trial. Section 700 R. S. (Comp. St. § 1668); Mason v. United States, 219 Fed. 547, 135 C. C. A. 315, and cases cited. It cannot now be considered, for the reason that it does not appear that a jury was waived in writing. Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; Ladd & Tilton Bank v. Louis A. Hicks Co., 218 Fed. 310, 134 C. C. A. 106. The judgment contains the following recital:

"And now both parties announce ready for trial and waive jury and agree to try the case before the court."

[2] It is further assigned as error that the facts pleaded in the libel do not support the judgment. This assignment is based upon the contention that the libel does not show that the intoxicating liquor was being introduced into the Indian country. Section 2140, R. S. (Comp. St. § 4141). Since the Indian Appropriation Bill, approved March 2, 1917 (39 Stat. 969, 970, c. 146 [Comp. St. 1918, § 4141a]), this is not necessary. A proviso in that act reads as follows:

"Provided, that automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty or federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section 2140 of the Revised Statutes of the United States."

This law would apply to the facts pleaded in this case. United States v. One Cadillac Automobile (D. C.) 255 Fed. 173; United States v. One Buick Automobile (D. C.) 244 Fed. 961; United States v. One Buick Automobile (D. C.) 255 Fed. 793. The history of this legislation, when being passed by Congress, shows that it was intended for such a situation as exists in Oklahoma. 54 Congressional Rec. 2052, 2931, 2970, 3808, 3811.

[3] The United States District Court did not lose jurisdiction over the automobile by the wrongful seizure of the same in a replevin action commenced in the county court of Carter county, Okl. The automobile was seized by the United States deputy marshal on May 18, 1917, who at once notified the proper officer of the United States, so that proceedings for the forfeiture of the automobile could be instituted. The libel in the present case was filed June 15, 1917. The seizure was necessary before the libel could be filed. The Ann, 13 U. S. (9 Cranch) 289, 291, 3 L. Ed. 734; The Silver Spring, Fed. Cas. No. 12,858; Dobbins Distillery v. United States, 96 U. S. 395, 24 L. Ed. 637. The federal court acquired jurisdiction by this seizure, and such jurisdic-

tion was exclusive. Section 256, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1160 [Comp. St. § 1233]). The seizure by process from the state court was void. Slocum v. Mayberry, 15 U. S. (2 Wheat.) 1, 4 L. Ed. 169; Gelston v. Hoyt, 16 U. S. (3 Wheat.) 246, 4 L. Ed. 381. The reversal of the conviction of Ford does not affect this case. P. Sanford Ross, Inc., Claimant, v. U. S. (June 2, 1919) 250 U. S. 269, 39 Sup. Ct. 452, 63 L. Ed. —.

Judgment of the court below is affirmed.

HARSHFIELD v. UNITED STATES.

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

No. 5302.

WAR ⊂⊃4—EVIDENCE INSUFFICIENT TO SUSTAIN CONVICTION FOR SEDITIOUS UTTERANCES.

Evidence *held* not to sustain a conviction for attempting to cause disloyalty, insubordination, mutiny, or refusal of duty in the military or naval forces of the United States, by the use of defamatory language toward the President and Cabinet, taking into consideration the place and circumstances of its utterance.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

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

John J. Halligan, of North Platte, Neb. (W. T. Wilcox, of North Platte, Neb., on the brief), for plaintiff in error.

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

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. The defendant, Harshfield, was convicted on the first count of an indictment which alleged the utterance of certain words defamatory to President Wilson and his Cabinet and hostile to the American soldiers. It was further alleged that the language used was a willful attempt to cause disloyalty, insubordination, mutiny, and refusal of duty in the military and naval forces of the United States. At the close of all the evidence his counsel moved for a directed verdict in his favor, upon the grounds that the allegations in the first count of the indictment did not constitute a crime against the government of the United States, and because the evidence introduced was not sufficient to sustain a verdict of guilty upon said count. In Schenck v. United States (March 3, 1919) 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470, it was stated:

"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."

Assuming that the evidence sustained the charge in the indictment as to the language spoken, we turn to the circumstances in which they were used. Harshfield is a stock farmer living in Lincoln county, Neb. On or about the date mentioned in the indictment he was at his house at about the hour of noon. The two men mentioned in the indictment as Walker and Powell came to the house and inquired of defendant if they could obtain some gasoline, at the same time claiming that they had become stranded out in the country. Defendant said that he could let them have some gasoline, and also asked them to stop for dinner. At the time the family were sitting at the dinner table there were present Powell, Walker, two hired men, Gilbert and Wile, two nieces, Clara and Bertha Laubner, and four children, Olive, Walter, Alva, and Wilbur. The language stated in the indictment is alleged to have been uttered at this dinner.

We have considered the nature of the words spoken and the circumstances in which they were uttered, and can find no support for a finding that they constituted an attempt to cause disloyalty, insubordination, mutiny, and refusal of duty in the military and naval forces of the United States. There was no evidence introduced at the trial that the defendant uttered the words charged against him for the purpose alleged, except as the words themselves show that disloyalty, insubordination, mutiny, and refusal of duty in the military and naval forces of the United States was the necessary and legitimate result of their use. We refrain from quoting the language alleged to have been used by the defendant. It was scurrilous, improper, and disgraceful to the man who uttered it; but, taking into consideration the circumstances in which they were uttered and the words themselves, they wholly fail to sustain the purpose for which it is alleged they were uttered. Von Bank v. United States, 253 Fed. 641, 165 C. C. A. 267; Doll v. United States, 253 Fed. 646, 165 C. C. A. 272.

Judgment below reversed.

SANDSTROM v. PACIFIC S. S. CO.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919.)

No. 3315.

MASTER AND SERVANT ⊂⊃253½—TERRITORIES ⊂⊃8—LIMITATIONS IN FEDERAL EMPLOYERS' LIABILITY ACT APPLY IN ALASKA.

The liability of a steamship company for death of a sailor, injured while in its employ on a vessel operated as common carrier in Alaska, is controlled by the provisions of Employers' Liability Act June 11, 1906, §§ 1, 4, as to carriers engaged in commerce in any territory of the United States, and under the latter section an action for employé's death occurring more than one year prior to its commencement is barred.

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 A. F. Sandstrom, administrator of Walter R. Weber, deceased, against the Pacific Steamship Company, a corporation of Maine. Judgment for defendant, and plaintiff brings error. Affirmed.

H. E. Foster, of Seattle, Wash., for plaintiff in error.

Grosscup & Morrow, of Tacoma, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The death of the party, to recover damages for which this action was brought, occurred more than one year prior to its commencement. The deceased died as the result of injuries received while employed by the defendant in error as a sailor on the steamship Admiral Watson, at the time operated by the defendant in error as a common carrier of commerce within the territory of Alaska, and the question presented by the record is whether the Employers' Liability Act of June 11, 1906 (34 Stat. 232, c. 3073), controlled the liability of the defendant in the case. The first section of that act is as follows:

"That every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employés, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employés, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works."

We think the question is conclusively settled in the affirmative by the decisions of the Supreme Court in the cases of El Paso & N. E. Ry. v. Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106, and

Washington, Alexandria, & Mt. Vernon Railway Co. v. Downey, 236 U. S. 190, 35 Sup. Ct. 406, 59 L. Ed. 533. That being so, and section 4 of the act of Congress referred to declaring "that no action shall be maintained under this act unless commenced within one year from the time the cause of action accrued," it necessarily results that the judgment must be, and hereby is, affirmed.

FLOUR CITY ORNAMENTAL IRON WORKS v. SCHULER.

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

No. 5296.

APPEAL AND ERROR ⊜209(1)—IN ACTION TRIED TO COURT, SUFFICIENCY OF EVIDENCE NOT RAISED BELOW NOT REVIEWABLE.

Where an action at law is tried to the court by stipulation, pursuant to Rev. St. § 649 (Comp. St. § 1587), the question whether the judgment is sustained by the evidence, not presented to the trial court, cannot be considered by the appellate court.

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

Action at law by Eugene Schuler against the Flour City Ornamental Iron Works. Judgment for plaintiff, and defendant brings error. Affirmed.

A. B. Darelius, of Minneapolis, Minn., for plaintiff in error.

Albert C. Cobb, J. O. P. Wheelwright, and John I. Dille, all of Minneapolis, Minn., for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

PER CURIAM. This is an action at law tried to the court, a jury being duly waived. The only assignment of error is that the evidence does not support the judgment. No such question was ever presented to the trial court, and we are therefore without authority to consider it. Section 700, R. S. U. S. (Comp. St. § 1668); Mason v. United States, 219 Fed. 547, 135 C. C. A. 315, and cases cited.

Affirmed.

UNITED STATES v. PETTS et al.

(District Court, D. Massachusetts. July 15, 1919.)

No. 2528.

INTOXICATING LIQUORS ⇐134—MANUFACTURE OF NONINTOXICATING BEER NOT WITHIN WAR-TIME PROHIBITION ACT.

War-Time Prohibition Act Nov. 21, 1918, § 1, does not prohibit the manufacture or sale of beer which is not intoxicating.

Criminal prosecution by the United States against Sanford F. Petts and Leopold H. Vogel. On demurrer to information. Demurrer sustained.

The United States Attorney.

John W. McCormack, Robert G. Dodge, and Storey, Thorndike, Palmer & Dodge, all of Boston, Mass., for defendants.

ANDERSON, Circuit Judge. The demurrer to this information raises simply the question as to whether Act Nov. 21, 1918, c. 212, 40 Stat. 1045, prohibits the sale of nonintoxicating beer. The government admits that the word "intoxicating" was omitted from the information for the purpose of raising, as a question of law, the right to sell a nonintoxicating liquor commonly called beer.

I am perfectly clear that no such strained construction should be given to this statute, which was passed 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," by prohibiting the use of intoxicating liquor as a beverage.

If I were in doubt—as I am not—I should feel constrained to adopt the view of the Circuit Court of Appeals for the Second Circuit in Jacob Hoffman Brewing Co. v. McElligott, 259 Fed. 525, —— C. C. A. ——, affirming the decision of the District Court in 259 Fed. 321. This construction has also been adopted by the District Court of Maryland.

I may add that the serious purpose of Congress and of a large part of the voters of this country to prevent the use of intoxicating liquors as a beverage ought not to be attempted to be made ridiculous by an absurd misconstruction of this statute. This case is no "liquor case."

Demurrer sustained.

INTERNATIONAL PAPER CO. v. BURRILL.

(District Court, D. Massachusetts. September 19, 1919.)

No. 1060.

1. TAXATION ⊜541—TAX PAID UNDER DRASTIC STATUTE PAID UNDER IMPLIED DURESS.
   A tax imposed by statute containing drastic penalties, for nonpayment and paid under protest, is paid under implied duress.
2. TAXATION ⊜542, 543(4)—RIGHT OF ACTION LIES AGAINST COLLECTOR TO RECOVER TAXES PAID UNDER DURESS.
   Unless and except as modified by statute, the common-law right of action for money had and received lies against a tax collector to recover taxes illegally collected and paid under protest, and it is no defense that defendant has paid such taxes into the state treasury.
3. COURTS ⊜363—NONRESIDENTS CANNOT BE DEPRIVED BY STATUTE OF RIGHT TO RECOVER TAXES PAID UNDER DURESS.
   Citizens of other states cannot be deprived by a statute of a state of their right through the federal courts to enforce their common-law remedy for recovery of taxes illegally exacted by the state.

At Law. Action by the International Paper Company against Charles L. Burrill. Judgment for plaintiff.

Charles A. Snow, Frank T. Benner, and William P. Evearts, all of Boston, Mass., for plaintiff.

Henry C. Attwill, Atty. Gen., and William Harold Hitchcock, Asst. Atty. Gen., of Massachusetts, for defendant.

ANDERSON, Circuit Judge. This is an action for money had and received, brought by the plaintiff, a foreign corporation, against the defendant, who was and is treasurer of the commonwealth of Massachusetts, to recover taxes paid by the plaintiff to the defendant on May 22, 1916, under the provisions of statutes held by the Supreme Court of the United States in International Paper Co. v. Massachusetts, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. Ed. 624, Ann. Cas. 1918C, 617, unconstitutional. This tax was paid under protest and under alleged implied duress.

[1] Under the Massachusetts act (St. 1909, c. 490, pt. 3, § 70) a petition was brought by the plaintiff in the Supreme Judicial Court of Suffolk county against the commonwealth of Massachusetts to recover this tax. This petition was on the plaintiff's motion dismissed without prejudice in January, 1919, because, under the holding of the Supreme Judicial Court of Massachusetts in International Paper Co. v. Commonwealth, 232 Mass. 7, 121 N. E. 510, the failure to make service within six months after payment, required by said section 70, was fatal to the maintenance of said petition. The plaintiff, therefore, now has no legal remedy against the commonwealth of Massachusetts to recover such tax. The present question is whether this action can be maintained against the defendant personally to recover money paid in response to demands now admittedly illegal. Stat. 1909, c. 490, pt. 3, §§ 56, 58, and 59, provides drastic penalties for the nonpayment of

such taxes. Clearly, under these statutes, upon the agreed facts, a finding of implied duress is warranted, and, I think, required. See Atchison, etc., Railway Co. v. O'Connor, 223 U. S. 280, 286, 32 Sup. Ct. 216, 217 (56 L. Ed. 436, Ann. Cas. 1913C, 1050) where Mr. Justice Holmes says as to such payments that "courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment is made."

The plaintiff's counsel contends that in cases of payment under implied duress protest is not required. It is unnecessary to rule on this point, for it appears that this tax was paid under protest. The defendant, then, obtained money from the plaintiff without legal right, of which the defendant was duly notified, and under implied duress. Although the defendant acted entirely in good faith and under the color of office, the statutes under which he obtained the plaintiff's money are absolutely void. In law, his acts were wrongful.

"A void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and in his claim of exemption from suit." Mr. Justice Lamar, in Hopkins v. Clemson College, 221 U. S. 636, 644, 31 Sup. Ct. 654, 657 (55 L. Ed. 890, 35 L. R. A. [N. S.] 243).

[2] The defense mainly relied on is that the defendant did not personally receive and retain the plaintiff's money, but turned the same over, as in duty bound under the statutes of the commonwealth of Massachusetts, into the treasury of the commonwealth. But the fact that the check in question may not have been handled by the defendant, or even known to him, is, in my view, immaterial. It was handled by his agent, and he was bound to know that the plaintiff was paying to him under protest money that it claimed he was not entitled to receive. He therefore received it and caused it to be deposited in the treasury of the commonwealth at his peril.

"If any person gets money into his hands illegally, he cannot discharge himself by paying it over to another." Lord Ellenborough, in Townson v. Wilson, 1 Camp. 396.

Neither he nor the commonwealth had any right to receive or retain this money. It was paid to him by the plaintiff under duress and in terror of penalties provided in the statute, supra.

A leading case dealing with the principles here involved is that of Elliott v. Swartwout, 10 Pet. 137, 9 L. Ed. 373.

This was an action for money had and received against the collector of the port of New York to recover certain duties found to have been illegally exacted by the collector from an importer. As to a part of the duties sought to be recovered, the collector had "received the money in the ordinary and regular course of his duty, * * * paid it over into the treasury, and no objection made at the time of payment, or at any time before the money was paid over to the United States." The court held that this must "be considered as a voluntary payment, by mutual mistake of law; and, in such case, no action would lie to recover back the money."

As to another part of the tax collected, the payer having at the time of payment given notice to the collector that the duties charged were too high, that he paid to get possession of his goods and intended to sue him to recover back amount erroneously paid, the court held this not to be a voluntary payment, but that an action for money had and received would lie against the collector, citing among other authorities Irving v. Wilson, 4 T. R. 485; Greenway v. Hurd, 4 T. R. 553; Sadler v. Evans, 4 Bur. 1984; Snowdon v. Davis, 1 Taunt. 358; Clinton v. Strong, 9 Johns. 369; Hearsey v. Pruyn, 7 Johns. (N. Y.) 179; Frye v. Lockwood, 4 Cow. (N. Y.) 454. The protest in the present case was, in my view, enough; it was not necessary for the plaintiff therein to threaten the defendant with a personal suit, in order to prevent the payment from being a voluntary one, assuming for the moment that protest is, in cases of implied duress, necessary.

A similar question came before the Supreme Court in Cary v. Curtis, 3 How. 236, 11 L. Ed. 576. This also was an action against the collector of the port of New York to recover duties found to have been illegally collected. The majority of the court held, by Mr. Justice Daniel, that the Act of March 3, 1839, c. 82, 5 Stat. 339, requiring the collector of customs to place money collected to the credit of the treasury of the United States and authorizing application by the aggrieved taxpayer to the Secretary of the Treasury, cut off the common-law right of action for money had and received against collectors of customs. From this construction of the statute Justices Story and McLean dissented, contending that the majority had misconstrued the act; also that, construed as the majority did construe it, it was unconstitutional. Apart from the statute, all the Justices were of the opinion that action for money had and received would clearly lie against the collector. That the minority of the court construed the act as Congress intended it to be construed appears from the facts stated by Mr. Justice Matthews in Arnson v. Murphy, Collector, 109 U. S. 238, 240, 3 Sup. Ct. 184, 186 (27 L. Ed. 920). It is there pointed out that after the Supreme Court held in Cary v. Curtis that the legal effect of the act of March 3, 1839, "was to take from the claimant all right of action against the collector, by removing the ground on which the implied promise rested. Congress, being in session at the time that decision was announced, passed the explanatory act of February 26, 1845, which, by legislative construction of the act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted, and took from the Secretary of the Treasury the authority to refund conferred by the act of 1839. * * *" It certainly is significant that Congress restored a right of action against federal officials acting ultra vires.

These authorities make it clear that, unless and except as modified by statute, the common-law right of action for money had and received lies against a tax collector to recover taxes illegally collected, with notice that they are not paid voluntarily, but under protest; duress, express or implied, may make protest unnecessary, as already noted.

Compare Lincoln v. Worcester, 8 Cush. (Mass.) 55, 61.

In Erskine v. Van Arsdale, 15 Wall. 75, 77 (21 L. Ed. 63), the court says:

"Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them."

De Lima v. Bidwell, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041, was also an action against the collector of the port of New York to recover duties alleged to have been illegally exacted and paid on certain importations of sugar from Porto Rico after cession to the United States. On page 177 et seq. of 182 U. S., 21 Sup. Ct. 743, 45 L. Ed. 1041, the court deals with the question whether the legality of the duties can be tested in this form of action and answered in the affirmative.

See, also, Pacific Whaling Co. v. United States, 187 U. S. 447, 453, 23 Sup. Ct. 154, 47 L. Ed. 253; State Railroad Tax Cases, 92 U. S. 575, 613, 23 L. Ed. 663; Atchison, etc., Railway Co. v. O'Connor, 223 U. S. 280, 287, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050; Gaar, Scott & Co. v. Shannon, 223 U. S. 468, 32 Sup. Ct. 236, 56 L. Ed. 510; Meek v. McClure, 49 Cal. 623; Van Buren v. Downing, 41 Wis. 122.

In Lamborn v. County Commissioners, 97 U. S. 181, 185, 186 (24 L. Ed. 926), it is said:

"Under this rule, illegal taxes or other public exactions, paid to prevent such seizure or remove such detention, may be recovered back, unless prohibited by some statutory regulation to the contrary."

[3] But in dealing with the rights of a citizen of another state, the "statutory regulation" which will bar his right cannot, in my view, be the enactment of the commonwealth of Massachusetts. Citizens of other states cannot be deprived by enactments of the commonwealth of Massachusetts of their right through the federal courts to enforce common-law remedies.

See Cunningham v. Macon, etc., R. R. Co., 109 U. S. 446, 452, 3 Sup. Ct. 292, 296 (27 L. Ed. 992), where the court said:

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.

"In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. See Mitchell v. Harmony, 13 How. 115 [14 L. Ed. 75]; Bates v. Clark, 95 U. S. 204 [24 L. Ed. 471]; Meigs v. McClung, 9 Cranch, 11 [3 L. Ed. 639]; Wilcox v. Jackson, 13 Pet. 498 [10 L. Ed. 264]; Brown v. Huger, 21 How. 305 [16 L. Ed. 125]; Grisar v. McDowell, 6 Wall. 363 [18 L. Ed. 863]."

In Massachusetts, actions to recover illegal taxes have commonly been brought directly against the cities and towns receiving them, because such municipal corporations may be sued on common-law principles; whereas the commonwealth may be sued only with its expressed consent. Compare Lincoln v. Worcester, 8 Cush. (Mass.) 55, where

Chief Justice Shaw in 1851 reviewed many of the earlier cases; also Preston v. Boston, 12 Pick. 7; Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145; Harrington v. Glidden, 179 Mass. 486, 491, 61 N. E. 54, 94 Am. St. Rep. 613.

In Harrington v. Glidden, supra, 179 Mass. at page 492, 61 N. E. 55, 94 Am. St. Rep. 613, Hammond, J., after reviewing many of the cases and the claim that the statutory remedy was exclusive, says:

"These and similar cases all proceed upon the principle that an assessment made by assessors who have no jurisdiction is not the assessment authorized by statute. It is no assessment at all and is absolutely void. As it is not the statutory proceeding, the statutory remedy is not exclusive. Such an assessment, therefore, can be attacked collaterally in an action of tort against the assessors, where such an action will lie, or in an action against the town to recover back the money paid, or in defence to an action by the collector. These general remedies are not for those who are aggrieved by assessors acting within their jurisdiction, but are allowable to redress wrongs inflicted by persons who pretend to be assessors, but who are not such, because acting without jurisdiction."

Compare Judson, Taxation (2d Ed.) §§ 650, 651.

Clearly if, after the Supreme Court had held the Massachusetts statutes unconstitutional, the defendant and other state officials had sought to collect the tax in question, application to this court for an injunction would have had to be sustained. Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Benedicto v. Porto Rican American Tobacco Co., 256 Fed. 422, — C. C. A. —, decided in this circuit on March 19, 1919.

These decisions all go upon the theory that the attempts of such officials to collect money or impose penalties under void statutes are wrongful and may do irreparable injury to the plaintiff. The injunctions run against the officials, and not against the state, which is expected to be the ultimate beneficiary of the taxes wrongfully exacted. If such acts of such officials may be enjoined as personal wrongdoing, it is clear that, after performance, the wrongdoers may be held personally liable to persons wronged.

Unless this action can be maintained, the plaintiff is apparently remediless in the courts. In his brief for the defendant, learned counsel says:

"When money has once been paid to the treasurer of the commonwealth, as in the case at bar, it is too late to institute proceedings as provided by the statute for its recovery. The Legislature alone has the power to determine whether just and fair dealing requires its repayment."

This amounts to saying that the commonwealth of Massachusetts may, by equipping various officials with apparent power under unconstitutional statutes, obtain from foreign corporations, and retain in its treasury, large sums of money, unless the Legislature shall mercifully otherwise decide.

Clearly the remedy provided under section 70 of St. 1909, c. 490, pt. 3, may be changed at any time. Foreign corporations are, under that section, now limited to the short period of six months to bring their action in the state court. That period might, by the Legislature of Massachusetts, be made even shorter, or the remedy abolished entirely.

No federal court can hold that the rights of foreign corporations or of other citizens of other states to recover money illegally obtained from them, through the implied duress of statutes held unconstitutional by the Supreme Court of the United States, shall lie at the mercy of the Legislature of Massachusetts or of any other state.

If, as the defendant's counsel claims, the only way to get the money out of the treasury of the commonwealth is through an act of the Legislature of Massachusetts, it is the defendant, who is legally in the wrong, and not the plaintiff, who should be remitted to that remedy. The plaintiff is entitled to a remedy in the courts of the nation.

As the money was wrongfully obtained by the defendant through implied duress, and as it is no defense that the defendant has paid the money into the treasury of the commonwealth, there must be judgment for the plaintiff for the amount of the tax, with interest thereon from the date of payment, May 22, 1916.

Judgment accordingly.

PENDAR v. EMPIRE GAS & FUEL CO.

(District Court, S. D. Texas. October 9, 1919.)

No. 279.

REMOVAL OF CAUSES ⊂=29—FOR DIVERSITY OF CITIZENSHIP IN SUIT IN STATE OF WHICH NEITHER PARTY IS CITIZEN.

A suit brought in a state court of a state of which neither plaintiff nor defendant is a citizen or resident is not removable on the ground of diversity of citizenship over the objection of plaintiff.

At Law. Action by Oliver S. Pendar against the Empire Gas & Fuel Company. On motion to remand to state court. Motion granted.

Sam Streetman, of Houston, Tex., for the motion.

A. D. Dyess, of Houston, Tex., opposed.

HUTCHESON, District Judge. This is a motion to remand to the district court for the Fifty-Fifth judicial district of Harris county, Tex., the above styled and numbered cause. The sole ground of removal is diversity of citizenship, while the ground of the motion to remand is that the plaintiff and defendant, while residents and citizens of different states, are neither of them residents of the state of Texas, or of the Southern district thereof. The plaintiff is a citizen of the state of South Dakota. The defendant is a corporation incorporated under the laws of Maine, and therefore a citizen, and, for jurisdictional purposes, a resident, of the state of Maine. It is conceded by counsel for the respondent that, were this suit brought in this district by original process, this court could not, under section 1033, Comp. St., since neither of the parties reside here, entertain jurisdiction without consent of both parties to the proceeding. But he contends that the removal statute (section 1010), authorizing the removal of a cause by a nonresident defendant into the District Court of the United States for the proper

district, is not limited or qualified by section 1033, but gives to a defendant the absolute right to remove any case into the federal district having jurisdiction over the place where the suit is brought in the state court, provided only the defendant is a nonresident of that state and district.

It is conceded further by counsel for defendant that the case of Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, is authority against this contention, and that, if that case is the law of this case, the motion to remand must be sustained. They point, however, to the fact that of the three propositions in effect decided in the Wisner Case —that a suit can only be removed into the district where it could have originally been brought, that mandamus will lie to correct the improper action of a district court in taking jurisdiction, and that jurisdiction cannot be conferred by consent where the parties are citizens of different states and neither is a citizen of the state where the suit is pending—the second and third have been overruled in Ex parte Hardin, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, and Ex parte Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, respectively, and they declare that the first is so wanting in merit as that certain of the inferior federal courts have already refused to follow it. They call my attention to a lengthy opinion by Judge Cochran, of the Eastern district of Kentucky, in the case of L. & N. Railway Co. v. Western Union Telegraph Co., 218 Fed. 91, an opinion of Judge Ervin, of the Southern district of Alabama, while sitting in the Northern district of Texas, in the case of James v. Amarillo City Light & Water Co., 251 Fed. 337, and a dissenting opinion by Judge Learned Hand of the district bench of the Second circuit, in the case of Guaranty Trust Co. v. McCabe, 250 Fed. 704, 163 C. C. A. 31.

I am not disposed to deny the force of much of the reasoning in the opinions of those judges, but it appears to me that their views are more cogent as arguments for an amendment of the law than as really declaring the law as it is written; besides, I derive little support from arguments ab inconvenienti. When a judge is able to say, "Ita lex scripta," he has completed his inquiry and established a firm basis for his judgment. The effect of those cases is to declare that, because it has been held that parties may waive the venue requirement of section 1033, which lies at the threshold of actual jurisdiction in any particular case, the plaintiff by bringing a suit in a state court puts it entirely in the power of the defendant to bring the matter into the federal court of the district where the suit is brought without consulting or considering plaintiff's wishes in the premises. Judge Ervin even goes to the point of declaring that a plaintiff has no right at all to be consulted as to the district to which the cause may be removed, and this is the effect, if not the verbiage, of the views of Judge Cochran and Judge Hand.

This view is directly in conflict, not only with the holding, but with the reasoning, of the Supreme Court in Ex parte Moore, supra, where the removal was sustained upon the express ground that the plaintiff, after the case had been removed by the defendant, had appeared and

pleaded thus affirmatively, consenting to the jurisdiction of that court. Mr. Justice Moody, in Re Winn, 213 U. S. 464, 29 Sup. Ct. 516, 53 L. Ed. 873, speaking for the court, says:

"It is well settled that no cause can be removed from the state court to the Circuit Court of the United States unless it could originally have been brought in the latter court."

And again, construing Ex parte Moore, said on page 469 (29 Sup. Ct. 519 [53 L. Ed. 873]):

"That case simply held that where there was a diversity of citizenship, which gave jurisdiction to some Circuit Court, the objection that there was no jurisdiction in a particular district might be waived by appearing and pleading to the merits."

I think both the disposition made by the Circuit Court of Appeals of Guaranty Trust Co. of New York v. McCabe, 250 Fed. 700, 163 C. C. A. 34, and the reasons which underlie it, are eminently correct. In that case it is said:

"It has long been settled that a defendant may insist upon or waive his objection to venue, * * * but it is also settled by Ex parte Moore, 209 U. S. 490, 506, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, that in a case where jurisdiction depends upon diversity of citizenship, * * * the plaintiff, in case of removal, also has the right to insist upon or waive his objection to the jurisdiction *because the district is not the 'proper district'—that is, either the residence of plaintiff or of defendant.*" (Italics mine.)

Concurring in these views, I shall grant the motion to remand; and it will be so ordered.

UNITED STATES v. ONE-STRAND PEARL NECKLACE et al.

SAME v. ONE TWO-STRAND PEARL NECKLACE et al.

(District Court, S. D. New York. July 3, 1919.)

CUSTOMS DUTIES ⊂=130—VIOLATION OF CUSTOMS LAWS—FORFEITURE.

The failure of the agent of an importer to whom merchandise was intrusted for carriage into the United States to declare it as instructed does not relieve his principal from its forfeiture.

Forfeiture Libels. Proceedings by the United States against one-strand pearl necklace and against one two-strand pearl necklace, with other articles in each libel. Judgment of forfeiture in each case.

Julian Hartridge, Asst. U. S. Atty., of New York City.
Melville J. France, of New York City, for claimant Stines.
David S. Meyers, of New York City, for claimant Kahn.

AUGUSTUS N. HAND, District Judge. Stines, one of the claimants, says that he gave the libeled diamonds which he claims to one Kahn to deliver to the Baroness Maydell, who was to take them to New York by the Scandinavian Line, and that he had cautioned her

to declare the goods to the customs authorities. It appears that Kahn delivered them to her on the steamer, and she refused to be responsible for them and redelivered them to Kahn, who failed to declare them. The question is whether, under these circumstances, they are subject to forfeiture. In the case of United States v. 1150½ Pounds of Celluloid, 82 Fed. 627, 27 C. C. A. 231, the Circuit Court of Appeals for the Sixth Circuit held that a warehouseman, who fraudulently and for his own gain took goods stored in his warehouse, which belonged to a third party, and smuggled them into this country, was a mere trespasser, and that, as the owner was not importing them at all, they were not subject to forfeiture for violation of the customs laws.

Here not only was Kahn originally in lawful possession of the goods, but he was authorized to take one step in their importation by delivering them to the Baroness Maydell, who was going with him on the steamer. It would tend to defeat the efficient administration of the act (Act Oct. 3, 1916, c. 16, 38 Stat. 114) if an importer by the failure of his agent on the very steamer which carried his goods to carry out his directions to deliver the goods to another agent could escape forfeiture. A further logical step would be that the neglect of a single agent to carry out the owner's directions to declare the goods would constitute a defense to forfeiture. Such a rule would give rise to all sorts of fraudulent defenses.

In the present case, if Kahn was the agent, the owner was bound by his failure to declare. If he was not the agent, after he once delivered the goods to the Baroness Maydell, she was the agent, and Kahn was merely her custodian, and her failure to declare bound the owner. On no proper theory can the neglect of this agent, who is once given goods in process of importation, relieve the owner from forfeiture.

As the one-strand pearl necklace in libel 1 would only be free of duty if Stines was a person arriving in this country, the purely personal privilege afforded by section 1, Free List, par. 642 (Comp. St. § 5291) is inapplicable, and forfeiture is inevitable. Kahn, who is the claimant of the other articles in libel 1, waived his claim at the trial, so that a verdict of forfeiture is directed as to all the merchandise in that case.

As to the claims of Stines to the two-strand pearl necklace, the lavaliere, and the ring in the second libel, all but the ring are in the same predicament as the jewelry he claimed in libel No. 1. The ring he says was given him by his father, and he claims it is free as of American manufacture. The expert testified that the setting was Russian, and Stines, in his deposition to the State Department, on August 15, 1918, made no such claim as he is now making. He apparently stated that the jewelry in general was purchased through the so-called "Thieves' Market," in Petrograd, and was the property of Mrs. Stines. The testimony may possibly only have referred to Stines' other jewelry, but in view of the whole situation, and in particular his statement then that all the jewelry being discussed was not his property, but belonged to Mrs. Stines, I do not think he can support his position as claimant, and a ver-

dict of forfeiture must be directed as to the first three items in libel 2. It is to be further noted that the ring was brought in by Kahn in the same pouch with the necklace and lavaliere, so that all must be forfeited together. Paragraph H, § 3, of Tariff Act.

The other articles in libel 2 are claimed by Kahn. No. 4 Kahn says was given him by his mother. It was set abroad, and could, if this story is true, be admitted only on proof of identity, which he did not furnish. Paragraph 404 Tariff Act. It should therefore have been declared, and the failure to do this rendered items 4 to 9, which were all in a single package, to wit, the jewel box, subject to forfeiture. Moreover, the appraisals would indicate that these articles (5 to 9) far exceeded in value the $100 exemption allowed for personal effects acquired abroad.

No. 10 is a jeweled cigarette case, which Kahn says was given him by a friend some years before. He brought it in, without declaration, on his person. Both Mr. and Mrs. Stines said that Kahn purchased such articles, and in view of his general conduct his testimony is not to be credited. No. 11 is explained by Kahn in the same way as No. 10, and must take the same course.

No. 12 is said by the mother and brother, as well as by Kahn, to have belonged to Kahn's father, and was worn by him. The expert from Tiffany's said it was a Russian setting. In view of Kahn's record, and the business he was pursuing of buying jewelry in Russia, I think he has not supported the burden of proof required of him, and this family story is not to be believed.

A verdict of forfeiture is directed as to all the articles claimed by Kahn in libel 2.

FIRST NAT. BANK OF CANTON, PA., v. WILLIAMS, Comptroller of the Currency.

(District Court, M. D. Pennsylvania. October 11, 1919.)

No. 275.

1. COURTS ⇐344—SERVICE OF PROCESS OUTSIDE OF DISTRICT CAN BE MADE ONLY UNDER STATUTE.

Service of process of a federal court outside the district in which suit is brought can be made only by authority of special statutory provision.

2. COURTS ⇐270—SUIT BY BANK AGAINST COMPTROLLER OF CURRENCY MUST BE BROUGHT IN DISTRICT OF COMPLAINANT.

Judicial Code, §§ 24 (16), 49 (Comp. St. §§ 991[16], 1031), providing that a suit brought by a national bank to enjoin the Comptroller of the Currency under the provisions of the National Banking Act shall be brought in the district where the bank is located, relate only to suits brought under Rev. St. § 5237 (Comp. St. § 9824), and a suit by a national bank to enjoin acts by the Comptroller alleged to be in excess of his authority is one under the general equity jurisdiction of the court, and can only be maintained in the district of which defendant is an inhabitant.

In Equity. Suit by the First National Bank of Canton against John Skelton Williams, Comptroller of the Currency. On motions by defendant to quash return of service and to dismiss for want of jurisdiction. Motions granted.

John B. Stanchfield, Charles Collin, and Henry F. Wolff, all of New York City, and John P. Kelly and M. J. Martin, both of Scranton, Pa., for complainant.

La Rue Brown, Jesse C. Adkins, and M. C. Elliott, all of Washington, D. C., and Rogers L. Burnett, of Scranton, Pa., for defendant.

WITMER, District Judge. The First National Bank of Canton, Bradford county, Pa., brought this bill in equity to enjoin John Skelton Williams, Comptroller of the Currency, from alleged threatened injury said to result from certain methods employed in the examination of the complainant bank, and in insisting upon special reports said to be ruinous and unauthorized by law. The bill arraigns the defendant with exceeding and abusing his lawful powers, or in exercising such powers arbitrarily, fraudulently, and for improper and illegal purposes, thereby threatening irreparable injury, and it seeks control of defendant's future action. The title of the suit was originally directed against the defendant Williams personally, but the body of the bill disclosed a suit charging Williams as Comptroller. On motion an amendment of the title corresponding to this effect was allowed.

Upon filing of the bill a restraining order was granted ex parte, and a rule was entered to show cause why a preliminary injunction should not issue. The defendant, Williams, being a citizen of Virginia and resident of the District of Columbia, and not to be found within this

district, copies of the subpœna were handed to the United States attorney of the district, and others were mailed to the defendant's official residence in the District of Columbia. The defendant appeared specially for the sole purpose of objecting to the jurisdiction, and moved to quash the return of service and to dismiss the proceeding for lack of proper service. The motions were denied, and, after filing also the usual motion to dismiss the bill for want of equity, the defendant filed affidavits, and the hearing proceeded on affidavits of the parties on the rule for a preliminary injunction.

Since hearing further argument of counsel, and upon careful examination of their briefs and the authorities presented, I have reached the conclusion that it was error to deny defendant's preliminary motions. The defendant's contention that this court has not acquired and cannot acquire jurisdiction in this case, either, in view of the manner of attempted service, over the person of the defendant or over the subject-matter of the cause, must be affirmed.

[1] Service of process outside the district in which suit is brought is warranted only by authority of special statutory provision. Green v. Railway Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916. In Cely v. Griffin (C. C.) 113 Fed. 981, the rule and its exceptions were clearly indicated as follows:

"The general rule is that the Circuit Court for each district sits in and for that district, and the process of a Circuit Court cannot be served without the district in which it is established without the special authority of law, therefor. Toland v. Sprague, 12 Pet. 300, 9 L. Ed. 1093. The only case where this rule is not in force is when there is suit in equity commenced in any court of the United States to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, and one or more of the defendants is not an inhabitant of or found within said district, the court can make an order requiring such defendant to appear, answer, or demur on a day certain—said order to be served on said absent defendant, if practicable; if not, to be published (Rev. St. U. S. § 738 [Comp. St. § 1039]); and also the case of an action brought for the infringement of a patent. (Noonan v. Athletic Club [C. C.] 75 Fed. 334)."

[2] But it is asserted by plaintiff that such exceptional provision authorizing the bringing of this suit is found in sections 24, clause 16 (U. S. Comp. Stat. § 991), and 49 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1100 [U. S. Comp. Stat. § 1031]), wherein it is provided as follows:

"Sec. 24. *Original Jurisdiction.*—The district courts shall have original jurisdiction as follows: * * *

"Sixteenth. * * * Of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located."

"Sec. 49. *Proceedings to enjoin Comptroller of the Currency.*—All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located."

The injunction proceedings mentioned in these provisions are such as are expressly authorized and provided for by statute pertaining to national banks. From an examination of the subject it appears that the only provision made authorizing such proceedings does not apply to injunction proceedings to enjoin the Comptroller as in the case at bar attempted, but to restrain him under certain circumstances when proceeding against such bank for alleged refusal to redeem its circulating notes, as provided in section 5237, Revised Statutes (Comp. St. § 9824), following:

"Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section 5227, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal."

While interesting and often of much assistance in construing statutes, a review of the chronological legislation following National Bank Act June 3, 1864, c. 106, §§ 50–57 (13 U. S. Stat. pp. 115–117), as well as consideration of the original act itself which bears the provisions of section 5237, Rev. Stat. under section 50, as also section 49 of the Judicial Code under section 57 (Comp. St. § 1031), does not evince any conclusion on the part of Congress to authorize any other proceeding than that clearly expressed by the provision quoted. That there may be proceedings maintained against the Comptroller, as well as against other public officials, to restrain action said to be unauthorized by statute, as here attempted, is not doubted, but when so sued it cannot be said that such proceeding is one arising under the provisions of the National Banking Act. It would merely amount to the ordinary suit in equity to restrain his unwarranted conduct in the exercise of official action as in the case of Philadelphia Co. v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; American School of Magnetic Healing v. McAnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, whereof, as was said in the latter case by Mr. Justice Peckham, "the courts generally have jurisdiction to grant relief."

The questions here raised were fully discussed by Judge Woodruff in Van Antwerp v. Hulburd, 7 Blatchf. 426, Fed. Cas. No. 16,826. Action was brought in the Northern district of New York by Van Antwerp, as assignee of the interest of the National Bank of Unadilla in certain bonds deposited with the Treasurer of the United States, against Hulburd, Comptroller of the Currency, and others, to compel the Comptroller and the Treasurer to disclose what disposition had been made of the bonds, and to obtain a decree directing these officers as to their duty and authority as to said bonds. Referring to the fifty-seventh section of the act of 1864, now section 49 of the Judicial Code, the court said:

"But there is a proviso to the fifty-seventh section, which, it is claimed, warrants the present suit. That proviso is in these terms: 'Provided, however, that all proceedings to enjoin the Comptroller under this act, shall be had in a Circuit, District, or territorial court of the United States, held in the district in which the association is located.' It is argued that, because the present suit is brought to obtain an injunction, and appertains to the alleged rights of the plaintiff to bonds deposited in pursuance of the Act, therefore this proviso declares that this suit shall be brought in this or some other federal court, and, by necessary implication, gives this court jurisdiction to summon the Comptroller, if not also the Treasurer of the United States, to appear therein and answer. This is a violent construction, I think, to the language of a proviso which is in the form of limitation, not of affirmative authorization, and has, I think, no such meaning. What are the proceedings which may be had to enjoin the Comptroller 'under this act'? No section provides for or refers to such a suit as the present."

Considering various sections of the act of 1864, the court came to speak of section 50, and of the proviso thereto, asserting that the effect of this proviso was limited to the particular case where the Comptroller appointed a receiver for a national bank on the ground that it has refused or failed to pay certain notes, and suggested that in those cases it was important that a bank should have a speedy and convenient means of correcting the possible mistaken decision of the Comptroller, concluding its discussion by saying:

"I find no other circumstances in which proceedings to enjoin the Comptroller under the act are authorized by it. * * * What I mean to say is that such a case is not provided for in the act in question, save as above stated and commented upon; and the court must seek its jurisdictional power over the subject-matter, and over the persons of the defendants, in some source other than the Act referred to."

While section 56 of the act of 1864, now section 380, Rev. Stat. (Comp. St. § 556), directs that the several United States Attorneys of the district shall conduct suits in which the United States or its officers or agents shall be parties, it will be noted that the suits and proceedings in which the district attorney is authorized to act are limited to suits and proceedings arising out of the provisions of this act; that is, the act of 1864. This provision, in effect, has no tendency to enlarge the jurisdiction of the court in respect of suits brought; it merely serves to indicate, as is plainly expressed, that where suits are properly brought arising out of the provisions of the Banking Act, and the government or its agents are parties, the district attorneys shall conduct the proceedings on their behalf. It is not doubted but that the proceedings under the provisions to which reference is made are those provided for in section 50 of the act, having to do purely with the official acts, exercised in good faith and within the discretion of the officer. Where the action is one directed against the officer for misfeasance, or conduct without the statute, it seems not likely to expect that the Congress would provide means whereby the proceedings would be conducted, nor does it seem probable that it would be supposed that the officer would be always satisfied to accept such proffered assistance. Being in the nature of a personal suit, it is altogether natural that he would not be satisfied

short of conducting his own proceeding. In the event and under the circumstances there is no reason why the Comptroller, when so charged, should not have the benefit of the jurisdiction to try his suit as generally provided by statute. If so, this court could not entertain the present suit.

Such suit being without any of the exceptions mentioned in the Judicial Code, section 51 (Comp. St. § 1033) thereof is controlling. Under it:

"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; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

If jurisdiction is said to be founded upon the latter provision, that of diverse citizenship alone, the reply is that the defendant has not been brought into court upon the service attempted; if upon the former, it being conceded that jurisdiction is founded, not alone on diverse citizenship, but also on the ground that a federal question being involved, which is the case here, as appears from the allegations in the bill, suit can only be brought in the district of the residence of the defendant. Cound v. Atchison, Topeka & Santa Fé Ry. Co. (C. C.) 173 Fed. 527; Whittaker v. Illinois Central R. Co. (C. C.) 176 Fed. 130.

Looking at the matter from any and every angle presented by the plaintiff, this suit cannot be here entertained. The defendant's several motions to quash the service and to dismiss for want of jurisdiction are reinstated and allowed.

The bill is accordingly dismissed.

SMITH v. BABCOCK & WILCOX CO. et al.

MORTON v. SAME.

(District Court, N. D. Ohio, E. D. October 3, 1919.)

Nos. 9987, 9988.

COURTS ⊂=314—JURISDICTION OF ACTION AGAINST RAILROAD UNDER FEDERAL CONTROL.

Under Federal Control Act, § 10 (Comp. St. 1918, § 3115¾j), an action to enforce a liability incurred in the operation of a railroad while under federal control may be maintained in such courts, and only such courts, as would have had jurisdiction in the absence of federal control, and the citizenship of the railroad company, and not of the Director-General, determines the jurisdiction of a federal court.

At Law. Actions by Thomas H. Smith, administrator, and by W. A. Morton, administrator, against the Babcock & Wilcox Company and Walker D. Hines, Director-General of Railroads, operating the Akron & Barberton Belt Railroad Company. On motions to dismiss for want of jurisdiction. Motions sustained.

Newcomb, Newcomb, Nord & Chapman, of Cleveland, Ohio, for plaintiffs.

Allen, Waters, Young & Andress, of Akron, Ohio, for defendants.

WESTENHAVER, District Judge. Defendants, appearing specially for the purpose, move to dismiss for want of jurisdiction. The amended petitions show that the plaintiffs are citizens and residents of the state of Ohio; that the defendant the Babcock & Wilcox Company is a citizen and resident of some state other than Ohio; that Walker D. Hines, the Director-General of Railroads and operating as such the Akron & Barberton Railroad lines, is a citizen of some state other than Ohio. The citizenship of the railroad company, the owner of the lines, is not stated, but in argument it was said without contradiction that it was a corporation organized and existing under the laws of the state of Ohio, and is therefore a citizen of the state of Ohio. In view of the settled rule that all facts necessary to give jurisdiction must affirmatively appear, it follows that for purposes of this motion it must be assumed that the railroad company is a citizen also of the state of Ohio.

Counsel for plaintiffs urge that the personal residence and citizenship of Walker D. Hines as an individual is controlling. In support of this contention is cited the well-known line of cases holding that the personal citizenship of an administrator or trustee is to be taken as determining the diversity of citizenship, and not the citizenship and residence of the decedent or beneficiary. This contention, if tenable, proves too much. In that event Walker D. Hines could not be sued at all in Ohio in these or similar actions, for the reason that process could not be served on him. When the defendant is a person, and

not a corporation, service must be made on him personally or by leaving a copy at his usual place of residence. Gen. Code Ohio, § 11286. It is only when the defendant is a railroad corporation that service may be had upon a regular ticket or freight agent, or, if there be no such agent, then upon a conductor in charge of any train or car. Gen. Code, § 11288. It is only when the defendant is a foreign corporation that service may be made upon a managing agent within the state. Gen. Code, § 11290. It follows that, if Walker D. Hines is to be regarded as sustaining the same relation to the cause of action and to the railroad company defendant as an administrator or trustee, no provision is made by law for serving process in actions upon him in Ohio. Even the remedy by attachment, which is permitted against other nonresident defendants, would not be applicable, for the reason that section 10, Act March 21, 1918, c. 25, 40 Stat. 456 (Comp. St. 1918, § 3115¾j), known as the Federal Control Act, prohibits the levying of any process, mesne or final, upon any property under federal control. Furthermore, attachment is not a means whereby original jurisdiction can be obtained in actions brought in federal courts. Cleveland & Western Coal Co. v. J. H. Hillman & Sons Co. (D. C.) 245 Fed. 200.

Counsel for defendant Walker D. Hines, Director-General, urges that this action is essentially one against the United States, and that, inasmuch as the United States is not a citizen of any state, the requisite diversity of citizenship does not exist. In support of this contention is cited Northern Pacific Railroad Co. v. State of North Dakota (United States Supreme Court, decided June 2, 1919) 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. ——. Fully sustaining this contention is the decision of the Supreme Judicial Court of Massachusetts in Public Service Commission v. New England Telegraph & Telephone Co., 122 N. E. 567, affirmed United States Supreme Court, June 2, 1919, MacLeod v. New England Tel. & Tel. Co., 250 U. S. 195, 39 Sup. Ct. 511, 63 L. Ed. ——. The liability for injuries resulting from negligent operation during federal control is undoubtedly a liability of the United States, and not of the owners of the railroad lines, and is to be paid from the operating revenue and revolving fund provided by that act. See Haubert v. Baltimore & Ohio Railroad Co. et al., 259 Fed. 361, decided by me September 3, 1919. The solution, however, of the question now presented, does not depend upon this proposition of law. Consequently it is deemed unnecessary to consider carefully what the relationship of the United States is to the present action.

The solution of the question depends, in my opinion, upon the proper interpretation and construction of section 10 of the Federal Control Act. The provisions of this section are familiar to counsel and need not be quoted. The first sentence of the section makes all carriers while in federal control subject to all laws and liabilities as common carriers, whether arising under state or federal laws or common law, except so far as inconsistent with the provisions of that act, or any other act applicable to federal control, or with any order of the President. This means that lines of railway, while being

operated under federal control and by a Director-General of Railroads, are subject to liability for injury due to a third person precisely to the same extent as if they were not under such federal control or operation. The second sentence provides that actions at law or suits in equity may be brought by or against such carriers and judgments rendered as now provided by law. This gives the consent of the United States to the extent that it is a party in interest to be sued in any court in the same manner in which the carrier itself may be sued prior to or except for federal control. By certain orders of the Director-General this consent to be sued has been regulated to the extent at least of permitting the actions to be brought and prosecuted in the name of the Director-General. He represents for purposes of action such interest as the United States has in the operation of railway lines during federal control.

This section further provides that no defense shall be made in any actions at law or in equity to enforce any liability on the ground that the carrier is an instrumentality or agency of the federal government, and that no such carrier shall be entitled to transfer any action brought by or against it to any federal court. Obviously this means that right to sue in or remove to the federal court is not restricted or enlarged in consequence of federal control. Construing these provisions together with the entire act, it seems obvious that Congress intended to interfere as little as could be avoided with the situation existing at the time the railroads were taken over, and that the rights and remedies of all persons should be preserved and might be enforced with a minimum of interference with pre-existing rights and remedies. Assuming the existence of a liability it seems evident that it was intended parties should have the right to assert the same in any court, and in the same manner as it might previously have been asserted. This intent extends, not merely to the method of bringing the parties into court, but to the jurisdiction of the court. Briefly, the situation is as if Congress had said to these respective plaintiffs:

It is true the Akron & Barberton Belt Line Railroad Company is to be taken over and operated by a federal agency, but the liabilities incurred in operating and your rights and remedies in asserting the same shall be and remain just as if no such federal control existed. You may proceed with an action in the same courts and in the same manner as if no federal control existed; but you must not seize under process any property in possession of federal control, but depend for payment upon the provision made by Congress.

The fact that the liability arising during federal control is not a liability of the owners of the railway lines, but of the United States, requires for convenience that the party to be sued should be its Director-General; but at the same time it seems manifest that no change in the manner or method of asserting that liability was intended or has been made. Properly construed, section 10 means that any court which would have had jurisdiction of plaintiff's action against the Babcock & Wilcox Company and the Akron & Barberton Belt Railroad Company prior to federal control will have jurisdiction under

federal control, and that no court which would not have had jurisdiction over plaintiff's cause of action, except for federal control, does not have it in consequence of federal control. To hold otherwise would be manifestly inconsistent with the general tenor and effect of the act itself.

The motions to dismiss will be sustained.

In re OFFRICHT et al.

(District Court, W. D. Texas. February, 1919.)

1. BANKRUPTCY ⊂=345—PROPERTY ACQUIRED WITH CONCEALED ASSETS SUBJECT TO RIGHTS OF CREDITORS.

Where a bankrupt concealed money from his trustee, with which he purchased a stock of merchandise and conducted business in the name of another, debts contracted in the name of such other in the course of the business *held* entitled to priority of payment from the proceeds of the property.

2. BANKRUPTCY ⊂=474—COSTS OF ADMINISTRATION ON REMOVAL OF ASSETS TO ANOTHER DISTRICT.

Where a bankrupt with concealed assets purchased and conducted a business in another district in the name of another, who afterward went into bankruptcy, the cost of administration of both estates in that district *held* payable from the proceeds of the property therein.

In Bankruptcy. In the matter of Paul Offricht and David Lacher, bankrupts. On review of order of referee. Affirmed.

The opinion of Referee Woodward in this cause follows:

Findings of Fact.

In the fall of 1916 Paul Offricht was adjudicated a bankrupt in the Dallas Division of the District Court of the United States for the Northern District of Texas and Geo. F. Rockhold, Esq., was appointed trustee of his estate. Prior to his adjudication Offricht had been engaged in the mercantile business at Greenville, Tex., and immediately prior thereto he had conducted a sacrifice cash sale which was followed by a midnight fire of unknown origin. He has been examined a number of times under oath, both before me and before the referee at Dallas, and his testimony concerning the events leading up to his failure is voluminous, and as to all essential matters untrue.

I find as a matter of fact that the bankrupt Paul Offricht secreted and withheld from his trustee in bankruptcy a large sum of money amounting to at least $5,500. The testimony of his unfortunate wife, who has died since the hearing was held, as to the source of the sum of $5,500 which went into the purchase of the Giddings stock, which will be hereafter referred to, is manifestly false in toto, and I disregard it entirely. It was procured through the efforts of Offricht as a part of his scheme to conceal his assets from his trustee.

The bankrupt D. Lacher was a Dallas junk dealer, without experience in the mercantile business. He was a friend of the Offricht family of many years' standing, and was selected by them as an accomplice in their efforts to conceal from the trustee of Offricht's estate the money belonging to him. His testimony to the contrary is unworthy of belief, and I attach no importance to it. The details of the arrangement between Offricht and Lacher have not been disclosed, because neither bankrupt has been willing to testify the truth re-

garding them; but I find as a fact that Offricht furnished the whole $5,500 which went into the purchase of the Giddings stock (being money which he had secreted from his trustee), and that Lacher was to be compensated by some character of interest in the profits the exact nature of which is not material. The contract of employment prepared in the office of one Garonzik was a simulated transaction in furtherance of the conspiracy.

In February, 1917, Offricht and Lacher purchased with this $5,500 a bankrupt stock at Giddings, Tex. The whole transaction was in the name of Lacher who executed notes for a small balance of purchase money, which notes have been paid out of the business. Offricht forthwith took charge of the business, ostensibly as manager for Lacher, and conducted same for about a year, in the course of which Lacher paid no attention to it, notwithstanding he swore that it represented the investment of the savings of his lifetime.

In the spring of 1918 Lacher went to Giddings and asserted rights in the business. A difference arose between him and Offricht, but the facts concerning it are shrouded in a maze of perjury. It appears to have grown more acute until July 5th, on which date Lacher, in an unguarded moment of truthfulness, wired the attorney for the trustee of Offricht's estate to come to Giddings and take Offricht's store. The telegram in question was made the basis of a summary ancillary proceeding, in which J. T. Robinson, of Lee county, was by the court appointed receiver of the Offricht estate in the Austin Division of the Western District of Texas. The receiver was appointed July 18, 1918, and qualified on the same day.

On July 25, 1918, D. Lacher, claiming to be the owner of the Giddings business in his name, filed his voluntary petition in bankruptcy, and at the first meeting of creditors A. Robinson, of Travis county, was appointed trustee of his estate. By agreement of all parties the trustee of the Lacher estate was ordered to sell all assets connected with the Giddings business and to deposit the proceeds in a special fund; such sale to be made without prejudice to the rights of either estate in such proceeds. The receiver of the Offricht estate was directed to co-operate in making such sale and did so. The sale netted $8,050.06; being 70½ cents on the invoice price, was duly confirmed. That sum, together with $69.80 collected on outstanding accounts, making $8,119.86 in all, is in the special account referred to. There was practically no other assets.

Between the date of the opening of said business at Giddings and the closing of the same, shortly prior to bankruptcy, numerous parties sold goods to the business upon credit, or rendered services which have replenished and conserved its assets. But for the furnishing of such credit the business could not have been operated, and the whole sum unlawfully invested in it by Offricht would have been lost. On October 17th, after full hearing, the relative rights of the two estates were adjudicated, as more fully appears from order of that date, and due notice of the entry of such order was sent by mail to every creditor of D. Lacher, as well as to the trustees and the receiver aforesaid, and their attorneys of record.

The trustee and the receiver of the Offricht estate alone seek a review of such order; the same having, by its terms, become final as to all other parties.

Conclusions of Law.

I conclude as a matter of law that the business at Giddings, operated in the name of D. Lacher, in fact belonged to Paul Offricht, and that said Paul Offricht was constructive trustee of such business for the benefit of his trustee in bankruptcy, subject, however, to the satisfaction in full of all claims incurred by said business in replenishing and conserving its assets. I further conclude that all costs legally incurred in administration of both estates in the Western District of Texas should be paid in full out of said fund. No briefs have been filed, and few cases of value cited on oral argument.

The representatives of the Offricht estate have advanced the doctrine of confusion of goods as bearing upon the question at issue. It seems to me to be entirely without bearing. There is no question here of any one's right

to recover property to which he has title, but which, without his fault, has been commingled with other property. On the contrary, title to all goods sold to the Giddings business was intended to and did pass to the owner of that business. The sellers parted with their title and assumed the status of creditors instead of owners.

The receiver and trustee of the Offricht estate are, in equity, the owners of all of the assets of the business by virtue of being the sole beneficiaries of the constructive trust under which Offricht held the property; but as beneficiaries under that trust they must take the property as they find it—that is, subject to the claims of all creditors who in good faith have performed services or furnished goods which have conserved or replenished the trust estate.

The reason for the rule is apparent. It is found in the circumstances under which the business was conducted. It was bought practically a year and a half before bankruptcy, and it would undoubtedly have been wholly dissipated and its value lost to the Offricht estate, but for goods and services furnished in the interval. The trust estate was constantly changing in value as goods were bought and sold, but it remained none the less a trust estate. It was an entity, and was worth on any particular day the difference between the value of its assets and the amount which it owed.

The only person who had the right to terminate the trust as against Offricht was his trustee, Mr. Rockhold. He had the power at any time by proper proceedings to oust Offricht and wind up the business. If he failed to do this through many months, and the trust estate was thereby somewhat diminished, he cannot complain, especially as against those who in good faith contributed to the maintenance of the trust estate in the interval. Under the order complained of he has been awarded the entire net trust estate. No theory has been suggested under which he should receive more.

S. A. Leake, of Dallas, Tex., for receiver and trustee Rockhold.

H. A. Hirschberg, of San Antonio, Tex., and M. H. Goldsmith, of Austin, Tex., for trustee Robinson.

John D. Hartman, of San Antonio, Tex., for bankrupt Lacher.

WEST, District Judge. [1, 2] Upon considering the petition filed by George F. Rockhold, trustee of the estate of Paul Offricht, bankrupt, No. 1315, Bankruptcy, pending in the Northern District of Texas, at Dallas, Tex., and J. T. Robinson, receiver in said cause, to review the order of the referee made in this cause on October 17, 1918, adjudging that the liquidated assets of Paul Offricht, bankrupt, in cause No. 780, Bankruptcy, in this court, constitute a fund subject to the payment of costs legally incurred in the administration of both of said bankrupt estates in this district, and subject further to the payment in full of all claims incurred by the business conducted under the name of D. Lacher in conserving and replenishing its assets, the court being of opinion, after due consideration of the record submitted, which embraced the testimony taken before E. M. Baker, referee for the Northern District of Texas, and that taken before D. K. Woodward, Jr., referee in bankruptcy at Rustin, together with briefs of counsel, that the order of the referee was correct:

It is therefore ordered that the said order of the referee, made and entered herein on October 17, 1918, be, and the same is hereby, in all things affirmed, and that said fund realized from the sale of the property of the bankrupt Paul Offricht, consisting of certain merchandise situated at Giddings, Tex., stand as a fund subject to the payments as

ordered by the referee, and the remainder thereof, if any, to be administered by the trustee herein, A. Robinson, as part of the estate of said Paul Offricht, bankrupt.

The clerk will duly enter this order of record at the Austin Division of the court, and return to the referee at said Austin Division the record on petition for review, together with a certified copy of this order for his observance.

HARRIS v. FIRST STATE BANK OF DAWSON, GA., et al.

(District Court, N. D. Georgia. October 2, 1919.)

No. 19.

EQUITY ⊂=409—FINDINGS OF FACT OF SPECIAL MASTER PRESUMABLY CORRECT.

Where a special master is appointed by consent of parties, with power to hear the evidence and make findings of fact and to state his conclusions of law, his findings of fact are presumed to be correct, especially where made on conflicting evidence, and may be set aside only where clearly unsupported by evidence.

In Equity. Suit by C. M. Harris, trustee in bankruptcy of John R. Mercer, against the First State Bank of Dawson, Ga., Ella R. Mercer, John M. Bell, and John R. Mercer. On exceptions to report of special master. Exceptions sustained in part.

M. C. Edwards and R. R. Jones, both of Dawson, Ga., Jas. W. Harris, of Cuthbert, Ga., and Pottle & Hofmayer, of Albany, Ga., for complainant.

Yoemans & Wilkinson and W. B. Parks, all of Dawson, Ga., for defendants.

NEWMAN, District Judge. In this case, which it was necessary to refer to a master, the court first appointed Henry R. Goetchius, Esq., the standing master in the Columbus division, as master in the case. Mr. Goetchius was unwell and unable to go on with the hearing of the case, involving the taking of a large amount of testimony at different points in the district, as it did, and he consequently informed the court of his inability to act as master in the case. Thereupon counsel, being given the opportunity by the court, agreed upon T. T. Miller, Esq., a member of the Columbus bar, as master, and his appointment was made by the court by consent of counsel. Consequently his findings come within the ruling in the case of Hattiesburg Lumber Co. v. Herrick, 212 Fed. 834, 129 C. C. A. 288, a case decided by the Circuit Court of Appeals in this (the Fifth) Circuit, which relies upon the ruling in Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764, Davis v. Schwartz, 155 U. S. 637, 15 Sup. Ct. 237, 39 L. Ed. 289, and other cases to this effect, and stated sufficiently in the third headnote of the Hattiesburg Case:

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

"Where by consent of the parties an order was entered appointing a special master, with power to hear and consider all testimony, whether taken by himself or by deposition, to view all physical evidence offered, to inspect the premises involved in the suit, and to report all testimony, with exhibits, together with his findings of fact and conclusions of law, his findings of fact were conclusive upon the court, unless unsupported by any legal evidence, or contrary to all the evidence, and his conclusions of law, based upon the facts so found, only were reviewable on exceptions."

In this case, therefore, the rule stated in the foregoing case, as well as in the cases by the Supreme Court of the United States, cited therein as authority, is applicable.

The main question in the case is whether or not the bankrupt, J. R. Mercer, transferred certain property referred to in the bill and in the master's report, and attempted to put the title out of himself by such transfers, for the purpose of hindering, delaying, and defrauding creditors; it being charged in the bill that a large amount of real estate and certain stocks in corporations and other personal property were thus transferred, and the parties holding the title thereto apparently knew of the fraudulent transfers, and that they were holding it really in trust for the bankrupt.

The evidence was sufficient to justify the findings of the master, which were largely in favor of the complainant, Harris, trustee in bankruptcy, and sufficient to support his findings that the titles were in the bankrupt, J. R. Mercer, at the time he went into bankruptcy, with certain exceptions which I shall state.

The evidence, while somewhat conflicting in some of the items, was clearly sufficient to support the master's finding in a great majority of the cases where land was alleged to have been transferred for the purpose of hindering, delaying and defrauding creditors. In some of the cases the evidence was such that, as stated by counsel, I believe the master would have been justified in finding either way; but, having found in favor of the complainant, his findings, under the rule I have stated, must stand in this case.

In Kimberly v. Arms, supra, relied upon by the Circuit Court of Appeals for this Circuit in the case I have cited above, the second headnote is as follows:

"When the parties consent to the reference of a case to a master or other officer, to hear and decide all the issues therein, both of fact and of law, and such reference is entered as a rule of court, it is a submission of the controversy to a special tribunal, selected by the parties, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law, and its determinations are not subject to be set aside and disregarded at the discretion of the court."

In Davis v. Schwartz, 155 U. S. 631 (15 Sup. Ct. 237, 39 L. Ed. 289), the first headnote, which states substantially what was decided, is as follows:

"In a case referred to a master to report the evidence, the facts, and his conclusions of law, there is a presumption of correctness as to his finding of fact similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the court under Rev. St. § 649, or in an admiralty cause appealed to this court."

All this may be said to have been qualified somewhat by the recent decision of the Supreme Court in the case of Denver v. Denver Union Water Co., 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649. The first headnote in that case is as follows:

"The findings of a special master appointed, with consent of parties, to take the testimony and report it, with his findings of fact and conclusions of law, for the advisement of the District Court, are not conclusive, but subject to review by that court upon exceptions."

In the opinion, by Mr. Justice Pitney, this is said:

"Although no opinion was filed, the ruling appears to have been based upon the theory that, because the order of reference was made by consent of parties, the conclusions of the master were not open to question. Kimberly v. Arms, 129 U. S. 512, 524 [9 Sup. Ct. 355, 32 L. Ed. 764], and Davis v. Schwartz, 155 U. S. 631, 633, 636 [15 Sup. Ct. 237, 39 L. Ed. 289], are cited in support, but they are distinguishable. In the former case, the reference, made by consent of the parties, authorized the master to hear the evidence and decide all the issues between them, and it was because of this that the court held the findings were not merely advisory, as in the ordinary case, but were to be taken as presumptively correct, 'subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise,' and that the findings ought to have been treated as 'so far correct and binding as not to be disturbed, unless clearly in conflict with the weight of the evidence upon which they were made.' Davis v. Schwartz is to the same effect. In the present case, the consent given to the order of reference was conditioned by the terms of the order itself, which, as we have seen, limited the functions of the master to the taking of testimony and reporting it to the court together with his findings of fact and conclusions of law for the advisement of the court."

As I understand these decisions taken together, the findings of the master in this case, as in all similar cases, are presumed to be correct, and especially on questions of fact, where there is conflicting evidence, and particularly where there is a question of fraud or no fraud. The master, having the parties before him, hearing their testimony, and seeing them, can judge much better of the real merits of their testimony than this court can from the written record. It must be clearly shown that the evidence was wholly insufficient to support the finding of the master, or that he erred in the law applicable to the case, before his findings should be disturbed.

In the present case I do not find any error of the master in findings as to the various pieces of property, except his finding in the matter of the First State Bank of Dawson building. I have gone over all the evidence that I can find applicable to this, and I do not think that the evidence at all justifies the finding of the master in the matter. The First State Bank paid for the lot out of their money, and paid for the building erected thereon. I do not think there can be any question about this, from the evidence, and the deeds to Mrs. Mercer and Mrs. Perry, and from them to the bank, are fully explained, I think, by the evidence. True it is that the original title went into Mercer for the lot on which the building now stands, but the evidence seems to show conclusively that the bank paid the money to Carver, who had formerly

owned the lot, and that fairly accounts, I think, for Mercer having subsequently made the deed to the bank. The whole transaction looks to me to have been perfectly fair, so far as the present investigation is concerned, and that the bank really owned, at the time Mercer went into bankruptcy, the lot and the building erected thereon.

As to the other properties, both real estate and stocks, which the master found in favor of the complainant, I think the evidence was sufficient to justify his findings, and, under the rule which has been stated above with reference to the findings of a master in cases like this, I think his findings are such as should not be disturbed.

There are no exceptions, except on the part of the defendants; the findings of the master against the complainant, and in favor of the defendants, are not excepted to at all. The result is, without further discussion, that the report of the master must be confirmed, and the exceptions overruled, except as to the First State Bank building and lot. As to that, as I have said, the evidence does not support the master's finding, and as to that his report is not confirmed, but is disagreed with.

A decree may be taken accordingly.

MINNESOTA & ONTARIO POWER CO. v. LOSEY.

(Circuit Court of Appeals, Eighth Circuit. October 25, 1919.)

No. 5199.

1. BANKRUPTCY ⟸303(3)—SUIT TO RECOVER PREFERENCE; EVIDENCE AS TO OWNERSHIP.
   Evidence in suit to set aside as a preference a transfer by bankrupt within four months of the filing of petition in bankruptcy *held* to sustain finding that property belonged to bankrupt, except certain paper furnished by defendant for bankrupt's customers, title to which remained in defendant till delivery to the customers, which has not taken place.
2. BANKRUPTCY ⟸302(1)—SUIT TO RECOVER PREFERENCE; BILL OF COMPLAINT.
   Bill of complaint in suit to set aside as a preference a transfer of property by bankrupt within four months of the filing of petition in bankruptcy *held* sufficient; it reciting the statutory requirements, and it not being necessary to allege identity of the existing creditors with those at the time of the transfer.
3. BANKRUPTCY ⟸305—SUIT TO RECOVER PREFERENCE; JUDGMENT WITH STAY.
   Defendant in suit to set aside a preferential transfer by bankrupt within four months of the filing of petition in bankruptcy is not entitled to have the judgment against it entered, with stay of execution till it has had opportunity to prove its claim in bankruptcy, with right then to have the amount thereof set off against the judgment, leaving execution to issue for the balance.

Appeal from the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Suit by L. L. Losey, Jr., trustee in bankruptcy of J. C. Brocklebank & Co., a bankrupt, against the Minnesota & Ontario Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John Junell, of Minneapolis, Minn. (Thomas L. Philips, of Minneapolis, Minn., on the brief), for appellant.

L. A. Lecher, of Milwaukee, Wis. (Henry Deutsch, Ralph Whelan, and Donald Bridgman, all of Minneapolis, Minn., on the brief), for appellee.

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

ELLIOTT, District Judge. The appellant, Minnesota & Ontario Power Company, hereinafter referred to as the defendant, is a corporation having its principal office at Minneapolis, Minn., engaged in the business of manufacturing and selling paper, its plant located at International Falls, Minn.

The appellee, L. L. Losey, Jr., hereinafter referred to as the plaintiff, is trustee in bankruptcy of J. C. Brocklebank & Co., an Illinois corporation, adjudicated bankrupt in the Northern district of Illinois on July 21, 1913, and its property is now in process of administration by that court. Its principal place of business was at Chicago, Ill., where it was engaged in the business of handling news print paper, securing and carrying out contracts with newspapers for supplying them with paper. It manufactured no paper.

This is a suit in equity to set aside an alleged transfer of property from the bankrupt to the defendant, made on February 18, 1913, in violation of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. §§ 9585–9656]), which property so transferred consisted of cash, a promissory note, certain moneys due under contracts for paper delivered to publishing companies with whom bankrupt had contracts and which had not been paid for; also certain paper on hand in warehouses in St. Louis and Memphis, and paper en route to said cities from defendant's mill; also contracts of bankrupt for future delivery of paper to publishing companies.

Briefly stated, the plaintiff alleged in his bill the filing of the involuntary petition of bankruptcy within four months of the alleged preferential transfer, his election and qualification as trustee, his residence, and the order authorizing the bringing of this suit; that on February 18, 1913, bankrupt was indebted to defendant and other unsecured creditors in amounts in excess of its assets—was insolvent; that the bankrupt was then the owner of cash and property, including the contracts above referred to; that on February 18, 1913, defendant secured the payment to itself of the money and the transfer and assignment to it of the note and the property and all moneys due from the publishing companies for paper theretofore delivered, and that defendant appropriated same to its own use; that said property was all of the available assets of the bankrupt; that at said time bankrupt was indebted to a number of other unsecured creditors in large sums, and by reason of said payment and transfer such creditors were and will be unable to secure payment of their claims; that the defendant knew and had reasonable grounds to believe the bankrupt insolvent at the time, and that a preference would be effected by such payment and transfer. The plaintiff demands that the transfer of this property be set aside, and that defendant be required to account for the amount and value of the property so transferred.

Defendant answered with denials, and alleged that the property described in the bill belonged to the defendant, was its property and was held by bankrupt as agent of defendant, and as such the bankrupt turned same over to defendant; that the contracts for furnishing paper to the publishing companies were entered into by bankrupt as agent of defendant, pursuant to some prior agreement between bankrupt and defendant, and that bankrupt in carrying out these contracts acted as the agent for the defendant, and received the money from the publishing companies for it; that the moneys due under the contracts for paper so delivered, and the paper which had been shipped or was stored to carry out the contract, was at all times the property of and belonged to defendant.

At the close of plaintiff's case defendant moved to dismiss the action of the plaintiff, and as grounds for such motion alleged that the bill of complaint failed to state a cause of action, and that the plaintiff had failed to make out a cause of action or a right of action against the defendant. This motion was denied, and defendant duly excepted.

The trial court, after hearing defendant's testimony, made its find-

ings in favor of plaintiff and against defendant upon the issues presented by the pleadings, and specifically found:

(1) That J. C. Brocklebank & Co., on February 18, 1913, was in fact insolvent.

(2) Assuming that the property above referred to was the property of the bankrupt, the payment and transfer of the same to the defendant constituted a preferential transfer, within the meaning of the bankruptcy statute.

(3) Assuming that the property transferred belonged to the bankrupt, the effect of such transfer was to enable the defendant to obtain a greater percentage of its debt than any other creditor of bankrupt of the same class.

(4) Assuming there was a transfer of property from bankrupt to defendant on February 18, 1913, which effected a preference, the defendant at that time knew, and had reasonable cause to believe from the information disclosed by the record, that such transfer would effect a preference to it.

In view of these findings, abundantly supported by the record, the vital question presented here, and the one question seriously urged by both parties, is the answer to the question as to whether there was ever an unlawful transfer of the property of the bankrupt to the M. & O. Company. The determination of this issue has involved the examination of a long and tedious record, embraced within a mass of oral and documentary evidence taken at the trial, and included in the record presented here.

Just who actually owned the property transferred by bankrupt, to-wit, the moneys, papers, sums due upon contracts, and the interest in the contracts, and paper thereafter to be delivered, is entirely dependent upon the relation of the bankrupt and the defendant to each other, and the relation that each bore to the contracts made with the publishing companies; the furnishing of the paper and the filling of the contracts by the M. & O. Company pursuant to letters passing between that company and the bankrupt; its indorsement or underwriting of the contracts between bankrupt and the publishing companies—and all of this must be interpreted in the light of the attitude assumed by the respective parties with reference to the transactions in question. The ownership of this property so transferred is entirely dependent upon, and must be interpreted in the light of, all these, and the entire record must be considered.

The different portions of the record relating to the transactions between the parties and the attitude of the parties themselves toward each other, through these transactions, are so inconsistent with each other that, by eliminating a part of the outstanding features which would tend to interpret the understanding of one with the other, and considering a portion of the record only, support can be found for each of three conclusions.

First. The contention of defendant that the relation of bankrupt to the M. & O. Company was that of a factor of that company in the transaction of the business of the sale and delivery of paper to publishing companies, and when bankrupt made contracts with publishing

houses, and such contracts were underwritten or guaranteed by the M. & O. Company, in truth and in fact they were the contracts of the M. & O. Company with the publishing companies, and the M. & O. Company was the party really interested in the fulfilling of such contracts; that the contract price for the paper as it was paid for to the bankrupt was the property of the M. & O. Company, and that bankrupt had no right, title, or interest in or to such payments; that the same in its hands was a specific trust fund, belonging to the M. & O. Company, and that bankrupt only acted as agent or factor of the M. & O. Company, receiving commissions therefor.

In this view, of course, it must follow that bankrupt had no right title, interest, or ownership in or to the paper that was furnished or in the funds received therefor, and in so far as such funds could be identified, the M. & O. Company could have pursued this money in the hands of the bankrupt as against the claims of the other creditors.

Second. The contention of the bankrupt, which is perfectly consistent with portions of the record, that the bankrupt purchased this paper from defendant for a price f. o. b. mill of defendant; that it became responsible for the payment of shipping charges; that it arranged for storage; that it was stored in the name of bankrupt who paid the insurance; that the delivery by defendant to bankrupt was f. o. b. mill, that delivery was pursuant to the terms of the contracts of the bankrupt with the publishing companies, and the price was the price fixed by contract of bankrupt with defendant; that the time of payment was fixed by agreement between them to conform to the time of payment fixed in the contracts between the bankrupt and the publishing company, both as to amount and time; and, therefore, that all of this property, both the paper in process of transportation and in the warehouses, as well as the moneys in bankrupt's hands, were all the property and money of the bankrupt, used in and about its business, the paper being purchased by bankrupt from defendant for the purpose of delivery upon its contract.

There are numerous items found in the record of the testimony taken at the trial, tending to show the relations of these parties as they themselves acted, entirely consistent with the claim above stated. If this view of the facts should be taken, then the defendant company had no right, title, or interest to any of this property, either the paper or the proceeds of the sale of paper, in the hands of the bankrupt.

Third. The record, however, is open to a further interpretation, and that is the one placed upon it by the trial court, in substance and effect that the bankrupt entered into the contracts with the publishing companies upon his own account, and not as the agent or factor of the defendant; that these contracts were executory, to be completed by delivery of the paper and payment therefor in installments, the sales of the portions to be delivered from time to time to be completed sales with the delivery and the payment therefor; that defendant was in no wise a party to these contracts, except as it became surety or guarantor; that the money in the hands of bankrupt, collected upon delivery of the paper by bankrupt to the publishing companies, was deposited by bankrupt in either of two different banks to bankrupt's credit, there

being no testimony that defendant ever claimed or attempted to exercise any right of ownership to the particular funds collected, and no effort to enforce any trusteeship on the part of the bankrupt, the transactions as to delivery of paper and collection therefor being entirely confined to the bankrupt and the publishing companies; that the contract under which this paper was furnished to bankrupt by defendant was an agency contract in so far as the delivery of the paper by defendant to bankrupt was involved; that bankrupt received the paper, paid for its storage, which was in the name of bankrupt, paid the insurance —in short, paid for the care and handling of the paper between the mill and place of delivery to the publishing companies under and by virtue of its contracts with such companies; that the relation of bankrupt to defendant was that of debtor and creditor for the paper so delivered to the publishing companies, finding the amount that was due the defendant from bankrupt by computing the amount of the contract price as between them for the paper that had been delivered to the publishing companies and paid to bankrupt by such companies; that all of the paper supplied by defendant, while in transit and in storage, and until the delivery thereof by bankrupt to the publishers, was the property of the M. & O. Company; and, therefore, that the turning over of this property which was held in storage at the time in question did not constitute a transfer of property belonging to the bankrupt.

That this paper, while in storage and until delivery, was the property of defendant, is emphasized by the undisputed record, showing that a month's supply of paper was to be kept on hand at the places of storage by the defendant, more than was used, and in the event there was unused paper—that is, paper that had not been delivered by the bankrupt to the publishing companies—it is conceded by all parties to the record that such remaining paper was the property of the defendant.

The trial court, therefore, we think properly found that this paper, being a part of the property turned over to defendant by bankrupt, was not the property of bankrupt, and that the title thereto had always remained in the defendant.

A different situation exists, however, as to the money, aggregating $34,597.96, the note for $2,500, the assignment of moneys owing by the publishing companies to bankrupt, and the assignment of the contracts between bankrupt and the publishing companies, whereby the former was to deliver paper in the future. To none of these properties or classes of property had the defendant ever asserted any ownership, right, or title, and the transfer thereof by bankrupt to defendant upon the date named, in the light of the foregoing findings as to insolvency, etc., did constitute a transfer within the meaning of that term as it is used in the Bankruptcy Act, and it is conceded that the value of such property so transferred to defendant constitutes a greater percentage of the debt owed by bankrupt to defendant than the percentage of the remaining assets of bankrupt to the remaining liabilities, and, therefore, that the transfer was a preferential one.

We think, therefore, that the trial court did not err in finding that the dealings between bankrupt and defendant constituted an executory

contract between them, whereby defendant furnished bankrupt paper with which it filled the requirements of the publishing companies upon its contract with them; that the deliveries of the paper to the publishing companies completed the delivery to bankrupt; and that it became liable to defendant therefor, the terms of payment both as to time and amount being made definite and certain by the terms of the contract between the bankrupt and the publishing companies to which reference was repeatedly made.

These latter findings are entirely consistent with the findings of the trial court, and that the same are supported by the record does not admit of denial. The elaborate arguments presented from the viewpoint of the respective parties upon these questions of fact demonstrate conclusively the uncertainty of the record. The entire difficulty is the result of failure upon the part of the parties interested to definitely define their rights and duties by proper contract, instead of leaving their rights to be determined from contracts between bankrupt and the publishing companies, the guaranty of these contracts by defendant, letters passing between bankrupt and defendant, oral conversations had between representatives of the respective parties, and what was done by the respective parties from time to time. The record here made is such that a finding upon the theory advanced by either of the parties to the record is inconsistent with the interpretation placed upon their relations by their acts at different times embraced within and covered by the transactions between the parties.

A careful examination of this record, however, fails to disclose that the defendant ever at any time consistently acted with reference to the dealings in question in such a manner that it can reasonably be said that it deemed itself the owner of the moneys paid by the publishing companies to the bankrupt for the paper.

[1] With all of this uncertainty in this record, keeping in view the fact that the finding of any of the three situations above suggested must disregard much of the testimony, and fail to take into account the actions of the defendant and the bankrupt companies with reference to these transactions, we are of the opinion that this record by substantial testimony amply supports the findings made by the trial court, and that his findings ought not to be disturbed.

[2] We find no merit in the contention of defendant that the bill of complaint is insufficient to state a cause of action. The action is statutory and the bill fully recites the statutory requirements. The bill of complaint need not allege the identity of the existing creditors with those at the time of the alleged transfer in an action to recover a preference. The citations by the appellant are not those of suits to recover preferences, but are to avoid transfers in fraud of creditors, which suits may be brought at any time subsequent to the transfer, and are not limited to the four months. In suits to avoid transfers in fraud of creditors, allegations are required such as are insisted upon by the defendant here. It may be added, however, that before defendant made its motion to dismiss the bill at the close of plaintiff's case, evidence had been introduced fully covering all of the matters which appellant insists should have been stated in the bill of complaint. This

evidence showed the identity of the creditors at the time this alleged transfer was made, and also that their claims had been allowed in the bankruptcy proceeding.

The trial court properly included within its decree that the same was entered without prejudice to the right of the defendant company to prove in the bankruptcy court its claim against the bankrupt company.

[3] Without reviewing the several provisions of the Bankruptcy Act involved in this determination of the court, the contention of the defendant that the judgment should have been entered with stay of execution until it had opportunity to prove its claim in the bankruptcy court, and having done so, then have the amount thereof set off against the judgment, leaving execution to issue for the balance, is denied. Boatman's Bank v. Laws et al., 257 Fed. 299, — C. C. A. —; Moise v. Scheibel, 245 Fed. 546, 157 C. C. A. 658.

The judgment of the trial court is affirmed

ÆTNA INS. CO. v. HEFFERLIN.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1919.)

No. 3317.

1. INSURANCE ⟸574(1)—EVERY INTENDMENT IN FAVOR OF VALIDITY OF AWARD.
Every intendment will be entertained in favor of an award made by appraisers appointed pursuant to arbitration provisions in a fire policy, and the award will be sustained, even though it does not conform to what would have been the judgment of the court.

2. INSURANCE ⟸574(1)—AWARD BY ARBITRATORS AFFIRMED.
An award by appraisers appointed pursuant to the provisions of a fire policy will not be sustained, where the appraisers omitted items of damage and failed to accept insured's tentative offer of information, and did not notify him as to the date of the hearing.

3. INSURANCE ⟸575—INSURED NOT REQUIRED TO SUBMIT TO SECOND APPRAISEMENT.
Where, through no fault of the insured, an award made by appraisers appointed under the arbitration provisions of a fire policy is set aside for their failure to consider all of the items of loss, etc., insured is not required to submit to a second appraisement of the loss.

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

Action by C. S. Hefferlin against the Ætna Insurance Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

This action was brought in the state court by Hefferlin, called plaintiff, against the insurance company, called defendant, to enforce liability under an insurance policy for $5,000, issued to cover a hotel, including foundations, window screens, doors, electric light wiring, and all fixtures. The building was almost wholly consumed by fire on November 30, 1916. The case was removed to the United States court.

In one count plaintiff alleges that his loss was $64,695, the value of the property when destroyed, that proofs of loss were made, that there was other insurance, and that the loss had not been paid. In the second count

it is alleged that plaintiff and defendant disagreed as to the amount of loss, and that according to the terms of the policy they thereupon attempted to have the amount of loss sustained ascertained by appraisers, one selected by plaintiff and the other by defendant; that the appraisers visited the burned building during a severe storm, when snow and storm conditions prevented an ascertainment of what, if any, salvage value there was; that the appraisers arbitrarily fixed the salvage value at $3,038.50, whereas there was in fact no salvage value; that the appraisers refused to permit plaintiff to furnish information as to the construction and condition of repair of the building at the time of the fire, or to furnish evidence with respect thereto, and that the appraisers, being ignorant of the condition and preservation of the building, arbitrarily fixed the sound value at the time of the fire at $50,601.80, depreciation at $12,842, whereas actual depreciation did not exceed $5,000, and the net loss at $34,721.21, whereas the actual cash value at the time of the fire was $64,695. It is alleged that the appraisers failed to give notice of the time when or place where they were to meet to make their findings, and that they failed to take into consideration room telephones and wiring, door and window screens, down spouts, and gutters. The insurance company answered that, because of disagreement as to the amount of loss and damage sustained, appraisers were appointed, and that the sound value, amount of salvage, and depreciation and net loss were as fixed by the appraisers. The company pleaded willingness to pay its proportionate amount of the award, and that if there was any omission of items it was because of the acts of the plaintiff, and that it was the duty of the plaintiff to submit to a new appraisal, consent to which was given by the company.

The jury rendered a general verdict, and made special findings in favor of plaintiff. They found that the cost of the building and fixtures in 1909 was $59,939, that when burned it would have cost $68,929.85, that the amount of depreciation was $7,222.75, and that the amount of salvage was $1,250. Under the findings, the company became liable to pay the plaintiff the amount stipulated in the policy upon which the action was based. Judgment was entered accordingly.

The policy, after providing that loss or damage shall be ascertained or estimated according to actual cash value, with proper deductions for depreciation, however caused, shall in no event exceed what it would then cost the insured to repair or replace with material of like kind and quality, reads: "* * * Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers as hereinafter provided, and the amount of loss or damage having been thus determined, the sum for which this company is liable, pursuant to this policy, shall be payable 60 days after due notice, ascertainment, estimate, and satisfactory proof of loss have been received by this company in accordance with the terms of this policy." The policy also contains the following: "In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire."

Frank & Gaines, of Butte, Mont., for plaintiff in error.

Smith, Gibson & Smith, of Livingston, Mont., and E. N. Harwood, of Billings, Mont., for defendant in error.

Before ROSS, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The errors assigned present the question whether the court erred in declaring as a matter of law that the award was invalid, and should it be

held that the appraisal was ineffective, whether it was obligatory upon the plaintiff, the insured, to submit to a new appraisal.

The evidence was that neither of the appraisers was acquainted with the hotel building prior to the time of its destruction; that the building and fixtures were almost entirely destroyed; that the foundations were shattered and the stone in them discolored; that the kitchen part of the hotel was entirely burned off, the upper walls caved in, and the floor sagged. Plaintiff testified that, when the appraisers started to go from Livingston to Corwin, where the hotel was situated, he asked one of them if he wished him to accompany them, and that the appraiser said he didn't care, and "guessed" it would be all right if he went; that at the time the appraisers examined the premises the ground was covered with snow, and the wind was blowing, and the temperature very cold; that the appraisers did not seem to give him much attention, and that, not being very strong himself, he left them and went to the depot; that the appraisers never asked him for anything, although he offered to give them any information he could; that they did not tell him they would give him an opportunity to give them information, nor did they make any inquiry of him about the condition of the hotel, nor invite information about the property; that when they came down from the hotel to Livingston they asked no questions. He said:

"They did not seem to want me to give them any information. I judged that from their demeanor."

He further testified that he could have given them information, and would have done so; that they brought to him the award, and that he told them it was too low, and that he was dissatisfied; that they did not include the down spouting and extras of the value of $300, nor the entire wiring of 80 inside rooms, telephone switchboard, or enunciator, which cost about $1,480, nor the screen doors and window screens on the entire building, worth $490.62. On cross-examination, plaintiff testified that he had a set of plans and specifications which had been used during the construction of the building, and that he furnished these to the insurance adjuster, who took them away with him, and that he had secured a duplicate set, which he turned over to an architect; that when he was going up to the hotel site he told one of the appraisers that he would tell him anything he wanted to know about, and that he told both the appraisers the same thing when he was at the hotel building site; that one of the appraisers said, "All right," they would call on him if they wanted anything; that he was a little offended at the demeanor of the appraisers, and thought they ought to ask him questions about the property, but they did not. Plaintiff also said that he had had the floors painted and inside varnishing done; that the building did not require much repair and was in very good condition.

The architect, who had furnished the plans and specifications for the building and supervised its construction, testified that the original cost of the hotel in 1910 was approximately $58,000, and that it would cost from 15 to 20 per cent. more to construct in 1916, and that in his opinion a fair depreciation would be 2 per cent. per annum. Another architect testified that in his opinion the cost of construction in 1916 would be about $65,000, and that the depreciation from 1910 to 1916

would not exceed 10 per cent.; that in June, 1918, after the fire, there was very little salvage, the foundation walls being badly shattered, and that not more than 25 per cent. of the stone was fit for use again.

One of the appraisers, in testifying for the defendant, said that in estimating depreciation he was guided largely by rules adopted by engineers, covering classes of material, and that these rules are determined by long experience and observation in different classes of materials; that he obtained plans and specifications of the building, and consulted at different times with the architect who drew the plans of the hotel, and from the information obtained from the architect and the plans and specifications the appraisers could estimate the cost of the building, with the exception of the electric light fixtures, and that he wrote to plaintiff to procure the invoice for those; that plaintiff did not furnish the figures for the electric light fixtures, and they got them from others; that the plaintiff had offered his services, but that the appraisers had obtained all the information from the specifications and plans that was required as to the building and would get the information with reference to the salvage and as to the condition of the ruins when they were upon the ground; that the ruins would speak for themselves, and that it was "up to us to decide without any outside interference"; that they examined the ruins, estimated how much was destroyed, and eliminated that, and allowed for what could be utilized; that they went all over the ruins, observed what was left of the interior finish, considered wear and tear, and estimated upon the outside walls by what they found still standing; that they estimated depreciation at not quite 4½ per cent. per annum. This appraiser frankly said: The "idea" was "that Mr. Hefferlin should have furnished all the information without solicitation"; that they got some information in Livingston, but that it was not the custom to get the information from the interested parties, unless the appraisers asked for it; that the plans did not inform them that there was a telephone system, window screens, and screen doors; and that the appraisers did not consider those items in making their estimate. The other appraiser testified generally to like effect concerning depreciation, and said that in the papers furnished there was nothing about room telephones or an enunciator; that they took an average of all depreciation, and proceeded upon the belief that the plans and specifications embodied everything there was in the building. Witness testified that on the way up to Corwin he did not hear plaintiff say anything about the appraisal matter, and did not talk with him about it.

[1, 2] It is well established that every reasonable intendment is in favor of an award made by appraisers who have acted pursuant to the terms of the clause of a policy such as there is in this case, and that an award will be sustained, even though it does not conform to what would have been the judgment of the court. But in the present case these points stand forth in a conspicuous way: The appraisers never received any explanations or statements of any character with relation to the property destroyed from the insured, and they omitted to consider important items of property that should have been included. In some respects the case is like that of Continental Insurance Co. v. Gar-

rett, 125 Fed. 589, 60 C. C. A. 395. The policy in that case provided for submission to appraisers, and that the appraisers should ascertain the sound value of and the loss upon the property damaged or destroyed. Award was made and subsequently action brought to set it aside, because of want of notice to the insured. There was no requirement in the agreement of submission that the appraisers should follow the law generally, but the Court of Appeals, speaking through Judge Lurton, held that notice should have been given to the parties of the time and place of the hearing "from the commonest principles of justice." The court was of the opinion that, if the character of the matter submitted were such as to justify an inference that the appraisers were chosen to act as experts and adjust the matter from their own knowledge, notice would not be necessary, and it was not obligatory upon the appraisers to hear evidence, unless the agreement of submission so provided. The arbitrators in that case were called upon to ascertain and appraise the sound value of a brick building which had been almost completely destroyed by fire; even the walls having, in part, fallen. The court said:

"Thus a mere examination of the premises could not, on the evidence in this record, have informed them as to the character of the finishing of the interior work, and its condition before the fire. The appraisers were experienced contracting builders; but, without some evidence, how was it possible for them to know the sound value or the loss and damage? Under such circumstances appraisers should give notice to both parties of the time and place of hearing, and require evidence in respect of facts which they could not otherwise know. The mere fact that the assured saw the appraisers on the street, and that he did not ask to be heard or object to their proceeding without notice, is not a waiver. The appraisers were not in session when complainant saw them, and he was not present when they examined the ruins or acted in any way in the discharge of their duty, and he had no notice of either the time or place of their session."

This case has been approved by the Supreme Court of Montana in Carlston v. St. Paul Fire & Marine Ins. Co., 37 Mont. 118, 94 Pac. 756, 127 Am. St. Rep. 715. Although in that case there was a more emphatic demand for a hearing than was made by the plaintiff in the present case, yet in view of the offer of the plaintiff to the appraisers that he would be glad to furnish them any information respecting the property, it is not unreasonable to say that his position is hardly less favorable than it would have been if he had made more formal request. They should have heard him. The omission to include the items of electric wiring, screen doors, and window screens shows that, notwithstanding the fact that the appraisers were experienced contractors, without evidence of the fact that these things were in the hotel at the time of the fire, it was next to impossible for them to determine accurately the sound value or the loss and damage. Canfield v. Watertown Fire Ins. Co., 55 Wis. 419, 13 N. W. 252; Rutter & Hendrix v. Hanover Fire Ins. Co., 138 Ala. 202, 35 South. 33; Phœnix v. Moore (Tex. Civ. App.) 46 S. W. 1131.

There is no suspicion of lack of good faith or of integrity of conduct on the part of the appraisers. We gather from the record that they acted in the best of faith and in a conscientious effort to perform their duty properly; but in their efforts to be impartial they failed to

acquire necessary information that they could have obtained by hearing the plaintiff. The insured evidently thought that it would be inappropriate for him to obtrude evidence upon the appraisers unless they requested it. The result, however, has operated unjustly to the insured, because the appraisers did not have before them sufficient information upon which to found accurate conclusions as to the pecuniary estimate of damage done to the property burned. We therefore think that, under the undisputed facts, the lower court was correct in holding the award ineffective, and that plaintiff could set it aside by action in court. As bearing upon the question we cite Ætna Ins. Co. v. Jester, 37 Okl. 413, 132 Pac. 130, 47 L. R. A. (N. S.) 1191; Phœnix Ins. Co. v. Moore, supra; Schoenich v. American Ins. Co., 109 Minn. 388, 124 N. W. 5; Palatine Ins. Co. v. O'Brien, 152 Fed. 922, 82 C. C. A. 70; Kaiser v. Hamburg Bremen Ins. Co., 59 App. Div. 525, 69 N. Y. Supp. 344; Canfield v. Watertown Fire Ins. Co., supra.

[3] Nor do we think that it was the duty of the assured to submit to a second appraisement of the loss. Having once, in good faith, undertaken to have an estimate of the amount of his loss made by appraisers appointed pursuant to the terms of the policy, and the appraisement having been defective and invalid, without fault on the part of the insured, he is not obliged to join in an attempt to have another appraisement, but may maintain this action. Uhrig v. Williamsburgh Fire Ins. Co., 101 N. Y. 362, 4 N. E. 745; Western Assurance Co. v. Decker, 98 Fed. 381, 39 C. C. A. 383; Solem v. Conn. Fire Ins. Co., 41 Mont. 351, 109 Pac. 432.

Believing that the rights of the insuring company have not been prejudiced, the judgment of the lower court is affirmed.

Affirmed.

LEE v. MINOR et al.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919.)

No. 3307.

COURTS ⇐260—JURISDICTION OF FEDERAL COURT IN SUIT FOR CONSTRUCTION OF WILL.

Under the statutes of California an independent suit in equity inter partes does not lie to construe a will, or to assail proceedings in probate by which the will is construed and the estate distributed, and a federal court in that state is without jurisdiction of such a suit.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Suit in equity by Jeanette W. Lee against Richard C. Minor, individually and as trustee under the will of Elizabeth E. Barnhart, deceased. Decree for defendants, and complainant appeals. Affirmed.

F. C. Heffron, of Roseburg, Or., for appellant.

John H. Miller, of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The second amended bill, to dismiss which a motion was made to and sustained by the court below, was based solely upon the diverse citizenship of the parties and the fact that the amount involved exceeded that required for jurisdiction, and alleged, in effect, among other things, that the deceased, then a resident of the city of Stockton, in San Joaquin county, Cal., executed, on October 7, 1899, her last will and testament, to which, on September 19, 1902, she added a codicil, in which will she named three trustees, one of whom was the appellee, Minor, and all of whom were subsequently appointed executors of the will at the time it was admitted to probate by the probate department of the superior court of the said county of San Joaquin—the said Minor being the sole surviving trustee and executor at the time of the bringing of the suit, about 14 years after the entering of the decree of distribution of the estate hereinafter referred to. The testatrix, after directing the payment of her just debts, the erection of a monument to her deceased husband, and the making of two bequests not necessary to be mentioned, declared, in the fifth clause of her will:

"All the residue of my estate, of every kind and nature, both real, personal, and mixed, wherever situated, of which I may die possessed, is hereby bequeathed and devised to, and by the court is to be distributed unto Henry W. Earle, Spottswood C. Allen and R. C. Minor, and to the survivor or survivors of them, in trust for the following purposes, namely:

"1st—To take possession, charge and management of the same and collect the rents, issues, profits and accumulations thereof (save and except that my daughter, Daisy Belle Nicewonger, shall have the use and occupancy of the dwelling house with all of its contents in the city of Stockton, free from all rent).

"2d—To pay annually the entire income or rents, profits and accumulations, after paying all taxes, other legal charges, and the sum of eight hundred dollars per year, which is hereby fixed as the annual compensation for my said trustees collectively when acting as such, to my daughter, Daisy Belle Nicewonger, during her life, and after her death in equal shares to the children of my said daughter, until the youngest of said children shall have reached his or her majority or dies without having reached his or her majority, when the trust herein created is to terminate and the said residue is to be divided and distributed in equal shares to the children of my said daughter or the issue of any deceased child, per stirpes.

"3d—Should my daughter, Daisy Belle Nicewonger, at any time during the continuance of this trust, become a widow or a single woman, then said trust is to immediately cease and terminate and the said residue and the whole thereof distributed to my said daughter.

"4th—In the event that my said daughter dies during coverture leaving no issue, then this trust is to terminate and the said residue of my estate is to be distributed and divided as follows, viz.:

"To my niece, Ida Fenner, of Watertown, New York, the sum of ten thousand dollars;

"To my niece, Ella Haven, of Watertown, New York, the sum of two thousand dollars;

"To my nephew, Estus Bartholomew, of Stockton, California, the sum of three thousand dollars;

"To my niece, Laura Bell Delano, the sum of three thousand dollars;

"And the remainder of said residue, to the extent of ten thousand dollars each (if the same is sufficient therefor) to the children of my brothers, Otis L. White and Necomb White, of Northport, Michigan, in equal parts and shares and not per stirpes; if any residue then remains, the same is hereby bequeathed to my said niece, Ida Fenner, of Watertown, New York, in addition to the sum of ten thousand dollars hereinbefore bequeathed to her.

"The income provided for in this will to be paid to my daughter is made for her exclusive benefit, without any right of assignment by her to any person whatever, and is not to be subject to the claim of any of her creditors."

The bill dismissed showed upon its face that the complainant is one of the children of Otis L. White (one of the brothers of the testatrix named in her will), and that her only child was Daisy Belle Barnhart, who, at the time of the execution of the will was the wife of one Cary Hayes Nicewonger, from whom she was divorced April 8, 1903, the decree of divorce expressly permitting her to resume her maiden name, and that she thereafter remained a single woman until long after the making and entry of the decree of distribution, when she married one Frank Albert Hillman, and thereafter, to wit, on March 17, 1912, died, leaving the latter surviving her, but leaving no issue.

The dismissed bill alleged that the real property of the deceased greatly exceeded in value the amount of all of the bequests named in her will and codicil, and set out in full the decree of distribution, which is as follows:

"In the Superior Court of the State of California in and for the County of San Joaquin.

"In the Matter of the Estate of Elizabeth E. Barnhart, Deceased.

"H. W. Earle, S. C. Allen, and R. C. Minor, the executors of the last will and testament of Elizabeth E. Barnhart, the above deceased, having on the 19th day of April, A. D. 1904, rendered and filed herein a final account and report of their administration of said estate, together with a petition for the final distribution of said estate, and an amendment thereto on April 22, 1904, and the said matters coming on regularly to be heard on the 2d day of May, 1904, proof having been made to the satisfaction of this court that the clerk of this court had given sufficient notice of the settlement of said account and the hearing of said petitions for distribution in the manner and for the time required by law, the court proceeded to the hearing of the same, and, documentary and oral evidence having been received, the hearing was continued until this day.

"And it appearing that said account is for a final settlement and is in all respects true and correct, is supported by proper vouchers, and that the said account is entitled to be allowed and settled as presented; and it appearing that all claims and debts against said decedent and all taxes on said estate, and all debts, expenses, and charges of administration, have been fully paid and discharged, and that said estate is ready for distribution; that said Elizabeth E. Barnhart died testate on the 16th day of May, A. D. 1903, and at the time of her death was a resident of said county of San Joaquin, state of California; that after the due and legal proceedings had been had an order was duly made and given by this court admitting to probate the last will and testament of said deceased, and the probate thereof has never been vacated or set aside; that the only child and sole heir of said Elizabeth E. Barnhart, deceased, is Daisy Belle Barnhart, who at the time of the execution of said will was the wife of Cary Hayes Nicewonger, and known as Daisy Belle Nicewonger; that on the 8th day of April, A. D. 1903, a decree of divorce was duly made, given, and entered by this court in the action of Daisy Belle Nicewonger v. Cary Hayes Nicewonger, dissolving the bonds of matrimony theretofore existing between said Daisy Belle Nicewonger and Cary Hayes Nicewonger, and permitting her to resume her maiden name of Daisy Belle Barnhart; that ever since said 8th day of April, A. D. 1903, said Daisy Belle Barnhart has been and is now a single woman; that the trust created in said will never vested, and became and is now inoperative and of no effect, and the whole of the residue of the estate of Elizabeth E. Barnhart, deceased, should be distributed in severalty to Daisy Belle Barnhart.

"And it further appearing to the satisfaction of the court that the sum of $3,500 has been placed in the hands of said executors to meet any suit that may be brought upon the rejected claim of Cary Hayes Nicewonger, referred to in the report accompanying the final account on file herein; that Daisy Belle Barnhart has assumed all the obligations incurred by said executors in and about the tract of land known as the Barnhart-Sargent reclamation; that all the allegations contained in said report and petitions for distribution are true and correct; and the court being fully advised of its judgment herein:

"It is therefore ordered, adjudged, and decreed that the said account be taken and considered as the final account of said executors, and that the same be, and the same hereby is, settled, allowed, and approved as presented; that all the acts and proceedings of said executors, as appearing on the records hereof, be and the same hereby are approved and confirmed; and the residue of the estate of said Elizabeth E. Barnhart deceased, hereinafter particularly described and now remaining in the hands of said executors, and any other property, not now known or discovered, which may belong to said estate, or in which the said estate may have any interest, be and the same is hereby assigned and distributed to Daisy Belle Barnhart, to have and to hold the same for her own sole and exclusive use, behoof, and benefit, absolutely and forever, and as the sole residuary legatee and devisee of the said Elizabeth E. Barnhart, deceased. [Here follows a recital of the property belonging to the estate.]

"Done in open court this 3d day of May, A. D. 1904.

"W. B. Nutter, Judge."

No fraud of any kind was alleged in the bill as amended, and although it alleged that the executors of the estate failed to give the complainant any notice of the proceedings leading up to the decree of distribution, it expressly alleged that—

"during the years 1903, 1904, and 1905 the statutes of the state of California with reference to probate matters did not provide for the giving or serving of any notice upon heirs or legatees or beneficiaries of testamentary trusts residing out of said state, as to proceedings in probate courts, even though said proceedings attempted to deprive said heirs and legatees and beneficiaries of their property (except possibly by indirection through citation or proceedings to determine heirship); that on the contrary said statutes tended to prevent such nonresidents from having actual knowledge of such proceedings and taking part therein by providing that ten days' notice is sufficient on all hearings, including hearings on petitions for final distribution, and that notice thereof can be given by posting three notices within the county ten days prior to said hearing; that said statutes also attempt to make a decree issued upon such hearing final against all heirs, legatees, and beneficiaries, nonresident as well as resident."

As will be seen from the decree of distribution, the court expressly found from proof made that the notice required by the state law had been duly given. In California there is no statute authorizing any one, by suit inter partes, to assail proceedings in probate, and it was expressly held by the Supreme Court of the state in Toland et al. v. Earl et al., 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100, that—

"an independent action in equity does not lie in this state to construe a will, whether it involves merely legal questions, or questions relating to the execution of trusts created by the will. It is the province of the superior court which settles the estate of a deceased person to construe the will and the trusts created thereby; and it may exercise all equity powers necessary for a complete administration of the estate, though not authorized in the limited exercise of its probate jurisdiction to determine controversies not within the scope of such administration."

See, also, Mulcahey v. Dow, 131 Cal. 76, 63 Pac. 158; Estate of Davis, 136 Cal. 590, 69 Pac. 412; Wills v. Wills, 166 Cal. 532, 137 Pac. 249.

The contention of the appellant is that this court should undertake to construe the will in question and put a different construction upon subdivisions 3 and 4 of its fifth section, than did the probate court of California—claiming that those two clauses are in irreconcilable conflict, and that therefore the last one should prevail under the rule embodied in section 1321 of the Civil Code of California, which is in these words:

"All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but, where several parts are absolutely irreconcilable, the latter must prevail."

The court below did undertake to construe the will, and did so in the same way that the California probate court did, both holding in effect that there was no conflict between them, but that they were alternative provisions, and that, as the daughter of the testatrix was a widow and a single woman at the time of the distribution of the estate, the trust immediately terminated, and the whole of the residue of the estate passed to her under the third subdivision of the fifth clause of the will.

There being no law of California authorizing any one, by suit inter partes, to assail the probate proceedings in question, we are of the opinion that this court is, as was the court below, without jurisdiction of the subject-matter of the bill, and therefore that the judgment dismissing it was correct. Sutton v. English, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664; Farrell v. O'Brien, 199 U. S. 110, 25 Sup. Ct. 727, 50 L. Ed. 101, affirming the decision of this court in 125 Fed. 657, 60 C. C. A. 347, under the title Carrau v. O'Calligan et al.

The judgment is affirmed.

LOWE v. PURE OIL CO. et al.

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

No. 1682.

1. COURTS ⟸329, 330—JURISDICTION OF FEDERAL COURT—AMOUNT IN CONTROVERSY.

   Allegation and proof as to the value of the matter in controversy, *held* sufficient to sustain the jurisdiction of a federal court.

2. WATERS AND WATER COURSES ⟸145—EXTENT OF RIGHT BY PRESCRIPTION—PIPE LINE IN BED OF CREEK.

   A right acquired by prescription to maintain a pipe line in a creek bed on one side of the stream, *held* not to extend to the other side, so as to give the right to remove the line to that side, to the damage of the owner of the land.

3. JUDGMENT ⟸606—MERGER—ACTION FOR INJURY TO REAL ESTATE—CONTINUING INJURY.

   A judgment against a landowner in an action by him for damages for occupation of his land by a pipe line, *held* not to estop him from maintaining subsequent actions where only temporary damages were in issue or considered.

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

Appeal from District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Suit in equity by the Pure Oil Company and the Producers' & Refiners' Pipe Line Company against John M. Lowe. Decree for complainants, and defendant appeals. Reversed.

Larrick & Lemon, of New Martinsville, W. Va. (Reese Blizzard, of Parkersburg, W. Va., on the brief), for appellant.

Thomas H. Cornett, of New Martinsville, W. Va., and John W. Dunkle, of Pittsburgh, Pa. (F. V. Iams, of New Martinsville, W. Va., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This was a suit instituted in the Northern district of West Virginia on the equity side of the docket. Bill was filed for an injunction to restrain defendant from trespassing, and also to restrain him from any proceeding, either in law or in equity, for the removal from the creek bed of all pipe lines operated by gravity maintained by common carrier in the extensive transportation of crude oil, and to quiet title.

The plaintiff the Pure Oil Company is a corporation created under the laws of the state of New Jersey, and duly authorized to transact business in the state of West Virginia, and the defendant is a citizen and resident of West Virginia.

The line, four inches in diameter, and in which the 26 rods in question is included, is a part of a system 20 miles long, operated for the past 17 years in piping oil for the public generally from the fields in the vicinity of Jacksonburg to tanks at Pine Grove, and laid in the bed of the South fork of Big Fishing creek, the location of the pipe line in the creek bed enabling the oil to flow by gravitation instead of by a mechanical system, which would be far more expensive; and from the tanks at Pine Grove the oil is piped by pressure to refineries at a distance.

Plaintiff alleges the following grounds as a basis for the relief sought to be obtained: (a) Diverse citizenship, and value of its entire system of gravity oil lines, exceeding $3,000; (b) want of title on part of defendant; (c) right conferred by act of Legislature of 1872–73 (chapter 192), declaring the creek in question a public highway; (d) title in plaintiff by prescription matured by actual possession taken and kept by virtue of said statute, and also under claim of ownership and right, without objection, and with acquiescence, as against defendant and his predecessors.

The defendant moved to dismiss the bill on the ground that the facts alleged did not entitle plaintiff to the relief sought. The answer admits the passage of the legislative act, but says it is declaratory of the common law, and became inoperative, according to its own provisions, within two years after its passage, and therefore conferred no right on plaintiff to lay pipe in the South fork of Big Fishing creek, a floatable stream; and it is further averred that plaintiff never applied to, or had the permission of, any authority, public or private, to lay

the line in question; further, that there is no corporation in West Virginia vested with power to exercise the right of way over any public highway without the permission of some public authority, and any one attempting to establish such right of way over any public highway without the permission of some public authority is a trespasser and liable to criminal prosecution therefor; that the law forbidding the use of a public highway except by such permission is more stringent than the law forbidding the use of private property for public use without payment of compensation; that the creek bed was included in 170 acres of land granted by I. D. Morgan by deed of January 25, 1901, to A. C. Ballouz, who subsequently granted to John M. Lowe, defendant, two parcels of the same by separate deeds dated December 28, 1906 (six lots), extending back almost to the top of the north bank of the creek opposite the point in question, but conceded to be outside the bed, and the other, dated August 11, 1913, for the "strip of land" or creek bed, and under which Lowe, the appellant, bases his claim and title.

The bill alleges adverse possession, and the answer avers the "adverse possession of plaintiff and its lessor, from 1901 to the fall of 1913, of the line in the creek bed." Notwithstanding the admission thus contained in the answer, defendant insists that such possession, under the circumstances, does not apply to the bed, or even the side of the creek bed, and that the line as then laid was in the creek bed owned by A. C. Ballouz, and in the south side, remaining there until defendant bought the bed of the creek from Ballouz, but that line was relaid on top of defendant's land on the opposite or north bank, over his objection, and after his purchase of the creek bed, but before August 11, 1913, the date of his deed.

The answer denies any right of the plaintiff to maintain and operate the line in the creek bed.

It is conceded that the Producers' & Refiners' Pipe Line Company has been and is now engaged in operating pipe line and transporting crude oil. It is further admitted that such line is operated by gravity, and is of great importance, use, and benefit in the economical transportation of oil, as alleged in the bill, but that such facts are immaterial.

[1] First, it is insisted by defendant that the court below was without jurisdiction, inasmuch as the amount involved in the controversy was not $3,000 in excess of cost and interest. This is based upon the theory that the amount involved should represent only the actual cost of removing this line from the south side of the creek to the north side of the creek.

As we have stated, it is alleged in the bill that the value of the entire system of gravity oil lines exceeds the sum of $3,000, and that, owing to the occupancy of the south side of the creek by the railroad in constructing its line, it is in such condition that it would be impracticable to locate the pipe line on that side, and that it was for this reason plaintiff was compelled to change its line so as to operate it for the purpose for which it was intended.

It is insisted by plaintiff that the removal of a part of this line would destroy the entire gravity system in the creek beds, among other things necessitating its removal from tanks at Pine Grove to Jacksonburg, the main connecting lines above Jacksonburg, also necessitating an alteration in a multitude of smaller lines connecting each well with the main line, at a great loss and expense, and thus either destroy the business or necessitate the construction of a pressure system on other lands, involving the purchase of new rights of way, for a distance of more than one mile, over a hill. It is contended that the construction of such line would cost $2,500 for labor done, $3,000 for pump station, and $3,000 for additional pipe, costing in the aggregate from $8,000 to $10,000. This, we think, should be considered in estimating the amount involved in this controversy.

In addition to this phase of the question, it is insisted by counsel for plaintiff that "where a particular matter of itself less than jurisdictional amount or value involves a right or estate as the subject of dispute, which right or estate depends upon the determination of the controversy, the value of the right or estate will fix the jurisdiction."

In Montgomery's Manual of Federal Procedure, § 174, c. 8, it is said:

"Generally speaking, where there is a definite amount that can be determined as being in dispute between the parties, this will fix the jurisdiction."

In view of what we have said as respects this point we think that the court below was warranted in holding that it had jurisdiction.

[2] The plaintiff insists that it is entitled to right of way by prescription which matured "by actual possession taken and kept for more than the statutory period of ten years under claim of ownership and right without objection, and with acquiescence as against defendant and his predecessors." The undisputed evidence shows that plaintiff acquired a prescriptive right by use for more than 10 years, maintaining his pipe line on the south side of the stream. The Supreme Court of West Virginia in the case of Mitchell v. Bowman, 74 W. Va. 498, 82 S. E. 330. The first syllabus is in the following language:

"One who for ten years or more continuously travels a defined way over the lands of another, with the knowledge of the owner, but without the owner's permission, interruption, or denial of the use, acquires the way by prescription."

Also in the case of Walton v. Knight, 62 W. Va. 223, 58 S. E. 1025, the first, second, and third syllabi are as follows:

"A private right of way by prescription may be acquired over another's land by visible, continuous, and uninterrupted use thereof for ten years, under a bona fide claim of right, with the acquiescence of the owner."

"Such use is presumed to be with the knowledge and acquiescence of the owner, and to prima facie give the right; which presumption will be conclusive, unless accompanied by the protest and objection of the owner under such circumstances as to repeal it."

"When there has been such use of another's land for the period requisite to create an easement by prescription, the bona fides of the claim of right is established."

It appears that the pipe line was laid in the south side of the bed of the creek. It further appears that no protest or objection was made

by Ballouz, the predecessor in title of defendant, to the occupancy, either at the time plaintiff first occupied the premises, or at any time during such occupancy.

The contention of plaintiff that it acquired a prescriptive right to use and maintain its pipe on the south side of the stream is not disputed; but in 1913 the plaintiff moved his pipe line to the opposite side of the stream in an entirely new location. The change, according to defendant's evidence, materially damaged his property on the north side of the stream. While, as we have said, plaintiff undoubtedly had a prescriptive right to the south side of the stream, we are of the opinion that such right did not extend to the north side, it appearing that the plaintiff did not occupy the north side of the stream for a sufficient length of time to acquire such right to that side. Plaintiff insists that its possession extended from one bank to the other, and that therefore it acquired a prescriptive right to occupy either side of the stream and any part thereof. We think this position is untenable in view of the purpose for which the side of the stream was used, and that occupancy of the south side did not inure to the benefits of the plaintiff, so as to vest it with title to the north side.

The bill challenges the right of defendant to compel plaintiff to remove this line either by physical or lawful force basing its right upon the fact that the quitclaim deed of defendant does not undertake to confer upon defendant the right to such remedy, further alleging that the absolute right to the premises in question is, as we have said, vested in the plaintiff by operation of law.

This would undoubtedly be true if the question as to the right of plaintiff to occupy the south side of the stream were involved; but, as we have stated, there is no controversy about this point. The plaintiff not having acquired a prescriptive right to the north side of the stream, the title to that portion of the premises remained with the grantor, and passed to the defendant by his quitclaim deed, such interest being vested in defendant's predecessors at the date of such deed.

[3] It is further insisted by counsel that plaintiff acquired title by estoppel by former adjudication of law, it appearing from the answer and evidence that there had been two adjudications, one in favor of defendant and one against him.

It was shown that defendant instituted suit against the Pure Oil Company for damages for the occupation and use of this creek bed, before a justice of the peace, wherein he recovered the sum of $14.50 as damages. It also appears that an action was instituted by defendant against the plaintiff in the circuit court of Wetzel county for damages occasioned by the occupation of the bed of the creek by the pipe line. In that case judgment was in favor of the Oil Company. While no certified copies of these judgments appear in the record, the evidence as to their nature and character is such as to constitute the basis of estoppel, if indeed, the facts are such as to warrant the same. In considering this phase of the question, it should be borne in mind that only temporary damages were involved in the two suits instituted by defendant. As respects this phase of the question it has been held that—

"It is the legal right of either plaintiff or defendant to elect to have permanent damages assessed in such an action upon demand made in the pleadings, and when either makes the demand the judgment may be pleaded in bar of any subsequent action. The defendant is required to set up this or any other equity upon which it relies, as well as to prove the averment on the trial. But where a plaintiff is allowed, without objection, to have such damage apportioned, the judgment is not a bar, and either party to a subsequent suit involving the same question may demand that both present and prospective damages be assessed, and upon proof of a previous partial assessment the jury may consider that fact in diminution of the permanent damage." Ridley v. Seaboard & R. R. Co., 118 N. C. 996, 1009, 24 S. E. 730, 734, 32 L. R. A. 708, 712.

In this case Judge Avery discusses the whole subject very fully and elaborately.

"Where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but where the cause of the injury is in the nature of a nuisance, and not permanent in character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage which it might inflict if permanent, then the entire damage cannot be recovered in a single action, but actions may be maintained from time to time as long as the cause of the injury continues." Watts v. Norfolk & W. R., 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 894; Hargreaves v. Kimberly, 26 W. Va. 787 (9th syllabus), 57 Am. Rep. 121; Smith v. Point Pleasant R. Co., 23 W. Va. 453.

"The case calls for what are designated in the decisions temporary damages. Injury to real estate differs in nature and degree. Under some circumstances, recovery may be had from time to time as damages accrue. Under others, but one recovery can be had, and that includes all the injury the property has sustained in the past and will sustain in the future. Damages recovered in the latter class of cases are called 'permanent' damages, and damages recovered in the former 'temporary' damages. Permanent damages are given on the theory that the cause of injury is fixed and indeterminable and the property must always remain subject to it. The injured party is limited to the recovery of temporary damages, when the injury is intermittent and occasional, or the cause thereof remediable, removable, or abatable. It assumes that the plaintiff himself may be able to remedy the cause of injury or relieve his property from its ill effects, or that the defendant wil be induced or compelled, by the infliction of repeated judgments for damages, to remove it." McHenry v. Parkersburg, 66 W. Va. 533, 535, 66 S. E. 750, 751, 29 L. R. A. (N. S.) 860, 863.

If the plaintiff's testimony be true that it will be necessary to remove the pipe line, and take it around in another direction at an expense of several thousand dollars, the pipe line, as now located, should then be regarded as a permanent structure similar to a railroad actually constructed. In that case all the damages, both past and prospective, should have been assessed in the actions brought by the plaintiff, and, even if the plaintiff had sought only damage up to the time of the action, the defendant would have had the right to have all the damages assessed in the one action. But, on the other hand, if the defendant's testimony be true that the pipe line could be replaced on the other side of the stream at a cost of only two or three hundred dollars, and with inconsequent risk from the railroad operation, then it would be presumed that the Oil Company would make the removal, and the plaintiff could recover only the damages accruing to the date of the recovery. In the latter event, the case would clearly fall under McHenry v. Parkersburg, supra.

It appears from the record that the case in the magistrate's court, as well as the one in the circuit court, was for temporary damages. The burden was on the plaintiff to show, from the record or otherwise, that in the former adjudication both permanent and temporary damages were involved and adjudicated. This burden not having been met, it follows as a matter of law that the former judgments did not adjudicate the right of the defendant to damages accruing after those adjudications.

For the reasons stated we are of the opinion that the court below erred in denying defendant's motion to dismiss the bill. The decree of the lower court is reversed, with instructions to dismiss the bill.

Reversed.

ARNESS et al. v. PETERSBURG PACKING CO. et al.

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919. Rehearing Denied October 14, 1919.)

No. 3278.

1. EJECTMENT ⟸12—PAPER TITLE TO SUPPORT ACTION—ALASKA STATUTES.
Under the Oregon statutes, in force in Alaska, a paper title is not essential to the maintenance of ejectment, and one who has been in possession of real property and has been ousted by a mere intruder may maintain ejectment for its recovery.

2. EJECTMENT ⟸11—TITLE TO SUPPORT—PUBLIC LANDS—POSSESSORY RIGHT.
The title to public lands as between persons neither of whom connects himself with the government is considered as vested in the first possessor whose possession will support ejectment against a trespasser. This rule is especially applicable to tidelands in Alaska, where by reason of the coast conformation such lands are largely used as sites for various industries.

Morrow, Circuit Judge, dissenting.

In Error to the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Ejectment by the Petersburg Packing Company and F. Schoenwald and S. T. Hills, as receivers and assignees of the Pacific Coast & Norway Packing Company, against Conrad A. Arness, Capella Arness, and John Doe, doing business as the Zenra Machine Shop Company. Judgment for plaintiffs, and defendants bring error. Affirmed.

John Rustgard, of Juneau, Alaska, for plaintiffs in error.

Hellenthal & Hellenthal and J. A. Hellenthal, all of Juneau, Alaska, for defendants in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. In an action of ejectment in the court below, the defendants in error recovered a judgment for the possession of a small parcel of tideland adjacent to a steamship dock and a cannery which they occupied and operated; they having alleged in their complaint that they had used and occupied the parcel in controversy, had cleared it of boulders and débris, and made it fit for the purpose of storing logs, pilings, pile drivers, and water craft thereon,

and had maintained cradles thereon to repair their boats and scows, and that at midnight December 7, 1915, without their consent, the plaintiffs in error entered upon said premises and removed therefrom the said cradles, pilings, logs, etc., and have since occupied and remained on the premises. The assignments of error present two principal questions: First, whether ejectment is the proper remedy of the defendants in error; and, second, whether ejectment will lie to recover tideland in the territory of Alaska.

[1] The action was brought, not as contended by the defendants in error, to recover an incorporeal hereditament, but to recover the actual physical possession of a parcel of tideland, and the court below aptly and appropriately instructed the jury concerning the nature of the possession which was necessary to support the action. It is not necessary under the law of Alaska that the plaintiff in ejectment shall have title in fee, or for life, or for a term of years, or color of title. The ejectment statutes of Oregon are adopted for Alaska. In Wilson v. Fine (D. C.) 38 Fed. 789, Judge Deady held that prior possession of real property is a sufficient legal estate therein to enable a party to maintain ejectment for the recovery of the possession of the same from an intruder. In Campbell v. Silver Bow Basin Min. Co., 48 Fed. 47, 1 C. C. A. 155, this court held that in Alaska, by the law of Oregon, which was there in force, a person in possession might maintain an action of ejectment to recover possession of real property from which he had been ousted by a mere intruder. In Sommer v. Compton, 52 Or. 173, 96 Pac. 124, 1065, it was held that prior possession of land for any length of time is prima facie evidence of title, and will authorize a recovery of possession against a mere volunteer, or one having no other rights than those of a trespasser. The same was held in Gallagher v. Kelliher, 58 Or. 557, 114 Pac. 943, 115 Pac. 596. And, again, in Kingsley v. United Rys. Co., 66 Or. 50, 133 Pac. 785, the court said:

"Naked possession vests a sufficient right of property in the person who has such possession as to permit him to hold the land against all the world except the true owner. Consequently, actual occupation or possession of real property is in its essential nature of an estate or right therein. Wilson v. Fine (D. C.) 38 Fed. 789."

And the court said that in Oregon the rule has become fixed that possession is a sufficient interest in land to enable one ousted therefrom to eject a trespasser or one unable to show a better title.

[2] The second question is whether ejectment lies to recover possession of public land where the plaintiff does not justify his possession by authority from the United States. The plaintiffs in error rely upon Burgess v. Gray et al., 16 How. 48, 14 L. Ed. 839, as sustaining the proposition that the mere possession of public land, without title, will not enable the possessor to maintain ejectment against any one who enters upon it. That case, however, does not so hold. The plaintiff in that case brought a suit to recover possession of land and to compel the defendants to abandon "their illegal claims." As the court said, it was in form a suit to obtain an injunction, to quiet the plaintiff in his possession, and to compel the adverse party to deliver up to be canceled evidences of title, "improperly and illegally obtained."

The court also said.

"The defendants are in possession, claiming title from the United States, and with evidences of title derived from the proper officers of the government. It is not necessary to inquire whether the title claimed by them is valid or not. The petitioner, as appears by the case he presents in his petition, has no title of any description derived from the constituted authorities of the United States, of which any court of justice can take cognizance. And the mere possession of public land, without title, will not enable the party to maintain a suit against any one who enters on it; and more especially he cannot maintain it against persons holding possession under title derived from the proper officers of the government."

The remarks of the court were made with reference to a "suit" brought not only to obtain possession but to cancel adverse claims, and the court recognized the settled rule that equity will not take jurisdiction for the sole purpose of restoring possession, and that, as the subject of jurisdiction in equity, the recovery of possession must be coupled with a demand for other relief. The recovery of possession alone is the ground and object of ejectment, and no case is found which holds that the mere possession of public land, without title, will not enable one to maintain ejectment against a trespasser who enters upon it. The contrary has been held in numerous decisions. In Coryell v. Cain, 16 Cal. 567, 573, Judge Field said:

"Actions for the possession of mining claims, water privileges, and the like, situated upon the public lands, are matters of daily occurrence, and, if the proof of the paramount title of the government would operate to defeat them, confusion and ruin would be the result. * * * And with the public lands which are not mineral lands, the title, as between citizens of the state, where neither connects himself with the government, is considered as vested in the first possessor, and to proceed from him. This possession must be actual and not constructive."

In Hart v. Cox, 171 Cal. 364, 153 Pac. 391, in an action of ejectment involving a parcel of desert land of the United States, where neither party relied upon a paper title, it was held that prior actual possession is sufficient to support the action. In Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913, an ejectment case, the court sustained as against a trespasser the right of possession of one who occupied land consisting of a portion of an island in a river and a dry river bed, the property of the state.

By the Act of May 17, 1884, c. 53, § 8, 23 Stat. 26, Congress enacted that persons in Alaska "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them." That statute conferred upon persons in possession more than a mere pedis possessio. It conferred the right to convey the possessory right to another. Carroll v. Price (D. C.) 81 Fed. 137; Martin v. Burford, 181 Fed. 922, 104 C. C. A. 360. The right of possession of the defendants in error does not depend upon that statute, they having acquired possession at a subsequent date. But the courts of Alaska have held that those who entered into possession of tideland subsequent to 1884 may, in any case in which public rights are not involved, maintain possession against an intruder. In Copper River Lumber Co. v. Humphreys, 2 Alaska, 39, Judge Wickersham held that one who actually occupied a small tract of public land for purposes of

manufacturing and sawing lumber was entitled to the exclusive possession thereof, under section 12 of the Act of Congress of March 3, 1891, c. 561, 26 Stat. 1100 (Comp. St. § 5080). The court said:

"There is some contention by the defendant that the land which he claims is above the ordinary high tide. It would make no difference, however, under the circumstances in this case, whether it was above or below ordinary high tide. If it is above high tide, the facts bring it fairly within the statute in relation to the disposal of lands for trade and manufactures, and, if it is below, the circumstances bring it clearly within the rule that the owner of uplands cannot be deprived of the use of the tideland in front of his upland holdings by a mere trespasser, and that he may construct wharves, mills, and approaches to the sea from his upland, and will be protected in such right by the injunctive process of the court."

In the case at bar the defendants in error own and operate a machine shop and a store on the uplands adjacent to the property in controversy, and at one side and entirely upon the tidelands they have constructed and maintained a cannery, warehouse, and a platform, all of which have been constructed since the year 1902. The plaintiffs in error come into this court assenting to that portion of the charge to the jury in which it was said that—

"While no one but the United States has or can have any strictly legal title to the tidelands in Alaska, yet it is the policy of our government to allow any one to occupy such lands, to possess them, to use them, to claim them as his own, for any useful purposes which do not interfere with navigation or the rights of fishery. * * * If a person is in possession of unappropriated public land of the United States, he has a right to such possession as against any other person who cannot show any better right."

And they took no exception to the court's instruction that—

"There is no evidence in this case that the occupation of the tideland in question at all interferes with the rights of navigation or of fishery."

In the brief of the defendants in error it is asserted, and it does not appear to be disputed, that in Alaska a substantial portion of all the towns have, with the tacit consent of the United States government, been built upon and over tidelands below mean high tide; that, due to the precipitous character of the uplands in Alaska, the tidelands have been taken possession of and improved to a greater extent than in perhaps any of the other territories previous to their admission as states; and that these rights of the first comer or prior possessor have been enforced against intruders, the same when the prior possession is of tidelands as when the possession is of uplands, the title to which is in the government of the United States.

To deny the right of possession of the defendants in error to the tideland here involved would be to deny their right to the possession of the cannery which they have constructed on tideland, and the dock which they use in connection with their business. The case of Bass v. Ramos, 58 Fla. 161, 50 South. 945, 138 Am. St. Rep. 105, cited by plaintiffs in error, differs materially from the case at bar. In that case the premises in controversy were beneath the navigable waters of Pensacola Bay. The plaintiff in ejectment was not in the actual possession thereof. He had but inclosed the same on two sides by posts and barbed wire, and he was not shown to be a riparian proprietor.

It is contended that certain documentary proof to show the right and title of the receivers was erroneously admitted in evidence. In the view which we take of the case, such evidence was superfluous, and its admission could not have prejudiced the plaintiffs in error. All that was in issue was the right of possession, and all that was recovered was the possession of the property in controversy. It was unnecessary to show how the possession was originally acquired. Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198, 208; Mining Co. v. Taylor, 100 U. S. 37, 42, 25 L. Ed. 541.

Error is assigned to the denial of the instruction requested by the plaintiffs in error that unless the jury found that both the receivers and the corporation plaintiff were entitled to the possession of the premises in dispute, the first as lessors, and the other as lessee, they could not find for either of them, but their verdict must be for the defendants. The jury did find that the defendants in error were entitled to the possession of the premises, the receivers as lessors, and the corporation as lessee. If the receivers were not necessary parties to the action, objection on that ground was waived in the court below. The plaintiffs in error were not injured by the refusal of the instruction. Adler v. Sewell, 29 Ind. 598. They cite Davis v. Coblens, 174 U. S. 719, 19 Sup. Ct. 832, 43 L. Ed. 1147, where the court quoted the rule that, if one plaintiff in a joint action in ejectment cannot recover, his coplaintiff cannot. That rule applies to actions in ejectment brought by plaintiffs as tenants in common or as joint tenants, or others with diverse interests in the property. It has no application to a case where lessor and lessee join in an action for the recovery of possession.

The judgment is affirmed.

MORROW, Circuit Judge (dissenting). This is a statutory action in ejectment brought under the provisions of sections 301 and 303 of the Alaska Code of Civil Procedure (Act of June 6, 1900, c. 786, 31 Stat. 383; Carter's Ann. Code Civ. Proc. Alaska, pp. 210, 211), providing:

"Sec. 301. Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action. Such action shall be commenced against the person in the actual possession of the property at the time, or, if the property be not in the actual possession of any one, then against the person acting as the owner thereof."

"Sec. 303. The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage in such sum as may be therein claimed. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had."

These two sections limiting actions of ejectment under the Alaska Code to legal titles and rights of possession were adopted from the Oregon Code of Civil Procedure passed in 1862. General Laws of Oregon, 1843–1872, pp. 175, 176; Lord's Oregon Laws, vol. 1, pp. 301–304. At the time of their adoption they had been construed by

the Supreme Court of Oregon, and the presumption is that they were adopted in the light of that construction. In Thompson v. Wolf, 6 Or. 308–311 (decided in December term, 1877), the Supreme Court of Oregon held that—

> In an action of ejectment "it is necessary that the plaintiff set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years (Civ. Code, § 315), thereby enabling the courts to settle the question of title, which is the great end of the action of ejectment with us."

In a more recent decision, the same court holds that the action of ejectment under the Oregon Code involves the right of property as well as the right of possession.

In Chance v. Carter, 81 Or. 229–237, 158 Pac. 947–950, the Supreme Court of Oregon said:

> "The action of ejectment involves both the right of possession and the right of property. The right of possession depends upon a right of property, because the right of possession must be traced to some estate in the property; and there can be no right of possession unless it is referable to and is founded upon an estate in the property."

The Code provisions and the construction placed upon them by the Supreme Court of Oregon are in accordance with the law of the federal jurisdiction as declared by the Supreme Court of the United States.

In Burgess v. Gray, 16 How. 48–64 (14 L. Ed. 839), Chief Justice Taney, speaking for the court, said:

> "And the mere possession of public land, without title, will not enable the party to maintain a suit against any one who enters on it."

See, also, Oaksmith's Lessee v. Johnson, 92 U. S. 343–347, 23 L. Ed. 682.

It is now the settled law that upon the acquisition of territory the United States acquires title to the tidelands equally with the title to the uplands, but with respect to the former the government holds it only in trust for the future states that may be erected out of such territory. Knight v. United States Land Association, 142 U. S. 161–183, 12 Sup. Ct. 258, 35 L. Ed. 974; Shively v. Bowlby, 152 U. S. 1–57, 14 Sup. Ct. 548, 38 L. Ed. 331. But while such territory remains in a territorial condition, the entire dominion and sovereignty, national and municipal, rests with the United States, and over it Congress has complete legislative authority and may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. Shively v. Bowlby, supra, 152 U. S. 58, 14 Sup. Ct. 548, 38 L. Ed. 331; Alaska Pac. Fisheries v. United States, 248 U. S. 78, 39 Sup. Ct. 40, 63 L. Ed. 138, decided Dec. 9, 1918.

Under this authority Congress, in the act of May 17, 1884 (23 Stat. 24), establishing a civil government for Alaska, provided in section 8 as follows:

> "That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such land is reserved for future legislation by Congress."

In the Act of March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes" (26 Stat. 1095), after making provisions concerning the entry of town sites in Alaska and for the possession and occupation of public lands in that district for the purpose of trades or manufactures, it was provided in section 12 (Comp. St. § 5080):

"That in case more than one person, association or corporation shall claim the same tract of land, the person, association or corporation having the prior claim by reason of possession and continued occupation shall be entitled to purchase the same."

In Carroll v. Price (D. C.) 81 Fed. 137, these statutes were held to be a recognition by Congress that a prior possession of land in Alaska was a right of possession and that an action for ejectment would lie to determine such right of prior possession; that this right of possession applied to tidelands as well as uplands, subject, however, to the public right of navigation; and that such right of possession would be determined by the same rules of law as govern similar rights on the uplands. The action in ejectment was accordingly sustained in that case.

In Heckman v. Sutter, 119 Fed. 83, 55 C. C. A. 635, this court had before it a controversy as to the right of possession of a certain tidelands flat used for fishing purposes on Tongass Narrows in Alaska. The plaintiffs derived their right of possession from an Indian who was in possession of the land at the time of the passage of the Act of May 17, 1884. The defendant in 1900 undertook to operate the same ground for fishing purposes to the exclusion of the plaintiffs. The plaintiffs brought suit against the defendant to restrain such interference, and the District Court in Alaska, upon the showing that the plaintiffs' grantor was in possession of the tide flat on May 17, 1884, granted the injunction. This court in sustaining that decree said:

"The prohibition contained in the act of 1884 against the disturbance of the use or possession of any Indian or other person of any land in Alaska claimed by them is sufficiently general and comprehensive to include tidelands as well as lands above high-water mark. * * * Congress saw proper to protect by its act of 1884 the possession and use by these Indians and other persons of any and all lands in Alaska against intrusion by third persons, and so far has never deemed it wise to otherwise provide. That legislation was sufficient authority, in our opinion, for the decree of the court below in securing the complainants in the use and possession of land which the evidence shows and the court found was held and maintained at the time of their disturbance therein by the defendants, and for years theretofore had been so held and maintained."

It will be observed that the right of possession claimed by the plaintiffs was determined by this court to have been secured to them by the express terms of the act of Congress of 1884, and not under a mere recognition of a general right of an American citizen to go upon public lands and occupy and use the same with the view of ultimately obtaining title thereto from the general government when the same should be open to purchase.

The plaintiffs in the present case did not derive their alleged right of possession from any one who was in possession of either the up-

lands, the tidelands in that locality or the tideland in dispute, at the time of the time of the passage of the act of Congress of 1884.

I call attention to this distinction now for the reason that we are dealing in this case with a suit in ejectment under a statute, and what we are required to determine is whether the plaintiffs had such right of possession of the premises prior to the entry of the defendants as will entitle the plaintiffs to maintain this action. We are not concerned with plaintiffs' prior possession of the land in controversy, except in so far as it may furnish a right of action in ejectment under the statute of Alaska.

In Malony v. Adsit, 175 U. S. 281–289, 20 Sup. Ct. 115, 44 L. Ed. 163, the action was ejectment, and the plaintiff had alleged in his complaint, and the court had found as a fact, that for more than nine years prior to April 9, 1891, he and his grantors were the owners by right of prior occupancy and actual possession of the land in dispute. This finding by the court placed the plaintiffs' occupancy and possession of the land in dispute at and prior to the Act of May 17, 1884. The Supreme Court, referring to the condition of things in Alaska under this act and the Act of March 3, 1891, said:

"The only titles that could be held were those arising by reason of possession and continued possession, which might ultimately ripen into a fee-simple title under letters patent issued to such prior claimant when Congress might so provide by extending the general land laws or otherwise."

The action of ejectment in that case was sustained, the court citing with approval the decision of the District Court of Alaska in Carroll v. Price, supra.

In McCloskey v. Pacific Coast Co., 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673, the Pacific Coast Company brought suit to enjoin McCloskey from erecting a structure on tidelands in front of property claimed by the plaintiff, alleging that as a littoral owner of lands abutting on the water of the sea it was entitled to free access to and from the navigable waters fronting thereon. The District Court awarded the injunction on the ground that the plaintiff was the littoral owner of the upland in front of which was the tideland in controversy. This court did not find that the plaintiff was in fact the littoral owner and possessed of an individual right as distinguished from the public right of access to the navigable waters in front of its land, but did find that the plaintiff's grantors claimed the possession and the right of possession of all the tidelands in front of its property at the time of the passage of the Act of May 17, 1884, and had maintained that claim ever since, except in so far as it had conceded to public use a certain street and sidewalk therein described, and, as under that act the plaintiff was entitled to have its possession of the tidelands in controversy protected, it was entitled to secure that protection by any appropriate suit or action. The injunction was accordingly sustained. This case has a bearing on the present controversy as the plaintiffs in this case appear to make some claim upon the ground that they have been in possession of the uplands in front of which is the tideland in dispute. The claim cannot be maintained.

In Columbia Canning Co. v. Hampton, 161 Fed. 60, 88 C. C. A. 224, the action was brought by Hampton to restrain the Columbia Canning Company from interfering with or obstructing the plaintiff in the use of a structure which he had commenced to erect for a fish trap on the shore in front of and abutting upon a tract of land entered by the plaintiff on the 19th of April, 1905, under what is known as "Soldier's Additional Homestead Scrip Act" (Comp. St. § 4594). The court below issued an injunction. This court held that the plaintiff could not acquire a possessory right under his upland location to occupy the shore and maintain an action against the defendant for interfering with or obstructing him in the use of such shore, nor had he, by his prior possession of the tideland, acquired a possessory right under the Act of May 17, 1884. The court repeated what had been said in previous decisions that the Act of May 17, 1884, did not provide for the protection of the possession of any land by any person or persons who might acquire possession or make claim thereto after that date. The decree of the District Court was accordingly reversed.

In Russian-American Co. v. United States, 199 U. S. 570–576, 26 Sup. Ct. 157, 50 L. Ed. 314, the Supreme Court held that section 8 of the Act of May 17, 1884, simply recognizes the right of such Indians or other persons as were in possession of land at the time of the passage of that act. The party claiming the possessory right in that case did not take possession of the land until five years after the act of 1884 was passed. The court held that it was a mere trespasser upon the land which it claimed by possessory right. See, also, Decker v. Pacific Coast Co., 164 Fed. 974, 91 C. C. A. 102; Dalton v. Hazelet, 182 Fed. 561, 105 C. C. A. 99; Worthen Lumber Mills v. Alaska-Juneau Gold Min. Co., 229 Fed. 966–969, 144 C. C. A. 248; Pacific Coast Co. v. James, 234 Fed. 595, 148 C. C. A. 361; Sheldon v. Messerschmidt, 247 Fed. 104, 159 C. C. A. 322; Whelpley v. Grosvold, 249 Fed. 812–815, 162 C. C. A. 46.

In addition to the Act of May 17, 1884, protecting the Indians and other persons in Alaska in their possession of any lands actually in their use or occupation at the time of the passage of that act, Congress in section 15 of the Act of March 3, 1891 (26 Stat. 1101 [Comp. St. § 5096a]), reserved the body of lands known as Annette Islands in Southeastern Alaska for the use of the Metlakahtlan Indians in prosecuting their fishing industries. This reservation included the adjacent waters and submerged land, as well as the upland. Alaska Pacific Fisheries v. United States, supra. By the Act of February 6, 1909, c. 78, 35 Stat. 598, the Cordova Bay Harbor Improvement & Town-Site Company was permitted to purchase not to exceed 2,000 acres of nonmineral lands of the United States as might be selected by said corporation and approved by the Secretary of the Interior, including tide or mud flats situated at the head of Cordova Bay. The tract selected was to have a frontage of not to exceed two miles on the wharfage and dock area and was to be reserved and remain under the control of the United States, in trust however for the future state which may be created, including the same or any part thereof within its boundaries. This reservation of tidelands was plainly in the interest of navigation and fishery.

I find nowhere in the statutes any such reservation of the tidelands in front of the town of Petersburg for the special benefit of that community or of any of its citizens or for any one, from which fact I draw the conclusion that no possessory or other rights have been created or reserved in favor of any one in such lands, but that they are free and open to the public for the uses and purposes of navigation and fishery.

I think that the occupancy of tidelands such as the plaintiffs had prior to their ouster by the defendants was not a right of possession in any legal sense. They had the right to use the place for the purpose of navigation and fishery, including the beaching, repairing, and mooring of floating property; but they had no right to exclude others from using the shore at that place for similar purposes. The possession which they had was therefore insufficient to support an action in ejectment, and the court should have so held in response to any one of several objections and motions made by the defendants.

SHOWALTER v. UNITED STATES et al.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918. On Rehearing, April 28, 1919.)

No. 1608.

1. CRIMINAL LAW ⟸619—CONSOLIDATION OF INDICTMENTS—VALIDITY.
   The Consolidation Statute is not invalid upon ground that federal Constitution requires each indictment to be passed upon by a separate jury.

2. CRIMINAL LAW ⟸720(7)—ARGUMENT TO JURY—CONCLUSION FROM EVIDENCE.
   A conviction for misapplying national bank funds will not be reversed because the district attorney argued to the jury that defendant had caused the bank to lose money.

3. CRIMINAL LAW ⟸829(1)—INSTRUCTIONS.
   A conviction will not be set aside for failure to give requested instructions where the charge actually given fully stated the law.

4. CRIMINAL LAW ⟸815(1)—REQUESTED INSTRUCTIONS—MISLEADING CHARACTER.
   In a prosecution for misapplying national bank funds, a requested instruction which was calculated to mislead the jury by reciting only a part of the relevant testimony *held* properly refused.

5. BANKS AND BANKING ⟸257(4)—MISAPPLYING NATIONAL BANK FUNDS—INSTRUCTION.
   In a prosecution for misapplying national bank funds, a portion of the charge illustrating the difference between a misapplication and an embezzlement, *held* not open to the objection that it authorized a conviction without proof of intent to injure and defraud the bank.

6. BANKS AND BANKING ⟸257(3)—MISAPPLYING BANK FUNDS—SUFFICIENCY OF EVIDENCE.
   Evidence that defendant bank official, being unable to pay his own note, paid it from the bank's funds, and substituted the note for the cash, etc., *held* to sustain a conviction for misapplying national bank funds.

Pritchard, Circuit Judge, dissenting on rehearing.

In Error to the District Court of the United States for the Northern District of West Virginia, at Martinsburg; Charles A. Woods, Judge.

Howard W. Showalter was convicted of misapplying bank funds, and brings error. Affirmed.

Certiorari denied 250 U. S. 672, 40 Sup. Ct. 14, 64 L. Ed. ——.

John A. Howard, of Wheeling, W. Va. (J. M. Ritz, of Wheeling, W. Va., on the brief), for plaintiff in error.

Harry H. Byrer, Asst. U. S. Atty., of Philippi, W. Va. (Stuart W. Walker, U. S. Atty., of Martinsburg, W. Va., on the brief), for defendants in error.

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

ROSE, District Judge. The plaintiff in error will be called the defendant, the position he had below. For a number of years prior to August, 1915, he had been vice president of the First National Bank of Fairmont, W. Va., and one of its directors and large stockholders. He was its ranking officer, in regular daily attendance. The jury might well have found that its affairs had long been very largely under his control. It once had had, and still publicly claimed, a capital of $200,000, and a surplus of $100,000. The comptroller of the currency had made up his mind that the surplus, and much, if not, all the capital, had been lost. He was unwilling it should continue its business. In order to prevent serious damage to the interests of the community, its assets were taken over by another of the national banks of Fairmont. The latter undertook to pay its debts, in so doing being partly protected by an agreement with the other banking institutions of the place, by the terms of which any loss incurred should be apportioned among them and it. The amount to be apportioned will not fall short of a quarter of a million dollars, and may considerably exceed that sum. An official investigation naturally followed, and as the result two indictments, one of 39 and the other of 6 counts, were returned against the defendant. By these he was charged with various false entries, misapplications, and embezzlement. By order of the court, and against his protest, these indictments were consolidated. He was found guilty as to the fifth count of the second indictment, which charged the willful misapplication of $2,066.46 of the bank's money with intent to injure and defraud it. He was acquitted on all the other counts. He originally assigned 11 errors. Abandoning the fifth of the series, he relies on the remaining 10. Little need be said as to most of them.

[1] He asserts by the first that the Constitution of the United States, properly construed, requires that each indictment shall be passed on by a separate jury, and that therefore the Consolidation Statute is itself invalid. If a statement of the contention is not its own sufficient answer, it would still be true that there must come a time when a question must be treated as finally settled. In view of the hundreds of cases in which like consolidations have been made and sustained by all courts, including the highest, it came many years ago.

There is nothing to show that in making the order in this case the court below abused its discretion.

[2] The second assignment of error complains that the district attorney argued to the jury that the defendant had caused the bank to lose money. The defendant says the evidence shows he did not. It is only under exceptional circumstances not here presented that an appellate court will set aside a judgment because counsel, in arguing to the jury, attempted to draw an extreme or unjustified conclusion from the evidence. In so saying, we must not be understood as intimating that in our opinion counsel for the government did so.

[3] The fourth, sixth, seventh, and eighth assignments are directed to the court's refusal of various requests for instructions as to the burden of proof, the presumption of innocence, and benefit of reasonable doubt. The court in the charge actually given, fully and accurately stated the law applicable to all these questions.

[4] The ninth assignment is based upon the denial of an asked-for instruction, which by segregating and reciting some but far from all of the testimony relevant to the count in question, was well calculated to mislead the jury.

[5] The tenth assignment asserts that the court used language which might have led the jury to believe that they could properly convict under the count upon which the conviction was obtained, although they did not find the defendant had made the misapplication charged with intent to injure and defraud the bank. The court had at length, and in careful and appropriate language, charged the jury. In the course of so doing the learned judge had repeatedly, clearly, and emphatically warned the jury that they could not convict unless they found such intent. When the charge was completed some discussion followed with counsel, and then it occurred to him that perhaps he had not stated the distinction between misapplication and embezzlement with sufficient clearness. He set about repairing this omission, and for the purpose of showing the difference between a misapplication and an embezzlement said:

"If a man takes funds of the bank from the bank's cash account, for example, and puts them to his own or some one else's use, that is misapplication of the funds at the bank, although he may not intend to embezzle, if he does it with intent. Abstraction implies not only a willful misapplication, but the actual taking of the funds from the bank, and the conversion of them to his own use and benefit, or to the benefit of another, with intent to defraud the bank. Now I think you will see, if you will just bear in mind the words misapplication and abstraction, abstraction means taking out; misapplication, while it stays inside the bank."

It is apparent to every one that the word "intent" as here used meant intent to injure or defraud. It is equally certain that every one present at the time so understood it. Immediately after he had used the language in question, he asked counsel whether they had any exceptions. If there had been any doubt in anybody's mind as to the meaning of what he then said, his attention would have been at once called to the point now made.

[6] There remains for consideration the third and eleventh assignments, which raise the question of whether there was sufficient evi-

dence to sustain the verdict of guilty. The misapplication in question took place on the 10th of July, 1915. There was evidence which would have justified the jury in finding that for months before that date the bank had been in desperate straits. In the preceding February, at the demand of the comptroller of the currency, the directors, including the defendant, unanimously voted "that no officer or official of this bank shall pay or charge to the account of any depositor any check of such depositor when there are not sufficient funds on deposit to the credit of the drawer of the check to meet the same." On the 21st of June the bank examiner requested the members of the board personally to purchase certain questionable assets of the bank. The board declined, and requested an interview with the comptroller. The board, through the committee of which the defendant was a member, had such interview on the 24th and 25th of June. As the result, a written agreement was entered into, and signed by the defendant, among others. By its terms $160,000 of paper was to be taken out of the bank. That sum exceeded by nearly $55,000 the total undivided profits and surplus of the bank. From this agreement it appears that $72,000 of this $160,000 was paper upon which the defendant was either principal or indorser. It was stipulated that, to avoid an assessment on the stockholders, the defendant would give his note for this $72,000, secured by the indorsement of some one satisfactory to the comptroller of the currency, and within 30 days he was to apply not less than $25,000 cash to this note. The agreement further provided that if the whole $160,000 was not provided for in 30 days it would be charged off, and the comptroller would send out formal notices of impairment of capital stock. The defendant expressly agreed that if he could not carry out his arrangements within 30 days he would sell out the bank or put it in liquidation.

On the 10th of July, two weeks and one day after making this agreement, a note for $2,066.46, which was in fact, although not in form, his own, was presented to him for payment. The holders of said note were insistent on immediate satisfaction. He had no funds, or practically none, to his credit at the bank, and yet he paid the note out of the bank's money. He left the note as cash with the bank. It was secured by a vendor's lien on some real estate. Less than a month later, the terms of the agreement of June 25th not having been complied with, the bank was, at the demand of the comptroller of the currency, taken over as already stated. In the course of liquidation of its assets, legal proceedings were taken to foreclose the vendor's lien above referred to. As the result the property was sold, and nearly two years after the money was taken out of the bank it was in that way recovered.

There was no question that the defendant had misapplied the funds in question. He knew the bank was in desperate straits for money, and he had been instructed not to permit overdrafts. If Bacon v. U. S., 97 Fed. 35, 38 C. C. A. 37, is sound law, this transaction was an overdraft; but if it was a loan, the conclusion would be the same. It is not claimed that defendant had any authority to make loans. He himself was in financial difficulties, and, being unable out of his own funds

to meet the note, he took the bank's ready money, and substituted for it an obligation not easily collectable, and of which the then holder was anxious to be rid. In the then condition of the bank, it was injured by withdrawing cash from it and substituting such a security in its place. The jury were entitled to find that the defendant had intended the obvious consequence of what he did. As was well said by the Circuit Court of Appeals for the Seventh Circuit in Walsh v. U. S., 174 Fed. at page 618, 98 C. C. A. at page 464:

"For a promotor of various enterprises to obtain the funds of a bank on the security of unmarketable bonds of his own enterprises at the risk of the interests of the bank is not proper and legitimate banking, and the entries on the books of the bank as loans and investments do not conceal the fraud thus perpetrated upon the bank."

And the Circuit Court of Appeals for the Third Circuit, in Lear v. U. S., 147 Fed. 359, 77 C. C. A. 537, has said:

"A reckless act, moreover, is always regarded, as the equivalent of a willful one, and that at least was here. The possibility of injury was apparent on the face of the transaction, notwithstanding which the interests of the institution of which he was the trusted head were put aside, and his own made paramount, in utter disregard of the outcome."

Affirmed.

On Rehearing.

Careful consideration has been given to all that at the rehearing was urged upon behalf of the defendant, but the majority of the court adhere to the opinion handed down October 1, 1918, and to the conclusion therein reached.

Affirmed.

PRITCHARD, Circuit Judge (dissenting). When this case was here in the first instance on appeal I concurred in the opinion of the court at that time. However, a further consideration of the questions involved impels me to the conclusion that the judgment of the court below should be reversed. The reasons upon which I base my conclusion may be briefly stated as follows:

(a) I am of the opinion that the court below erred in granting the motion of the government to consolidate the indictments.

(b) That the court erred in permitting the district attorney to argue to the jury that the bank had lost money on account of the conduct of the defendant, whereas it does not appear that the bank lost any money on account of the transaction for which defendant was indicted.

(c) As I have stated, the record shows that the bank did not lose a single dollar on account of any of the transactions of the defendant.

Therefore I am of the opinion that the court erred in refusing to grant the instruction referred to in the ninth bill of exception. The defendant was entitled to have this instruction submitted to the jury. It clearly raises the question as to whether it was shown by the evidence that the defendant committed the acts with which he is charged with intent "to injure or defraud the bank."

TWENTY-ONE MINING CO. et al. v. ORIGINAL SIXTEEN TO ONE MINE, Inc.

(Circuit Court of Appeals, Ninth Circuit.)

No. 3190.

1. EQUITY ⟸53(4)—OBJECTION TO JURISDICTION WAIVED.

Where a suit in equity to quiet title, in which the court has jurisdiction of the subject-matter and parties, has been fully heard without objection, and the court has announced its decision, it is too late for defendant to object to the jurisdiction to grant relief prayed for on the ground that the suit is ancillary to a pending action at law in which the question of title is involved.

2. MINES AND MINERALS ⟸38(18)—EVIDENCE SUSTAINING FINDING OF SEPARATION OF VEIN BY FAULT.

A finding that an ore vein found beneath the surface of defendant's claim was a continuation of the vein apexing in complainant's claim, which was separated from the upper part by a fault, *held* supported by the evidence.

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

Suit in equity by the Original Sixteen to One Mine, Incorporated, against the Twenty-One Mining Company and the Valentine Mines Company. Decree for complainant, and defendants appeal. Affirmed.

See, also, 255 Fed. 658.

Frank R. Wehe, John B. Clayberg, and Bert Schlesinger, all of San Francisco, Cal., for appellants.

Wm. E. Colby, John S. Partridge, and Grant H. Smith, all of San Francisco, Cal., and Carroll Searls, of Nevada City, Cal., for appellee.

Before GILBERT and MORROW, Circuit Judges, and DOOLING, District Judge.

DOOLING, District Judge. This is an appeal from a decree entered in an action in equity. The appellee was plaintiff and the appellants defendants in the lower court, and will be so designated here. The plaintiff is the owner of the Sixteen to One mining claim and the defendant Twenty-One Mining Company is the owner of certain claims adjoining. The subject of the controversy is a vein carrying gold and other valuable minerals, the apex of which, according to the complaint, is wholly included within the lines of the said Sixteen to One claim, but which on its downward course extends beneath the surface of the claims owned by the defendant. The original complaint, in which the Twenty-One Mining Company was named as sole defendant, contains all the essential averments of a bill to quiet title to said vein, and avers that the defendant claims and asserts some estate and interest therein adversely to plaintiff, and has in pursuance of such adverse claim entered upon portions of the extralateral segment thereof, and mined and extracted and converted to its own use

valuable ore therefrom. The complaint also contains the following averment:

"Plaintiff further avers that heretofore, to wit, on the 2d day of August, 1916, the plaintiff commenced an action at law against the defendant herein, in the District Court of the United States in and for the Northern District of California, to recover of and from said defendant the possession of all and singular the property of plaintiff hereinbefore described, and to recover the sum of one hundred thousand ($100,000) dollars as damages for the wrongs and injuries heretofore done and committed by said defendant upon the property of this plaintiff, as in this bill of complaint set forth; that said action at law is now pending in said court and undetermined."

The complaint then prays that defendant be required to set forth the nature and extent of its claim; that all adverse claims of defendant be determined by the court; that by its decree it be declared that defendant has no estate or interest in the said vein or any part thereof, and that it be adjudged that plaintiff's claim thereto is good and valid; that defendant be enjoined and forever restrained from asserting any claim to said vein throughout its length adverse to plaintiff; that a writ of injunction issue in accordance with the rules and practice of the court to restrain defendant from entering upon said vein, or working therein, or extracting ore therefrom, and that upon the final determination of said action at law such injunction be made perpetual; that an account be taken for the waste committed, and that plaintiff have judgment therefor; and for such other and further relief as to the court may seem meet and just.

It is true that plaintiff had commenced an action at law against defendant; but such action was not, as is alleged, to recover possession of the property in dispute, but solely to recover damages for trespass thereon. The law action was first tried, and resulted in a verdict in favor of plaintiff in the following form:

"We, the jury, find in favor of plaintiff and assess the damages against defendant in the sum of $100,000, less cost of extraction of ore, on account of unwillful trespass."

Because of the uncertainty as to the actual amount of damages awarded therein, this verdict was later set aside in part by an order in the following terms:

"It is ordered that the verdict heretofore entered herein be permitted to stand, in so far as it finds the issue in favor of plaintiff, and a new trial will be awarded for the sole and only purpose of assessing the amount of the recovery."

At the opening of the trial of the law case before the jury, plaintiff's counsel made the following statement:

"Now, if your honor please, there is pending in this court an action on the equity side, in which the ownership of this vein is involved in the form of an injunctive proceeding, and I was going to suggest that it will save both parties a lot of trouble and a lot of money if the court will order that the testimony, in so far as applicable, taken in this case, shall be applied to the equity case. Is there any objection to that?"

To this defendants' counsel replied:

"It is perfectly satisfactory."

Whereupon the court declared:

"It is so ordered."

After the trial of the case at law, Valentine Mines Company, which had no connection with the alleged trespass involved in that case, but had, after the present action had been commenced, acquired some interest in the property from the other defendant, was, by order of court and the consent of all the parties, made a defendant herein, and a supplemental bill was filed. This contained all the averments of the original bill, with the additional averment that a verdict had been returned in the law case in favor of plaintiff and damages assessed at $100,000, less cost of extraction of ore, and that judgment had been entered thereon. This bill was answered by both defendants. The answer asserts the rights of defendants to the property in dispute, avers that plaintiff has wrongfully extracted and converted to its own use valuable ores therefrom, of the value of more than $93,000; that said acts were committed by plaintiff after the commencement of the action; and that in consequence the court had issued an order restraining plaintiff from further working and extracting ore therefrom. The answer prays that plaintiff take nothing, and that defendants have their costs. It also prays that said restraining order against plaintiff be made perpetual as an injunction against plaintiff from further trespassing upon any part of said vein or veins, and from making any openings whatever beneath the surface of defendants' claims, and from entering thereon or therein.

Pursuant to the agreement mentioned, and by consent of counsel for both sides, the present action was submitted to the court for decision upon the evidence and proofs introduced in the trial of the case at law, together with certain depositions taken after such trial was concluded. The court in a written opinion decided in favor of the plaintiff, and directed a decree to be entered in accordance with the prayer of the bill. Then for the first time defendants objected to the jurisdiction of the court to enter such decree on the general ground that the suit in equity was wholly ancillary to the action at law, and that no decree could be entered therein until the final determination of said action, and then only in the exercise of such ancillary jurisdiction.

Two propositions are vigorously urged by defendants on this appeal: (1) That the trial court was without jurisdiction to enter the decree appealed from, for the general reason above stated; (2) that, upon the testimony, the decree, if entered, should be in favor of defendants.

[1] Even if it were true that the present action was commenced as ancillary to the case at law, which is not at all certain, the objection now urged, and which was made for the first time after the court had announced its decision in favor of plaintiff, comes too late. The action was treated by all parties as an action to quiet title. The plaintiff's counsel stated in their opening brief before the trial court:

"This is a suit to quiet title and for injunctive relief."

And defendants opened their reply brief with the statement:

"The issues are fairly stated in the opening brief of plaintiff."

The trial court, in the opinion directing a decree for plaintiff, declared:

"The relief sought is a decree quieting title in the plaintiff and awarding an injunction against the commission of further trespass by the defendant."

The defendants were seeking affirmative relief, and the cause was submitted by all the parties, not as one already determined by verdict or judgment in the action at law, or as dependent upon the result of that action, but as res integra, upon which the independent judgment of the court was sought, and which was to be decided, not upon the evidence adduced in the law case alone, but upon other additional and independent testimony as well.

The trial court, in passing upon this phase of the case, sums up the situation as follows:

"The stipulation on the part of the defendants to submit the equity suit on the testimony taken in the law action, the taking of further testimony by depositions to enable the court to determine the ownership of the vein, which it is now claimed was the issue involved in the law action, the request to appoint mining engineers or experts to examine the mine and report to the court, and the final submission of the case on the merits, is utterly inconsistent with the attitude of the defendants at the present time. But, whatever inconsistencies the parties may have been guilty of in the past, they were in entire accord in submitting the case on the merits, and in urging and insisting that the court in the equity suit should decide and determine the sole issue in the case, namely, the title or ownership of the disputed vein."

It is not a case here of conferring jurisdiction on the court in a matter not of equitable cognizance. The court as a court of equity had and has jurisdiction to quiet title, the bill contains all the allegations necessary for that purpose, all the parties were properly before the court, and all acquiesced in the method of procedure. In such case, neither party will be permitted, by the temporary withholding of objections until after the court has announced its decision, to place himself in such advantageous position that, winning, he can accept the fruits of victory, or, losing, escape the burdens of defeat. The decree appealed from, therefore, cannot be disturbed for lack of jurisdiction.

[2] The real controversy on the merits is as to the identity of the vein found beneath defendants' claims with the one having its apex in the claim belonging to plaintiff. The latter vein terminates at a fault. On the other side of the fault, and a short distance below, another vein exists. Plaintiff's contention is that these veins on either side of the fault are in fact segments of the same vein. Defendants contend that they are entirely different veins; that there were originally two veins, one lying above the other, of which the disputed vein was the upper, and plaintiff's vein the lower; that a portion of plaintiff's vein was thrown upwards several hundred feet, so as to bring it a short distance above the vein in dispute on the opposite side of the fault, while the same disturbance also threw the continuation of the disputed vein lying on that side of the fault several hundred feet upwards; that therefore the real continuation of plaintiff's vein may be found several hundred feet below the vein in dispute, while the continuation of the disputed vein was thrown above the present surface of the mountain and has been eroded by the action of the

elements. Many witnesses testified that the disputed vein and plaintiff's vein are identical. Practically an equal number testified that they are not. The witnesses on both sides were geologists, mining engineers, and practical mining men. Various maps and models were presented, supporting one theory or the other. There are 655 pages of printed testimony and affidavits in the record. From this evidence the jury in the case at law, and the court in the present case, decided that the disputed vein is a continuation of plaintiff's vein. This finding is amply supported by evidence, any summary or analysis of which must necessarily be voluminous, without serving any useful purpose whatever. That there is a sharp conflict in the testimony is true. The trial court accepted the theory and evidence of the plaintiff, and no such obvious error intervened, nor has any such apparent mistake been made in its consideration of the facts, or its conclusions therefrom, as would warrant this court in disturbing or modifying them.

The decree appealed from is affirmed.

BARBUR et al. v. COURTRIGHT.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919.)

No. 3221.

1. EXECUTION ⊂=51—MODE OF LEVY ON PROPERTY IN CUSTODY OF THIRD PERSON.

Money placed by a property owner on the counter of a city auditor for the redemption of his property from a tax sale by the city, and for which the auditor issued his receipt and certificate of redemption, *held* to be in the legal custody of the auditor and subject to levy on an execution against the purchaser at the tax sale, under L. O. L. § 300, only by garnishment of the auditor.

2. TAXATION ⊂=742—RIGHTS PASSING AS INCIDENT TO ASSIGNMENT OF SALE CERTIFICATE INCLUDE RIGHT OF ACTION FOR CONVERSION OF REDEMPTION MONEY.

An assignment of tax sale certificates *held* to vest the assignee with a right of action for the recovery of money previously paid in redemption of the property and wrongfully converted by another.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Action at law by Morris L. Courtright against A. L. Barbur, J. M. Hurlburt, and the First National Bank of Portland. Judgment for plaintiff, and defendants bring error. Affirmed.

Dolph, Mallory, Simon & Gearin, of Portland, Or., for plaintiffs in error.

Ridgway & Johnson, of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. [1] At the times here in question the plaintiffs in error Barbur and Hurlburt were, respectively, the duly elected, qualified, and acting auditor of the city of Portland, Or., and sheriff of Multnomah county, of that state, and the other plaintiff in error

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

one of the banks of Portland. The action was brought against them in the court below for the alleged unlawful conversion of the aggregate amount of $3,014.64; the complaint containing seven counts, each alleging in substance the sale of certain property by the city of Portland to one H. M. Courtright for unpaid and delinquent improvement liens, the issuance of a certificate of sale, its assignment prior to the filing of the complaint to Morris L. Courtright, the payment to the auditor in full redemption of each certificate of the sum of money called for therein, including principal, penalty, interest, and costs, and the unlawful taking of each sum by the bank and its codefendants.

The record shows that each of the certificates of sale for delinquent assessments of the property covered by the first four counts of the complaint was in the usual form and duly and regularly issued by the treasurer of the city of Portland pursuant to its charter, and certified that the property therein described and sold was sold subject to redemption within three years from the date of the certificate, and that, if not so redeemed, the holder of the certificate would be entitled to a deed of the property upon presentation and surrender of the certificate to the treasurer of the city; that each of those four certificates was during the year 1914 assigned by H. M. Courtright to the plaintiff in the action, M. L. Courtright, the latter having thereafter and during the same year assigned the same to various banks of Bay City, Mich., which held the title thereto at the time of the alleged conversion.

The evidence showed that the assignments of the certificates covered by the first three counts were not entered in the lien docket of the city until after September 1, 1917, and that the assignment of the certificate covered by the fourth count of the complaint was not so entered until February 7, 1917. The evidence also showed that the certificate first mentioned was reassigned to M. L. Courtright September 22, 1917, that the second mentioned certificate was reassigned to him February 17, 1917, the third September 28, 1917, and the fourth February 1, 1917; the first three of such reassignments having been entered upon the lien docket September 28, 1917, and the fourth February 7, 1917.

The evidence further showed that within the prescribed time, in pursuance of the right of the owner to redeem the said property from such sales, the requisite sums of money were placed upon the counter in the office of the defendant A. L. Barbur, auditor of the city, in his presence, or that of one of his deputies, and offered to said auditor, but that before the same came into his physical possession, or that of his deputy, all of said sums were seized by the defendant T. M. Hurlburt, sheriff of Multnomah county, under and by virtue of writs of execution issued to him upon a judgment that had been theretofore recovered by the plaintiff in error First National Bank of Portland against H. M. Courtright—the auditor, however, signing and issuing in each instance a certificate of redemption of the property.

The evidence further showed that, at the time of the seizure by the sheriff of the money for the redemption of the property covered by the first four counts of the complaint, no writ of garnishment was

served, and that the judgment debtor, H. M. Courtright, was not present in the office of the auditor, and never at any time had physical possession of those sums of money, or any portion thereof; but it is admitted that in levying upon the money referred to in the last three counts of the complaint the sheriff levied the writ by serving upon the auditor the required notice of garnishment, and that the latter issued his required certificate, after which the sheriff took into his possession the money referred to in the last three counts.

The statute of the state of Oregon provides that property may be levied upon under a writ of execution in like manner and with like effect as similar property is attached. Section 233, Lord's Oregon Laws. And section 300 of the same Laws provides that property of a judgment debtor, not in the debtor's possession, shall be attached as follows:

"* * *

"2. Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his possession.

"3. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same, or, if it be a debt, then with the debtor. * * *"

Respecting the money referred to in the first four counts, the real question therefore is: Whose money was it while lying on the counter in the auditor's office, under the circumstances that have been stated? The court below considered it as delivered into the possession of the auditor for H. M. Courtright, the holder of the certificates of sale and judgment debtor, and, being thus held by a third party for the latter, could, under the state statute, be attached only by the sheriff leaving with the auditor a certified copy of the writ of execution, together with a notice specifying the property attached, and accordingly held the plaintiff entitled to recover on the first four counts, with interest on the money for its unlawful detention. For the money referred to in counts 5, 6, and 7 of the complaint the court rendered judgment in favor of the defendants to the action, the correctness of which holding is not here questioned.

The counsel for the plaintiffs in error concede that, if the money tendered by the owner of the property described in the first four counts came into the possession of the auditor, the necessary procedure would have been by garnishment; but they urge that the auditor never did obtain such possession. It is true that he had not put his hands upon the money at the time of its seizure by the sheriff, but it is undisputed that it was taken to the office of the auditor by the representative and agent of the owner of the property for the purpose of redeeming it, and that in the execution of that purpose the owner, through his representative, tendered it to the officer by placing it upon his desk, and accepted from the officer in each instance a receipt for the money, reciting upon its face that it was "in full of the redemption" of the property specifically described therein, an entry of which transaction the auditor thereupon made upon the records of his office.

The bill of exceptions shows that each of the four receipts so given and accepted were similar, except only as to dates, names, amounts, and description of the property, one of which only is inserted in the record and is as follows:

"City of Portland, Oregon.

"Office of the Auditor of the City of Portland.

"Portland, Ore., June 2, 1915.

"Received of Joseph Simon, Atty., six hundred seventy-five 30/100 dollars in full for the redemption of L. 10 B. 3, Howe's addition, sold by the city of Portland 6—6—1912 to Harry M. Courtright for $482.75 for the improvement E 39th St.

Sold for	$482.75
Penalty	48.27
Interest	144.28

"D. 36 P. 196.

"A. L. Barbur, Auditor of the City of Portland,
"By E. W. Jones, Deputy."

We agree with the court below that the legal effect of what was done was to put the redemption money into the custody of the auditor for payment over to the holder of the certificates of purchase, H. M. Courtright, and, being thus in the hands of a third person, was subject to levy by the sheriff only in the manner provided by the statute that has been cited. See Spaulding v. Kennedy, 6 Or. 208; Price v. Boot Shop, 75 Or. 343, 347, 146 Pac. 1088; Marks v. Shoup, 181 U. S. 562, 565, 21 Sup. Ct. 724, 45 L. Ed. 1002.

Regarding the causes of action here involved, there having been no valid levy of the writs of execution, it is obvious that section 416 of the charter of the city of Portland, referred to by counsel, requiring notation of assignments of delinquent certificates on the City Lien Docket to make them valid, is inapplicable to the present case.

[2] Nor are we able to sustain the contention of the plaintiffs in error that the assignment of the certificates of sale by the Bay City banks to the defendant in error only transferred to the assignee the right to make demand for moneys that may have been paid in redemption, or for deeds to the property in the event of no redemption, and that no right of action for conversion passed thereby. In Final v. Backus, 18 Mich. 218, 231, Chief Justice Cooley, speaking for the court, said:

"The position is that the right of action for a tort is not the subject of assignment; and this we understand to be the general rule. 1 Spence, Eq. Juris. 180, 181; 2 Spence, Eq. Juris. 868 to 873; Adam's Eq. 54; Story's Eq. Juris. § 1040, g; Carroll v. Potter, Walk. Ch. [Mich.] 365; Rice v. Stone, 1 Allen [Mass.] 566; Comegys v. Vasse, 1 Peters, 213 [7 L. Ed. 108]. But this rule applies only to those torts which are merely personal, and which, on the death of the person wronged, die with him; while torts for taking and converting personal property, or for injury to one's estate, and generally all such rights of action for tort as would survive to the personal representatives, may, it seems, be assigned so as to pass an interest to the assignee which he can enforce by suit at law. North v. Turner, 9 Serg. & R. [Pa.] 234; Butler v. N. Y., & E. Railroad, 22 Barb. [N. Y.] 110; People v. Hudson R. R. R., 4 Duer [11 N. Y. Super. Ct.] 74; Waldron v. Willard, 3 E. D. Smith [17 N. Y.] 488; McKee v. Judd, 12 N. Y. 622 [64 Am. Dec. 515]; Rice v. Stone, 1 Allen [Mass.] 566; Jordan v. Gillen, 44 N. H. 424."

See, also, Tome v. Dubois, 73 U. S. (6 Wall.) 548, 553, 554, 19 L. Ed. 943; Dahms v. Sears, 13 Or. 47, 11 Pac. 891; Sperry v. Stennick, 64 Or. 96, 129 Pac. 130; Kruse v. Bush, 85 Or. 394, 398, 167 Pac. 308; New Liverpool Salt Co. v. Western Salt Co., 151 Cal. 479, 91 Pac. 152.

The judgment is affirmed.

In re DE RAN.

In re FREMONT LUMBER CO.

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

No. 3240.

1. BANKRUPTCY ⟸372—RECORD INSUFFICIENT TO SHOW CLOSING OF ESTATE.
   Record of the District Court in bankruptcy, as sent up on petition to revise an order made by it for repayment by the trustee's attorney of fees allowed and paid to him, *held* not to show that the estate had been fully administered and closed prior to the order, especially in view of the court's affirmative finding that it had not been fully administered.

2. BANKRUPTCY ⟸446—SCOPE OF REVIEW ON PETITION TO REVISE.
   The Circuit Court of Appeals, on petition to revise an order of the bankruptcy court, cannot determine controverted questions of fact, but is limited to review of questions of law.

3. BANKRUPTCY ⟸372—CLOSING OF ESTATE NOT SHOWN BY RECORD OF BANKRUPTCY COURT.
   The closing of bankrupt's estate is not established by entry on the referee's book, "Order allowing account and discharging trustee filed;" the record of the bankruptcy court not showing that the referee's record was transmitted to the court, or its clerk, as required by Bankruptcy Act, § 39, subd. 7 (Comp. St. § 9623), and section 42 (section 9626), and the record supporting a presumption that, had the closing order been brought to the court's attention, the court would, as authorized by section 2, subds. 8 and 10 (section 9586), have returned to the referee his record for further proceedings.

4. BANKRUPTCY ⟸482(1)—ALLOWANCE BY REFEREE TO TRUSTEE'S ATTORNEY SUBJECT TO RE-EXAMINATION.
   Allowance by referee in bankruptcy of the account of the trustee's attorney for services and expenses is not a final adjudication, but is an administrative order, subject any time before closing of estate, to re-examination and disposition according to the equities.

5. BANKRUPTCY ⟸482(1)—ALLOWANCE TO ATTORNEY MAY BE SET ASIDE BY COURT.
   The bankruptcy court, being one of equity, can set aside an allowance for services and expenses of attorney of one of its officers, when shown that it was procured through fraud.

6. BANKRUPTCY ⟸482(1)—RE-EXAMINATION OF ALLOWANCE TO TRUSTEE'S ATTORNEY NOT IN REFEREE ONLY.
   Claim of attorney for trustee in bankruptcy having in accordance with existing custom, though not required by any rule, been certified by the referee to the District Judge, with recommendation, and he having allowed it, jurisdiction to re-examine it is not with the referee alone.

7. BANKRUPTCY ⟸482(1)—RE-EXAMINATION OF ALLOWANCE OF CLAIM ON JUDGE'S MOTION.
   A bankruptcy court may of its own motion institute proceeding for re-examination of allowed claims of attorney for trustee.

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8. BANKRUPTCY ⊂=482(1)—PROCEDURE ON RE-EXAMINATION OF ALLOWANCE TO REFEREE'S ATTORNEY.
A plenary suit, as distinguished from a summary proceeding, is not necessary for re-examination, on the ground of fraud, of the allowed claim for services and expenses of the attorney for the referee in bankruptcy.

9. JUDGES ⊂=30—DESIGNATION OF JUDGE OUT OF DISTRICT ON DISQUALIFICATION OF TRIAL JUDGE.
Under Judicial Code, § 21 (Comp. St. § 988), on disqualification of the trial judge for bias or prejudice, it is not necessary, for designation of another judge outside the district, that all the judges of the district be disqualified.

10. BANKRUPTCY ⊂=482(1)—RIGHT TO COMPENSATION OF ATTORNEY FOR TRUSTEE.
Attorney for trustee in bankruptcy is not entitled to receive or retain compensation from the estate; he while so acting, having really worked against the interests of the estate and its creditors.

Petition to Revise an Order of the District Court of the United States for the Northern District of Ohio; John M. Killits and Arthur J. Tuttle, Judges.

Petition of Hal C. De Ran to revise an order of the District Court in the case of the Fremont Lumber Company, bankrupt. Order affirmed.

W. H. Boyd, of Cleveland, Ohio (David B. Love, of Fremont, Ohio, and E. B. King, of Sandusky, Ohio, of counsel), for petitioner.

Harry W. Morgan, of Toledo, Ohio (Brown, Geddes, Schmettau & Williams and Smith, Beckwith & Ohlinger, all of Toledo, Ohio, of counsel), for respondent.

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

KNAPPEN, Circuit Judge. The Fremont Lumber Company (a corporation) was adjudicated bankrupt by the court below on June 8, 1908, and a general reference made. On the 26th of the same month De Ran was appointed attorney for the trustee in bankruptcy, one Eisenhour. On September 28, 1910, De Ran's account for services and expenses as such attorney from June 26, 1908, to July 27, 1910, was allowed at $1,336.05, and payment made in due course. On November 2, 1917, Judge Killits, on his own motion, instituted a formal investigation into the administration of the bankrupt's estate by citing the referee and the trustee to appear before him, later subpœnaing De Ran and others. As the result of this investigation, the judge made, on January 9, 1918, certain findings which, in connection with the amendment of February 16, 1918, may be summarized as follows:

(1) That while De Ran was assuming to act as attorney for the trustee, for which services the compensation in question was allowed him, he, in fraud of creditors and in violation of his duty as attorney for the trustee, prosecuted two claims in favor of one Christy against the estate, aggregating more than $10,000, and caused Christy to draw dividends on those claims, having at the time knowledge that one of them, aggregating more than $5,000, was not a primary liability of

the bankrupt and under no circumstances allowable as such, and that as against the other, also allowed in the sum of more than $5,000, with knowledge that Christy had previous to the bankruptcy taken an assignment of the judgment against the principal debtor on said claim, the value of which was sufficient to reduce the general claim to $140.

(2) That while so acting as attorney for the trustee, and during the period covered by said allowed compensation, De Ran procured an appraisement of the assets of the bankrupt's estate at $20,888, with knowledge that a state court, which had jurisdiction over a receivership prior to the bankruptcy, had appraised the assets at upwards of $60,000, and by withholding such knowledge procured the referee to approve a sale of such assets upon the second appraisement, at a trifle more than $20,000, to one Zurhorst, the latter acting therein for certain parties including De Ran, the assets so sold being then fairly worth more than $45,000; that De Ran acquiesced and participated in the fact that such purchasers of the bankrupt's assets were exonerated from paying cash for their purchases and were permitted to distribute the purchase price over a period of four years without interest (which would have amounted to more than $1,600), and to retain the cash proceeds of the purchase of the estate subject to general distribution.

(3) That, had De Ran's conduct been brought to the attention of the bankruptcy court when his claim for allowance for services and expenses as attorney to the trustee was presented, it would have been altogether disallowed.

(4) That in conscience and equity De Ran ought not to be permitted to retain the compensation so paid to him as attorney for the trustee.

De Ran was accordingly ordered to show cause why he should not repay the $1,336.05 so paid him, with interest. Another order seems also to have been entered requiring De Ran to show cause why he should not be disbarred from practice, a committee being appointed to prosecute such proceeding. Thereafter Judge Killits, on March 4, 1918, entered an order reciting his own disqualification to sit in any matter in the case to which De Ran was a party defendant or a respondent to any issue raised therein, and directing notice accordingly to the senior Circuit Judge. Judge Tuttle was accordingly designated on the 16th of the same month to hear and determine all such matters and issues.[1] After hearing upon testimony and arguments of counsel, an order was entered by Judge Tuttle on April 27th which, as modified by action of July 17th following, found that the allegations contained in Judge Killits' rules of January 9th and February 16th, respectively were true, and requiring De Ran forthwith to pay the $1,336.05, with interest at 6 per cent. per annum from September 26, 1910, to a new trustee of the bankrupt estate, who had been elected upon the resignation of the former trustee pending the hearing mentioned. This proceeding is brought under section 24b of the Bankruptcy Act (Act

[1] Petitioner claims to have tendered for filing an affidavit of Judge Killits' disqualification just before his entry mentioned. This affidavit has not been sent up, and apparently was not filed. The practice as to disqualification would have been the same, had affidavit been filed as under the judge's certificate. Judicial Code (Act March 3, 1911, c. 231) § 21, 36 Stat. 1090 (Comp. St. § 988).

July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. § 9608]) to review that order and judgment.

The grounds relied upon for reversal, as we understand them, are these:

1. That the District Judge had no jurisdiction to make the orders complained of because—

(a) The estate had been fully administered and duly closed more than two years before the proceeding in question was instituted.

(b) The referee had sole jurisdiction over the allowance of petitioner's account as attorney for the trustee, that no creditor or person interested had ever objected to such allowance or applied for relief therefrom, that Judge Killits had no authority on his own motion to so interfere, and that the allowance of petitioner's claim was thus a final adjudication thereon.

(c) That the action of the District Court here complained of was barred both by laches and by statutes of limitation.

2. That if the subject-matter is open to trial, it can be litigated only in a plenary suit.

3. That Judge Tuttle's designation was invalid.

4. That no ground is stated in the rule to show cause empowering the court to enter the order complained of, and the grounds stated are contrary to the facts and the law, as shown by the record.

[1-3] 1. Was the estate fully administered and actually closed prior to November 2, 1917? So far (according to the record here) as shown by the records in the District Court, the immediately pertinent proceedings were these: The referee's record shows: January 7, 1911, final report of trustee filed; cash on hand $3,754.21. On the 10th, amended proof of First National Bank, Fremont, filed $2,888.93. On the 11th, notified creditors of meeting January 26th, 10 o'clock a. m., for final dividend. On the 26th, hearing on final distribution. On the 30th, list of creditors and dividends recorded and placed in hands of trustee. On the 30th, memorandum of bankruptcy statistics filed. During the year 1911 there are no entries on the record kept in the District Court, and after 1911 no entries upon the records of either court (as appearing in the District Court clerk's office) until 1914, when these entries by the referee appear: May 12, record and bankruptcy statistics forwarded to clerk. May 16, record of proceedings returned to attach distribution account of trustee, this latter evidently in response to the entry on the court's record of May 15, 1914, "letter directing the trustee to report forthwith filed." The next entries by the referee are these: February 6, 1915, distribution account filed by trustee sent to Toledo, February 18, record of proceedings forwarded to Toledo. On the District Court records appear the following: February 8, 1915, trustee's final report received from referee and filed. On the 19th, referee's record of proceedings filed. March 25th, objections of National Bank of Commerce, Detroit, Mich., to confirmation of trustee's report filed. July 2, order instructing referee in regard to trustee's report. Same date, certified copy to F. A. Seager [the referee]. These instructions appear to be a direction to—

"cause to be transmitted to the court the trustee's report of distribution of the first dividend under date of August 17, 1909, and the final report of the

trustee preliminary to the declaration of the final dividend, said report being apparently dated January 17, 1911. The referee will see that these reports are severally made a part of the files of this cause on or before the 30th of July, 1915."

Neither the entries by the referee nor the record of the District Court show that this instruction was complied with. There are no further "entries by referee" shown by the record as sent up by the District Court. On that court's records the next entry is that of November 2, 1917, recording the issue of citation to Eisenhour and Seager. On the face of this record it seems plain that the estate was not closed in January, 1911, as petitioner contends, even if it was then thought ripe for closing. It was never closed unless, as petitioner further contends, such closing was effected on February 27, 1915, through an alleged order of the referee allowing the trustee's account and discharging that officer. As already said, no such order appears of record in the District Court so far as shown by the record in the instant proceeding.

In the proceeding before Judge Tuttle, in which the order here under review was made, the respondent (petitioner here) presented by answer the defense, among others, that the referee had on February 27, 1915, as shown by his records and the files of the court, approved the trustee's final account and duly and regularly discharged the trustee and finally closed the estate. In our opinion Judge Tuttle's order under review naturally implies a denial of the asserted closing. Such implication is made clear by reference to that judge's order of April 27, 1918 (the date of his order requiring petitioner to repay the $1,336.05 in question), which latter order accepted the resignation of Trustee Eisenhour and appointed as receiver the present trustee, Isenberg, and in which order Judge Tuttle expressly declared:

"That the order and findings made by this court on April 1, 1918, and filed with the clerk of this court on April 2, 1918, be and the same are hereby in all respects approved and confirmed."

The order referred to by Judge Tuttle is an order made by Judge Killits revoking petitioner's appointment as attorney for the trustee, disallowing, as against receipts in the trustee's final reports, certain claims for credits amounting to $1,356.47, which included a small dividend to each of two creditors, claimed not to have been paid, and directing the then Referee Belford to readminister the estate, and in that connection to consider the propriety of instituting certain actions on account of alleged fraudulent payments or misappropriations from the estate, and expressly finding that the estate—

"has never been lawfully closed as provided by law, there having been no lawful approval of the proceedings thereunder nor of the final account of distribution of the trustee in bankruptcy; said administration not having been completed according to law."

We think the record not open to the criticism that Judge Tuttle's findings in this or any other regard were based otherwise than upon evidence presented to and weighed by him in connection with the arguments of counsel. This being so, the effect otherwise to be given his finding is not destroyed by any disqualification on Judge Killits'

part to so adjudicate. In this proceeding we cannot determine controverted questions of fact. We are limited to a review of questions of law. Duryea Power Co. v. Sternbergh, 218 U. S. 299, 31 Sup. Ct. 25, 54 L. Ed. 1047; In re Stewart (C. C. A. 6) 179 Fed. 222, 102 C. C. A. 348; In re Holden (C. C. A. 6) 203 Fed. 229, 121 C. C. A. 435. In the face of this finding, and as the record in the District Court stands, the contention that the estate had been closed must be rejected unless, as petitioner contends, the contrary is affirmatively established by an entry appearing on the then referee's book, as follows: "Feb. 27 [1915]. Order allowing account and discharging trustee filed" which record petitioner asks this court to receive as conclusive evidence of the fact stated, in connection with an affidavit of the then referee that such order was made and entered by him on his docket as referee in the bankruptcy proceeding on the date there shown, and that immediately thereafter he mailed the original to the clerk of the District Court. By amendment to the petition for revision in the instant case it appears that this record book was offered in evidence on the hearing below; and the answer to that amendment asserts that—

"The evidence presented on the hearing on the merits of this matter * * * impeached, contradicted, and qualified the alleged record of the referee in bankruptcy, of which one of the exhibits to said amendment to said petition to revise purports to be a copy and said evidence destroyed the alleged legal effect of said alleged record of said referee."

In this state of the record here we think the referee's record book cannot be held to prove itself conclusively, and as matter of law. Subdivision 7 of section 39 of the act (section 9623) requires referees to "transmit to the clerks the records, herein required to be kept by them, when the cases are concluded," and subdivision (c) of section 42 (section 9626) expressly requires that the book or books containing a record of the proceedings before the referee shall on the conclusion of the case before that officer be not only certified to by him, but transmitted with such papers as are on file before him to the court of bankruptcy, there to "remain as a part of the records of the court." It is not claimed that the book was so transmitted, but on the contrary, it seems to have always remained in the personal custody of the then referee; he contenting himself with transmitting a certified copy of so much of the book as pertains to the estate in question, in accordance with what he says was his practice. As already said, there is no competent record evidence that the item in question ever went to the clerk's office (there is not even a notation to that effect in the referee's book).[2] The law does not contemplate that so important an action as the closing of an estate and the discharging of a trustee should rest in personally retained records. The affidavit referred to is plainly incompetent and cannot be received against respondent's objection. Its receipt would result in impeaching the judgment of the trial court by evidence which, so far as appears by the record here, was not before that court; for it was not referred to in the petition for revision

[2] A copy of the referee's entry (if filed in the clerk's office), certified by the clerk, would have been competent evidence under our rule 34 (202 Fed. xxi, 118 C. C. A. xxi).

or in the amendment thereto and, so far as this record shows, is no part of the records of the trial court.

We may also suggest, without answering, the query whether a mere signing and filing of an order closing an estate without extending it in permanent form on a docket or journal complies with section 42a of the Bankruptcy Act, which requires that the referee's record shall be kept "as nearly as may be in the same manner as records are now kept in equity cases in Circuit Courts of the United States."

But, assuming that the referee's order of February 25, 1915, was actually made and entered in his docket on that date as completely as is contemplated by official form No. 51, we think the estate is not shown to have been thereby effectually closed, not only for lack of competent evidence that it was reported to the court, but for this further consideration: Assuming (without so deciding) that under section 55 of the Bankruptcy Act (section 9639) a creditors' meeting following the distribution account of February 6, 1915, as distinguished from the dividend account of January 7, 1911, was not required (although we are disposed to think it was required, it was not had), and thus that the estate was on February 25, 1915, ripe for the referee's order in question, we think the record further negatives the idea of an effective closing on that date. Such closing involves a proposition of fact. Whatever might have been the intention of the referee, his action was not final until in some way acquiesced in by the District Court.

Assuming, for present purposes, that such acquiescence would ordinarily result from the filing in the District Court clerk's office of an order discharging the trustee and approving his account, without seasonable action to review, yet the court had power to determine for itself, in the first instance, the question of closing the estate. The court had shown itself interested in the administration by directing the trustee on May 15, 1914, to report forthwith. It was not until nearly 9 months later that the trustee's distribution account was filed with the clerk of the District Court, followed 11 days later by the referee's record of proceedings. In the absence of further report by the referee of any action by him, and after a creditor had made objection (directly to the District Court) to the confirmation of the trustee's report, the referee was directed to transmit to the court the two trustee's reports before referred to. The record does not show that either of these reports was ever filed in the District Court. Subdivision 8 of section 2 (section 9586) authorizes the court to reopen an estate whenever it appears it was "closed before being fully administered." This authority could doubtless be exercised ex parte. Subdivision 10 of that section empowers the courts to "return with instructions for further proceedings, records * * * certified to them by referees." The record here would support, rather than repel, a presumption that the referee's record of February 25, 1915, would have been returned to him for further proceedings, and the order closing the estate set aside, had the closing order been brought to the court's attention by its filing in the clerk's office. Under these circumstances, and in view of the affirmative findings of fact below (which the evidence tends to support) that the estate had not been fully administered, we think the

defense that the estate had been closed before the proceeding here in question was instituted is not established by the record before us.

[4, 5] 2. We see no force in the contention that the referee's allowance of petitioner's account amounted to an adjudication which the District Judge had no jurisdiction to set aside. Had the claim been that of a creditor it would, under section 57k of the act (section 9641), be subject to reconsideration and rejection, in whole or in part, at any time before the estate was closed. But while the claim was not that of a creditor, and so not subject to the statute, it was, nevertheless, being an administrative order, subject at any time before the closing of the estate to re-examination and to such disposition as the equities of the case require. In re Ives (C. C. A. 6) 113 Fed. 911, 51 C. C. A. 541; Davidson v. Friedman (C. C. A. 6) 140 Fed. 853, 72 C. C. A. 553. A court of bankruptcy is a court of equity (Bardes v. Bank, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175), and has undoubted jurisdiction to set aside an allowance for services and expenses of an attorney to one of its officers, when it satisfactorily appears that the allowance was procured through fraud. The allowance of the claim was thus not a final adjudication.

[6] The proposition that the referee alone had jurisdiction to re-examine the claim does not impress us. It is not accurate to say that the action allowing the claim was solely that of the referee; in a much more proper sense it was directly the action of the District Judge. It is shown not only by the referee's record, but by that in the office of the clerk of the District Court, that petitioner filed with the trustee a claim for $1,567.30; that the referee, in accordance with a then existing practice, certified the claim to the District Judge, with recommendation that it be allowed at $1,536.05; that the judge allowed the claim at $1,356.05.[3] The referee seems to have made no further order. It is immaterial that this practice of submitting to the District Judge directly the allowance of claims of this nature, instead of having the allowance made by the referee subject to review under the act, was (as petitioner contends) not required by any actual rule of the District Court. It was apparently based upon an existing practice, presumably required by the District Judge. The latter had complete authority, notwithstanding the general reference, to take to himself the allowance of claims of this nature. The action had was as effectively that of the judge as if had under a positive order withdrawing that subject from the referee's consideration, or as if the referee had in the first instance allowed the claim, and the matter then been brought before the District Judge for review.

The estate not having been closed, the statute of limitations does not apply. The record precludes any basis for claim of laches in re-examining the account.

[7, 8] 3. Equally without merit, to our minds, are the contentions that the District Court had no jurisdiction sua sponte to institute the proceeding under review, and that, in any event, a plenary suit, as

[3] As shown by the District Court's record, or at $1,536.05 as shown by the referee's record. Both court and counsel seem to treat the actual allowance as $1,336.05.

distinguished from a summary proceeding, was necessary. We have lately had occasion in two cases to consider the jurisdiction of a court of bankruptcy to proceed on its own motion to correct an erroneous allowance or a fraudulent action. International Corporation v. Cary, 240 Fed. 101, 104, 105, 153 C. C. A. 137; In re Veler, 249 Fed. 633, 644, 161 C. C. A. 543. In the Cary Case, in sustaining the action of the referee (under section 57k of the act) in setting aside the allowance of a claim on his own motion, we said:

"While it is probably the better practice generally for the referee to act upon petition of the trustee or of creditors, and, in case the information comes in the first instance to the referee, to direct the trustee to institute proceedings for re-examination, yet we cannot think that the referee is without jurisdiction to act, as in the case in question, upon his own motion. There may or may not have been reason for proceeding sua sponte, but the presence or absence of such reason is not fatal to jurisdiction. A court of bankruptcy is a court of equity (Bardes v. National Bank, 178 U. S. 524, 525, 20 Sup. Ct. 1000, 44 L. Ed. 1175); the proceedings therein are more summary than in ordinary suits; * * * and it cannot be that an equity court, acting under such summary practice, is powerless, in the interests of justice, on its own motion to take steps to correct what it believes to have been an erroneous action had upon insufficient knowledge."

In the Veler Case, where the District Court, in a proceeding instituted sua sponte, held the original petitioning creditors liable for receiver's certificates, debts and later costs, on the ground that the receivership was fraudulently had, we said (speaking through Judge Denison):

"The District Judge became suspicious that he had been imposed upon. It was not only his clear right, but his duty, to proceed upon his own motion into a thorough inquiry upon the subject."

In that case, in rejecting a contention that a plenary action at law before a jury was essential to relief, it was said (249 Fed. 644, 161 C. C. A. 554):

"The whole matter is ancillary to the bankruptcy proceedings, and the bankruptcy court has, in a broad sense, the power of a court of equity."

In the Veler Case we set aside the action of the District Court because we thought that the parties charged had not had the kind or degree of hearing to which they were entitled, from the fact that the court, which made not only the order to show cause but the final order, seemed to have regarded the conclusions upon which the order to show cause was based as "unassailable unless by new and additional evidence." The instant case is, to our minds, clearly distinguishable from the Veler Case, in that here Judge Killits, after formulating the specific charges on which the order to show cause was based himself retired from the trial of the issues, which was turned over to Judge Tuttle; and, as we have already suggested, the record contains nothing to show that the latter judge based his conclusions otherwise than upon his own independent judgment, formed after hearing the testimony of witnesses and the arguments of counsel, or that he gave undue weight to the fact that a co-ordinate judge had presented the charges and preliminarily found the facts on which the order to show cause issued. We think it proper, however, to say that

in our opinion Judge Killits would have followed a better practice if, after his disqualification was entered, he had refrained from himself further prosecuting the inquiry which resulted in the order and direction of April 1, 1918, before referred to. But that order and direction was not the final action of the court. The order and finding were "in all respects approved and confirmed" by Judge Tuttle.

[9] 4. We cannot accede to the proposition that Judge Tuttle was without jurisdiction to hear the instant proceedings from the fact that there are two District Judges for the Northern district of Ohio, and that Judge Westenhaver, the other District Judge, is not shown to have been disqualified. We set to one side, as without the record, the assertion in petitioner's brief that Judge Westenhaver was in fact not disqualified, as well as respondent's assertion that Judge Tuttle was already under general designation to sit in the Northern district of Ohio. As the record stands, we think there was no lack of jurisdiction in Judge Tuttle. The authority to designate another judge upon Judge Killits' certificate of disqualification is expressly conferred by section 21 of the Judicial Code, under the practice specified in sections 20 and 14 (sections 981, 987). Assuming that Judge Westenhaver was not disqualified, the Circuit Judge was not bound to designate him; the statute gave the Circuit Judge the choice of methods. It will be presumed that the designation was made for reasons deemed sufficient. We find nothing in the statutes which limit the power of designation to a case where all the judges of the district are disqualified; and we cannot read such limitation into the statute.

[10] 5. We see no basis for the proposition that no ground is stated in the rule to show cause empowering the court to enter the order complained of, and that the grounds stated therein are contrary to the facts and the law as shown by the record. Petitioner, as attorney for the trustee, was in effect the attorney for the bankrupt's estate and its creditors. According to the facts preliminarily found by Judge Killits, and ultimately found by Judge Tuttle, petitioner, while thus acting as attorney for the estate and its creditors in rendering the service for which the allowance in question was made, was really working against their interests, and impliedly without the knowledge of the court allowing the account. Under elementary principles (if these findings are sustained) petitioner was not entitled to receive or to retain the compensation in question. It is a mistake to treat these findings as mere assumptions; nor can we upon this record say that the facts so stated and found are contrary to the facts as presented to the trial court. As we have already said, the instant proceeding is not such as to enable us to consider the controverted questions of fact. The substantial merits of the case, except as involved in the legal propositions which have been discussed, are not before us.

It results from the views we have expressed upon these various propositions that the action of the District Court here complained of must be affirmed.

In re O'GARA COAL CO.

O'GARA v. NEW YORK CENT. R. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. July 29, 1919. Rehearing Denied September 24, 1919.)

No. 2726.

1. BANKRUPTCY ⟸384, 387, 440—ORDER IN AGREEMENT FOR SETTLEMENT OF CLAIMS A COMPOSITION AND APPEALABLE.

An order approving an agreement for settlement of claims and distribution of assets of a corporation which had been duly adjudged a bankrupt, whereby the corporation was permitted to continue in business, the trustee having realized large profits while conducting its business, is in the nature of a composition which under Bankruptcy Act, § 14c (Comp. St. § 9598), would operate as a discharge, and hence such order is reviewable under section 25a (Comp. St. § 9609) by appeal, as an order granting or refusing to grant a discharge, and not by petition to review and revise.

2. BANKRUPTCY ⟸376—COMPOSITION AGREEMENT FAIR AND EQUITABLE.

On appeal from an order approving an agreement for the settlement of claims and distribution of the assets of a bankrupt corporation, whereby a corporation which had been adjudicated a bankrupt resumed business, *held*, that the plan was not open to attack as unfair and inequitable to the bankrupt corporation.

3. BANKRUPTCY ⟸389½—BANKRUPT CORPORATION MAY ELECT OFFICERS AND DIRECTORS PENDING SETTLEMENT.

In view of the provisions of the Bankruptcy Act for compositions, a corporation, though bankrupt, may elect officers and directors while its affairs are being conducted in the bankruptcy court, and such officers and directors may agree to a settlement of claims and distribution of assets in the nature of a composition.

4. CORPORATIONS ⟸198—VOTING TRUST VALID UNDER NEW YORK LAWS.

Where a New York corporation, engaged in coal mining, had its principal offices and place of business in Illinois, *held*, that stockholders might make valid voting trust agreements, such agreements being authorized by the New York laws, and votes for directors cast under the voting trust were not illegally cast.

5. CORPORATIONS ⟸283(1)—VALIDITY OF ELECTION OF OFFICERS.

That a director and subsequent president of the corporation had been attorney for the largest stockholder, and without his knowledge or approval acquired a large interest in the stock of the corporation, will not defeat the general election of officers, and open to objection an agreement for settlement of claims and distribution of assets approved by the officers so elected.

6. CORPORATIONS ⟸283(3)—VALIDITY OF ELECTION OF OFFICERS.

Where a large stockholder in a corporation attacked the legality of an election of directors, asserting that one of the directors, who had been his attorney, by virtue of such employment, induced other stockholders to join a voting trust, the election will not be set aside unless it be shown that by reason of such breach of trust relation a sufficient number of votes were controlled to determine the election, and that but for such action the result would have been different.

7. CORPORATIONS ⟸283(4)—ESTOPPEL TO ATTACK ELECTION OF DIRECTORS.

Where a stockholder of a New York corporation, which elected directors after adjudication in bankruptcy and while its affairs were being administered in the bankruptcy court, did not attack the election in the state courts of New York, he cannot at a much later day, after the directors have approved a plan of settlement and distribution of assets, which was in the nature of a composition, attack the legality of the election.

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

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

In the matter of the O'Gara Coal Company, bankrupt. An agreement for settlement of claims and distribution of assets, assented to by the New York Central Railroad Company and others, was approved by the court, and Thomas J. O'Gara appeals and petitions to review and revise the order approving the agreement. Petition to review and revise dismissed, and order affirmed on appeal.

See, also, 235 Fed. 883, 149 C. C. A. 195.

The O'Gara Coal Company, a New York corporation, was duly adjudged a bankrupt October 3, 1913, owing at such time about $510,000 on unsecured claims and $2,728,000 represented by bonds secured by a mortgage due September 1, 1955, drawing interest at 5 per cent. In addition there were disputed claims aggregating approximately $1,200,000, all of which disputed claims were subsequently disallowed. The assets consisted of about $19,000 in cash and coal mine leases covering some 30,000 acres in Illinois. In addition thereto bankrupt owned all of the stock of two coal mining companies, the Harrisburg Saline Collieries Company and the Harrisburg Big Muddy Coal Company, to which stock it was claimed the lien of the mortgage did not extend. Success attended the efforts of the trustee, who, aided by war prices, was able to show large profits. In May, 1918, current assets amounted to $1,590,000 and the value of the bankrupt's holdings was fixed at $10,000,000; the liabilities remaining about the same.

Bankrupt defaulted in its bond interest installment on September 1, 1913, and also failed to provide for the sinking fund installments due August 1, 1912 and 1913. In January, 1914, the trustee under the mortgage declared the entire amount of principal and interest immediately due and payable. In July, 1916, a decree was entered fixing the validity and determining the amount of the lien of the trust deed, all in favor of the trustee, and adjudging certain property not included in said mortgage to be equitably subject to the lien of said mortgage. This was done over the objection of appellant, Thomas J. O'Gara, who was the largest individual stockholder, owning some 45 per cent. of the stock, and was at one time the president of the corporation and later for a short period one of the trustees in bankruptcy. The estate being solvent in 1918, efforts were made to reorganize the company, and these plans bore fruit in May, 1919, when a plan of reorganization and a scheme for the full payment of all unsecured claims was worked out to the satisfaction of the court. This reorganization plan was proposed by certain unsecured creditors but met the approval of a bondholders' committee representing nearly all of the unsecured creditors, and purported to have the approval of the bankrupt company. It likewise met the approval of the court, who characterized the plan as "a fair and reasonable one, and it is to the best interests of the bond holders, the other creditors of the O'Gara Coal Company, and the O'Gara Coal Company that the same should be consummated in accordance with the plan and prayer contained in the petition herein presented to the court, and it is the duty of the Equitable Trust Company of New York to participate in carrying out the same."

Briefly, this plan provided for the payment out of the cash on hand, upon which the mortgage was a lien, of all unsecured claims; it increased the amount due on each ton of coal mined, thus providing an adequate sinking fund, provided for the waiver of the mortgagee's rights to insist upon the immediate payment of the entire sum represented by the mortgage, to wit, $2,728,000, extended the mortgage to all the property of the bankrupt, continued in force according to its original terms the mortgage and provided for the immediate payment of $250,000 to the mortgagee in consideration of its waiver of its rights. Other provisions of less importance need not be here recited.

Appellant denied that the bankrupt ever consented to the scheme of composition, but the court found in appellees' favor on this issue.

John S. Miller, of Chicago, Ill., for petitioner appellant.

Robert J. Cary and Julius Moses, both of Chicago, Ill., for respondents.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). [1] Appellant sought to review this order, both by way of appeal and by a petition to review and revise. Appellees insist that the remedy is solely by petition to review and revise, and that on such application O'Gara is barred from a consideration of the questions presented because of the record, which included the findings of fact made by the District Court, a part of which has been quoted.

We are convinced that, notwithstanding the matter was brought to the attention of the court by the petition of creditors, the proceeding was in the nature of a composition, which, under section 14c of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. § 9598]), upon becoming effective, would operate as a discharge in bankruptcy. As the granting or refusal to grant a discharge is by section 25a of the Bankruptcy Act (Comp. St. § 9609) made reviewable by appeal, we conclude the order here under consideration was properly reviewable by appeal. In re Friend, 134 Fed. 778, 67 C. C. A. 500.

[2] Appellant attacks the plan of reorganization as inequitable and unfair to the bankrupt company and its stockholders. We have examined the testimony and the record with some care, and have reached the conclusion that the findings of the District Court above quoted are amply supported by the record. In the absence of such findings we would have been unable to reach any other conclusion.

In so concluding, due weight has been given to the fact that the company was operating most successfully in 1918. But a profitable business was not the only factor to be considered in solving this problem. For example, to pay unsecured creditors it was necessary to use the accumulated cash, which was subject to the lien of the mortgage. Sufficient funds to pay off the mortgage were not available. A new loan was therefore the only alternative. And in 1917–18 current rates of interest had soared. Five per cent. bonds were at a discount. Besides, the expenses incident to floating such a loan was no small item.

[3] Appellant disputes bankrupt's right to consent, claiming that the O'Gara Coal Company had no authority to transact any business, not even to elect its officers and directors, while its affairs were being conducted in the bankrupt court.

The provisions in the Bankruptcy Act providing for a composition clearly indicate that the Congress did not intend to deny to corporations the right to protect their own interest, including the right to elect directors. To give the bankrupt companies the right to propose compositions is inconsistent with a denial of the right of stockholders and directors to maintain the corporate existence and to take action necessary to the submission of such proposals. Nor does the right of the court to control the affairs of the company, as was done in Graselli Chemical Co. v. Ætna Explosive Co., 252 Fed. 456, 164 C. C. A. 380, deny to the stockholders the right to act in case the court fails or re-

fuses to exercise its supervisory power. 5 Thompson on Corporations, 5265.

Appellant contends that the bankrupt company did not consent to the plan of reorganization approved by the court, although he admits that at the regular annual meeting held March 6, 1918, a board of directors was chosen who in turn elected the officers that duly approved of the plan and joined in the petition to have the same approved by the court. Appellant contends, however, that the election of March 6, 1918, did not result in the selection of the directors who subsequently voted their approval of the plan under consideration. This contention is made, first, because the four directors each secured 30,083 votes cast under a voting trust agreement dated December 14, 1917; second, because one of the four directors and later the president of the company had been appellant's attorney, and it was a betrayal of the confidential relation existing between attorney and client that resulted in appellant's loss of control of the company's affairs.

[4] While conceding that a voting agreement was valid in the state of New York (in fact, authorized by the statutes of that state), appellant claims that this corporation was engaged in mining coal and had its principal offices and place of business in Illinois. We find nothing, however, in the statutes of Illinois or the decisions of its courts that would deny to stockholders of a New York corporation the right to make valid voting trust agreements, and no statute or decision to show that Illinois excludes foreign corporations from doing business in the state on account of the corporation's compliance with the regulations of the chartering state, and we reject as untenable the claim that these votes were illegally cast.

[5, 6] The claim that any one of the directors was chosen through the breach of the confidential relation of attorney and client finds no support in the pleadings or in the proof. Appellant alleges that a director and a subsequent president of the company—

"who after contriving to have this respondent (meaning O'Gara) authorize him to act as attorney at law for this respondent with respect to the interests of this respondent in the O'Gara Coal Company, looking to the reorganization thereof, acquired a large interest in the stock of the O'Gara Coal Company without the consent, knowledge, or approval of this respondent, for the purpose of using the said stock and the voting rights thereunder adversely to the interests of this respondent."

This allegation clearly fails to set forth any fact which would defeat the action of the stockholders at their annual meeting. But appellant further alleges that the said director, while acting as appellant's attorney and through and by virtue of such employment, induced various stockholders to join in the voting trust agreement, and caused them to cast their lot with said director, believing that in so doing they were acting for and with appellant. Obviously the stockholders' action cannot be nullified for the reason thus set forth, unless it be shown that a sufficient number of votes were thus controlled to determine the election.

It appears from appellant's answer that there were eight candidates for membership on the board of directors, seven of whom were elected. The smallest number of votes cast for any of the four whose ac-

tion is here challenged was over 31,000. The vote which the eighth candidate received was less than 8,000. It was necessary for the appellant to aver that, but for the fraudulent action on the part of the attorney, if there was (and there was no evidence received to support the claim), this eighth candidate would have been elected.

[7] Moreover, the aggrieved party, if the facts supported his claim, would have had ready redress in the New York state court. Not having challenged the result in any of the ways open to him, his right to contest the action of the officers of the company chosen by this board of directors at this late date cannot well be recognized. We conclude the officers and directors were the de jure officers and directors of the O'Gara Coal Company at the time they gave the company's consent to the proposed plan of reorganization.

Concluding, as we do, that the record affirmatively shows consent on the part of the bankrupt to the proposed plan of composition and reorganization, we find it unnecessary to consider the various other contentions of the appellees in support of the order complained of—contentions involving the right of appellant to review the question here presented, the necessity of securing the consent of the bankrupt to the reorganization plan, the right of de facto officers to act for the company, and other interesting legal questions.

The petition to review and revise is dismissed. Upon appellant's appeal, the decree is affirmed with costs.

LOGAN v. UNITED STATES.
WISDOM & STRICKLAND v. SAME.

(Circuit Court of Appeals, Fifth Circuit. October 15, 1919.)

Nos. 3379, 3381.

INTERNAL REVENUE ⊂=46—FORFEITURE OF VEHICLE USED FOR REMOVAL OF PROPERTY TO DEFEAT TAX.

A vehicle or animal committed by the owner to the possession of a third person, who uses it in the removal of goods or commodities to defraud the United States of a tax imposed thereon, under Rev. St. § 3450 (Comp. St. § 6352), is subject to forfeiture, although the owner had no knowledge of such illegal use.

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Proceedings by the United States against one automobile, Wisdom & Strickland, claimants, and against one mule, J. W. Logan, claimant. Judgments of forfeiture, and claimants bring error. Affirmed.

Sam P. Maddox, of Dalton, Ga. (J. G. B. Erwin, of Calhoun, Ga., and Maddox, McCamy & Shumate, of Dalton, Ga., on the brief), for plaintiff in error Logan.

L. C. Hopkins and Clarence Bell, both of Atlanta, Ga. (C. T., L. C. & J. L. Hopkins, Dorsey, Shelton & Dorsey, and Bell & Ellis, all of Atlanta, Ga., on the brief), for plaintiffs in error Wisdom & Strickland.

Hooper Alexander, U. S. Atty., and J. W. Henley, Asst. U. S. Atty., both of Atlanta, Ga.

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

GRUBB, District Judge. These two cases are substantially alike in their nature and the legal principle controlling them, and may be considered together. In each, the appeal is from a judgment of the District Court condemning and forfeiting to the United States, in the former an automobile and in the latter a mule, as having been used in the removal of goods or commodities (viz., whisky) for or in respect whereof a tax was imposed, with intent to defraud the United States of such tax. Section 3450 of the Revised Statutes (Comp. St. § 6352) directs that such articles shall be forfeited. It is conceded that the automobile and the mule were used for the removal of non-tax paid spirits, and would have been subject to forfeiture, if they had belonged to the user. It is conceded that the automobile was sold to the user by the plaintiffs in error in the first case; they retaining title to secure the balance of unpaid purchase money. It is conceded that the claimant in the second case sold the forfeited mule to the user in whose possession it was seized, taking a mortgage back to secure the balance of unpaid purchase money. It is conceded that neither claimant had knowledge of the illegal use to which their property was put.

The case of United States v. Mincey, 254 Fed. 287, 165 C. C. A. 575, decided by this court, would seem to be controlling of both cases. The plaintiffs in error ask us to reconsider the Mincey Case, and also to distinguish each of the present cases from that case.

In deference to the earnest argument of plaintiffs in error, we have again considered the question involved in these appeals, but without being convinced that there is any good legal reason for departing from our previous decision. The cases of Dobbins Distillery v. United States, 96 U. S. 395, 24 L. Ed. 637, and United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555, so far as they relate to personal property, are not distinguishable from the cases now under consideration, and control their decision. In the Dobbins Distillery Case, mention is made, in the court's opinion, that the lessor committed his property to the custody of the lessee for a business necessarily under strict regulations, viz., a government distillery. However, this was a lawful disposition of his property, and we cannot see how it could be said to charge him with knowledge of his lessee's subsequent infractions of the internal revenue laws. The statute forfeiting realty provides for proof of knowledge of the violation in the owner, but no such requirement rests upon the government as to personalty. In the Stowell Case, personal property of a third person, in custody of the offender, was forfeited, though the owner was ignorant of the fact that a distillery was being operated on the premises where the property was seized, and in connection with which it had been used, without the owner's knowledge or consent. Reference is made to sections 3460 and 3461 of the Revised Statutes (Comp.

St. §§ 6362, 6363), as being inconsistent with the construction given section 3450 in the Mincey Case, both because of a supposed lack of good reason for protecting an absent claimant, since it is contended that, if present, he is permitted to say nothing to prevent the forfeiture, and because of a supposed discrimination against a present claimant, because he could not prevent a forfeiture by showing an absence on his part of willful negligence and an intention to defraud, though the absent claimant is relieved from the forfeiture by making such a showing to the Secretary of the Treasury.

The first contention loses sight of the right of a claimant to be heard in denial of the guilt of the property sought to be forfeited, as well as his possible right to show that the guilty user of it acquired possession of it without claimant's knowledge or consent.

The second contention ignores the provisions of section 5292, R. S. (Comp. St. § 10130), which provide a remedy by which any person whose property is forfeited may have the forfeiture remitted, if the Secretary of the Treasury is of the opinion that it was incurred without willful negligence or any intention of fraud in the person incurring it. Section 3461 applies to an application for relief from forfeiture, after condemnation and sale, where the owner, through absence or other cause, was ignorant of the seizure until after the sale. Section 5292 is open to any person who can make the requisite showing, whether absent or not, and before condemnation as well as after. Under it, as under section 3461, the endeavor is not to prevent forfeiture, but to obtain relief from it. Neither section offers a defence to the judicial declaration of a forfeiture, but only an appeal to the discretion of the Secretary for a remission of it. The fact that section 5292 authorizes the application to the Secretary, while the government's suit to condemn is pending, is persuasive that Congress recognized that a showing of absence of willful negligence or fraud would not prevent the judicial declaration of the forfeiture, but was only to be addressed with effect to the clemency of the Secretary. In the case of United States v. Stowell, supra, the Supreme Court, construing a similar act, said that it required:

"That all personal property which is knowingly and voluntarily permitted by its owner to remain on any part of the premises, and which is actually used, either in the unlawful business, or in any other business openly carried on upon the premises, shall be forfeited, even if he [the owner] has no participation in or knowledge of the unlawful acts or intentions of the person carrying on business there, and that persons who intrust their personal property to the custody or control of another at his place of business shall take the risk of its being subject to forfeiture if he conducts, or consents to the conducting of, any business there in violation of the revenue laws, without regard to the question whether the owner of any particular article of such property is proved to have participated in or connived at any violation of those laws."

The court further said that that case did not require a decision as to property "stolen or otherwise brought upon the premises without the consent of the owner." A similar reservation was contained in this court's opinion in the Mincey Case. The long history of forfeitures in this country, for violation of internal revenue and customs laws, of property, regardless of ownership, whether innocent or

guilty, repels the idea that such forfeitures conflict with the owner's right to due process of law. We regard it as settled that personal property voluntarily committed by the owner to the possession of a third person, for use by him, becomes subject to forfeiture, under section 3450, though the owner has no knowledge of the illegal use to which it is put by the possessor.

In each of the cases now under consideration, the property was voluntarily intrusted by the owner to the offenders. In the first case it was sold, with a retention of title to secure unpaid purchase money. In the second case it was sold, and a chattel mortgage taken, to secure unpaid purchase money. In each case the possession of the purchaser, as against the seller, carried the right to make such use of it as the purchaser saw fit. In each case the seller selected the person on whom he bestowed possession, and who abused it by using it to violate the revenue law. No reason appears for distinguishing either case from the Mincey Case. The test of a voluntary bestowal of possession by the owner upon the wrongdoer applies equally well. In the Mincey Case the owner attempted to restrict the use to be made of the property by directions to his servant, which were departed from. In the two cases under consideration, the possession of the offenders was without limitation as to use. The owners took the risk of loss of lien by the destruction of the property by the purchasers. They also took the risk of loss of lien by forfeiture of the property through the purchaser's wrongful act. Guilt is attributed to the property because the public necessities attending the enforcement of revenue laws require the instruments used to evade collection to pay the penalty, regardless of ownership.

We are unwilling to depart from the principle decided in the Mincey Case, and, finding no distinguishing feature in the cases submitted, the judgments in both are affirmed.

NG LEONG v. WHITE, Commissioner of Immigration.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919. Rehearing Denied December 1, 1919.)

No. 3301.

1. ALIENS ⟸31—DEPORTATION OF CHINESE ON RE-ENTRY.
Immigration Act Feb. 5, 1917, § 19 (Comp. St. 1918, § 4289¼jj), providing for the deportation of "any alien who shall have entered or who shall be found in the United States in violation of this act or in violation of any other law of the United States," applies to a Chinese alien who re-entered after its passage, and who re-entered or was found in the United States in violation of prior statutes.

2. ALIENS ⟸32(8)—DEPORTATION OF CHINESE ON FRAUDULENT RE-ENTRY.
Evidence *held* to sustain findings that a Chinese alien fraudulently re-entered the United States on a certificate as a merchant, when his true status was that of a laborer.

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

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

Proceeding for deportation of Ng Leong, a Chinese alien. From a judgment denying a writ of habeas corpus to discharge defendant from the custody of Edward White, Commissioner of Immigration of the Port of San Francisco, he appeals. Affirmed.

John L. McNab, 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, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. [1] The majority of the Circuit Court of Appeals of the Fifth Circuit, in the case of Mayo, Immigration Commissioner, et al. v. United States, 251 Fed. 275, 163 C. C. A. 431, held that section 19 of the Immigration Act of February 5, 1917 (39 Stat. 874, c. 29 [Comp. St. 1918, § 4289¼jj]), does not apply to a Chinese person against whom deportation proceedings were pending at the time of its taking effect, unless some offense was thereafter committed which changed his status.

In the present case, however, the appellant, who is admittedly a Chinaman, entered this country at the port of San Francisco subsequent to the passage of that act, so that, if he was thereafter found to be illegally in the United States, we think there can be no doubt of the application to him of section 19 of the Act of February 5, 1917, since section 38 thereof (Comp. St. 1918, § 4289¼u) declares that it "shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons, * * * except as provided in section 19 hereof"; and since the said section 19 provides for the taking into custody upon the warrant of the Secretary of Labor, and the deportation of "any alien who shall have entered or who shall be found in the United States in violation of this act, or in violation of any other law of the United States."

The Secretary of Labor and his subordinate officials of the Immigration Department having found the present appellant to be illegally here, resulting in an order for his deportation, we are therefore to inquire into the legality of those proceedings. By stipulation of the respective parties, the original record "as prepared by the Immigration Department, consisting of the warrant of arrest, testimony, and proceedings had before the Immigration Inspector, and order for deportation of the Immigration Department," has been brought and submitted to this court and has been attentively examined and considered. It shows that the appellant was afforded full and fair opportunity to present his side of the case after knowledge of that made by the government, and that he had a perfectly fair hearing before the officials of the Immigration Department is expressly conceded in the brief of his counsel.

It is urged, however, in behalf of the appellant, who it appears from the record went under various names, that his true status at the time of his departure from the United States for China April 26, 1910, and at the time of his re-entry into this country November 1, 1917, under the merchant's certificate that had been issued to him by the

Immigration Department at the time he left here for China, was that of a merchant, and not that of a laborer, as was found and determined on the hearing below by the government authorities, and in effect by the court.

The case shows that the appellant first came to the United States prior to the enactment of any of the Chinese Exclusion Laws, where he remained continuously for about 25 years, working as cook, and in restaurants in other capacities, at various places in California and Texas, but having during that time acquired, according to his testimony, a $500 interest in a Chinese firm located in San Francisco. For many years immediately preceding his going back to China, and up to about one month prior to his starting on that trip, he was residing in Texas, engaged in the manual labor that has been mentioned. On arriving in San Francisco to take ship April 26, 1910, he procured, through a member of the Chinese firm, in which he testified that he had the interest spoken of, and through two white witnesses, from the immigration authorities of the government, the issuance to him of a merchant's certificate, which certificate, if rightly and fairly issued, entitled the holder, under the law, to re-enter this country without limit as to time; whereas, a laborer's certificate, to which he was unquestionably entitled under the law, permitted his re-entry only within one year thereafter, or a certain limited extension not important to state, since he did not return for about 7 years, to wit, November 1, 1917, when he was admitted by virtue of the certificate that had been issued to him under the circumstances that have been mentioned, and when he promptly proceeded to Texas, where he resumed his former occupation as cook.

[2] We are of the opinion that the evidence clearly justified the findings of the government inspector that the appellant—

"is an alien, subject of China and of the Chinese race, and that he re-entered the United States in violation of section 7 of the Chinese Exclusion Act of September 13, 1888 [Comp. St. § 4308] being a Chinese laborer, who failed to produce to the proper officer the return certificate required by said section; and further, that he entered the United States without inspection, by means of false and misleading statements; further, that he has been found within the United States in violation of section 2, Chinese Exclusion Act of November 3, 1893 [Comp. St. § 4320] having secured admission by fraud, not having been at the time of entry a lawfully domiciled exempt, returning to resume a lawfully acquired domicile and to follow an exempt pursuit in this country"; and his recommendation of the deportation complained of.

The facts of the present case are very different from the facts of the case of United States v. Chin Quong Look (D. C.) 52 Fed. 203, and from the facts in the case of Lau Ow Bew v. United States, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340, that were relied upon by the appellant in the proceedings in the court below. Nor, in our opinion, do our decisions in the cases of Ong Chew Lung v. Burnett, 232 Fed. 853, 147 C. C. A. 47, or Lui Hip Chin v. Plummer, 238 Fed. 763, 151 C. C. A. 613, at all sustain the contention of counsel for the appellant, for the reason that the conclusion of the court below, and that of the officers of the government which it in effect affirmed, was not based upon conjecture or suspicion, but upon substantial evidence going

to show that the merchant's certificate issued to the appellant, and upon which he was readmitted to this country, was obtained by false and fraudulent means.

The judgment is affirmed.

BROWN v. UNITED STATES. *

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919.)

No. 3290.

1. INDICTMENT AND INFORMATION ⟸3—PROSECUTION FOR VIOLATION OF SELECTIVE DRAFT ACT BY INFORMATION.

Prosecution for violation of Selective Draft Act May 18, 1917, § 13 (Comp. St. 1918, § 2019b), by maintaining a house of ill fame within the prohibited distance from a military post, may be initiated by information, and prosecution by indictment is not necessary; the maximum punishment being a fine and imprisonment for not exceeding 12 months.

2. CRIMINAL LAW ⟸814(8, 9)—INSTRUCTIONS NOT APPLICABLE TO EVIDENCE PROPERLY REFUSED.

A requested instruction in a criminal case, submitting the issue of entrapment of defendant, *held* not applicable under the evidence, and properly refused.

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 Florence Brown. Judgment of conviction, and defendant brings error. Affirmed.

Marshall B. Woodworth, 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.

ROSS, Circuit Judge. An information was filed in the court below against the plaintiff in error, defendant there, alleging that she did, within a certain specified time, unlawfully and willfully keep a house of ill fame at No. 600 Geary street, San Francisco, and particularly in Apartment No. 37 thereof, and within five miles of Ft. Mason and the Presidio, both of which places during all the said times were used for military purposes by the United States; the said offense being committed in violation of section 13 of the act entitled "An act to authorize the President to increase temporarily the military establishment of the United States," approved May 18, 1917 (Act May 18, 1917, c. 15, 40 Stat. 83 [Comp. St. 1918, § 2019b]), and of the order of the Secretary of War made and issued January 17, 1918, in pursuance of that act, making it unlawful for such houses to be kept within five miles of any military camp, station, fort, post, cantonment, training or mobilization place used by the United States for military purposes.

[1] The contention on the part of the plaintiff in error that the offense charged against her could only be prosecuted by indictment is

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

*Rehearing denied January 5, 1920.

wholly without merit, since the punishment prescribed by law for a conviction thereof is a fine or imprisonment not exceeding one year, or both, in the discretion of the court.

By act of Congress a sentence to imprisonment for a period longer than one year, or to imprisonment and confinement at hard labor, may be ordered to be executed in a state prison or penitentiary, and such imprisonment, whether with or without hard labor, is an infamous punishment. Mackin v. United States, 117 U. S. 348, 352, 6 Sup. Ct. 777, 29 L. Ed. 909. But that a crime the punishment for which is confined to imprisonment in a county jail is but a misdemeanor, and may be prosecuted by information, has long been settled. United States v. Waller, Fed. Cas. No. 16,634, 1 Sawy. 701; United States v. J. Lindsay Wells Co. (D. C.) 186 Fed. 248; In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149, and cases there cited; Ex parte Wilson, 114 U. S. 417, 425, 5 Sup. Ct. 935, 29 L. Ed. 89.

[2] It is insisted by counsel in behalf of the plaintiff in error that the court below erred in refusing to give this instruction to the jury:

"You are hereby instructed that if the evidence shows that it was suggested to the defendant by the government officials, or she was induced, to commit the offense alleged in the indictment by the government officials, providing you should first find beyond all reasonable doubt that any offense at all was committed by the defendant as charged in the indictment, then as a matter of public policy you cannot convict the defendant on any alleged offense which it was suggested to her she should commit or which she was induced to commit."

We have not any desire, nor the slightest intention, to depart from the settled rule in this circuit, as stated by this court in the case of Peterson v. United States, 255 Fed. 433, 166 C. C. A. 509, that where the officers of the law have incited a person to commit the crime charged, and lured him on to its consummation, for the purpose of arresting him in its commission, the law will not authorize a verdict of guilty.

As has been said, however, the charge against the plaintiff in error was the alleged unlawful and willful keeping of a house of ill fame at a certain designated place within the prohibited distance of a military establishment of the government, and there was not in the evidence anything tending to show that any of the government authorities undertook to induce her to commit that offense. The evidence was without conflict to the effect that the defendant to the indictment occupied the premises therein designated as Apartment 37 of the house at 600 Geary street, San Francisco, during the period alleged, at which place she was visited two nights by two men in the government employ, on the first occasion both being in uniform of the government, and on the second in civilian dress, and on both occasions seeking to obtain evidence that the plaintiff in error maintained the place for purposes of prostitution.

In view of the record, we are of the opinion that the plaintiff in error was not entitled to the requested instruction above stated, and that the case was fairly submitted to the jury by the trial judge, where he said:

"A house of ill fame, within the meaning of this law, is a house or room where prostitution is habitually carried on. It is not sufficient for the government to prove that the defendant is a prostitute, or has committed one or

more acts of prostitution; but, before you will be justified in convicting her, you must be satisfied to a moral certainty and beyond a reasonable doubt that she kept and used the place referred to in the indictment as a place where prostitution was habitually carried on by her. The character of the house may be gathered from the statements of the inmate herself; and if you believe that two men in soldier's uniform came there, and she said she could not deal with them, not because she was not in that business, but because she did not know them; that two others came back the next day, and that those conversations were had—if you were satisfied that those are the facts, I would say they are sufficient evidence upon which to conclude that this room was a place where she habitually carried on prostitution with those who came there seeking it."

The judgment is affirmed.

SABIN v. HORENSTEIN.

In re JUDKIS' ESTATE.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919.)

No. 3321.

BANKRUPTCY ⟸178(1)—SALE IN BULK AS FRAUDULENT TRANSFER.

Sales by bankrupt, a merchant, to defendant at different time of goods in job lots *held* not so out of his usual course of business as to constitute sales in bulk, within Oregon Sales in Bulk Act, as amended by Laws Or. 1913, p. 538, or as to render such sales void for fraud; it appearing that bankrupt had made similar sales to others at various times during two or three years, and there being no sufficient proof that defendant knew of any fraudulent intent.

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Suit in equity by R. L. Sabin, trustee in bankruptcy of the estate of L. Judkis, against H. Horenstein. Decree for defendant, and complainant appeals. Affirmed.

L. Judkis, a merchant carrying a stock of men's furnishings, clothing, and shoes of the value of about $12,000, was on December 10, 1917, adjudged an involuntary bankrupt. During the months of July, August, September and October, 1917, the appellee purchased from the bankrupt merchandise in lots ranging from $6 to $225, aggregating about $1,000. The trustee in bankruptcy brought a suit against the appellee under the sales in bulk statute of Oregon (section 6069, L. O. L., as amended by Laws 1913, p. 538) to recover the value of the goods so sold. The law as amended is as follows: "It shall be the duty of every person who shall bargain for or purchase any goods, wares or merchandise in bulk, * * * for cash or on credit, to demand and receive from the vendor thereof, * * * at least five days before paying or delivering to the vendor any part of the purchase price or consideration therefor, or any promissory note or other evidence of indebtedness therefor, a written statement under oath containing the names and addresses of all of the creditors of said vendor, together with the amount of indebtedness due or owing, or to become due or owing by said vendor to each of said creditors."

Section 6070, as amended, provides that the vendor shall give notice to creditors at least five days before the consummation of such sale of his purpose in making the same, and that upon his failure to do so such sale

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

shall as to creditors be conclusively presumed fraudulent and void. Section 6072 defines "sales in bulk" as "any sale or transfer of goods, wares or merchandise, * * * out of the usual or ordinary course of the business or trade of the vendor, or whenever thereby substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed, or attempted to be sold or conveyed, to one or more persons, shall be deemed a sale or transfer in bulk, in contemplation of this act." Prior to the amendment the statute read as follows: "Any sale or transfer of a stock of goods, wares, or merchandise out of the usual or ordinary course of the business or trade of the vendor, or whenever thereby substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed or attempted to be sold or conveyed to one or more persons, shall be deemed a sale or transfer in bulk, in contemplation of this act."

The evidence was that during the six months prior to the adjudication in bankruptcy the bankrupt had sold in job lots, including the sale to the appellee, merchandise of the value of $5,000 or $6,000, and that he had purchased the goods from various wholesale dealers on credit, and had not paid for the same. Upon the evidence the court below found that the appellee had not purchased the goods in violation of the statute and the complaint was dismissed.

Sidney Teiser and L. B. Smith, both of Portland, Or., for appellant.

M. A. Goldstein and Frederick H. Drake, both of Portland, Or., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is contended that the court below erroneously construed the statute in holding that the intention thereof was to prevent persons who were dealing in merchandise from disposing of their entire stock, or the larger portion of it, or such proportion of it as will render the vendor less able to pay his obligations, and in holding upon the evidence in the case that the sales made to the appellee were not out of the usual or ordinary course of the business of the bankrupt. We are not convinced that the court below was in error in either respect. The court found upon the evidence, which was taken in open court, that during the two or three years prior to bankruptcy the bankrupt was doing both a retail and jobbing business, and that on numerous occasions he had sold goods in job lots, although the bulk of his jobbing business was done within three or four months prior to bankruptcy, and that the goods sold to the appellee were sold in the usual course. This finding was made upon the testimony of a number of witnesses, who testified that they had made various purchases in job lots, most of which were of small quantities of merchandise, and it is conclusive upon us on the appeal, whatever may be the true construction of the act, and it is decisive of the question whether the sales were made out of the usual course of business.

Undoubtedly the statute is sufficient in its scope to include a series of sales to various purchasers whereby the greater portion of a merchant's stock may be disposed of. The appellant points to certain features of the evidence which tend to indicate that the intent of the bankrupt in disposing of his goods was fraudulent, and we may concede such to have been the fact. Reference is also made to sus-

picious circumstances as evidence that the appellee participated in the fraud. But as to that the court below held otherwise. It is true that the appellee was in the "barber business," but he also had a supply store and he was engaged in buying and selling goods; and it is true that he and the bankrupt were friends, and had had various business transactions covering a period of several years prior to the bankruptcy, and that on one occasion the appellee purchased from the bankrupt a lot of shoes for $225, which was the invoice price, less freight, and that the sale was made on a rising market. But these and the other circumstances referred to are not sufficient to show fraudulent intent on the part of the appellee, and there was no evidence that he had knowledge of the other sales in job lots made by the bankrupt, and there was nothing in the evidence to indicate that he knew of any fraudulent scheme of the bankrupt to dispose of any portion of his stock in violation of the statute.

The decree is confirmed.

SCATENA et al. v. CAFFEY, U. S. Atty., et al.

(District Court, S. D. New York. August 20, 1919.)

INTOXICATING LIQUORS ⊂⊃2½, New, vol. 8A Key-No. Series—WAR PROHIBITION ACT CONSTITUTIONAL.

War Prohibition Act *held* constitutional, as within the war powers of Congress in dealing with conditions growing out of the termination of hostilities and demobilization.

In Equity. Suit by Sylvester Scatena and others against Francis G. Caffey, United States Attorney for the Southern District of New York, and another. On motion for preliminary injunction. Denied.

The complainant moves for an injunction pendente lite. The suit is to restrain seizures and prosecutions under the Act of Congress of November 21, 1918 (chapter 212), commonly known as the War Prohibition Act, on the ground that the present enforcement of that act is unconstitutional, for the reason that the emergency purporting to justify the enforcement of the war power no longer exists. The complainants are owners of vineyards in California, the crops of which are not adapted to consumption as fruit, and are suitable only for the manufacture of wines. The complainants manufacture wines from these vineyards and sell the same. They allege that the prohibition attempted by the Act of November 21, 1918, will be ruinous to their business and property (1) because it will prevent the sale within the United States of a large amount of wine already manufactured; (2) because their vineyards and plant will be rendered valueless and their business broken up.

Samuel Seabury, of New York City (Samuel Seabury, John Z. Lowe, L. Hamilton Rainey, and George Trosk, all of New York City, of counsel), for complainants.

Francis G. Caffey, U. S. Atty., of New York City (Earl B. Barnes, Asst. U. S. Atty., of New York City, of counsel), for defendants.

AUGUSTUS N. HAND, District Judge (after stating the facts as above). Under the decision of the Circuit Court of Appeals of this Circuit, in the recent case of Jacob Hoffmann Brewing Co. v. McElli-

gott, Acting and Deputy Collector of Internal Revenue, etc., and Francis G. Caffey, United States Attorney, etc., 259 Fed. 525, —— C. C. A. ——, this court would apparently have jurisdiction of both of the defendants. Here the complainants sue upon the ground that the act under which the defendants are proceeding is wholly unconstitutional. In the Jacob Hoffmann Brewing Company Case the court reversed a preliminary injunction restraining the United States attorney upon the ground that jurisdiction did not lie where he was attempting to proceed under a valid act and his interpretation of the act was the only thing in question.

The Circuit Court of Appeals, in the last-named case, expressly held the Act of November 21, 1918, constitutional, although I understand that the argument was made in the Circuit Court of Appeals, and it was certainly made in the District Court, that no war emergency then existed. Counsel for the complainant said in their brief filed before me:

"So in the case at bar the test is whether or not an emergency or necessity *now exists* which warrants the government in enforcing the prohibitions of the Act of November 21, 1918, against these complainants to the destruction of their very valuable property and their several businesses with the inevitable and uncontroverted consequence of incalculable damage. No such war emergency *now exists*."

I also, in my opinion in that case, suggested that the question of constitutionality depended upon whether prohibition of the liquor traffic—

"bears any substantial relation to the conduct of the war, either in contributing to the support of armies or to their safe and efficient demobilization."

I think the valid exercise of the war power depends, not merely upon whether the means employed is adapted to aid in the immediate prosecution of the war, but also whether it can be said to have any substantial relation to conditions directly growing out of the termination of hostilities. So long as the treaty of peace is not ratified there is some chance of the resumption of hostilities, though I place but the slightest weight upon this. A war emergency, however, of serious import arises in respect to the period of demobilization. During that period there has been and still is a stream of enlisted men coming into and remaining within the United States. The great stimulus engendered by the popular excitement which attended the war and by an expectation of having to combat the country's foes has disappeared, and a more or less purposeless and dull routine has followed as the inevitable lot of the young soldiers. Under such circumstances, men are especially subject to all the temptations which a lack of definite purpose, as well as a certain relaxation of discipline, are likely to entail. During the same period the country has been filled with other men but recently discharged from military service, a considerable number of whom are said in the moving papers before me to lack employment.

There is, besides all this, the general restlessness which has apparently always followed the termination of a great war. Under such circumstances it can strongly be argued that the free use of stimulants may have peculiar dangers to the community. At all events, I do not

see how it can be fairly said that no emergency exists directly growing out of the war, or that such emergency may not be affected by such a thing as the liquor traffic. Whether such a drastic prohibition law as that of November 21, 1918, is a means which ought to have been employed to deal with such a situation may be doubted, but for a court to say that the legislation in question has no substantial basis in fact is going altogether too far. Congress (and not the court) has the sole right to determine how to deal with this emergency, providing its determination, however differing from the judgment of the court, is not without a substantial basis in fact. Not only is there lack of judicial power to deal with the situation, except within the foregoing narrow limits, but it is practically very important that it be thoroughly understood that the responsibility for legislation enacted by virtue of any power inherent in Congress rests absolutely with that body, and cannot be shifted to the courts, because the public, or some portion thereof, may afterwards think the legislation unwise.

Certain recitals in the Act of March 21, 1918, indicate that the object was to increase efficiency in the production of supplies and to conserve the man power of the nation for the war itself; but Congress in enacting a law is not necessarily limited to the purposes recited in the preamble, though they doubtless have a most important bearing upon the construction of the act. I think it plain from the terms of the act that Congress had among its objects the regulation of the liquor traffic during the period of demobilization. That was a critical period; more critical in some respects than that of active hostilities. If Congress thought that drastic prohibition during a time when there would probably be considerable lack of employment and restlessness would be advantageous, it was within the war power, in my opinion, for it to adopt legislation which would care for these conditions, arising so immediately out of the war itself, in ways it deemed most effective.

After full arguments, and after reading the interesting brief submitted by counsel for the complainants, I do not find that the position they take has sufficient basis to require any further reply from the government. The motion for a preliminary injunction is denied.

E. J. DODGE CO. v. FIRST NAT. BANK OF PORTLAND, OR.

(District Court, D. Oregon. June 25, 1917.)

CORPORATIONS ⊂=377(2)—CANNOT CONTRACT FOR PURCHASE OF OWN STOCK.

Under Civ. Code Cal. § 309, prohibiting directors from dividing or paying to stockholders any part of the capital stock of a corporation, a California corporation cannot make a valid contract for purchase of its own stock, and may maintain a suit to cancel such a contract, whether or not it was authorized by its directors.

In Equity. Suit by the E. J. Dodge Company against the First National Bank of Portland, Or. Decree for complainant.

F. A. Cutler, of San Francisco, Cal., for plaintiff.

Dolph, Mallory, Simon & Gearin, of Portland, Or., for defendant.

RUDKIN, District Judge. The issues presented by the complaint are thus succinctly stated by Judge Hunt on the appeal from the order granting a temporary injunction:

"The substance of the complaint is: That about September 25, 1914, E. D. Porter, who was manager, secretary, and treasurer, and one of the directors, of the Dodge Company, a lumber manufacturing corporation of California, plaintiff below and appellee here, 'purporting to represent' the Dodge Company, entered into an agreement with the bank, which then owned 200 shares of the capital stock of the Dodge Company, to buy these shares for $41,000. That in payment of the purchase price Porter executed and delivered, in the name of the Dodge Company, four promissory notes, negotiable in form, bearing interest at 4 per cent. per annum, payable to the bank in amounts and at the times following: $10,000 one year after date, $10,000 two years after date, $10,000 three years after date, and $10,000 [$11,000] four years after date. That the notes were held by the bank, and were to be held by it until the notes were fully paid, when they were to be delivered to the Dodge Company. That Porter had no right or authority from the Dodge Company, or otherwise, to make or enter into the agreement with the bank for the purchase of the 200 shares of stock, and no authority to make, execute, and deliver the notes to the bank, or to make any payments thereon. That the agreement referred to was made, and the notes executed and delivered by Porter, without the knowledge, consent, or ratification of the board of directors, or any of the stockholders, other than Porter, of the Dodge Company. That no record of the agreement or of the notes was ever entered on the records of the Dodge Company, and no knowledge of the same came to the directors or stockholders until about October 26, 1915, when the directors disapproved of and disaffirmed the transaction, and ordered that action be commenced to have the agreement of purchase and sale of the stock declared void, and to have the notes canceled and surrendered, and the money paid recovered. The complaint avers that the agreement of the Dodge Company to purchase its own stock from the bank is illegal and void, under section 309 of the Civil Code of California, and that the notes were executed without consideration and are wholly void; that the bank has the possession of the 200 shares of stock, which have never been transferred, and intends to negotiate and transfer the notes to bona fide purchasers for value, and that such negotiation and transfer will greatly damage the Dodge Company; and that Porter, without right or authority, in carrying out the terms of the agreement, has paid to the bank from funds of the Dodge Company various sums on account of interest and principal on the notes. The Dodge Company relinquishes all right to the 200 shares, and consents that title and possession may remain with defendant. The prayer is for preliminary injunction restraining the bank from negotiating the notes pending suit and from instituting suit upon the notes, or any of them, and for decree canceling and ordering the bank to surrender the notes to the Dodge Company, and for $7,054 paid by Porter to the bank on account of the notes." First Nat. Bank of Portland, Or. v. E. J. Dodge Co., 233 Fed. 74, 147 C. C. A. 144.

The answer denies the want of authority in Porter to purchase the stock or execute the notes, denies that the contract is illegal and void under the laws of the state of California, and by way of estoppel alleges:

"That prior to the 25th day of September, 1914, the E. H. Dodge Lumber Company, a corporation under the laws of the state of Oregon, doing business at Portland, Or., was justly indebted to the Security Savings and Trust Company, a banking and trust company, doing business at Portland, Or., for moneys advanced and obligations which the said E. H. Dodge Lumber Company had assumed in favor of the said Security Savings & Trust Company in a sum exceeding $40,000.00; that E. H. Dodge, the president of said E. H. Dodge Lumber Company, being the owner of 200 shares of the capital stock of the plaintiff corporation, had theretofore pledged said 200 shares of stock to said Security Savings & Trust Company as collateral security for said indebtedness;

that while such indebtedness was so due and owing from the said E. H. Dodge Lumber Company to the said Security Savings & Trust Company, and during the summer of 1914, and long prior to September 25th of that year, the plaintiff, acting by and through one F. D. Parr, its agent for that purpose, and E. D. Porter, manager, secretary, and treasurer of said plaintiff, and a director of said corporation, and as this defendant is advised and believes, and therefore alleges upon information and belief, by due authority of its board of directors, entered into negotiations with this defendant to acquire the title and ownership of said 200 shares of stock so held by said Security Savings & Trust Company, and thereupon plaintiff agreed with this defendant that if this defendant would cause said Security Savings & Trust Company to foreclose its said lien upon said 200 shares of stock, and would acquire the legal title and ownership of said stock, when title to said stock was so acquired the said plaintiff would purchase the same from this defendant; that, in pursuance of said agreement, defendant arranged with said Security Savings & Trust Company to foreclose its said lien upon said 200 shares of stock, so that this defendant could, and thereafter did, acquire full title and ownership of said stock; that thereafter, in consummation of the said agreement and understanding so had with the plaintiff, this defendant sold the said 200 shares of stock to the plaintiff for the sum of $41,000, accepting in payment therefor the promissory notes mentioned and described in plaintiff's bill of complaint, and by agreement of the parties the defendant retained the possession of said shares of stock as collateral security; that the plaintiff, acting by said E. D. Porter, its manager, secretary, and treasurer, in the name and under the corporate seal of said plaintiff, duly executed and delivered to the defendant the four promissory notes described in said bill of complaint, said notes being delivered to defendant at Portland, Or., and all of said notes being dated and payable at Portland, Or., and to evidence his authority to act for plaintiff, said E. D. Porter as such manager, secretary, and treasurer delivered to this defendant a certified copy of a resolution which he represented to defendant had been duly adopted by the board of directors of the plaintiff corporation at a meeting thereof duly held on September 25, 1914, as follows."

Here follows what purports to be a resolution authorizing the purchase of the stock and the execution of the notes in payment of the purchase price.

It will thus be seen that, aside from the question of estoppel, two issues are presented by the pleadings: First, the authority of Porter to purchase the stock and execute the promissory notes; and, second, the power or authority of the corporation itself. The first is largely a question of fact; the second, a question of law. While Porter, as general manager and secretary, had no express authority to make the purchase of the corporate stock or to execute promissory notes for the purchase price, and while he was not expressly authorized so to do by the board of directors, I would nevertheless feel constrained to hold that the corporation is now estopped to deny his authority, if that were the only issue in the case. For many years Porter, as general manager, had entire charge of the extensive business operations of the corporation; during the year in which this transaction occurred there was but one meeting of the board of directors; there was no fraud or concealment in the transaction; the corporation books showed the payment of large sums of money to the defendant, and the slightest diligence or inquiry on the part of other members of the corporation would disclose the purpose for which these payments were made. In this day and age when so large a part of the business of the world is transacted by corporations, a majority of whose directors

are nominal stockholders and mere figureheads, it is not in the interest of public policy, private morality or common honesty to permit them to drift along and, upon a change of management, adopt such contracts as are beneficial and reject such as prove unprofitable. Counsel for plaintiff asserts that the directors could not carry out this contract without violating the laws of the state of California, but I apprehend, if the stock had enhanced in value, the directors would find no difficulty in performing the contract and making some disposition of the stock without doing violence to either their consciences or the laws of the state.

On the other hand, I see no escape from the conclusion that the contract in question is in contravention of the laws of the state of California. Section 309 of the Civil Code of that state prohibits directors of corporations from dividing, withdrawing, or paying to the stockholders, or any of them, any part of the capital stock, or from reducing or increasing the capital stock except as therein provided. In discussing the effect of this prohibition in Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013, the court said:

"The position of the respondent is that the contracts for the retaking by the corporation of its own shares are illegal and void, as in violation of the provisions of section 309 of the Civil Code, prohibiting directors of corporations from dividing, withdrawing, or paying to the stockholders, or any of them, any part of the capital stock, or from reducing or increasing the capital stock, except as provided in the section. The phrase 'capital stock,' as used in this section, and in the section of the Practice Act from which the code provision was drawn, has been construed in various decisions of this court. Its meaning has been definitely settled to be, not the shares of which the nominal capital is composed, but the actual capital i. e., assets with which the corporation carries on its corporate business. * * * Although the prohibition runs, in terms, only against the directors, the effect of the section is to deprive the stockholders as well of power to do the forbidden acts. * * * In other jurisdictions, the authorities show a sharp conflict over the question whether, in the absence of any statutory or charter restrictions, a corporation may employ its assets for the purchase of shares of its own stock. Cook Corp. (6th Ed.) § 311. But in view of the code provisions to which we have referred it cannot be doubted that, in this state, a corporation is not authorized to make such purchase, since the result would be to illegally withdraw, and pay to a stockholder a part of the 'capital stock.' Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 661, 34 Pac. 444. The want of power to buy its own stock does not prohibit a corporation from taking the stock in satisfaction of a loan, or when otherwise necessary to save itself from loss (Ralston v. Bank of Cal., 112 Cal. 208, 213, 44 Pac. 476); but the general rule is, as above stated, that the purchase is unauthorized. Thus this court has condemned, as in violation of section 309, a by-law assuming to give to any stockholder the right, upon 60 days' notice, to withdraw from the corporation, and to receive, upon surrender of his stock, the amount paid therefor." Vercoutere v. Golden State Land Co., 116 Cal. 410, 48 Pac. 375.

The plaintiff is a creature of the laws of the state of California, and its powers are limited and defined by those laws as construed by the highest court of the state. These powers may not be enlarged or extended by contracting beyond the limits of the state, if it be conceded that the contract in question is an Oregon contract, which admits of some doubt; and if, under the laws of California a corporation may not purchase or traffic in its own stock, the fact that corporations

in other jurisdictions may do so, or may make such purchases from their surplus profits, is not material. Such being the law, it seems to me that the California decision above cited is controlling and decisive here. I am aware that the defense that a contract is ultra vires, or in violation of a statute, is not a special favorite of the law, because such a defense is almost invariably interposed from sordid motives; but the courts permit the defense ex mero motu, and not from any consideration for the immediate parties. If the contract is ultra vires, and beyond the power of either the board of directors or the stockholders to make, the facts pleaded as an estoppel constitute no defense. To permit corporations to contract by estoppel, where contracts are prohibited by law, would in effect override the statute. If the plaintiff is entitled to the equitable relief claimed, it follows as a matter of course that it is entitled to recover all sums paid under the void contract.

A decree will therefore be entered in accordance with the prayer of the complaint.

UNITED STATES v. PITTSBURGH BREWING CO. et al. SAME v. INDEPENDENT BREWING CO. et al. SAME v. OLMSTEAD.

(District Court, W. D. Pennsylvania. May Term, 1919.)

Nos. 65–67.

INTOXICATING LIQUORS ⇐216—INFORMATION FOR VIOLATION OF WAR-TIME PROHIBITION ACT.

In an information charging violation of War-Time Prohibition Act, prohibiting the manufacture or sale for beverage purposes of "beer, wine or other intoxicating malt or vinous liquor," by the manufacture or sale of "beer" for beverage purposes, it is not necessary to aver that such beer was intoxicating.

Criminal prosecutions by the United States against the Pittsburgh Brewing Company and others, against the Independent Brewing Company and others, and against Daniel Olmstead. On demurrers to informations. Overruled.

R. L. Crawford, U. S. Atty., of Pittsburgh, Pa.

C. A. Fagan, Reed, Smith, Shaw & Beal, and R. A. & James Balph, all of Pittsburgh, Pa., for defendants.

THOMSON, District Judge. We have here three informations, which were filed under federal practice by leave of court—the first against the Pittsburgh Brewing Company and its officers, charging the illegal sale of 10 barrels of beer; the second against Daniel Olmstead, charging the illegal sale of certain glasses of beer; and the third against the Independent Brewing Company, wherein it is charged, first, that the defendants illegally manufactured certain beer, and, secondly, that they sold such beer after its manufacture.

The informations in each case aver that the beer in question contains as much as one-half of 1 per cent. of alcohol, and also aver that

the sales were made for beverage purposes. To these several informations the defendants have demurred, wherein they allege that the informations, respectively, are not sufficient in law, and particularly because the informations do not allege that the beer in question was intoxicating.

These informations were drawn under the act of Congress approved November 21, 1918, which is commonly known as the War-Time Prohibition Act (40 Stat. 1047, c. 212). The substance of the act, so far as it is material to these informations, provides that 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 shall be unlawful after June 30, 1919, until the conclusion of the present war, and thereafter until the termination of demobilization, to use any 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, and after June 30, 1919, it shall be unlawful to sell distilled spirits or any beer, wine, or other intoxicating malt or vinous liquor for beverage purposes, except for export.

Congress was here clearly legislating with reference to certain intoxicating beverages, and among these they specified beer and wine. They must, of course, be presumed to have used these terms according to their usual and ordinary signification, as they were known in common use, well understood, and well defined. Prior to the passage of this act, namely, February 6, 1919, the Commissioner of Internal Revenue promulgated certain regulations forbidding the brewing of beer on or after May 1, 1919, where the alcoholic content should exceed one-half of 1 per cent. by volume, and forbidding the sale of beer after June 30, 1919, having a greater alcoholic content than one-half of 1 per cent. by volume. On the same day the Treasury Department of the United States, by regulation or decision, interpreted the act of November 21, 1918, declaring "within the intent of the act of November 21, 1918, a beverage containing one-half of 1 per cent. or more of alcohol by volume, will be regarded as intoxicating." While this is by no means conclusive of the legislative interpretation of the act in question, the Supreme Court of the United States has said that such interpretations are entitled to great weight.

The important question raised by the several demurrers is: Is it necessary in the information to aver that the particular beer charged to have been unlawfully sold, is intoxicating? If an act of Congress prohibited the manufacture and sale of opium, morphine sulphate, and other poisonous narcotic drugs, this would be a legislative declaration that opium and morphine sulphate were narcotic and poisonous, and it would not be necessary, in an information charging their illegal manufacture and sale, to charge that they were in fact narcotic and poisonous. It would not even be open to the defense either to aver or prove that these drugs were not narcotic or poisonous, if in fact they were opium or morphine sulphate. They could only escape by showing that the drugs which they manufactured and sold, were in fact neither opium nor morphine sulphate.

So here, when Congress used the words "beer, wine and other intoxicating beverages," we have a legislative declaration that beer and wine are intoxicating beverages. This being true, it is not necessary in the information or indictment to aver their intoxicating character, because the Legislature has so declared. The defendants may avoid on trial the effects of the statute by proof that the beverage which they sell is in fact neither beer, wine, nor spirits. We are dealing, therefore, here with a demurrer which, in the eye of the law, admits for the purposes of the argument the truth of the facts set forth in the information, namely, that the defendants sold beer, that they sold it for beverage purposes, that it contained an alcoholic content of at least one-half of 1 per cent. and that it was not sold for export.

On this motion, therefore, I think the information sufficient, and the demurrers must therefore be overruled, and they are accordingly overruled in each case, and the defendants are directed to plead.

UNITED STATES v. BERGNER & ENGEL BREWING CO.

(District Court, E. D. Pennsylvania. July 17, 1919.)

Nos. 6 and 7.

INDICTMENT AND INFORMATION ⊜146—RULING ON DEMURRER TO INFORMATION UNDER WAR-TIME PROHIBITION ACT.

Ruling on a demurrer to an information charging violation of War-Time Prohibition Act, § 1, by the manufacture of "beer" for beverage purposes, refused, where the purpose was to obtain a construction of the statute, and a ruling as to whether the particular beverage made by defendant is within its prohibition, which is a trial question.

Criminal prosecution by the United States against the Bergner & Engel Brewing Company. On demurrer to information. Ruling withheld.

Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., and W. L. Frierson, Sp. Asst. Atty. Gen., for the United States.

Theo. F. Jenkins, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Whenever, as here, a controversy has arisen over the meaning of words or phrases, it is dangerous to employ a paraphrase in which to present the dispute, because the paraphrase may be as open to opposing constructions as the original phrase. We will therefore present this controversy by the quotation of the very words, the use of which by Congress has provoked it. Congress, by Act Nov. 21, 1918, c. 212, 40 Stat. 1046, prohibited the use of cereals in the manufacture of "beer," etc., "or other intoxicating * * * liquor." etc.

Informations have been filed in which it is charged that the defendant did use cereals in the manufacture of "beer," contrary to the form of this act of Congress. It will be noted that the charge contains no averment that the beer thus made was intoxicating. The omission was

intentional and the averment advisedly not made. This was because the meaning of the act of Congress is asserted to be that the manufacture of beer is forbidden as such, as well as other beverages, if the latter are intoxicating.

Demurrers have been interposed to the informations because the defendant construes the act of Congress to mean that neither the manufacture of beer nor of any other beverage is forbidden, unless it is intoxicating, and, as the beer made by the defendant is not averred to be intoxicating, the information does not charge any offense against the law to have been committed. It will be observed that no answer to the question before us as thus presented can be given without giving a construction of the act of Congress. The law of the case would thus be declared in advance of trial. It is, indeed, frankly avowed that the securing of this construction is the real purpose of the present proceeding. It is intended to be a "test case."

In view of the disposition we have decided to make of the case as now presented, it is proper that there should be interpolated at this point a statement of the attitude of the court, and the particular circumstances affecting that attitude, including what has already been done toward reaching a ruling in a test case. Speaking for both its members, this court would willingly render all the aid within its power to uphold the law and compel its observance, and to save the people from the scandal of being obliged to witness attempts being made to experiment with the criminal law in the effort to find out how far its violators could go before inviting punishment. The people should also be saved, if possible, from the scandal of witnessing violations of law by a large number of persons sought to be justified by the plea that there is a doubt of the criminality of what is being done, whether the doubt is real or a mere pretense.

Ordinarily, when a question arises of whether a given act would be a violation of law and subject the violator to a criminal prosecution, good citizenship, as well as common prudence, would dictate refraining from what even might be a crime, and no one would be justified in counseling the experiment of testing its criminality. Any one who thus experimented should do it with his eyes open to the possible consequences, and should receive small measure of sympathy if punishment overtook him. The principle of law, voiced in the legal maxim that "ignorance of the law excuses no one," is a necessary doctrine, and when applied to the criminal law is not a harsh one. When, however, we learn that the act of Congress was passed wholly and solely to conserve our food supply, and that it forbids some things to be done and permits others, and when we further learn that men whose profession and business it is to know the law, and judges whose official duty it is to declare it, differ in opinion of what may be done and what may not be done, no one possessing any degree of intellectual honesty can deny that all doubts of what is the law should be authoritatively settled, in order that the law may be obeyed.

One of the difficulties of the general subject is that this law deals with beverages many of which are beyond all question intoxicating, and all of which are believed, at least by many persons, to be intoxicat-

ing. Indeed, this very demurrer is based upon the proposition that they are all intoxicating, or their manufacture is not prohibited, and the prosecution admits that they have been branded by Congress as intoxicating, although contending that those specifically prohibited in the act (as beer is) are prohibited as such, and that their alcoholic contents need not be averred or proven. Certain words and phrases, such as "intoxication," "intoxicating liquors," "alcoholic drinks," "prohibition," and the like, are words which, following the well known phrase, coined by Oliver Wendell Holmes, are said to be "polarized."

It is difficult to separate in thought a purely revenue or economic enactment dealing with intoxicants from those laws which are passed in pursuance of the police power of government, and have for their motive and purpose the protection of the morals or health of the people. The law with which we are now concerned has, of course, no relation to any such purpose as that indicated. Indeed, at the time of its enactment, Congress had no power to have directly so legislated. The legal purpose and intent of the law was wholly aside from and outside of this latter class of legislation. This thought has an important bearing upon the construction to be given to the act. It was well within the power of Congress, and clearly germane to the subject of legislation with which Congress was dealing, to have prohibited the manufacture of any beverages, whether intoxicating or not, or to have prohibited only those which are intoxicating.

The broad question upon which we are asked to express an opinion is: What did Congress do? Consistently with our expressed willingness to render any aid in our power to render, we should answer this broad question, if any good result would thereby be accomplished. We are, however, unable to see that any result would flow, other than the expression of one more opinion on the subject. Attempts are often made to secure the expression of such opinions. They are often, however, judicial only in the sense that they are given by men who hold judicial office. We have, in our present system of law, no branch which may be called advisory. It might be of advantage to have one, as is advocated by many who are active in promoting law reforms. A good objection to the exercise of such a function is that judges do not possess the power. Attempts have been made to have the meaning of this law declared by securing decisions which are really judicial. We must await the determination of this litigation to learn its results.

A proceeding was instituted in the District Court for the Southern District of New York. The meaning of the act of Congress was there discussed, and the opinion accompanying the ruling made gave a construction to the act. A bill in equity was then filed to restrain the revenue officers and the District Attorney from enforcing the provisions of the act otherwise than in accordance with this construction. The motion for the injunction was heard by another judge of the same court. He followed the construction already given and allowed the injunction. Hoffman Brewing Co. v. McElligott, 259 Fed. 321. An appeal was then taken to the Circuit Court of Appeals of the Second Circuit, and the decree awarding the injunction, so far as it affected the district attorney, was reversed; but the opinion placed the reversal on

other grounds than that of a wrong meaning having been given to the act of Congress. 259 Fed. 525, — C. C. A. —. An indictment was then found and brought into the District Court for the District of Maryland, to which a demurrer was interposed. The judge before whom the demurrer was argued was asked to construe the act of Congress, and base his ruling upon the construction given to it. The court took the view that, independently of the opinion which he might entertain of the meaning of the act of Congress, he should give to it the same construction given to it by the courts of the Second circuit. The demurrer was accordingly pro forma sustained. United States v. Standard Brewery, 260 Fed. 486. From this judgment an appeal has been taken to the Supreme Court and is there pending.

There are now added to this list rulings by the courts of different districts which are at least in form conflicting. If the construing of the act at this time would lighten the labors or lessen the responsibilities of the Judiciary Department, or the withholding of a ruling would deprive the defendant of a right, the duty of now deciding the question we are asked to decide would be presented. We do not see, however, that it is before us. The real question is merely one of pleading. Indeed, the line sought to be drawn by the defendant is so fine that the untrained eye has difficulty in following it. There is no criticism of the form of the informations. They in apt terms charge the offense as the act of Congress defines it. Giving the law the meaning for which the United States contends, it is admitted that the informations are good. If the meaning be otherwise, then all which is required is the insertion of one word in the informations.

The real question presented is not answered by disposing of this demurrer. It merely has changed its form from what the information must say is the fact to what is the fact. The only practical result reached is the regulation of the proofs at the trial. It cannot be said (until the law is so found to be) that the question cannot be ruled as a question of pleading because it has been so ruled. It may, however, be ruled as a trial question upon the ground that, as the offense is charged in the words of the statute, the words have the meaning in the information which the same words have in the law. The thought is that the word "beer" in the law means the beverage which in the common speech of the people is known by that name. If the defendant has not made "beer," but has made some other liquor or beverage, then it is admitted that there must be proof that the liquor made is intoxicating. Assuming that beer, the manufacture of which is forbidden, is intoxicating (as would doubtless be asserted if it were necessary to assert it), and assuming that Congress has branded "beer" as intoxicating (as is practically admitted), the fineness of the line sought to be drawn by defendant is disclosed, and it also appears that the question raised is a trial question rather than one of pleading.

The defense suggested on which the demurrers are based is really this: The defendant is charged with making beer, the manufacture of which Congress has forbidden. The forbidden beer has a certain range of alcoholic content which makes it intoxicating, and Congress has called it intoxicating. The beverage which defendant has made has a

less alcoholic content, and is not intoxicating. It is in consequence not the forbidden "beer." Presented in this way, the question is clearly a trial question. The real question may therefore be ruled as a trial question. When a question can be so ruled, it is usually the part of practical wisdom not to rule it as a question of pleading and the demurrer might be overruled on this ground. When there is added to this the reasonable expectation that the question will be authoritatively settled before any trial could be ended, there would seem to be no need to anticipate the ruling.

The real situation seems to be that the defendant asks to be advised. Put in its best light, the attitude is this: Congress has forbidden the manufacture of "beer." We think Congress had in mind that "beer" is intoxicating. What we want to know is that, if we make a beverage which, although having some of the characteristics of beer, has such a low alcoholic content as not to be intoxicating, will this be a violation of the law? We ask for the opinion of the court, in order that we may know what we may do.

Among the many objections to complying with this request is that such an expression of opinion will not settle the law. It may, in consequence, do more harm than good. Assume either meaning of the act of Congress contended for to be found by this court. Assume either construction to be upheld by the Supreme Court. If the defendant's construction is upheld, there is nothing for this court to do; but, if the correctness of this construction be denied, then every defendant who is brought up for sentence is in one of two situations: He has violated the law, in defiance of the pronouncement of the court that he was violating it, or he has done only what the court told him he had the right to do. Why should the court voluntarily create this embarrassment for itself? If the answer is that the law should be settled, and a test case ruling made for this purpose, the reply is that this has already been done, and nothing is gained by having two or more test cases to present the same question. Let the man who chooses to take the risk of violating the law by doing what may be found to be a violation take the whole responsibility for so doing. There is no call upon the court to share the responsibility with him. If he is in need of advice, he must go to his lawyer for it. Under our system of laws it is no part of the duty of the judges of the courts to advise prospective litigants.

The defendant has leave to withdraw the demurrers filed, and to plead to the informations, or, if counsel prefer not to do so, the demurrers will be disposed of when the case is ready to be tried.

We have withheld the foregoing opinion until we received copies of the rulings in other districts, which we were advised were in course of transmission to us. We now have two of them—one sustaining the demurrer and the other overruling it. We find ourselves in accord with the ruling of Judge Thomson of the Western District of Pennsylvania. United States v. Pittsburgh Brewing Co., 260 Fed. 762. The only difference is that he has seen fit to overrule the demurrer now, and we do not see any occasion to make any formal ruling at this time. All that is really involved is a regulation of the burden of proof, and this, as we have said, is properly a trial ruling.

BOISE COMMERCIAL CLUB v. OREGON SHORT LINE R. CO.

(Circuit Court of Appeals, Ninth Circuit. October 20, 1919.)

No. 3314.

1. REMOVAL OF CAUSES ⊜12—TO DISTRICT OTHER THAN THAT IN WHICH ACTION COULD HAVE BEEN BEGUN.
Where an Idaho corporation sued a railroad company, a Utah corporation, in the state court of Idaho for overcharges claimed to have been exacted in violation of the Interstate Commerce Act, *held* that, under Judicial Code, § 24 (Comp. St. § 991), section 28, as amended by Act Jan. 20, 1914 (section 1010), and section 51 (section 1033), the railroad company could not remove the cause to the federal District Court for Idaho on the ground that the action was based on a federal statute, because the action could not in the first instance have been begun there by the Idaho corporation.

2. COURTS ⊜107—EFFECT OF DENIAL OF CERTIORARI BY SUPREME COURT.
Where the federal Supreme Court denies a writ of certiorari to review a judgment of the Circuit Court of Appeals, though there was involved a single question, which was one entirely of jurisdiction, and concerning which there had been radically diverse decisions by the lower federal courts, the denial will fairly imply that the Supreme Court was satisfied the jurisdictional point had been rightly decided, even though denial of a writ of certiorari ordinarily will not indicate the Supreme Court's opinion.

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

Action by the Boise Commercial Club, a corporation, against the Oregon Short Line Railroad Company, a corporation, begun in the state court, and removed to the federal court. There was a judgment for defendant, dismissing the complaint, and plaintiff brings error. Reversed and remanded, with directions.

Martin & Cameron, of Boise, Idaho, for plaintiff in error.

George H. Smith, of Salt Lake City, Utah, and H. B. Thompson and John O. Moran, both of Pocatello, Idaho, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. By writ of error the Boise Commercial Club, an Idaho corporation, asks reversal of a judgment of the District Court for Idaho, dismissing its complaint after a hearing on the merits. The Commercial Club brought action in the state court for Ada county, Idaho, to recover money for freight overcharges collected by the railroad company, a Utah corporation; the claims growing out of the alleged violation by the railroad company of the long and short haul provision of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379). The railroad company sought removal upon the ground that the suit was based upon the alleged violation of the Interstate Commerce Law, as amended by acts of Congress approved June 29, 1906, and June 18, 1910 (34 Stat. 584; 36 Stat. 547 [Comp. St. § 8566]). The District Court ordered removal. After removal the Commercial Club moved to remand to the state court upon the

ground that the United States Court was without jurisdiction to hear and determine the case over the objections of the plaintiff below, for the reason that under section 51 of the federal Judicial Code the Commercial Club could not, over the objection of the defendant railroad company, have originally maintained the suit in the federal court within the district of Idaho, but only in the federal court of the district of Utah, that being the district whereof defendant is an inhabitant, and that the suit was not removable to the United States District Court for the District of Idaho without the consent of both parties, which consent the plaintiff refused to give. The court denied the motion, and, after overruling an amended demurrer, answer was filed, trial was had and judgment was entered dismissing the complaint.

[1] Section 51 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. § 1033]) provides that, except as provided in certain sections:

"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; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

By section 24 of the Judicial Code (Comp. St. § 991), the District Courts of the United States are given jurisdiction of all suits of a civil nature at common law or in equity where the matter in controversy exceeds the sum or value of $3,000 and arises under the Constitution or laws of the United States, or is between citizens of different states. By section 28 of the Judicial Code, as amended by Act Jan. 20, 1914, c. 11, 38 Stat. 278 (Comp. St. § 1010), any suit of a civil nature arising under the Constitution or laws of the United States, of which the District Courts are given original jurisdiction by the title, which might be pending at the time of the passage of the act or thereafter brought in any state court, could be removed by the defendant or defendants therein to the District Court of the United States for the proper district, and any other suit of a civil nature of which the District Courts of the United States are given jurisdiction by the title, and which were pending or which might be brought in any state court, could be removed to the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state.

It is unnecessary to cite the numerous and conflicting decisions bearing upon the question of jurisdiction where the remand of an action like this is prayed for. In the later cases, such as Western Union Telegraph Co. v. Louisville & Nashville R. R. Co. (D. C.) 201 Fed. 932, Hohenberg & Co. v. Mobile Liners (D. C.) 245 Fed. 169, and James v. Amarillo Light & Power Co. (D. C.) 251 Fed. 337, the more important decisions are referred to and the differing views argued with special ability. In the two latter opinions Judge Ervin held that, where jurisdiction of the court is founded on the fact that the action is between citizens of different states and suit is brought in a state court of a state in which defendant is not a resident, there is a right of removal to the federal court of that district, which right cannot be contested by plaintiff on the ground that he could not have brought the

suit in that federal court over the objection of plaintiff. The reasoning of the learned judge in James v. Amarillo Light & Power Co., supra, was that in Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, the Supreme Court intended to hold that the District Court had no jurisdiction to try an action where neither party resided in the state of such court, and expressed the opinion that the provisions of section 51, limiting the bringing of the suit in the first instance, are limitations to bind the plaintiff, but are not binding upon the defendant. The court said:

"The provisions of section 51 expressly so state, and do not in any manner undertake to regulate or control or limit the right given by section 28 to defendant. If plaintiff, being a resident of one state, and defendant of another, bring his suit in a federal court of a third state, defendant can, by appearing generally, waive the objection as to venue, and such court has jurisdiction to try such suit. If, therefore, plaintiff brings his suit in a state court, defendant is given by section 28 the right to remove it to this same court, and it has just as much jurisdiction to try such case as if plaintiff had originally brought it there."

Such was the view taken by the court in Rubber & Celluloid Harness Trimming Co. v. Whiting Adams Co., 210 Fed. 393, and Louisville & Nashville R. R. Co. v. Western Union Telegraph Co. (D. C.) 218 Fed. 91.

There is much force in the view and we should be inclined to take a similar position, were it not for the action of the Supreme Court (247 U. S. 505, 38 Sup. Ct. 427, 62 L. Ed. 1240) in denying certiorari applied for in Guaranty & Trust Company of New York v. McCabe et al., 250 Fed. 699, 168 C. C. A. 31. There the plaintiff was a New York corporation, with its principal place of business in the Southern district of New York, and the defendants were inhabitants of Charleston, in the Eastern district of South Carolina. The court considered the citizenship and residence of the members of the firm of Pell & Co., the assignors, and after stating that the plaintiff could have brought its action against the defendants in the United States District Court for the Eastern District of South Carolina, ruled that at no time could it have brought the action in the United States District Court for the Southern District of New York, because all the members of Pell & Co. were not residents of the Southern district of New York. Smith v. Lyon, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, and Interior Construction Co. v. Gibney, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401, were cited in support of that proposition. The court quoted from Ex parte Wisner, supra, to the effect that, in order to make a suit removable under section 2 of the act of 1887–1888 (Comp. St. § 1047), it must be one which the plaintiff could have brought originally in the United States court to which it would be removed by original process, and regarded it as settled by the case of Ex parte Moore, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, that in a case where jurisdiction depends upon diversity of citizenship the plaintiff, in case of removal, also has the right to insist upon or waive his objection to the jurisdiction because the district is not the proper district; that is, either the residence of plaintiff or of defendant. To the argument that Ex parte Moore, supra, had been overruled, the

court replied by citing Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, as holding that the Supreme Court had disapproved of Ex parte Wisner only so far as that case had held that mandamus was a proper remedy, and argued that, if the Supreme Court had intended to go further, it would have said so. The court cited the classifications of section 51 of the Judicial Code and said:

"Where the parties are citizens of different states and the action is founded only on that fact, the statute clearly authorizes the bringing of the suit in one of two places, i. e., the residence of the plaintiff or the defendant, and, as held in Ex parte Moore, supra, when the suit is brought elsewhere, either plaintiff or defendant has the right to object to removal on the ground that such removal takes the cause to a district other than the residence of the plaintiff or defendant."

Judge Learned Hand, in a dissenting opinion, took a contrary view; but, as already said, upon application for certiorari the Supreme Court denied the writ.

[2] We assume that ordinarily the denial of the writ of certiorari by the Supreme Court may not indicate the expression of an opinion in affirmance of the law of the case as applied by the Circuit Court of Appeals; but where there is a single question involved, and that question is entirely one of jurisdiction and there have been radically diverse decisions by the lower federal courts, the denial of the writ would fairly imply that the court was satisfied that the jurisdictional point had been rightly decided.

Under the circumstances, therefore, it is proper that our decision should be against the view that there is jurisdiction in the present case.

The judgment is therefore set aside, and the cause is remanded, with directions to grant the motion to remand.

LINDGREN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 20, 1919.)

No. 3210.

1. EMBEZZLEMENT ⟸5, 47—FELONIOUS INTENT AS ELEMENT.
A felonious intent is an essential ingredient of the crime of embezzlement by a bailee, and such intent is always a question for the jury.

2. EMBEZZLEMENT ⟸39—EVIDENCE OF INTENT.
The exclusion of testimony offered by a defendant, charged with embezzlement as a bailee, tending to show absence of a felonious intent, *held* error.

Gilbert, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Fourth Division of the District of Alaska; Charles E. Bunnell, Judge.

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

Cecil H. Clegg and Le Roy Tozier, both of Fairbanks, Alaska, and Fernand De Journel, of San Francisco, Cal. (De Journel & De Journel, of San Francisco, Cal., of counsel), for plaintiff in error.

R. F. Roth, U. S. Atty., of Fairbanks, Alaska, and Annette Abbott Adams, Asst. U. S. Atty., of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. It appears from the record that prior to November 20, 1916, one Henry Cook held a lease from the owners of certain mining ground situated on Vault creek, in the Fairbanks recording district of Alaska, during the operation of which he became indebted to various parties in various amounts; among his numerous creditors being the plaintiff in error, Lindgren, in the sum of $6,650, Samson Hardware Company in the sum of $6,848.03, and E. R. Peoples, Incorporated, in the sum of $4,383.02. In that condition of affairs, Cook assigned, in writing, his lease of the property, called Sierra association claim, together with the machinery thereon, to a man named E. M. Keyes, "to have, use, and hold the same in his mining operations under said lease and the present assignment thereof"—the lease expressly declaring:

"And in consideration thereof the said E. M. Keyes agrees to carry on mining operations upon said demised premises under said lease in a miner like manner; that out of the gross proceeds of such mining operations he will first pay the royalty which shall accrue thereon under said lease, to the owners of said demised premises, excepting the said Henry Cook, and will next pay his actual operating expenses, which shall include wages of himself at the rate of $10 per day while actually engaged in said mining operations, all laborers' wages, cost of material, wood, and other supplies furnished, necessary repairs to and replacement of worn-out tools and equipment, and will pay or cause to be paid the part of said output then remaining pro rata to the following creditors of the said Henry Cook in proportion to their respective claims, as set forth in the instrument signed by them and hereto attached and made part hereof."

That instrument, which was signed by the creditors of the said Cook, including those that have been mentioned, declared as follows:

"In consideration of the foregoing assignment of lease, lease of mining machinery, and agreement on the part of the said E. M. Keyes to carry on mining operations upon the land in said lease so assigned and referred to, we, the undersigned creditors of the said Henry Cook, in the amounts set opposite our respective names, do hereby agree that we will not, prior to August 1, 1917, commence or prosecute any action against the said Henry Cook, nor attach nor issue execution against any of the property hereinbefore leased to the said E. M. Keyes, nor attempt in any wise, by proceedings at law or otherwise, to interfere with or hinder the said E. M. Keyes in his mining operations upon said ground, nor with his use of the machinery thereon and used by him, and will accept as payment on account of our respective claims against the said Henry Cook, out of the net proceeds of said mining operations as above provided, our pro rata share thereof in proportion to our respective claims"—which were enumerated.

While Keyes, who was engaged in mining other property in the vicinity, does not appear to have signed the lease reciting his foregoing agreement, the record shows that he entered upon the performance thereof, putting in active charge of the work a foreman named

Anderson, who had been foreman for Cook while he was working the property prior to the assignment. It appears that the money due Lindgren was for wood furnished by him for the working of the ground, a part of which wood was furnished to Cook before his assignment of the lease, and a part of it to Keyes after the assignment, and that the amounts due, respectively, E. R. Peoples, Incorporated (of which concern one Stroecker was bookkeeper), and Samson Hardware Company (whose representative was one Barrack), were for other supplies furnished in the mining operations.

Keyes took possession of the mine shortly after the assignment of the lease to him, and on the 22d of May, 1917, there was a clean-up of the dump, which yielded about $7,000 in gold dust—a man named Webster representing Keyes, and Stroecker being also present as the representative of E. R. Peoples, Incorporated. It appears that it was agreed among all the interested parties present that the proceeds of the clean-up should be sent by Lindgren to Fairbanks, and there converted into money, which money should be brought back to the mine by Lindgren, where it should be distributed in payment, so far as it would go, of the amounts due the laborers, and that this was done. But it also appears that the money so realized was not sufficient to entirely pay the amounts due the laborers, and there was testimony given on the trial tending to show that the latter were unwilling to proceed with the work upon the mine, except upon the agreement that the remaining indebtedness to them, as well as what they should earn by future work, should be paid out of the next clean-up.

Whether or not that arrangement was fully agreed to by all of the interested parties present—there was a substantial conflict in the testimony upon the subject—the work did proceed as before under Keyes, and a second clean-up was made, which amounted, after paying the royalty due the owners of the property, to $5,479.55, which amount was not sufficient to pay in full the claims of the laborers. It appears that the gold dust from the second clean-up was also sent in charge of Lindgren, on a Saturday, to the bank at Fairbanks, distant from the mine about 27 or 28 miles, for conversion into money, he arriving there too late in the evening to return to the mine that night, but he got the $5,479.55 in money, and the next day—Sunday—he started back with it to the mine, but before proceeding far changed his mind and concluded not to go, of which change and intention he notified Stroecker (who was at the mine) over the telephone, resulting in the arrest that (Sunday) night of the plaintiff in error at the instance of Stroecker, acting for and by direction of E. R. Peoples, Incorporated, and his subsequent indictment, trial, and conviction in the court below; the indictment being in these words:

"That the said John Lindgren, on the 2d day of June, 1917, in the Fairbanks precinct, Fourth judicial division, territory of Alaska, had in his possession a certain sum of money of the value of five thousand and four hundred and seventy-nine and $^{55}/_{100}$ dollars ($5,479.55) lawful money of the United States, a further description whereof is to the grand jury unknown, which said sum of money was then and there the property of E. M. Keyes, as trustee for certain laboring men other than the defendant, which had been

delivered into and intrusted to the possession and control of the said John Lindgren, as bailee of the said E. M. Keyes, as trustee for certain laboring men other than the defendant, and the said John Lindgren accepted and received the same as the property of the said E. M. Keyes, as trustee for certain laboring men other than the defendant, and as bailee of said E. M. Keyes, as trustee for certain laboring men other than the defendant; that at the aforesaid time and place said John Lindgren, contrary to the terms of his said trust and holding the aforesaid sum of money as such bailee, did then and there willfully, unlawfully, and feloniously embezzle and fraudulently convert to his own use the aforesaid sum of money, with the unlawful, felonious, and fraudulent intention to then and there deprive the aforesaid E. M. Keyes, as trustee for certain laboring men other than the defendant, thereof—contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

[1, 2] It is elementary that a felonious intent on the part of the accused was essential to his conviction of the crime alleged. Yet the record shows that on the trial the court, upon objections interposed by the attorney for the government, refused to permit either the defendant or Cook to testify that the defendant, on his way back to the mine with the $5,479.55, met Cook, when this, in substance, occurred between the two: That in answer to a question by Cook as to how things were going at the mine, the defendant said, not very well. When Cook further asked the defendant whether he had received the amount due him, and being answered in the negative, Cook said to the defendant:

"Well, you keep that money"—referring to the proceeds of the second clean-up, which the defendant was at the time taking back to the mine—adding: "That money belongs to me, always did, and you have a right to apply it on your account."

To the refusal of the court to permit that testimony, either by Cook or the defendant, the latter duly reserved exceptions, as well as to the subsequent refusal of the court to permit the defendant to answer this question:

"Q. Did you act upon the advice of any attorney in holding the gold dust as you have testified you did hold it, on Sunday, the 2d day of June, 1917?"

By the question so propounded the defendant was, in effect, asked whether in withholding the money under the circumstances testified to by him, he acted upon the advice of an attorney. In each of the rulings mentioned we are of the opinion that the court below committed clear error. It was not at all a question as to whether the defendant had the legal right to withhold the money in payment, or to secure the payment, of the amount due him for the wood he had furnished; but the question for the jury to determine was whether he withheld the $5,479.55 with the felonious intent to embezzle it. It was not and is not pretended that there was any secrecy about the defendant's conduct in the matter; according to the evidence, he talked at least twice over the telephone with Stroecker, first telling him that he was going to the mine with the money, and later informing him that he (defendant) had changed his mind. If, in doing so, the defendant acted in good faith, believing that he had the legal right to withhold the money and with no felonious intent respecting it, it

is manifest that he could not be guilty of the crime of embezzling the money. Surely, therefore, the defendant was entitled to have the jury informed as to what if any advice he received from his attorney; and equally clear is it, we think, that he was entitled to have the jury consider the conversation he had with Cook that has been referred to, particularly as it appeared from the testimony that his arrest and prosecution was had at the instance of E. R. Peoples, Incorporated, and that in the testimony of Peoples there was a very evasive denial, if denial at all, of this testimony of the defendant:

"Q. Did you have a talk with Peoples there (referring to a time preceding any work by the assignee of the mining ground)? A. I did. Q. What was said to you about hauling any wood or anything else onto this Sierra association? A. Mr. Peoples stated that there was some arrangement made whereby Mr. Cook could go ahead with his mining operations on Vault creek, and Peoples asked me if I would go ahead and furnish wood for the claim during the winter of 1917 and the early part of the winter of 1916, and I asked him who was going to operate the ground and he told me he—Mr. Peoples and Mr. Barrack—was to finance Henry Cook, so that he could go ahead with his operations on Vault creek, and I asked then Mr. Peoples how much wood he thought they would need there, and he told me about 300 cords; they figured taking out a block there. I also asked Peoples if he had been out and panned the ground, and if he knew that the ground would pay. * * * Q. What was said between you and Peoples there with reference to you furnishing any further wood or timbers upon this claim? * * * A. I told Mr. Peoples that I did not feel financially able to furnish the wood to the claim without knowing that I would receive the money therefor. Mr. Peoples took a piece of paper and a pencil, and he figured out that the dead work was done on the claim. He showed me where the dump box and the sluice boxes had been put in, and that the shaft was down and partly cribbed. He also showed me that the machinery was all set up. And he said: 'In fact, they are about ready to hoist the dirt.' He also figured out what the wood would cost. He asked me what I would charge for the wood, and I told him, and he figured out what the expense of the men would be, and he figured out that it would produce about $1.50 to the square foot. He told me whatever I put on the ground, or done, or furnished to the claim, during the winter of 1916 and 1917 would be absolutely good, that there was no chance to lose on it, and that he (Peoples) would see that I was paid in the spring out of the clean-up, or, if the clean-up didn't produce enough gold out of it, that he (Peoples) would pay me. Q. Did you afterwards go out onto the property and haul wood? A. I did."

The section of the Criminal Code of Alaska (Comp. Laws, § 1927, p. 657), upon which the indictment in the present case was based, was copied from a similar section of the Code of Oregon, and in the case of State v. Littschke, 27 Or. 189, 40 Pac. 167, it appeared that Littschke received, as bailee, from one Mrs. Hess, certain money which one Liebe thereafter claimed that Mrs. Hess had stolen from him and which he thereafter demanded from Littschke, notifying him that should he make any other disposition of the money he would be held responsible. By indictment in that case it was charged that Littschke, while so in possession, embezzled and feloniously converted the money to his own use. A conviction having been had, the Supreme Court, in reversing the judgment and remanding the case for a new trial, said, among other things:

"The other assignment of error is directed to the refusal of the trial court to permit the defendant to show that the money which he is accused of embezzling did not belong to Elizabeth Hess, but had been stolen by her

from one Theodore Liebe; that Liebe had demanded of him the possession thereof, and ordered and directed him not to pay it over to Mrs. Hess, and at the same time notified him that, if he did, he would be held responsible therefor."

After referring to the rule in relation to bailments, the court further said:

"But, notwithstanding this rule, the evidence was clearly competent on the question as to whether the money was in fact feloniously converted by the defendant to his own use with an intent to steal it. A felonious intent is an essential ingredient of the crime charged in the indictment, and is always a question for the jury. Without a felonious and criminal intent on the part of the defendant, there could have been no crime, although there may have been a breach of trust, and although Liebe's claim to the money may constitute no defense in a civil action by Mrs. Hess to recover possession, because of the rule that a bailee cannot dispute the title of his bailor. But this is a criminal prosecution, and the conversion by the defendant must not only have been a tortious act, but it must have been with a felonious intention, and this, as we have already said, was a question of fact for the jury under all the circumstances of the case. If he was the bailee of Mrs. Hess, and in good faith retained possession of the money, and refused to pay it over to her because of Liebe's claim and demand, but with no intention of converting it to his own use, he cannot be convicted of the crime charged in the indictment, because in such case there would be an entire absence of the felonious or criminal intent which is an essential ingredient of the crime."

On principle, the present case is stronger for the appellant than was the case cited, for there the appellant had no apparent interest in the money, while here the appellant had at least some direct interest in the proceeds of the clean-up. It seems unnecessary to multiply authorities to the effect that in such cases a felonious intent is essential to constitute the crime of embezzlement. We cite, however, a few. State v. Coyle, 41 Utah, 320, 126 Pac. 305; People v. Lapique, 120 Cal. 25, 52 Pac. 40; Wadley v. Commonwealth, 98 Va. 803, 35 S. E. 452; Dunavant v. Commonwealth, 144 Ky. 210, 137 S. W. 1051; Walker v. State, 117 Ala. 42, 23 South. 149; Eatman v. State, 48 Fla. 21, 37 South. 576; 15 Cyc. 508.

The judgment is reversed, and the case remanded for a new trial.

HUNT, Circuit Judge. I concur in the judgment of reversal and remand for new trial, upon the ground that the court erred in refusing to permit the defendant to testify to the conversation he had with Cook. The matter appears to have been so directly connected with the transaction involved, and with the act of the defendant in retaining the money intrusted to him, that the defendant should have been given the right to introduce the evidence before the jury, as bearing upon the ultimate question of whether or not his conduct was actuated by fraudulent or honest purpose.

GILBERT, Circuit Judge (dissenting). I cannot agree to the proposition that it is competent evidence for the defense, on a trial for larceny by bailee, to show that the accused was told, by one who had no interest in the money which he held in trust, to keep the money and appropriate it to his own use. The money which the plaintiff in error had in his possession did not, as he was well aware, belong to

Cook. Both Cook and he were parties to a written agreement by which Cook assigned his lease to Keyes, and whereby the latter was obligated to pay all sums realized upon clean-ups pro rata to Cook's creditors. In pursuance of that agreement the plaintiff in error had been intrusted with the proceeds of the first clean-up, and had taken it to Fairbanks, and had returned with the money for the payment of creditors pro rata in pursuance of the agreement. He was intrusted in the same manner with the proceeds of the second clean-up. He was well aware of the terms of the agreement, and of the understanding under which the mine was operated. It is true that one who appropriates money under authority of another, under the bona fide belief that he is authorized, is not guilty of larceny, although his belief is mistaken.

"It is necessary, however, in all cases, that the claim of right be a bona fide one." 25 Cyc. 50.

It is not shown, and there was no offer of proof, that the plaintiff in error was influenced in any degree by Cook's statements; on the contrary, his whole evidence is that he never at any time appropriated, or intended to appropriate, or keep the money. He testified that after his conversation with Cook he continued on his way to the mine, and that he returned to Fairbanks only on account of the lameness of his horse, that he intended to go out with the money on the train on the following morning, and that he would have done so, but for his arrest.

I agree with Judge HUNT that it was not reversible error to sustain the objection to the question propounded to the plaintiff in error:

"Q. Did you act upon the advice of any attorney in holding the gold dust, as you have testified you did hold it, on Sunday, the 2d day of June, 1917?"

The plaintiff in error had testified that he held the gold dust on Sunday, the 2d day of June, in trust for the true owners thereof, and that he intended to take the same to the mine, there to be disbursed in accordance with the agreement of the parties. It was immaterial whether or not, in so holding it, he was acting under the advice of an attorney.

UNITED STATES v. ATLANTA TERMINAL CO.*

(Circuit Court of Appeals, Fifth Circuit. October 15, 1919.)

No. 3417.

COMMERCE ⊂⊃27(2)—MASTER AND SERVANT ⊂⊃13—TERMINAL COMPANY SUBJECT TO HOURS OF SERVICE ACT—"INTERSTATE COMMERCE."

A terminal company, incorporated as a railroad company, which owned a terminal passenger station and the tracks leading thereto, used by various interstate railroads, which sold tickets and checked and loaded baggage for their trains, maintained a telegraph office through which their train orders were transmitted, operated all switches to and from its tracks, and through its station master directed the movements of all trains while on such tracks, *held* a common carrier engaged in transportation of passengers and baggage by railroad in interstate commerce, and subject to the provisions of the Hours of Service Act March 4, 1907 (Comp. St. §§ 8677–8680), as respects its telegraph operator, who transmitted the train orders.

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

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Suit for penalty by the United States against the Atlanta Terminal Company. Judgment for defendant, and the United States brings error. Reversed.

Hooper Alexander, U. S. Atty., and John W. Henley, Asst. U. S. Atty., both of Atlanta, Ga., and Stacy H. Myers, Sp. Asst. U. S. Atty., of Washington, D. C.

Albert Howell, Jr., and Arthur Heyman, both of Atlanta, Ga., for defendant in error.

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

GRUBB, District Judge. This was a civil suit brought by the plaintiff in error for the recovery of a penalty for an alleged violation of Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415, 1416 (Comp. St. §§ 8677–8680). The District Judge directed a verdict for the defendant (defendant in error), and from the judgment entered thereon, the plaintiff (plaintiff in error) has sued out this writ of error. It is conceded that, if the defendant was a common carrier within the meaning of the Hours of Service Act, the verdict was improperly directed, and the judgment should be reversed. The employé concerned was concededly engaged in the movement of trains. A violation of the provisions of the act, accordingly, appears from the record, if the act applied to the defendant.

The only question for decision is whether or not the defendant was a common carrier engaged in the transportation of passengers or property by railroad in interstate commerce. The act applies to that class of corporations only. The plaintiff was required to show (1) that the defendant was a common carrier; (2) that it was engaged in the

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 250 U. S. —, 40 Sup. Ct. —, 64 L. Ed. —.

transportation by railroad of passengers or property; and (3) in interstate commerce. The status of the defendant will best appear from the recital of facts stipulated into the record, and which are as follows:

"Atlanta Terminal Company, the defendant, is a corporation, chartered under the railroad law of Georgia as a railroad corporation. The defendant does not operate any trains, either freight or passenger, for itself, and owns and controls no locomotives or cars. It owns a passenger terminal station, known as the 'Atlanta Terminal Station,' and as a part thereof has a train shed with numerous tracks extending throughout the length of said shed and beyond the same, connecting with the lines of the various railroads that use said station for their passenger business. The railroads entering and using this station are Southern Railway, Central of Georgia Railway, Atlanta & West Point Railroad, Seaboard Air Line Railway, and Atlanta, Birmingham & Atlantic Railway. Certain trains of the Louisville & Nashville Railroad and Nashville, Chattanooga & St. Louis Railway now connect with the Central of Georgia Railway, and also with this station. In March, 1917, the Southern Express Company occupied space in said Terminal Station and handled their own express matter. The passenger trains of the various railroad lines handling mail received and mail delivered to the Atlanta Terminal Station; this mail being handled to and from the trains by employés of the Atlanta Terminal Station, but from the station into the city and from the city into the station by the United States mail service. No freight business for any of the railroads was handled by or through the Atlanta Terminal Station, but the Atlanta Terminal Company, acting for the various railroads, furnished ticket agents to sell tickets, and baggage agents to check and transfer baggage to and from trains. The Terminal Station also furnished porters, train callers, and gatemen to direct passengers in going to and from trains. Atlanta Terminal Station also furnished car inspectors to examine the equipment of trains leaving the station, and trains were not allowed to leave the station until directed to do so by the station master. In addition to the above, said Atlanta Terminal Company operated a telegraph office.

"The Atlanta Terminal Station furnishes its own track men, who keep up the track that belongs to the company. It also furnishes tower or signal men, who are located just north and south of the main shed, for the purpose of changing switches and letting trains in and out of the station. These tower men are under the direction of the station masters. All trains are switched or moved, as well as made up, by the respective railroads that enter said station, but their movement in the station or station grounds is under the direction and control of the Terminal Company station masters. The telegraph office of the Atlanta Terminal Company connects with four dispatchers' offices of the Southern Railway, operating with five dispatchers. These offices are at Atlanta, Birmingham, Greenville, and Williamson. It connects with the dispatcher's office of Atlanta & West Point Railroad Company at Montgomery. It connects with the dispatcher's office of the Atlanta, Birmingham & Atlantic Railway at Manchester, Ga. It connects with the Seaboard Air Line dispatcher's office in Atlanta, Ga. The telegraph office, through its operators, handles train orders. The telegraph office of the Atlanta Terminal Company handles train orders for the respective railroads entering its station, respecting the movements of trains out of the Atlanta Terminal Station; a great many of the trains handling passengers from other states and into other states. These train orders relate exclusively to trains leaving the Atlanta Terminal Station for other points, and cover instructions to the conductors and engineers as to the moving of their respective trains and as to meeting other trains on the respective railroads."

1. That the defendant, under the facts stated, was a common carrier of passengers and baggage, has been settled by the decisions of the Supreme Court, notably the cases of United States v. Union Stockyards, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226, and United States

v. Brooklyn Eastern District Terminal, 249 U. S. 296, 39 Sup. Ct. 283, 63 L. Ed. 613. In the latter case the Hours of Service Act was held to apply to a terminal company, which performed similar duties and in a similar manner to those performed by the defendant under the facts stipulated. The Supreme Court in that case said:

"The precise question presented is, therefore, whether the fact that the Terminal conducts these operations, not as an integral part of a single railroad system, but wholly as an agent for one or several, exempts the railroad companies, because they are not the employer, and exempts the Terminal because it is not a common carrier; thus making inapplicable a provision regarding the physical operation of the property devised for the protection of employés and the public. One who transports property from place to place over a definite route as agent for a common carrier may, under conceivable circumstances, be a private carrier. But what is there in the facts above recited to endow the Terminal with that character? The service which it performs is distinctly public in character; that is, conveying between Brooklyn and points on any of the ten interstate carriers and their connections all property that is offered. The fact that the railroad of the Terminal is short does not prevent it from being a common carrier. United States v. Sioux City Stockyard Co. [C. C.] 162 Fed. 556. Nor does the fact that the thing which it undertakes to carry is contained only in cars furnished by the railroad companies with which it has contracts. Railroads, whose only service is hauling cars for other railroads, have been held liable as common carriers under the Safety Appliance Acts * * * (Union Stockyards Co. of Omaha v. United States, 169 Fed. 404 [94 C. C. A. 626], Belt Railway Company of Chicago v. United States, 168 Fed. 542, 93 C. C. A. 666, 22 L. R. A. [N. S.] 582); and under the Twenty-Eight Hour Law, * * * (United States v. Sioux City Stockyards Co., supra). * * * In no respects, therefore, does the service actually performed by the Terminal for or in respect to shippers differ from that performed by the railroad companies at their other stations. True, the service is performed by the Terminal under contracts with the railroad companies as agent for them, and not on its own account. But a common carrier does not cease to be such merely because the services which it renders to the public are performed as agent for another. The relation of connecting carriers with the initial carrier is frequently that of agent. See Bank of Kentucky v. Adams Express Co., 93 U. S. 174 [23 L. Ed. 872]. The relation of agency may preclude contractual obligations to the shippers, but it cannot change the obligations of the carrier concerning the physical operation of the railroad under the Hours of Service Act, which as this court has said must be liberally construed to secure the safety of employés and the public. Atchison, Topeka & Santa Fé Railway Co. v. United States, 244 U. S. 336 [37 Sup. Ct. 635, 61 L. Ed. 1175, Ann. Cas. 1918C, 794]."

2. The defendant contends, also, that it was not engaged in transportation of passengers or property by railroad. It is true that it had no cars or engines and no trainmen or engineers. It had, however, railroad tracks, a station, switches, and a telegraph office and signal towers. It employed a station master, signal tower men, car inspectors, telegraph operators, ticket sellers, and baggage checkers and handlers. It is true that the passengers and baggage were carried on the cars and by the engines of the various railroad companies entering the terminal. However, they became passengers as soon as they bought tickets from defendant's agents, and while still on the defendant's station premises, and before boarding their train. Part of the transportation preceded their entrance to their trains, and that part was handled exclusively by the defendant. The same is true as to the

passengers' property. It became baggage and began its transportation as soon as it was checked in the defendant's baggage room. After the passenger boarded the coach, and after his property was loaded into the baggage car, both still remained under the control of the defendant, until the train had left the terminal track. Until that time its movements were subject to the control and direction of the defendant's station master, to whose orders the train crew was subservient, and whose orders alone could start or stop the train while it was within the terminal limits. The train orders which governed its movements, after its departure, were transmitted to the train crew through the defendant's telegraph operator—the same person who is alleged to have been kept on duty in violation of the act. So that while the manual acts which started, moved, and stopped the train were not those of the defendant's employés, the orders and directions which put it in motion and caused it to stop were those of defendant's employés.

Direction and control are as much a part of transportation as are the physical acts of running the engine or handling the train. It is also true that trains, in motion, could only enter and leave the terminal tracks through switches thrown by signal men of defendant, and upon signals given the train crews by defendant's signal men. These acts were acts of transportation, and the defendant was engaged in transportation of passengers and baggage, upon a railroad, while doing them. The fact that the railroad company engaged jointly with defendant in the transportation does not change the conclusion reached. If the railroad companies had performed the entire service themselves, it would all have been transportation. The fact that part of it was performed by their agent, a separate corporation, does not make it less so. That it was transportation by railroad appears from the fact that it was carried on by a corporation organized as a railroad company and over its own railroad tracks. That they were short ones does not signify; nor does the fact that the defendant did not own the engine or cars. The mischief sought to be remedied by the Hours of Service Act is the same, whether the service is performed by the railroad company or by its agent, the Terminal Company, jointly with it, and whether by the use of its own cars and engines or those of the Terminal Company. It is equally important that the remedy be applied to the latter as to the former. The hazard from the excessive hours of service is the same in either case.

3. That the service performed by the defendant was interstate transportation appears clearly from the stipulated facts. The transportation of the railroad companies in which it participated was interstate transportation of passengers and baggage. The fact that the defendant performed its part thereof entirely in Georgia is unimportant, since it was part of an interstate movement and partook of the nature of the entire movement. Union Stockyards Co. v. United States, 169 Fed. 404, 94 C. C. A. 626; United States v. Stockyard Co., 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226.

We think the defendant was a common carrier engaged in the transportation of passengers and baggage by railroad in interstate com-

merce, within the meaning of the Hours of Service Act of March 4, 1907, and that the District Court erred in directing a verdict in its favor, which requires a reversal of the judgment appealed from.

Reversed.

JOHNSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1919.)

No. 3327.

1. PROSTITUTION ⟸1—"WILLFULLY" PROPERLY DEFINED IN INSTRUCTION.
In a prosecution under Laws Alaska 1913, c. 57, in which defendant was charged with "willfully permitting" his wife to practice prostitution, an instruction that the word "willfully," as used in the statute, means "intentionally or knowingly," *held* correct (citing Words and Phrases, Willful).

2. PROSTITUTION ⟸5—INSTRUCTION AS TO "WILLFULLY" PROPERLY REFUSED.
In a prosecution under a statute making it an offense for a man to "willfully permit" his wife to practice prostitution, a requested instruction that the act must have been done affirmatively and corruptly *held* properly refused.

3. COSTS ⟸292—CRIMINAL PROSECUTIONS IN ALASKA—POWER TO AWARD COSTS.
In a criminal prosecution under a statute of Alaska for an offense not capital, a judgment of conviction may properly include costs of prosecution, in view of Rev. St. § 974 (Comp. St. § 1615), allowing imposition of costs on defendant, and Act Aug. 24, 1912, § 3 (Comp. St. § 3530), making federal Constitution and laws applicable to Alaska.

In Error to the District Court of the United States for the Third Division of the Territory of Alaska.

Criminal prosecution by the United States against W. H. Johnson. Judgment of conviction, and defendant brings error. Affirmed.

Wm. H. Rager, of Anchorage, Alaska, L. V. Ray, of Seward, Alaska, and E. E. Ritchie, of Valdez, Alaska, for plaintiff in error.

William A. Munly, U. S. Atty., of Valdez, Alaska, and J. C. Murphy, Asst. U. S. Atty., of Anchorage, Alaska.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The offense of which the plaintiff in error was convicted, and for which he was sentenced in the court below to imprisonment for ten months in jail and to pay the cost of prosecution, taxed at $417.67, was that of willfully permitting his wife to practice prostitution—the statute under which the prosecution was had reading as follows:

"That any male person who may be found loitering around houses of ill fame, or who solicits, incites, induces, encourages, persuades, or prevails upon any other male person to patronize any house of ill fame or any woman commonly reputed to be a prostitute; or who shall be an inmate of any house of ill fame, or who is commonly known to consort with any prostitute, or who willfully permits a woman to whom he is married to practice prostitution, or who lives upon or receives the earnings of any prostitute, shall be deemed a

pimp or macque, and upon conviction shall be imprisoned in a federal jail not less than thirty days nor more than one year." Session Laws of Alaska 1913, pp. 120, 121.

The points made in behalf of the plaintiff in error relate to instructions given and refused, to the inclusion of the costs of the prosecution in the judgment, and to the alleged insufficiency of the evidence to sustain the verdict of guilty returned by the jury.

As to the last-mentioned point, we think the evidence amply sufficient. It is enough to quote a little from the testimony of the witnesses Mossman, Cavanaugh, and Sturgis, who were deputy marshals at Anchorage, the place of the offense. Mossman testified:

"It came to my knowledge that the relationship of husband and wife existed between this defendant and this woman on the line. I called him into the office—sent out for him—on the 20th of November, 1917, and asked him a number of introductory questions, as to where he had been, and where he came from, and how long he had been here, etc., and finally asked him if he was a married man, and he told me he was. I then asked him where his wife was; and he said, 'She is on the line;' and I said, 'By what name does she go on the line?' and he said, 'Violet.' I said, 'Have you ever made any effort to get her off the line?' and he said, 'I told her that I thought we could get along without her working on the line;' and I said, 'You never made any real effort to get her off the line?' and he replied, 'No;' and I asked him as to their marriage license, where it was, and he told me it was either at home in his trunk or else she had it.

"Q. Where did you locate it? A. I sent Mr. Cavanaugh out with this defendant. They went to Mr. Johnson's room, and didn't find it in his trunk, and they then went to the house where the woman was on the row, and Mr. Cavanaugh returned with the license."

The witness further testified that at the time in question the defendant was engaged in running a taxicab for hire; his principal business being taking passengers from the town to the district where his wife was engaged in the practice of prostitution.

Cavanaugh having testified that he was present in the marshal's office when Mossman had the conversation with the defendant prior to his arrest, was questioned, and answered, among other things, as follows:

"Q. What was the gist of that conversation? A. Mr. Mossman asked him if he was married, and he said he was, and he asked him if his wife was down on the line working, and he said, 'Yes,' and asked him if he had done anything to take her off the line. I can't recall just exactly what he said, but I believe he said he told her to get off, or something to that effect, and she didn't do it. Q. Had he ever made any complaints to the marshal's office to get his wife off of this line? A. No, sir. Q. You may state whether or not you secured this marriage license? A. Yes. Q. Where did you get it? A. Why, she gave it to me. Q. Who told you where to get it? A. We asked him where the license was, and he said, if he didn't have it, why his wife had it; so I went to his room with him, and he went through his trunk and couldn't find it, and then he took me down to her house and she gave it to me. Q. Did it appear from his conversation at that time and the conversation you had with his wife that he and Mrs. Johnson were perfectly friendly? A. I never had any conversation with her; but the appearance was friendly when I went down to get the license, which she gave me. It was the first time I was ever in there, and I told her I wanted the license, and she wanted to know if she could have it back again, and I told her 'Yes.'"

And Sturgis testified that his particular duty was police work in "the restricted district," having charge thereof; that he knew the

wife of the defendant, who went by the name of Violet Johnson, and who was one of the prostitutes in the district; and that he had seen the defendant, whose business was that of driving a taxicab, go into the house belonging to Violet Johnson.

Mossman having testified to certain admissions made to him by the defendant, and the latter having acknowledged in his testimony that he told Mossman that he had never said anything to the officers of the law about getting his wife to change her mode of life, the defendant requested the court to instruct the jury that "too great weight ought not to be attached to evidence of what a party has been supposed to have said," because of possible misunderstanding or unintentional changing of the language, and thereby altering its effect. The court refused the requested instruction, but subsequently recalled the jury and gave this instruction:

"In view of the evidence in this case, you are instructed that the oral admissions of a party, in this case of the defendant Johnson, ought to be viewed by you with caution. This is a rule laid down in our statute, and given in proper cases, and I believe this to be a proper case, inasmuch as there were such admissions testified to. You will recall that one of the witnesses, I think Mr. Mossman, testified that the defendant Johnson had made certain admissions to him, oral statements, and I say to you again that this rule provides that you should view such admissions with caution. The reason of that is, if one makes admissions, another testifying to them may have misunderstood what the man said, or not get them exactly right, and things of that kind. That is the reason why you should look upon them with caution—that is the extent of the rule in that respect. You may retire."

It is needless to cite authorities to show that the error complained of was thus cured by the court.

[1] Complaint is also made that the court below refused to give this instruction:

"The court instructs the jury that the accusation against the defendant in this case is that the defendant on the 20th day of November, 1917, at Anchorage, Alaska, did willfully permit one Della Johnson to practice prostitution, the said Della Johnson being then and there married to said defendant; said accusation being brought under chapter 57 of the Session Laws of Alaska of 1913, p. 120, which makes it an offense for any male person who willfully permits a woman to whom he is married to practice prostitution; this being a penal statute, the court further instructs you that the word 'permit,' used in such statute, includes and means affirmative assent on the part of the defendant, and the word 'willfully,' as used in such penal statute, means not merely voluntarily, but implies that doing of the act with a bad purpose; that is to say, it means corruptly, and unless the prosecution has proved by the evidence beyond a reasonable doubt that the defendant acted with the corrupt purpose and a wicked and corrupt intent, and consented to his wife practicing prostitution as alleged in the complaint herein, then you will find the defendant not guilty."

Instead, the court told the jury that the word "willfully," as used in the statute upon which the charge was based, "means intentionally or knowingly," and further instructed them as follows:

"Intention, as I have advised you in other criminal cases, is something that no man can determine by looking into the mind of another; so a man is presumed to intend, he must be taken to intend, the natural, reasonable consequences of his acts. Now, in this case you are to determine whether he did this willfully or knowingly or intentionally by his conduct, as, for instance,

if he had left the country and not seen the woman again, you might naturally infer from that act, that course of conduct, that he had not willfully permitted it, and it is for you to determine from the evidence in this case, from the fact of his going down and taking people down to this district, to where she was established at that time—it is for you to determine, from that course of conduct, whether he did knowingly, intentionally, and willfully permit her to practice that profession or business."

We are of the opinion that in both respects the action of the trial court was right.

[2] There are a number of reasons why the requested instruction was properly refused: First, because the word "permit," as used in this statute, does not mean "affirmative assent" or "consent," nor does the word "willfully," so used, mean "corruptly," nor was it necessary, to constitute the crime denounced by the statute, that the defendant should "have acted with the corrupt purpose and a wicked and corrupt intent and consent" to his wife practicing prostitution. In the first place, while the statute makes the despicable act of one who lives upon and receives the earnings of any prostitute a crime, it is a separate and distinct crime from that other most heinous offense of a husband willfully permitting his wife to practice prostitution, also expressly made a crime by the same statute.

The statute does not use the word "corrupt," or "corruptly," in defining the crime under consideration, and we are of the opinion that neither of those words have any proper application to it, the use of which might and probably would have confused the minds of the jury, the very thing every trial court should always seek to avoid. Swenson v. Bender, 114 Fed. 1, 9, 51 C. C. A. 627. In the case of Hamburg-American Steam Packet Co. v. United States, 250 Fed. 747, 757, 163 C. C. A. 79, in speaking of the word "corrupt" in connection with the crime of conspiracy, the court said:

"Bouvier's Law Dictionary defines corruption as being something against law, and illustrates its application by the case of a contract for usurious interest wherein it was 'corruptly agreed,' etc. In State v. Lehman, 182 Mo. 424, 81 S. W. 1118, 66 L. R. A. 490, 103 Am. St. Rep. 670, it was held that an act is done corruptly when it is done with an intent to obtain an improper advantage inconsistent with official duty and the rights of others. And in State v. Johnson, 77 Ohio St. 461, 83 N. E. 702, 21 L. R. A. (N. S.) 905, the court held that one who addresses a communication to the judges of a court for the purpose of influencing their decision in a case pending therein, by disparaging one of the parties or the relator in a suit brought by the state, 'corruptly' endeavors to influence officers of the court in the discharge of their duties; and we conclude that an act such as charged in the indictments is done corruptly when it is done with a wrongful intent to acquire some improper advantage for one's self or for another, and which is inconsistent with the rights of others. As the offense charged is that of conspiring to defraud the United States, the parties necessarily must have conspired 'corruptly,' as well as 'unlawfully,' 'willfully,' and 'feloniously,' if they conspired at all to defraud."

The statute expressly provides that any man who willfully permits his wife to practice prostitution shall be deemed a pimp or macque, and upon conviction be imprisoned as therein specified, and we think the court below correctly defined the word "willfully" as meaning "knowingly and intentionally." It has been so defined in the very nu-

merous cases that have arisen under the Espionage Act, the decisions under which have been published by the government in the form of bulletins, and among which decisions are those of United States v. Rhuberg (Bulletin No. 107), decided by Judge Wolverton, and United States v. Marie Equi (Bulletin No. 172), decided by Judge Bean. See, also, Bouvier's Law Dictionary (8th Ed.) vol. 3, p. 3454; Words and Phrases, vol. 8, p. 7468 et seq.

Nor are we able to agree with counsel for the plaintiff in error that a husband who willfully permits his wife to practice prostitution must affirmatively permit or consent thereto in order to bring him within the terms of the statute defining the crime in question. "Permit" is an ordinary word of common and familiar use, and easily understood by every man and woman with sense enough to qualify as a juror. There was, therefore, no occasion for the court to undertake to define it, and certainly it was right in refusing to comply with the request to instruct the jury that it meant the affirmative assent on the part of the defendant.

[3] The remaining point on behalf of the plaintiff in error relates to the inclusion in the judgment against the defendant of the costs of the prosecution. The record shows that the bail bond executed by and on behalf of the defendant provided for the payment of such costs in the event of the affirmance of the judgment. Section 974 of the Revised Statutes (Comp. St. § 1615) is as follows:

"When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution."

By section 3 of the act of Congress of August 24, 1912 (37 Stats. 512, c. 387 [Comp. St. § 3530]), it is provided:

"That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory [Alaska] as elsewhere in the United States."

And the amendatory act of August 29, 1914 (38 Stats. 710, c. 292 [Comp. St. 1918, § 3544a]), declares that:

"In the prosecuting of all crimes denounced by territorial laws the costs shall be paid the same as is now or may hereafter be provided by act of Congress providing for the prosecution of criminal offenses in said territory."

This court held in the case of Nagle v. United States, 191 Fed. 141, 111 C. C. A. 621, that all laws of Congress of general application, not locally inapplicable, are in effect in Alaska. That being so, we think the decisions in the cases of American Surety Co. v. United States, 239 Fed. 680, 152 C. C. A. 514, Fidelity & Deposit Co. of Maryland v. Expanded Metal Co., et al., 183 Fed. 568, 106 C. C. A. 114, and Hardesty v. United States, 184 Fed. 269, 106 C. C. A. 411, apply and are a sufficient answer to the point under consideration.

The judgment is affirmed.

WILSON v. DAY et al.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919. Rehearing Denied December 1, 1919.)

No. 3273.

1. DESCENT AND DISTRIBUTION ⟸84—PURCHASE OF PROPERTY BY ADMINISTRATOR FROM DISTRIBUTEE.
   Rev. Codes Idaho, § 5543, providing that no administrator may purchase property of the estate he represents, or be interested in any sale thereof, *held* not to invalidate a purchase of property by an administrator from a distributee after his final report had been approved and by final distribution the property had ceased to be property of the estate, although he had not at the time been formally discharged.
2. DESCENT AND DISTRIBUTION ⟸84—VALIDITY OF PURCHASE OF PROPERTY OF DISTRIBUTEE BY ADMINISTRATOR.
   The purchase of property from a distributee immediately after distribution by the former administrator of the estate will be closely scrutinized by a court of equity and be set aside at the instance of the seller unless the utmost fairness and good faith in the transaction are shown.
3. DESCENT AND DISTRIBUTION ⟸90(5)—VALIDITY OF PURCHASE OF PROPERTY BY ADMINISTRATOR FROM DISTRIBUTEE.
   A finding that a transaction by which the owner of an interest in a mine, received from her husband's estate, sold the same to the late administrator, who was also part owner, was fair, that the purchaser was not chargeable with fraud or misrepresentation, and that the price paid was as near the value of the property as could be estimated considering its character, *held* supported by the evidence.

Appeal from the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit in equity by Mathilde Cardoner (Joseph R. Wilson, her executor, substituted as complainant) against Eugene R. Day and others and the Hercules Mining Company, a mining partnership. Decree for defendants (253 Fed. 572), and complainant appeals. Affirmed.

Ettienne P. Bujac, of Carlsbad, N. M., and Charles R. Brice, of Roswell, N. M., for appellant.

Chas. W. Beale and John H. Wourms, both of Wallace, Idaho, for appellees Eugene R. Day and Eleanor Day Boyce.

John P. Gray, of Cœur d'Alene, Idaho, for appellee Harry R. Allen.

Isham M. Smith, of Seattle, Wash., for appellee Jerome J. Day.

James E. Babb, of Lewiston, Idaho, for appellee Harry L. Day.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is an appeal by Mathilde Cardoner from a decree of the District Court of Idaho, dismissing the complaint of plaintiff and refusing to cancel a certain deed of sale of mining property made by appellant October 28, 1916.

The appellees, except Harry R. Allen, Edward Boyce, and the Hercules Mining Company, are owners of undivided interests in the Hercules mine and other properties in Idaho and are conducting mining operations as the Hercules Mining Company under the laws of Idaho. The appellee Eugene R. Day since 1912 has been manag-

ing partner of the Hercules Company and acted as administrator of the estate of Damian Cardoner throughout its administration. At the time of the submission to this court appellant disclaimed any relief as against appellee Allen.

Appellant was the widow of Damian Cardoner, who died in the Canary Islands in 1915. His entire estate, being community property prior to his death, was by probate proceedings distributed to appellant. Deceased also left one daughter. Eugene R. Day, administrator of the estate, filed his final account, and a decree of distribution was entered on October 11, 1916, and actual distribution was had on that day, and decree of final discharge of the administrator was made November 1, 1916. The complaint alleges that on October 28, 1916, after some preliminary conferences with one Allen, joined as defendant below, appellant conveyed by deed to Eleanor Day Boyce her entire interest in the Hercules and other mines, together with her interest in all property of the Hercules Mining Company, a partnership, together with certain real estate in the town of Burke, Idaho, for $370,000; that the terms were $50,000 cash, and the balance in two weeks; that the $50,000 was paid as agreed and an escrow conveyance deposited in the bank; that Allen, alleged to be a friend of appellant, who had negotiated the sale, demanded and received $5,000 commission; that the transaction was consummated on November 14, 1916, when the balance of the purchase price was paid into the bank and the deed delivered to Mrs. Boyce; that Allen was in reality acting for the Day interests and persuaded plaintiff to dispose of her interest in the mine; that at the time of filing suit and at the time of the sale the Hercules property was worth not less than $20,000,000 and that it has a value of $30,000,000; that plaintiff was not informed as to the real condition of the mine, did not realize that she was conveying all her interest in the mine, and (on information and belief) that the cash on hand was greatly in excess of the amount claimed, and that thereby she was defrauded; that Eugene R. Day had been manager of the mine for some years, and appellant had confidence in him and his judgment; that. by reason of Day not disclosing to appellant the real facts about the value of the mine, appellant was defrauded; that appellant discovered her mistake in making the sale in December, 1916, notified the Days of her intention to rescind the sale, and tendered them the entire purchase price; that appellees declined to accept the tender and refused to reconvey.

The defendants substantially deny all equities in the complaint and deny any fraudulent intent or misrepresentations on the part of Eugene R. Day or Allen.

The issues largely narrow to the following principal questions: Was Allen Mrs. Cardoner's agent? Was he acting for Eugene R. Day in endeavoring to negotiate the sale? Did Eugene R. Day practice any fraud, or make any misrepresentations by way of concealment or otherwise upon Mrs. Cardoner relative to the value and possibilities of the mine? Was the sum paid for Mrs. Cardoner's one-sixteenth interest the reasonable value, or was it near to a fair and adequate consideration for the interest acquired?

The District Court found that plaintiff received $350,000 for the mine; that Allen acted as plaintiff's agent; that Allen was not in the employ of the Day interests; that he made no misrepresentation of facts and discussed with Mrs. Cardoner only possibilities and matters which furnished legitimate subjects for consideration; that at no time did plaintiff think Allen was representing the Day interests rather than hers; that Allen was designated as her agent by written instrument; that plaintiff paid Allen's commission without protest; and that he continued to act as her agent thereafter and was on friendly terms with her.

As to Day's relationship, the court found: That at the request of the daughter, with apparent approval of appellant, Day was appointed administrator of the estate and discharged his duties as such; that on September 27, 1916, he filed his final account; that the account was duly approved October 14, 1916, and the estate turned over to plaintiff; that the order formally closing the estate and discharging Day was not filed until November 1, 1916; that appellant stood upon the sale for two months and accepted the balance of the purchase price after November 1st, the date on which Day was discharged; that she approved the transaction and authorized delivery of the deed by the escrow holder; that in any ordinary business transaction plaintiff could not easily be deceived or overreached; that she consulted her attorney, who was thoroughly familiar with the mine and its workings and made no complaint to him or to other friends and interested persons.

The District Court gave much consideration to what was the actual value of the property at about the time plaintiff sold her interest, and after referring to the cost of extracting, treating and marketing ores, the uncertainty as to the price at which the product of the mine could be sold, the difficulty of valuing the present worth of ores in the earth, the peculiar conditions which existed by reason of the world war which was then in progress, concluded that the price paid approximated the reasonable market value of the interest of the plaintiff, and that the sum received "was probably as much as she could have obtained from any other source, and, in any view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required."

From the extensive record we make the following statement of appellant's testimony: Plaintiff said that she left Idaho for Spain in 1906 with her husband, who had been in the general merchandise business in Idaho; that he owned a one-sixteenth interest in the Hercules mine; that he never discussed the subject of the mine with plaintiff; that he died in the Canary Islands in 1915, leaving herself and one daughter his sole heirs; that the daughter returned to the United States in April, 1915, to look after the estate; that she applied for letters of administration to be issued to defendant Eugene R. Day, which was satisfactory to plaintiff; that plaintiff returned to the United States in April, 1916; that she knew nothing about the laws and customs of the state of Idaho; that her husband transacted all the business himself and she took no part in it; that she resided in

Spokane in 1916, but had to go away on account of asthma; that upon arrival from Spain she telephoned Mr. Day in an endeavor to make an appointment with him; that she could not see him that day, but went to Wallace two days later to see him; that she asked him for the statements regarding the condition of the mine that had not been received since the death of her husband; that he said they were not ready, but that he would send them; that he asked her if she wanted to sell her interest and she declined; that she did not see him again until August 3d in his office at Wallace; that she asked again for further statements, but that Day said he did not have time; that she told him she would like to send them to her daughter who was in Spain, and that he said he never would send the statements to Spain, and that he never did; that she received no statements after she arrived in Spokane in April, 1916; that after the visit in April he sent her an envelope which contained some statements of the mine figures, but that he made no explanation of them and she did not understand them at all; that Day told her he did not have time to make the statements, and that she did not receive any after she was in Spokane; that she went to Burke on the 4th of August to look over her property; that Day was to meet her in Burke to look at the property, but failed to do so; that she next saw Day on the 12th and 14th of October, in connection with the distribution of the estate; that she got her accounts from Day on the 14th; that she next saw him on the 28th of October; that he gave her a check for $5,000, but that he never gave her any information concerning the mine; that she had known Mr. Allen 20 years; that she saw him on the 23d of October, when he asked if she wished to sell the Hercules; that she told him she did not; that he told her the Days were "bucking" the Guggenheims, that the mine was not good any more, and that they would lose money because the Days did not have as much money as the Guggenheims; that they had some conversation about the lease and insurance on the house, and then he asked again if she did not want to sell her interest in the mine, and practically repeated the same statements he had made previously regarding the probabilities of the mine running out; that he told her the mine was worth about $5,000,000; that he figured out on paper what her share would be, and that she told him she did not want to sell; that she next saw Allen in Wallace on the 27th of October; that he came to see her the following morning and told her that perhaps after she left Spokane dividends would not be sent and that she might lose everything and advised her to sell; that Mrs. Wood and Allen said she might have litigation, that she had better sell; that Allen produced a "paper" (letter authorizing him to sell her interest in the mine for $312,500), which she signed; that she told Allen she thought the mine was worth more, and he said he would see if Mr. Day would not give more; that after discussing the transaction Mrs. Wood advised plaintiff to sell everything, including the real estate; that Mr. Day agreed to pay $5,000 more for the real estate, but refused to raise his price for the mine; that Allen said that the mine was not worth more than $5,000,000 and that was her share; that she was sick that day; that she signed the deed that evening; that they "made" her sign the

deed; that she did not read the deed; that they told her it was not necessary because "it was like the other paper from the time of the distribution of the property"; that she remarked to Day that she did not know whether she was wise to sell to him or whether he was wise in buying; that Day was present when the deed was signed; that he gave her two checks, one for $5,000 and one for $45,000; that the agreement was that in case the rest of the purchase was not paid in two weeks the $50,000 was to be forfeited; that the transaction was had in the evening after dinner; that Allen suggested that they go to the bank the following morning to deposit the deed; that it was Sunday, but they telephoned, and an officer of the bank (Vincent) met them at the depot in Spokane the next morning, and they proceeded to the bank; that when the conveyance was handed over Allen asked Vincent how much commission he should charge, and that Vincent answered he did not know, and that Allen claimed $5,000 and accepted the check for $5,000 which had been given by Day as part of the first payment of $50,000; that she was too sick to wait in Spokane two weeks; that she went to see Mr. Paulsen, an owner in the mine, and asked him if the Guggenheim rumor were true, and he said he thought not; that she had authorized Allen to collect her rents prior to the 28th of October; that thereafter he looked after her insurance and lease on the store; that after the distribution of the property she authorized Allen to sell some bank shares following the advice of Judge Wood; that Allen was sent to her by Day, and that she did not think she would have to pay a commission; that she left Spokane for Albuquerque, N. M., on the 6th of November; that she bought a house there; that she wrote for Mr. Wilson, an attorney who had been employed by her husband during his lifetime, to come from Philadelphia to see her as she was too sick to go to him; that he came in December, and that she told him of the sale of the mine; that he said she had not received enough for her share in the mine; that Mr. Wilson went to Spokane and ascertained that the mine was worth more than he had advised her it was worth; and that he returned to Albuquerque about December 18th.

Day testified, in substance, that Mrs. Cardoner frequently called upon him about April, 1916; that she told him of trouble she had had with her son-in-law and her daughter, and asked him to deliver any papers to her and to give her statements made by the Hercules Mining Company; that some statements had accumulated after the death of Mr. Cardoner, and that he gave these statements to her; that afterward she complained that there were some statements lacking; that he asked the chief accountant to make the statements for her, and that he gave them to the plaintiff, the last statement having been given to her in September, 1916, about the time of the winding up of affairs of the administration of the estate of plaintiff's deceased husband; that he turned over to her everything about October 14th, and delivered all the statements for each month for 1916, up to and including September of that year; that back in April, 1916, the plaintiff wanted to know about the mine; that he told her details, commencing with the matter of a mill in Wallace, and that he asked her to visit the property; that

he told her of changes since she had lived in Burke; that the upper levels of the mine were worked out, and that approach to the ore body was gained through a long tunnel known as the Humming Bird, and that this tunnel and property had been acquired in part from her husband, a large stockholder in the Humming Bird property; that he told her of the stock interest in the Humming Bird, described the condition of the mine, how it was largely worked out from the apex to the Humming Bird level, that the shaft had proceeded down from the No. 5 level and cut the vein on the 200, but that there was not sufficient work done to tell about the ore bodies at that time, and that the shaft was still being sunk; that good ore had been discovered, but how good and how much was not then ascertained; that he explained to her that the company owned many claims, much stock in outlying claims which had little value except by way of protection to the Hercules property; that mining stocks and smelter stocks had been purchased, and particularly that they had purchased a half interest in the Northport Smelting Company for $40,000 and a three-eighths interest in the Pennsylvania Smelting Company at a cost of $87,500; that they had gone into these smelting operations because they were no longer able to have an advantageous smelting contract renewed, and that the business was in better condition by reason of a connection with a smelter and refinery in which the company had a substantial interest; that he told plaintiff that he believed this was a wise business investment, and that she inquired particularly into this because she said she had heard her husband say that the company should keep out of the smelting business; that he referred to the ore in transit and told her that it would probably amount to $800,000 or a million dollars, and that she expressed doubt about tieing up so much money in the smelting business.

Day further testified that Mrs. Cardoner asked his opinion as to the future life of the mine below the Humming Bird tunnel, and that he told her, while the history of the country showed that the ore became baser as they went down, he believed that large bodies of ore would be discovered in new development below No. 5 level; that she asked how deep he believed they would have to go; and that he told her no one could say, and that the best opinions would be proved by the example of others who mined in the district close to that particular place. Day said that she called frequently at his office, often remaining from 45 minutes to 2½ hours; that she wanted to know particulars concerning the business, and that he gave her every bit of information within his knowledge; that he told her of all the operations in cutting a drift to the vein; and that he never concealed anything from her or misrepresented any fact.

Defendant Allen testified: That on October 14, 1916, after the decree of final distribution of the estate of Mr. Cardoner had been entered and a statement had been given to Mrs. Cardoner by Mr. Day, plaintiff took the papers to him (Allen) and went over them with him, asked for certain explanations, and requested him to look up some matters in connection therewith for her. These matters pertained to the Hercules dividends, certain insurance matters and certain bank stocks. That he was not the agent of Day and did not represent him in the

transaction in connection with the sale of the property. That he never had been an agent of Day or of Mrs. Boyce. That about October 16, 1916, Mrs. Cardoner told him of certain family troubles and wondered what she could sell her interest in the Hercules for. That he advised her not to sell, but that she was apprehensive lest her son-in-law might come from Spain and disturb the probate proceedings and gain control of certain of her property interests.

Allen further testified that plaintiff asked him to see what he could get for her interest in the Hercules, and said that Day might buy it and she wished him to find out what Day would give for it; that after he returned to Wallace he saw Day, told him what Mrs. Cardoner had said, and asked him if he was interested in acquiring her interest in the property; that subsequently he saw Day, who offered $275,000 for the interest of the plaintiff, but that he told Day that was not sufficient; that Day subsequently raised his price to $300,000, and that he told him that that was not enough; that Day told him there was about $600,000 in the bank and that he wanted to know if, in the event of purchase and sale, he (Day) would give Mrs. Cardoner her share of the cash, and that Day replied that he would think it over; that he saw Day again, and he said he would give her $300,000 for her interest in the mine and her share of the cash; that he reported to Mrs. Cardoner what Day had said, and told her that Day had said the only reason that he would consider buying was because it would give the Day family control; that he told Day that if he could not make a sale to him (Day) he would take the matter up with Paulsen and Hutton, who were also interested in the Hercules and in the American Smelting & Refining Company, and would try to get the top price; that on October 23d he went to see plaintiff, told her what Day had said, and, after a long discussion, plaintiff asked if Day would not give more; that he told plaintiff she should first make up her mind whether or not she wanted to sell, and that he would then try to have Day buy on the basis of a value of $6,000,000, and was satisfied that he could negotiate with Day on the basis of $5,000,000; that he showed plaintiff the two bases and explained what her interest would bring; that he advised her to talk with her partners who were in Spokane and to consult her attorneys and friends, and, if finally she wished to sell, to come to Wallace, and that it would not take long to get together and complete the transaction.

Allen said that plaintiff seemed worried about what her daughter would think of the matter, and testified that he went over the statements of the mine which he had, showing that it had paid something over $9,000,000, and had accumulated assets that would bring profits to $11,000,000; that he told her of different mines, some of which had been worked out, reminded her that the Hercules had gone into the new venture of a smelter, that there were chances in the lead market; that they would be in competition with the Guggenheims who controlled the price of lead to a great extent, and that she should consider these matters, but that he did not advise her to sell; that on the 27th of October he saw Mrs. Cardoner again and again they discussed the matter of sale; that he told her Day had refused to buy on the basis

of $6,000,000, but had finally agreed to pay $312,000 for the mine and its assets and to give her one-sixteenth of the cash on hand and to pay $15,000 for the Burke property; that Mrs. Cardoner said she would think it over and would meet him at the apartment of Judge Wood the next morning at 10 o'clock; that on the 28th he met her at Judge Wood's apartments; that he had an authorization with him for Mrs. Cardoner to sign; that she seemed satisfied with it, but she thought the Burke property was worth $20,000, whereupon Allen said he would again see Day; that he did talk with Day, and that Day agreed to give $20,000 for the Burke property, but refused to give more for the mine; that on that day he advised plaintiff to sell on the basis of $5,000,000, as he considered it a fair price, and told plaintiff why he thought so.

After delivering the escrow to an officer of the bank, Allen said there was some discussion as to what the commission should be, and that Mrs. Cardoner said, "Why, you are working for the Days, aren't you?" that he told her he was not working for the Days, but for her, and that, after submitting the matter to the bank officer, it was satisfactory to Mrs. Cardoner to pay $5,000, and she did pay him that sum by check. Allen denied that there was any understanding of any character between himself and Day, and asserted emphatically that he had first advised Mrs. Cardoner not to sell and then advised her to confer with the other partners and with her counsel, and that his advice to her to sell was after he had looked over the statements of the Hercules mine.

Judge Wood, a judge of one of the courts of Idaho and a former counsel of the plaintiff, testified that he did not hear the interview between Mrs. Cardoner and Allen, but that Mrs. Cardoner went to his room and asked him for his advice; that he refused to give it, but added that with his knowledge of the country and of the partnership affairs he had said to her:

"If I were owning that property and were offered that price, I think I should accept it."

Paulsen said that Mrs. Cardoner called upon him about October, 1916, and asked him about newspaper statements to the effect that the Guggenheims or the American Smelting & Refining Company were to absorb the Day interests in the smelters and mines for about $20,000,000; that he told her that he had seen the article in the paper, but that she must disregard it, as there was nothing in it, and that even if the Guggenheims were "after" them the Hercules people could take care of themselves; that Mrs. Cardoner then asked him about the value of the property, and that he replied that there was a "good deal of guesswork connected with fixing the price of a mine in the state of development that the mine was in at that time," that the shaft level was getting pretty low, and that they did not have a great deal of ore exposed at that time; that she then told him some people wanted to buy her interest and asked what he thought about her selling. Quoting the testimony of the witness:

"I did not want to advise her, because if I advised her to sell I might make a mistake, and if I advised her to keep it I might make a mistake, so I

told her I thought my judgment would not be worth much to her. I didn't like to advise her. However, I said, 'My interest is not for sale,' and that is about all that was said."

Paulsen further testified that Mrs. Cardoner asked about dividends and wondered why there had not been dividends paid for the last few months, and that he replied that they had gone into the smelting business and were branching out and had to take care of those additional propositions and had a large amount of ore in transit which had not been settled for. Mr. Paulsen expressed the opinion that he did not give a great deal of thought to just what the value of the property was at the time Mrs. Cardoner spoke to him, but that, after he ascertained what had been paid for her interest, "I felt that she got a good price for it." He added that he would not have been willing to pay any more for that interest than she received.

Mr. Hutton said that Mrs. Cardoner called upon him in the fall of 1916 and asked him what he thought the value of the mine was, and that he told her that, taking everything into consideration, the depth of the mine and all the equipment, smelters, and concentrators, he considered that $4,000,000 was a good price for it, and that he considered the sum paid to Mrs. Cardoner a fair price.

By what we have said it is very clear that the question of the relation of the price paid by Day to the value of the interest conveyed by Mrs. Cardoner became most important. Difficult as it generally is to reconcile the different views of men experienced in mining matters in their estimates of the value of mining properties, nevertheless it not infrequently becomes the duty of the courts to conclude from the evidence taken in the particular case whether the sum paid has true approximate relation to the value of the claim or property conveyed. This problem was interwoven with the present controversy.

As to the past history of the Hercules Mining Company, there were the statements which Day gave to Mrs. Cardoner. Among other details, they showed from month to month the aggregate amount of dividends that had been paid, the amount of net income received, the investments made by the partnership, the cash on hand, amount received from ore sales, and amount paid for operating expenses. For example, it was perfectly plain by the September, 1916, statement that the dividends paid up to October 1, 1916, amounted to $10,379,527.72; that investments in real estate, timber lands, smelting stocks, accounts receivable, cash deposited (all set forth by items), brought up the net income received to $12,019,128.04; that the cash received from January 1, 1916, to October 1st, for ore sales, was $2,861,304.61, which, with $11,755.34 for interest and discount, made receipts of $2,873,059.95; that the operating expenses from January amounted to $1,069,052.03; and that the net income for the period was $1,804,007.92. The difference between $1,804,007.92, or over $400,000 more than the $1,400,000 distributed in dividends and actual net profits, is shown to be due to the difference in amounts finally received on ore in transit at the beginning and close of such period. Settlements for ore in transit shipped up to October 28, 1916, did not appear because obviously there was no settlement for ore in transit prior to the close of the

month of October. The method of accounting was to treat this ore in transit, not as a distributive net income, but as an operative capital.

Mr. Allen thoroughly understood the statements, and, according to the testimony of Day, Mrs. Cardoner was told of the new arrangement concerning the smelting of the ores of the mine and was advised that there was a large amount of ore in transit and unsettled for.

Mr. Burbridge, a mining engineer of long experience in Idaho and Washington, testified in detail as to the valuation of the mine, based upon the development shown about the time of the sale by Mrs. Cardoner. The witness based his calculations upon the past history of the mine, personal investigation and knowledge of other mines, and the mining in ore chutes developed in tunnel No. 5. Based upon these estimates, the value of Mrs. Cardoner's interest at the time of the sale, including a one-sixteenth of the cash on hand and of the ore in transit, was $293,405, or $56,595 less than $350,000 which she received for the mine. The present value of a one-sixteenth interest of the total value was estimated to be $385,974. The payment of this sum in dividends, when spread equally over a period of 9.4 years, was found to be the equivalent of the payment of the whole sum at the end of 4.7 years. The witness took the present tax value as the sum which, at compound interest, would amount to $385,974 in 4.7 years and on a 6 per cent. compound interest basis deduced that it would be $293,405. In estimating depth of the mine, he was in part controlled by the data available concerning other mines in the vicinity of the Hercules, and he gave the history of several where profits ceased below depths of 1,800, 1,650, and 1,900 feet, respectively, and made his assumptions based upon productiveness of the ore remaining below ground as equal to the yield of the ground that had been worked out. He took the profits realized and the average operating cost between 1908 and 1912, when prices were regarded as normal for lead and silver, labor, and other operating conditions. In the five years, 1908–1912, inclusive, the profit per ton of ore mined averaged $3.37.

It is urged that the estimates of Burbridge are not entitled to the greatest respect because he did not carry them up to the period of 1916 when the price of lead was higher than normal. The witness said that in that time there were two boom periods when lead was higher than normal, and that it was probable, in his opinion, that after the war was over prices for lead and silver would be lower. He estimated that upon a remaining tonnage of 1,575,600 tons to last 9.4 years at a value of $2.50 to $3 per ton, there would be, say, $4,726,800. To this he added cash on hand on October 28, 1916, $649,359, and by including the ore in transit as worth $1,048,864, and adding thereto accounts collectible, $29,400, he arrived at a total of $6,454,423. From this he deducted the amount due to a smelter, $278,838, which left an estimated value of $6,175,585 for the Hercules property as of October 28, 1916.

It is true that the calculations of Mr. Greenough, who is also an educated and experienced mining engineer and testified for the plaintiff, conflicted in many respects with the opinions and deductions of Mr.,

Burbridge. The lower court accepted Burbridge's evidence as of greater weight, and it is evident that Mr. Greenough was not nearly as familiar with the conditions and veins in mines in the vicinity of the Hercules as was Mr. Burbridge. Furthermore, Mr. Greenough based his estimates of value ($10,750,000) upon the hypothesis that as the ore bodies went down there was a greater value than seems warranted, considering the evidence that as the work was carried down the ore bodies became somewhat baser, with more zinc and a gradual decrease in the silver ratio.

[1] Advancing now to the principles to be applied in the disposition of the rights of the parties, it is important to remember that prior to the time that Day and the plaintiff began to negotiate for purchase and sale, the property involved had been ordered distributed by the proper court sitting in probate within the state of Idaho, and that in pursuance of the decree of such court the property had been turned over by Day as administrator. It appears, however, that the formal order of discharge of Day as administrator was not entered until November 1, 1916, or several days after definite agreement of sale had been made. But it is clear that the right of possession of the property here involved passed from the administrator to Mrs. Cardoner upon the entry of the decree of distribution; and by the statutes of Idaho (sections 5626 and 5627) the order or decree of distribution was as to such property conclusive as to the right of the plaintiff subject only to be reversed or set aside or modified on appeal. Therefore, from the time of the delivery to Mrs. Cardoner as required by the decree, Day, as administrator, had no possession of or control over the specific property so turned over and all such property so released from his control ceased to belong to the estate of the decedent. The administrator may not have been formally discharged from his trust, but the property delivered pursuant to decree passed out of the jurisdiction of the court in probate proceedings unless to compel delivery. Buckley v. Superior Court Cal., 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135; Wheeler v. Bolton, 54 Cal. 302; Moore v. Lauff, 30 Cal. App. 452, 158 Pac. 557. Section 5543 of the Idaho Revised Code, which provides that no administrator must directly or indirectly purchase any property of the estate he represents and that he must not be interested in any sale, is not applicable, because, as we have said, the property distributed belonged to the plaintiff, and as a result after distribution was not the property of the estate which the administrator represented. This we believe to be the correct legal view of the relationship of the appellee Day to the property when he agreed to buy it, and, in our opinion, after distribution Day was not in the legal position of one purchasing property of the estate he represented. We are satisfied that the Idaho statute cited cannot be invoked as a ground for declaring the sale void and invalid at law.

[2] On the other hand, a court of equity in considering the evidence will not weigh with great nicety at what precise time Mr. Day was legally absolved of obligation to his trust as administrator, but will carefully weigh the case as one where the conduct of Day and Allen and all the circumstances of their dealings with each other and with

Mrs. Cardoner must be subjected to the closest scrutiny, and upon the principle that Day held a fiduciary relationship and that, unless he has shown that he dealt with Mrs. Cardoner with entire fairness and absolute candor and with scrupulous integrity, the sale will be annulled. Day had been administrator of the estate of Mr. Cardoner and was a partner in the mines here involved, and well knew the mining properties and was able to judge of their probabilities. He knew that Mrs. Cardoner trusted him as administrator and that naturally she would seek information as to the condition of affairs from him. He knew practically all that could be known about the mines, and as a partner, by reason of having just theretofore had charge as administrator, he was bound by every rule of honor to give to her all the knowledge he possessed, and not to conceal or omit to make full disclosure.

[3] By these standards we have tested his conduct, and our carefully formed judgment is that the findings of the learned judge who tried the case are sound and right, and that there is nothing whatever to justify any well-founded belief of combination between Day and Allen, and that when the suggestion of a combination between those two is dispelled, and the conduct of Day is closely examined, it appears that he gave to the plaintiff all the knowledge that he himself had of the conditions and possibilities of the future of the mine, of the smelting venture, of the ore conditions, of the ore shipments, and of all other matters upon which she could base an intelligent judgment of the value of her interest. Furthermore, Allen, acting for Mrs. Cardoner, made a study of the statements which Day gave to Mrs. Cardoner, explained them to her, and at her wish solicited Day's interest as a buyer and, after dickering with Day by and with the knowledge of plaintiff, agreed upon terms even to the last debated point of the price for the real estate in Burke.

It is evident that Mrs. Cardoner was a woman of capability and intelligence with more than an ordinary acquaintance with the business of her husband. She had taken necessary steps to defeat the will which her husband had made, and even as far back as 1903 in a proceeding in court she made a statement as to the income of her husband and had recapitulated his mining interests, alleging them then to be of an estimated value of over $2,000,000. It is also shown that, after the administrator turned the property over to her, she herself checked some of the accounts, and, upon discovering a slight discrepancy, asked her agent, Allen, to investigate them. Furthermore, she was not satisfied about selling her interest in the Hercules until she sought the advice of Judge Wood and had conferred with several co-owners in the property. Nor did she agree to sell until after her extended conferences with Allen. Among other circumstances of much weight is the following incident as testified to by Allen: After discussing with plaintiff what a sale on the basis of $5,000,000 would yield to her, he said:

"* * * And then we talked over the Burke real estate and she wanted to clean—she wanted to clean up on her holdings up there in the Cœur d' Alene country, for the reason that she was afraid that this son-in-law would cause her some trouble. I remember a discussion there—she always talked at our home—on dividing the interest in the Hercules with her daughter. And I

asked her about that, and she said: 'Well, if I leave that interest, Pauchet (the son-in-law) will get hold of that and Bertha (the daughter) won't have any good of it. If I take the money for it I can get the money out of their way so that he cannot get his hands on it.' I said, 'Supposing they upset the proceedings of the probate court?' 'Well,' she said, 'I will have my money then. I don't care.'"

This evident desire to "clean up" in the Cœur d'Alene country is also shown by the fact that she took steps to sell her stock in the Wallace Bank & Trust Company which was part of her inheritance from the estate. Allen acted for her in the sale, collected the proceeds, and forwarded them to her on October 19, 1916.

Again, there is the fact that after November 1st, when Day was wholly discharged as administrator, and for over two months thereafter, Mrs. Cardoner made no objection to the sale she had made, and it was after November 1st that she accepted the greater amount paid on account of the purchase price, and thereby gave approval of the transaction and authorized the holder of the escrow deed to deliver it to the grantee, Eleanor Day Boyce.

We also attach significance to the evidence of Mr. Allen, showing that he had a number of meetings with Day during the dickering about the price, "boosting him up," until Allen finally said that if he could not deal with him (Day) he would probably take the matter up with certain other parties who might be interested in it. This evidence harmonizes with that given by Day, who says that he told Allen that, if Mrs. Cardoner thought she ought to get at the rate of $6,000,000 for her interest, he would not pay it, and that if there were other buyers they could take it at that price.

It is fair to say that there were decided conflicts between the testimony of Mrs. Cardoner and Mr. Day. The District Court, however, has resolved the differences in favor of Mr. Day's versions as to material matters; and after analyzing what the witnesses said and weighing all that was done by the parties themselves, including Allen, we are convinced that the conclusions reached are supported by the weight of evidence. A careful study of the whole case leads us to conclude that the plaintiff, an elderly woman, was somewhat apprehensive concerning family affairs, and, not at all unnaturally, wished to convert her property interests into available cash in bank. Of her own volition she sought the advice, not of one, but of a number of those whom she knew and in some of whom she confidently trusted. The character of the principal part of her property and the difficulty of estimating its value appear to have made her friends and others to whom she went exceedingly careful in giving her counsel, and all appear to have advised or conferred with her in the best of faith and with no wish other than to be fair and frank. Possessed of all the knowledge that her friends and advisers and partners had and could give her, she thought it wise to sell for the sum offered, which, under the evidence, appeared at the time to be fair and just and was as near the value of the property as could be well arrived at. In our opinion she has advanced no sound reason why equity should relieve her of her contract.

The decree is affirmed.

PIONEER REDUCTION CO. v. BEEDLE et al.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919.)

No. 3181.

1. SPECIFIC PERFORMANCE ⟸121(4, 11)—EVIDENCE INSUFFICIENT TO SHOW ENFORCEABLE PAROL CONTRACT.
   Evidence *held* not to establish an alleged parol agreement between the parties to share jointly in an enterprise with such certainty as to warrant specific enforcement, and also to show that, if made, complainant was chargeable with bad faith in acting under the agreement, which barred it from equitable relief.
2. SPECIFIC PERFORMANCE ⟸121(1)—PROOF OF PAROL AGREEMENT MUST BE CLEAR TO BE ENFORCEABLE.
   In a suit for specific performance of a parol contract, the evidence must be clear and satisfactory, both as to the existence of the contract and as to its terms.

Appeal from the District Court of the United States for the District of Nevada; Edward S. Farrington, Judge.

Suit in equity by the Pioneer Reduction Company against F. C. Beedle and the Belleville Tailings Association. Decree for defendants, and complainant appeals. Affirmed.

This was a suit in equity, which resulted in a decree in favor of the defendants thereto, and the bringing of it here on appeal by the complainant below. The subject-matter of the controversy is a dump of tailings alleged in the bill to have amounted to about 150,000 tons, one-fifth of which is alleged to have been owned by the Rhodes Mining Company, a California corporation, and the remaining four-fifths by the Argentum Mining Company, an Arizona corporation, of which tailings both the complainant and the defendant Beedle had some knowledge, as well as a desire to acquire them to work for profit. The record shows that three-fourths of the stock of the complainant corporation was owned by Benjamin Hall and the remaining one-fourth by Nicholas Snell, its superintendent—Hall being its president and in control of its operations.

The bill alleges that on or about December 23, 1913, the complainant and the defendant Beedle agreed that the complainant should enter into negotiations for the purchase of the tailings from the owners, and, in the event a purchase could not be effected, for a contract to work them on a royalty basis—which negotiations should be conducted in the name of the complainant, both parties to the agreement, however, to use their joint efforts to secure the tailings, and, if secured, to work them jointly—sharing equally in the expenses and in all profits arising from their treatment and reduction; that in pursuance of that agreement the complainant communicated to the defendant Beedle the results of certain assays and tests which it had theretofore made of the tailings and proceeded to enter into negotiations with the owners of them; that in January, 1914, complainant caused the tailings to be measured, sampled, assayed, and tested at an expense of about $750, and thereafter communicated to Beedle the progress of its negotiations therefor, and that in March, 1914, it reached an agreement with the owners by which the complainant was to have the right to work the tailings on a royalty basis of 45 cents a ton, which agreement was reduced to writing, but not executed; that notwithstanding those facts, of which, it is alleged Beedle was fully informed, the latter on April 3, 1914, entered into a contract with the owners of the tailings by which he was granted the exclusive right to work them on a royalty basis of 50 cents per ton, or to purchase them for $75,000, in consequence of which the owners refused to execute the previously drawn contract with the complainant; that this action on the part of Beedle was clandestine-

ly taken by him for the purpose of defrauding the complainant, and in violation of the alleged agreement of joint adventure; that the defendant Beedle and his codefendant and successor in interest, Belleville Tailings Association, though frequently requested, have refused to fulfill or comply with the terms of the alleged agreement of joint adventure, or to admit the complainant to any participation in the said alleged contract of April 3, 1914; that in May, 1914, the defendant Beedle organized the Belleville Tailings Association as a joint-stock company, to which he soon thereafter made a pretended conveyance of the said tailings and of all his rights under his contract with the said mining companies, the capital stock of which association was divided into 100 shares, of which 36 were issued to Beedle and 59 to other persons, who paid no consideration therefor; that in October of the same year the said Tailings Association was incorporated, and succeeded to the rights and interest of the said joint-stock company; that the defendants to the suit are engaged in reducing the said tailings, having already treated at least 50,000 tons thereof, extracting therefrom metals of the value of $150,000, from which they have realized a profit of $50,000 or more; that in addition to his dividends the defendant Beedle has received $300 a month since May 1, 1914, out of the profits arising out of the treatment of the tailings, one-half of which the complainant alleges belongs to it; that efforts are being made to sell stock of the said association to persons who may not have notice of the complainant's alleged rights; and that if the defendant corporation is permitted to declare and pay a dividend it will be impossible to recover the same, for the reason that some or all of such stockholders are insolvent. The prayer of the bill is, among other things, for an accounting, an order restraining the defendants from treating the tailings or disposing of them, and enjoining the defendant Beedle from disposing of any stock owned or controlled by him in the defendant corporation, and restraining the latter from declaring or paying dividends, and also praying for the appointment of a receiver of the property.

The answer of the defendants, in addition to setting up various affirmative defenses, put in issue, among other things, the alleged contract of joint adventure, and the alleged negotiations for the tailings by and in the name of the complainant, as also the allegations that the latter communicated to the defendant Beedle the results of any samplings, assays, or tests thereof, and the alleged expenditures by the complainant of any moneys growing out of such negotiations, and also denied that the complainant ever reached any agreement with the owners of the tailings for the working or treatment of them, or that the defendant Beedle's contract with the owners was executed clandestinely or in fraud of the complainant.

Miller & Mashburn and A. Grant Miller, all of Reno, Nev., and James Snell, of Grass Valley, Cal., for appellant.

Augustus Tilden, of Reno, Nev., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] There are several reasons why we think the judgment of the court below right, and that it should be affirmed: First, because of that firmly established principle that every party coming into a court of equity, seeking any sort of relief, must do so with clean hands. Hall's own testimony shows very clearly that he was far from doing so, and that he was the active and exclusive agent of the corporation complainant in all of the transactions he practically admits.

Whether the agreement alleged as the basis of the suit be treated as a joint adventure or a partnership, it is obvious that each party to it was bound to observe good faith, and to disclose to the other all of the facts and negotiations regarding their common undertaking.

Prior to their preliminary talk, or agreement, if it may be so termed, which was December 20 or 23, 1913, both Hall (acting for the complainant) and Beedle knew of the tailings in question, had taken samples, and made tests of them, and each had been and was desirous of acquiring and working them, if satisfactory terms could be obtained. In all they had four conversations regarding the matter, at none of which was any third party present. Beedle at the time was working, at a place called Columbus, a small lot of tailings which came from the same mines—Candelaria mines—as the tailings in question, which were located at a place called Belleville. After stating his acquaintanceship and former friendly relations with Beedle, Hall gave this as the substance of his first conversation with him about the matter:

"I asked him how he was getting along with a small lot of tailings he was working at Columbus, Nev., and he said he had about finished them. I stated we were going to take over the Belleville tailings, if we could get a satisfactory price on them. He stated, 'I have been figuring on the Belleville tailings, too.' I stated it would be foolish to figure or bid against each other; it would be better for us to go in together and buy them outright. He says, 'I have not got money enough to buy them outright, but I would be willing to go in with some one who has money enough to buy them.' He said there wasn't much profit in handling small lots, as he had been doing, and that the Belleville tailings was a very large lot of tailings, and it would be worth while, and we ought to make some money out of them; and I said I thought we would do very well with them; and I asked him how far it was from where he was working his tailings to Candelaria, and he told me. * * * I told him what results we had got from our samples; that we had had some samples from the Belleville tailings that had been taken by Mr. Porter. We had made some further tests on them, and gave him the result of the tests; told him we had obtained from 90 to 100 per cent., practically, of the gold, and from 50 to 55 per cent. of the silver; and he stated, that is just what he had been obtaining on the Columbus. He says, 'The silver will not let go;' then he spoke about the plant he had at Columbus that he had been using, and asked if we would be willing to use it. I says, 'Certainly, we will take anything you have over there as part of the expenses; we will use anything you have over there.' We spoke about the treatment of the tailings, about how they would work, and what he thought it would cost. The conversation was quite lengthy. * * * I told him that our assays on the tailings were about a dollar in gold and probably ran about eight ounces in silver. * * * I also stated to him about what I thought we could buy them for, about $30,000 or $40,000 if we paid cash, which would bring them down to about 40 cents per ton. I stated to him about what my idea was about what it had cost us to handle similar material at a plant we were operating in Sutter Creek, told him we had done very well on those tailings, and told him to come out to the works and see us. I stated to him I thought we could handle them at about the same price as on Sutter Creek, on account of handling so many more tons a day. * * * He stated that he would be glad to get in with us, take an interest with us, and he wanted to know if we would take his plant, and I told him that we would use his plant as part of the plant, whatever we could use. I knew what his plant was; a small cyanide plant, as I understood; would handle probably 20 or 25 tons per day."

The substance of the next conversation, which Hall stated occupied a few minutes in January following, when Beedle came into his bank to get a check cashed, he gave as follows:

"In the first conversation he asked me if we had an option on the Belleville tailings, and I said, 'No;' that the tailings had been there a good many years. I didn't think it was necessary to procure an option, and that no one was

likely to come along at this stage and take an option that had not sampled them. * * * I stated that we would prefer to buy them for cash; that we had ample funds to handle them that way, and preferred to handle them in that manner, being more satisfactory to us, and probably to the other parties. It would give us an opportunity to handle the tailings whenever we felt like it; if we didn't want to run it wouldn't make any difference, was my idea. I was speaking for the Pioneer Reduction Company; I always spoke as 'we.' To the best of my recollection I stated to him it would be foolish for us to go and bid one against the other for the tailings, during the first conversation on the 23d of December, and that it would be better for us to go in together, because to bid one against the other would run the price up probably so there wouldn't be any profit for either of us. He answered, 'All right;' he would be glad to go in with us."

Hall then related conversations that he stated he had previously had with Porter regarding the tailings and the amount for which he thought they might be purchased, and subsequent negotiations concerning the same tailings that he had had with one Lane, who, it appears from the record, was acting as a broker in the endeavor to dispose of them to the complainant through Hall, which negotiations with Lane were, according to Hall's own testimony, pending at the time of his first conversation with Beedle. The substance of Hall's third conversation with the latter is thus stated by him:

"After the conversation with Mr. Beedle in the bank, I walked home with him from town, from Nevada City, to where he was stopping, just across the street from where I lived, about ten minutes' walk, and we spoke about the tailings—the extraction. I asked him how long he was going to stay, and he stated he was going to San Francisco in a short time; but he didn't state where he would stop in the city, or what he was going for. I again saw him about ten days after that—it might have been two weeks—at the Good Friend Hotel in San Francisco. All these conversations were prior to the 3d day of April, 1914. In the conversation walking home from town in Nevada City, we spoke about the costs of treatment, and went over pretty near the same ground we had been over before, in regard to the cost, and the extraction, and costs of the plant. He stated he would be glad to go in with us, or glad he was going in with us; he would be pleased to join us as a partner in the enterprise; that was the understanding from his language. * * * I met Mr. Beedle in San Francisco by accident. I didn't know where he was stopping. I sat at the desk writing a letter in the Good Friend Hotel, and Mr. Beedle came, tapped me on the shoulder, and sat right opposite me; and I said, 'Hello, Fred, I didn't know you were here;' and he asked me how we were getting along with the tailings proposition, and I told him just as soon as we had things in shape I would let him know, and that Mr. Nick Snell and Gus Hoffman had gone over to sample them. I don't know that he made any reply; I don't recollect that he did; he turned around and went out. This was on January 17th, I think. During the conversation in Nevada City I said that we would go ahead with the negotiations, speaking for the Pioneer Reduction Company, and try and get them as cheap as we could. He informed me the cheapest price they had made to him was 60 cents a ton, and I had already told him before we thought we could get them for 40 cents. The Pioneer Reduction Company sent Mr. Snell and Mr. Hoffman to Belleville to sample the tailings. During the time they were sampling them, I went over there and assisted in measuring and estimating the tonnage. I was there about three or four days, and then returned to Nevada City. Mr. Snell and Mr. Hoffman remained there until they finished sampling the tailings, and then they shipped to the Pioneer Reduction Company at Nevada City about 600 pounds of samples. After they arrived in Nevada City, which was probably a week or ten days after we had finished sampling, we proceeded to make determinations as to the extraction, and approximate the cost of treatment in regard to the amount of chemicals that would be used; and

after finishing all our determinations, I went to San Francisco to see the Rhodes Mining Company, prepared to make them an offer for the tailings. The first offer that I made to them was 40 cents a ton, stating that the tonnage did not appear to be as much as they had informed us it was. We didn't think it was over, at the outside, 100,000 tons, and probably less than that; that in view of these conditions we thought 40 cents a ton would be a fair price. Mr. Lane, who was there at the time, stated that that was much cheaper than he thought they could be bought for. Mr. Lane and Mr. Scrivner were present. Mr. Lane was there first, and when I told him we would offer 40 cents a ton, we went to see Mr. Scrivner, who was the representative of the Rhodes Mining Company."

Mr. Scrivner, as appears from the record, was a lawyer, and, as stated by the witness, represented the Rhodes Mining Company, which owned an undivided interest in the tailings, and Judge Denson the record shows was the attorney of the Argentum Mining Company, the owner of the other undivided interest in them, the president of which latter company, and its representative was located at Colorado Springs. It appears without dispute that through those attorneys and Lane Hall was endeavoring to secure the tailings at the time he saw Beedle in San Francisco, and had the opportunity to convey to him all the information he had regarding the matter, and to which information Beedle was manifestly fairly entitled, if there was really any existing agreement between them. Hall's account of that interview is given above, which is in material conflict with the following account of it given by Beedle, after referring to a part of their previous conversation:

"I told Mr. Hall I was going away for a couple of weeks, and he wanted to know where I was going. I told him San Francisco. He wanted to know how long I would be down, and I told him a couple of weeks. He said he would be down in about a week, and he wanted to know, if we could make satisfactory arrangements for these tailings, if I would go over with him from San Francisco and sample them, and I told him I would if we could get an option on them. He said he didn't think any one would bother with them; they had been laying there so many years; and he said, 'I will see what we can do.' Our understanding was that I was to meet him in San Francisco, and we would go together to Belleville and sample the tailings. By satisfactory arrangement I referred to the price of the tailings, lease, and bond, and terms. I met Mr. Hall at the Good Friend Hotel in San Francisco January 15th or 16th. He said he had an option on the Belleville tailings for 30 days. He didn't say who he got it from. I said: 'How does this happen? You agreed to go to Belleville with me and sample these tailings; have you changed your plans?' He says, 'I don't know what I will do yet.' I says, 'You are not going to Belleville with me to sample the tailings?' He said, 'No, I can't go.' He told me nothing about the price of the option, from whom it was received, or any of its terms, or whether it was written or oral."

It is evident, we think, that neither Hall nor Beedle then considered that there was any definite agreement between them, but, if so, that each was acting in bad faith towards the other, in which latter event neither has any standing in a court of equity. This is, in our opinion, made perfectly plain by the fact that Beedle shortly afterwards, to wit, on April 3, 1914, without the knowledge of Hall, acquired a lease on the tailings for himself, through negotiations with the representative of the Argentum Mining Company at Colorado Springs, and by the

fact that Hall, according to his own testimony, 15 days after Beedle had obtained the lease, wrote this letter:

"F. C. Beedle, Goldfield, Nevada—Dear Friend: Have the matter of the Belleville tailings in such shape that I think we shall soon be in a position to start operations; am writing to you as I stated, to know what interest you wish to take with us and on what terms and conditions. Of course, you will understand that you come in at the same price as ourselves, actual cost. We have two other propositions, of equal magnitude, under way, and therefore shall be glad to hear from you as promptly as possible. I believe we can all do well on the Belleville tailings, under the condition of our option. With kindest regards to yourself and family, I remain."

The inquiry made of Beedle in that letter by Hall, to know what interest he wished to take with Hall's company, and on what terms and conditions, taken as written, is perfect confirmation of the contention on the part of the appellee that no definite agreement ever had been entered into between them respecting the tailings. But Hall in his testimony undertook to explain the inquiry by saying in effect that he deliberately made it as a "decoy" for the purpose of getting "an expression from Mr. Beedle of his conduct." If the purpose be conceded, it is not of a character to appeal to the favorable consideration of a chancellor, for courts of equity always require of all parties before them good faith and fair dealing.

As will have been seen from the statement of the case, the complaint alleged, among other things, that both parties to the agreement were to use their joint efforts to secure the tailings, and if secured to work them jointly—sharing equally in the expenses and in all profits arising from their treatment and reduction; that in pursuance of that agreement the complainant communicated to the defendant Beedle the results of certain assays and tests which it had theretofore made of the tailings, and proceeded to enter into negotiations with the owners of them; that in January, 1914, complainant caused the tailings to be measured, sampled, assayed, and tested at an expense of about $750, and thereafter communicated to Beedle the progress of its negotiations therefor.

Notwithstanding the foregoing allegations of the complaint, which was verified by Hall, and notwithstanding it appears from the evidence without conflict that Hall had promised to pay Lane $1,500 for his services as broker in the matter, had obtained quotations on tanks and for 15,000 feet of pipe, had caused the tailings to be carefully measured and sampled, sending 600 pounds thereof to Nevada City, and there worked and tested in many ways during a period of several weeks, there is, as said by the court below, nothing in the record even tending to show that Beedle was ever informed or consulted in respect to a single one of those proceedings on the part of Hall, except the statement of the latter in the interview at the Good Friend Hotel in San Francisco, that Snell and Hoffman had gone to Belleville to sample the tailings, and that Beedle would be informed as soon as things were in shape.

Whether or not such conduct on the part of Hall was sufficient, or any justification for the ignoring of him by Beedle in obtaining the lease for himself, it is unnecessary for us to decide. What we

hold is that the conduct of Hall, acting for the appellant, was such as to preclude a court of equity from granting it any relief.

[2] Moreover, it is not even contended that the evidence shows that there was anything specific or definite in respect to the alleged parol agreement. We think it unnecessary to cite the many authorities that might readily be cited to show that the court below did not err in holding that in such a case it is essential that the evidence be clear and satisfactory, both as to the existence of the contract sought to be enforced, as well as to its terms, and in accordingly denying the decree for specific performance thereof.

Entertaining these views, we need not make reference to any of the other points made and argued by counsel.

The judgment is affirmed.

SHEA v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919.)

No. 3311.

1. CRIMINAL LAW ⟸863(1)—ADDITIONAL INSTRUCTION AFTER SUBMISSION OF CASE PROPER.
   The giving of an additional instruction in a homicide case, after the jury had been out 30 hours, urging an agreement, if possible, on account of the expense and defendant's right to a speedy trial, *held* not error, where the judge did not ask the jury how they stood and expressed no opinion on the merits.
2. CRIMINAL LAW ⟸1151—REFUSAL OF CONTINUANCE IN DISCRETION OF COURT.
   The refusal of a continuance in a criminal case *held* not reversible error; the matter being one of discretion for the trial court.
3. CRIMINAL LAW ⟸785(16)—INSTRUCTION AS TO WITNESS TESTIFYING FALSELY CORRECT.
   The giving of an instruction in a criminal case, expressly provided for by statute, that a witness willfully false in one part of his testimony may be distrusted in others *held* not error; the court following the language of Code Civ. Proc. Alaska, § 673, stating the points on which a jury should be instructed.

In Error to the District Court of the United States for the Third Division of the District of Alaska.

Criminal prosecution by the United States against John Shea. Judgment of conviction and defendant brings error. Affirmed.

O. P. Hubbard, of Valdez, Alaska, and John F. Dore, of Seattle, Wash., for plaintiff in error.

William A. Munly, U. S. Atty., of Valdez, Alaska.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was charged with the murder of Rance W. Book on November 14, 1917, at Cordova, Alaska. Some ten days prior to the homicide Book had married a woman who was the divorced wife of the plaintiff in error. She had

gone to Seattle in October of that year and had met the plaintiff in error and agreed to resume the former relation. She returned to Cordova, intending, as she said, to sell her property and thereafter rejoin the plaintiff in error at Seattle. About three weeks later the plaintiff in error followed her to Cordova, and on the day on which he arrived he shot and killed the man whom she had married. The plaintiff in error was adjudged guilty of murder in the second degree. To reverse that judgment he brings this writ of error.

[1] Error is assigned to the following instructions given to the jury after they had deliberated for a time upon their verdict and were brought into court upon the court's order:

"You have now been out about 30 hours on this case, and while I have no doubt that any differences between you are honest and sincere, I want to call your attention to the fact that in no case can absolute certainty be expected. * * * If a large number or majority are of a certain opinion, the juror dissenting should carefully consider whether his doubt or difference from such opinion is a reasonable one, which makes no impression upon the minds of so many men equally honest and equally intelligent as himself. Upon the question of the expense in the trial of this case, I deem it proper to call your attention to the fact that this case has involved a very great expense upon the government. A large number of witnesses have been called from their homes and business important to themselves already for a considerable time; that they reside at Cordova, and a steamer is expected to pass through Valdez en route to Cordova within the next 12 hours, and there will probably not be another steamer for a week or more; also, in connection with the matter of expense, I call your attention to the difficulty of getting qualified jurors in a case of this kind, in so small a community, after so many have been disqualified, having already been called and excused on this case. We all desire to see justice administered, honestly and fairly. At the same time, justice to both the government and defendant requires that it be not attended with too great outlay or expense. The defendant has already been in custody over six months, and is entitled to have the case speedily determined. I call these facts to your attention as matters for your careful and honest consideration; but I wish to impress upon you that nothing that I have said should be understood as seeking to influence the conscientious and honest opinion which you or any one of you, as reasonable men, may entertain. If you have a reasonable doubt of the defendant's guilt, as the same is defined to you in the instructions already given, you should acquit the defendant; if you have not, you should convict him, and the degree of the crime is a matter which should not cause you to entirely disagree and fail to reach a proper verdict."

We are not convinced that the court in so instructing the jury committed reversible error. In 16 C. J. 1091, it is said:

"It is proper for the court, after the jury have deliberated for some time, to recall them to ascertain why they cannot agree, and to inquire as to whether there is any likelihood of an agreement. Providing nothing is said to coerce an agreement, or to indicate what verdict should be rendered, or that may be considered as an appeal to the jury to decide the case in some way even at the expense of honest convictions, the court may give the jury further instructions or advice calculated to assist them in coming to an agreement, may call their attention to the time taken in the trial and the great expense incurred therein, or which would be incurred by a retrial, may impress upon them the importance of the case, and urge them strongly to come to some agreement."

We do not think that the instruction here in question was more coercive or more invasive of the province of the jury than the instruc-

tion to the jury in United States v. Allis (C. C.) 73 Fed. 182, which was approved in Allis v. United States, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91, where the court said:

"It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment."

Again in Allen v. United States, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528, the court approved an instruction of the court in which the jury were told it was their duty to decide the case if they could conscientiously do so, and that they should listen, with a disposition to be convinced, to each other's arguments; that in case the larger number were for conviction, a dissenting juror should consider why, if his doubt was a reasonable one, it made no impression upon the minds of so many other men equally honest and equally intelligent with himself. The court said:

"It certainly cannot be the law that each juror should not listen with deference to the arguments, and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself."

In Suslak v. United States, 213 Fed. 913, 130 C. C. A. 391, this court reviewed and held proper instructions to the jury not dissimilar from those which are here under review.

The plaintiff in error relies upon Peterson v. United States, 213 Fed. 920, 130 C. C. A. 398, in which we held certain instructions to the jury reversible error. In that case the court had inquired of the jurors as to how they were divided, and was informed that they stood five to seven; thereupon the court said to the jury, among other things, "The government has a right * * * to a verdict without further expenditure of time and money," and in conclusion the court expressed the belief that the jurors could honestly come to an agreement. We adverted to the fact that nowhere did the court make it clear that, however desirable it might be to avoid another trial and finally to terminate the prosecution, an agreement should not be reached in violation of the honest conviction of any one of the jurors.

In the case at bar there was no inquiry as to how the jury stood. Early in their deliberations they had asked for an instruction as to the relative punishment of murder in the first degree and manslaughter. This indicates that the jury were deliberating only upon the degree of the crime of which they should find the defendant guilty. Upon that question the court gave the instruction which is principally relied on for reversal and said:

"The degree of the crime is a matter which should not cause you to entirely disagree and fail to reach a proper verdict."

But at the same time the court charged the jury that if they had a reasonable doubt of the defendant's guilt they should acquit him, and

took pains to impress upon the jury that nothing that had been said should be understood as seeking to influence the conscientious and honest opinion which they or any one of them as reasonable men might entertain.

[2] Error is assigned to the denial of the motion of plaintiff in error for a continuance. The affidavits in support of the motion stated that the plaintiff in error had resided at Seattle for many years, and that his general reputation for peaceableness and orderly conduct was good; that a witness, Mary E. Book, was formerly his wife, visited Seattle, and registered at a hotel in the name of Mrs. John Shea, and sent for him to come and talk over their differences and troubles with a view to renewing the marriage relation; that an adjustment of their differences took place, and Mary E. Book stated that she would return to Cordova, and sell her personal effects, and come back to Seattle; and that those facts could be proven by four witnesses who were named; and the plaintiff in error made further affidavit that he was not possessed of sufficient means to bring the witnesses from Seattle, and was unable to pay the costs and expenses thereof. The affidavits failed to state that the facts so sought to be proved could not be established by other witnesses procurable at or near the place of trial, and in fact the substance of what he stated would be proven as to his relations with Mary E. Book were admitted by her on the trial.

In Isaacs v. United States, 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229, it was held that the action of a trial court upon an application for continuance is purely a matter of discretion unless it is clearly shown that discretion has been abused. In Crumpton v. United States, 138 U. S. 361, 11 Sup. Ct. 355, 34 L. Ed. 958, it was held that it is a matter of discretion with the trial court and not reviewable on writ of error whether, in a criminal case, a court will grant an application for process for witnesses and will delay trial pending the execution of the process. And in Goldsby v. United States, 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343, the court said:

"The right to summon witnesses at the expense of the government is by the statute (Rev. St. § 878 [Comp. St. § 1489]), left to the discretion of the trial court and the exercise of such discretion is not reviewable here."

In view of these authorities, we think the ruling of the court below is not reversible error.

[3] We are asked to take notice of an alleged error in the instructions to the jury, notwithstanding that no exception was taken thereto. The court instructed the jury that a witness who is willfully false in one part of his testimony may be distrusted in other parts. There was no error in this. The court followed the provisions of chapter 65 of the Code of Alaska, § 673, stating the points on which a jury are to be instructed, one of which is "that a witness willfully false in one part of his testimony may be distrusted in others." Similar instructions under similar statutes have been sustained in State v. Connors, 37 Mont. 15, 94 Pac. 199, State v. Kyle, 14 Wash. 550, 45 Pac. 147, and People v. Sprague, 53 Cal. 491.

We find no error. The judgment is affirmed.

MAGON et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919.)

No. 3318.

1. INDICTMENT AND INFORMATION ⟸129(1)—JOINDER OF COUNTS RELATING TO SAME TRANSACTION.
Counts charging publishing an article in a foreign language tending to cause insubordination and refusal of duty in the military forces, and to discourage enlistments, and also containing anarchistic propaganda, of sending such article through the mails without first filing an English translation thereof with the postmaster, and of conspiracy to commit such offenses, *held* properly joined in the same indictment, under Rev. St. § 1024 (Comp. St. § 1690), providing for the joinder of counts relating to same transaction.

2. INDICTMENT AND INFORMATION ⟸125(5½)—FOR CONSPIRACY NOT DUPLICITOUS.
A count in an indictment for conspiracy is not duplicitous, because the conspiracy charged is to violate several separate and distinct statutory provisions.

3. CRIMINAL LAW ⟸371(1)—EVIDENCE OF OTHER OFFENSES ADMISSIBLE TO SHOW INTENT.
In a prosecution for unlawfully using the mails for circulating seditious and anarchistic matter, and for conspiracy to commit such offenses, speeches and other publications of defendants, unquestionably seditious and anarchistic, *held* admissible on the question of intent.

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

Criminal prosecution by the United States against Ricardo Flores Magon and Librado Rivera. Judgment of conviction, and defendants bring error. Affirmed.

The indictment under which the plaintiffs in error were convicted in the court below contained six counts, to the second of which a demurrer was sustained, and it is here contended by their counsel that none of the others stated any criminal offense against either of the defendants thereto.

In substance, the first count charges that the defendants, on or about March 1, 1918, at the city of Los Angeles, did willfully, unlawfully, and feloniously conspire together to write and cause to be written and published an article containing false reports and false statements which would tend to interfere with the operation and success of the military and naval forces of the United States, promote the success of its enemies, cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, and obstruct the recruiting and enlisting services of the United States, all contrary to certain specified provisions of the laws of the United States, which article would be printed, published, and circulated in the Spanish language, without first filing an English translation thereof with the postmaster of the city of Los Angeles, and which article they would publish and cause to be published in the newspaper called "Regeneracion," and which article so published they would deposit and cause to be deposited in the post office establishment of the United States for mailing and delivery, and which article the defendants intended should contain indecent matter and language; that in pursuance of the said conspiracy the said defendants did, on or about March 16, 1918, publish and cause to be published in said newspaper "Regeneracion" a certain manifesto signed by themselves, specifically set out in the first count in Spanish, with an English translation thereof,

which manifesto was addressed to the members of the "Mexican Liberal Party," and "the anarchists of the whole world and the working men in general," the substance of which manifesto was and is strongly anarchistic, and was and is in violation of the provisions of the acts of Congress known as the Espionage Act (Act June 15, 1917, c. 30, tit. 1, 40 Stat. 217 [Comp. St. §§ 10212a–10212h]), the Trading with the Enemy Act (Act Oct. 6, 1917, c. 106, 40 Stat. 411 [Comp. St. §§ 3115½a–3115½j]), and section 211 of the Penal Code as amended (Act March 4, 1909, c. 321, 35 Stat. 1129, as amended [Comp. St. § 10381]).

The third count charged that the defendants on March 16, 1918, at the city of Los Angeles, when the United States was at war, did knowingly, unlawfully, and feloniously cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States by then and there publishing and causing to be published in the paper there printed and published known as "Regeneracion" the article set out in the first count of the indictment, which article, by such reference, was made a part of the third count.

The fourth count charged that the defendants on the same day and at the same place did knowingly, unlawfully, and feloniously use and attempt to use the United States mails for the transmission of the said nonmailable matter by then and there depositing and causing to be deposited in the post office at Los Angeles, for delivery, the said newspaper "Regeneracion," addressed to "Luz Esparza Staples, Guadalupe Co., Tex.," which paper contained the article set out in the first count, and was by such reference made a part of the fourth, with the further averment that it contained matter urging treason, insurrection, and forcible resistance to the laws of the United States.

The fifth count made similar charges against the defendants, with the additional averment that the said newspaper "Regeneracion" contained "an editorial respecting the government of the United States, the present war, the policy of the United States, and the state and conduct of the war," and was printed, published, and circulated in the Spanish language "without first having filed with the postmaster at Los Angeles, California, in the form of an affidavit, a true and correct and complete translation of the entire article aforesaid."

The sixth and last count charged that the defendants at the time and place already stated did willfully, unlawfully, and feloniously deposit and cause to be deposited in the post office the said newspaper "Regeneracion," addressed to "Mrs. S. E. Raybon, 1107 Tampa St., Tampa Fla.," which paper contained certain indecent substance and language and which said newspaper was a publication of an indecent character, tending to incite in the minds of persons reading the same murder and assassination, and which said substance and language was so printed and published in said "Regeneracion" in the Spanish language, and is, with a true and correct translation thereof, set out in the first count, and, by reference, made a part of the sixth.

J. H. Ryckman, Chaim Shapiro, and S. G. Pandit, all of Los Angeles, Cal., for plaintiffs in error.

Robert O'Connor, U. S. Atty., and W. F. Palmer, Asst. U. S. Atty., both of Los Angeles, Cal.

ROSS, Circuit Judge (after stating the facts as above). [1] It is clear that all of the acts charged against the defendants were connected together and concerned the same transactions, and were therefore of the same class of offenses. In such circumstances it is expressly declared by statute that they may be included in the same indictment, the statute being:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which

may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated." Rev. St. § 1024 (Comp. St. § 1690).

See Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; Glass v. United States, 222 Fed. 773, 138 C. C. A. 321; Sidebotham v. United States, 253 Fed. 417, 165 C. C. A. 159.

[2] It is contended for the plaintiffs in error that none of the facts alleged in counts 1, 3, 4, 5, and 6, constitute an offense against the United States, and complaint is also made of "the duplicitous character of the indictment." We see nothing duplicitous about it. The fact that the first count alleges a conspiracy to violate three separate and specific provisions of the federal statutes in no respect makes it duplicitous. There is but the one crime charged in that count, namely, conspiracy; the number of its objects is wholly immaterial. Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561, decided March 10, 1919, and cases there cited; and see the numerous cases cited in Jelke v. United States, 255 Fed. on page 275, —— C. C. A. ——. In each of the other counts in question the charge is the unlawful depositing in the post office establishment of the government of copies of the nonmailable matter specifically set out in the first count.

[3] It is assigned as error that the trial court admitted in evidence, over the objections of the defendants, a speech made by the defendant Magon March 27, 1917, and published in his paper "Regeneracion" July 28, 1917, and in the like admission, over like objections, of a letter from one Emma Goldman, of date February 6, 1918, and likewise published March 6, 1918. The speech of the plaintiff in error Magon was delivered at a meeting in the city of Los Angeles organized by the "International Workers' Defense League in Defense of Comrades Raul Palma and Ogilon Luna," who, it appears from the speech, were arrested by some members of the police of the city for views spoken by them "to the workers congregated at the Plaza."

In the speech of Magon, which was admitted in evidence, he not only admitted that he is an anarchist, but boasted that "the words of the anarchists are words of truth and justice"; that they—

"hurt all of those who live from the labor of others; our words hurt the parasites, the useless and noxious beings who suck the blood of the people; the clergyman, the bourgeois, and the ruler; these are the ones who are injured by our words. So much the worse for them, so much the better for us! That the country is at war, and that is why we cannot talk. Bully reason this!"

In a very recent case, Mead v. United States, 257 Fed. 639, 642, —— C. C. A. ——, we had occasion to say that free speech in times of war is by no means the same thing as free speech in times of peace, and in a late case the Supreme Court held precisely the same thing in effect. In the same speech of the plaintiff in error Magon, which it is claimed was erroneously admitted in evidence, he further said, among other things:

"We, the anarchists, cannot shut up; we shall not shut up. So long as injustice reigns, our voice shall be heard. * * * Go on, you haughty

overlords, swallow your order, for we, the anarchists, are not disposed to obey it; we cannot shut up, we will not shut up, and we shall speak, cost what it may. * * * Above your caprice is our right, right which we do not owe to you, but to nature, which has endowed us with a mind to think, and in the defense of a right, understand it well, we are ready for anything, and to face it all, be it the dungeon or the gallows. Don't forget that right, no matter how much you may mutilate it, no matter how much you may crush it, no matter how much you may try to annihilate it, when it is persecuted the most, and when you are proudest of your triumph, it roars its vengeance in dynamite belches lead from the barricade."

The Goldman letter, written while the writer of it was imprisoned, published in the "Regeneracion" by Magon and circulated by the other plaintiff in error, was in advocacy of the same general principles, and urged her "Dear Faithful Friends" to whom it was addressed, among other things, to spread her "Bolsheviki pamphlet in tribute to their great courage and marvelous vision and for the enlightenment of the American people," and concluded with these words:

"Good-bye, dear friends, but not for long—if the spirit of the Bolsheviki prevails. Long live the Bolsheviki! May their flames spread over the world and redeem humanity from its bondage!"

We think it does not admit of doubt that both the speech and the letter were properly admitted in evidence, as bearing on the intent with which the plaintiff in error Magon published and the other plaintiff in error aided him in depositing the publication in the mail.

The judgment is affirmed.

SOUTH BUTTE MINING CO. v. THOMAS et al.*

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919.)

No. 3256.

1. MINES AND MINERALS ⟸16—ONLY KNOWN LODES EXCLUDED FROM PLACER CLAIMS.

Under Rev. St. § 2333 (Comp. St. § 4632), relating to placer claims, it is only veins or lodes, the existence of which is known at the time of application for the placer patents, that are excepted therefrom in the event they are not applied for and granted upon the additional payment required.

2. CONTEMPT ⟸20—IN DISREGARDING DECREE.

Where the federal court quieted the title of a holder of a placer patent as against one who located a lode claim within the limits of the placer patent, and sought to sustain the location on the ground that the lode was known at the time the placer patent was issued, such decree is conclusive on the lode claimant, and for him to attempt to secure a lode patent from the Land Department is contemptuous conduct, and cannot be excused on the ground that the issuance of a lode patent would destroy the effect of the decree quieting title, for the question ultimately is one for the courts.

3. CONTEMPT ⟸28(1)—LACK OF CONTUMACY AS AFFECTING SENTENCE.

The failure of the record to show contumacy on the part of the contemnors is a proper circumstance to be considered in assessing the punishment for contempt.

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

*Rehearing denied January 5, 1920.

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Suit by the South Butte Mining Company against Thomas B. Thomas and others. After a decree in its favor, complainant filed a petition for a rule requiring defendants to show cause why they should not be punished for contempt. From a judgment dismissing the contempt proceedings, complainant appeals. Reversed and remanded.

John A. Shelton, of Butte, Mont., for appellant.

Thomas B. Thomas, of Oakland, Cal., pro se.

Peter Breen, J. R. Jackson, N. A. Rotering, and H. K. Jones, all of Butte, Mont., for appellees Bucher and Wuerch.

Mrs. Percy William Anstett, pro se.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The appeal in this case is from the judgment of the court below that certain proceedings taken by the appellees, and hereinafter specified, did not constitute a violation of an injunction theretofore granted by final decree of the same court in the suit of the present appellant against the appellee Thomas, and dismissing the contempt proceedings that had been instituted against him and his grantees, the other appellees herein.

The suit in which the injunction was awarded was brought by the present appellant in the court below against the present appellee Thomas, to quiet its alleged title to certain placer mining claims in the state of Montana which had prior to June 9, 1906, been patented to the predecessors in interest of the mining company, in which suit the then defendant Thomas filed in addition to his answer a cross-bill, alleging that within the boundaries of the patented placer claims he entered, on or about December 1, 1909, then being a qualified citizen of the United States, and made a discovery therein of a vein of mineral-bearing quartz or rock in place showing a well-defined wall, and immediately thereafter located the same under the name Resurrection quartz lode mining claim, specifically describing it and alleging it to be the identical Resurrection quartz lode mining claim of which complaint was made in the bill, and that within 30 days thereafter he filed for record the certificate of such location, duly verified, as required by law.

The cross-bill further alleged, upon information and belief, that at the time of the respective applications for the placer patents the said Resurrection vein or lode was well known, and was of such a character as justified exploitation and the expenditure of money and time in developing the same, all of which was well known to the predecessors in interest of the complainant at the time of their respective applications for the placer patents; that subsequent to December 1, 1909, the cross-complainant performed the required annual work upon the said alleged Resurrection lode claim, and in all respects complied with the law relating thereto. Its prayer was that the bill be dismissed, and that the alleged title of the cross-complainant to the said lode claim be quieted. That suit resulted in a decree for the

complainant, and was brought here on appeal, where it was affirmed; the case being reported in 211 Fed. 105, 128 C. C. A. 33.

[1] As shown by the opinion of this court, the evidence offered by the mining company showed its title to the lands described in the bill by virtue of the placer patents, which were issued at different dates, all of which were prior in time to the location of the lode claim, and the proof on the part of the then appellant Thomas consisted—

"of a certified copy of the certificate of location of the Resurrection lode claim, recorded on January 7, 1910, and an amended statement of the location thereof, recorded January 28, 1910; a certified copy of the location notice of the Morning Star lode claim, of date July 2, 1877; a certified copy of the location notice of the Green copper lode claim, of date January 1, 1891; a certified copy of the location notice of the Pay Streak lode mining claim, of date August 2, 1881; also a map purporting to show the location of these various lode claims, and showing that the Pay Streak lode claim covered a portion of the ground which was subsequently embraced within the Resurrection quartz lode mining claim; that the Green copper lode claim adjoined the end thereof, and that the Morning Star was distant therefrom."

There was no evidence, other than the copies of the location notices of the three lode mining claims mentioned, to prove that, at the time when the predecessors in interest of the South Butte Mining Company made applications for the placer patents, any veins or lodes of quartz or other rock in place bearing valuable mineral deposits were known to exist. In holding the evidence of the cross-complainant insufficient to overcome the case made by the placer patents, we said:

"First, the application for the appellee's placer patent for the land within which the Resurrection claim is located is prior by 4 years to the Pay Streak location, and 14 years prior to the Green copper location; second, the mere fact that mineral lode locations were made is not proof that the ground on which they were located contained a vein or lode within the meaning of section 2333 of the Revised Statutes (U. S. Comp. St. 1901, p. 1433). A mere location of an alleged vein or lode is not sufficient to prove that a vein or lode was known to exist. Migeon v. Montana Central Ry. Co., 77 Fed. 249, 23 C. C. A. 156. The lode or vein which is known to exist, so as to be excluded from the patent, must be one which contains mineral of such extent and value as to justify expenditures for the purpose of extracting it. Migeon v. Montana Central Ry. Co., 77 Fed. 249, 23 C. C. A. 156; Casey v. Thieviege, 19 Mont. 342, 48 Pac. 394, 61 Am. St. Rep. 511."

The statute which lies at the foundation of the case is section 2333 of the Revised Statutes (Comp. St. § 4632), which reads as follows:

"Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or

lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

Long before the present case arose this court had occasion to construe that section, in the case of Migeon et al. v. Montana Cent. Ry. Co., 77 Fed. 249, 23 C. C. A. 156, where we said of it:

"This section of the statute was primarily intended for the benefit and protection of the locators of placer claims. If a lode is known to exist within the boundaries of a placer claim, the applicant for a patent must state that fact, and then, by paying $5 an acre for that portion of the ground, and $2.50 an acre for the balance, a patent will issue to him, covering both the lode and placer ground; but, if the lode is known to exist, and is not included in the application for a patent, then it will be construed as a conclusive declaration that the owner of the placer claim has no right of possession, by virtue of his patent for the placer ground, to the vein or lode. It matters not whether there is a lode or vein actually within the limits, which subsequent developments may prove, if it is not known to exist at the time of the application, the patent for the placer claims will include such lode or vein. In such cases the Supreme Court has repeatedly declared that it is not enough that there may have been some indications, by outcropping on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other precious metals to justify their designation as 'known veins or lodes'; that, in order to meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. Mining Co. v. Reynolds, 124 U. S. 374, 383, 8 Sup. Ct. 598, 603 [31 L. Ed. 466]; U. S. v. Iron Silver Min. Co., 128 U. S. 674, 683, 9 Sup. Ct. 195, 199 [32 L. Ed. 571]; Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 143 U. S. 394, 404, 424, 12 Sup. Ct. 543, 553 [36 L. Ed. 201]; Sullivan v. Mining Co., 143 U. S. 431, 12 Sup. Ct. 555 [36 L. Ed. 214]; Brownfield v. Bier [15 Mont. 403] 39 Pac. 461, and authorities there cited This construction as to the meaning of section 2333 is, in our opinion, founded in reason, and is in harmony with the construction given by the courts to the other sections of the statute relative to the rights of locators of mining claims upon the public lands of the United States. But, in any event, the rule, as above stated, is now too well settled to be departed from.

"The decisions of the Supreme Court upon controversies arising between mineral claimants on one side and parties holding town-site patents on the other are applicable to this class of cases. The doctrines therein announced are directly in line with the cases we have referred to. In such character of cases the court has repeatedly declared that, under the acts of Congress which govern such cases, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect; but they must at that time be 'known' to contain mineral of such extent and value as to justify expenditures for the purpose of extracting them and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. Deffebach v. Hawke, 115 U. S. 393, 404, 6 Sup. Ct. 95, 101 [29 L. Ed. 423]; Davis' Adm'r v. Weibbold, 139 U. S. 507, 525, 11 Sup. Ct. 628, 635 [35 L. Ed. 238]; Dower v. Richards, 151 U. S. 658, 663, 14 Sup. Ct. 452, 454 [38 L. Ed. 305]."

As will be seen from the cases cited, it is only veins or lodes the existence of which is known at the time of the application for the placer patents that are excepted therefrom, in the event they are not applied for and granted upon the additional payment required; so that, even had the patents in question in terms exempted therefrom all veins or lodes within their boundaries, known to exist at their date or at any other time after the application therefor, such attempted ex-

tension of the statutory exemption would have been absolutely void and of no effect. Iron Silver Min. Co. v. Mike & Starr Co., 143 U. S. 394, 402, 419, 12 Sup. Ct. 543, 36 L. Ed. 201; Roberts v. Southern Pacific Co. (C. C.) 186 Fed. 934, 936.

[2] But what the present appellee Thomas and his coappellees, who derived whatever rights they have, if any, from him, undertook to do, according to the record, was—notwithstanding the final decree of the court below, affirmed by the judgment of this court, quieting the title conveyed by the placer patents to the whole of the ground covered by them—to make subsequent application to the Land Department for the government title to the aforesaid Resurrection lode claim, upon the ground that it was a known lode at the time of the application for the respective placer patents. It was that precise fact that Thomas had the opportunity to prove, and actually undertook to prove, in the suit to quiet the title to the whole of the property embraced by the placer patents, and which he wholly failed to do, as has been shown, resulting in the final decree against him. To permit him, or any of those claiming under him, to again litigate or assert that claim in any forum or department of the government, would, in our opinion, be a clear violation of the fundamental principle that the final decree of every court having jurisdiction of the parties and of the subject-matter is thereafter conclusive of all matters so actually litigated and determined.

The views of the learned judge of the court below, controlling his judgment here appealed from, may be seen from the following excerpt from his opinion:

"In the Realty Co. Cases [D. C.] 218 Fed. 963, and [D. C.] 215 Fed. 999, this court referred to the discord between cases involving placer patents and cases involving other land patents determined by the Supreme Court, and the grave consequences to placer patentees. By these Supreme Court decisions in the former cases it is settled that, though a placer applicant submits proof of no known lodes and pays for the entire area within the bounds of his claim the patent conveys no title to known lodes within that area. Title to them remains in the United States. They are public mineral lands, open to future identification, location and patent, and of course subject to no laches or limitations. The placer patent is valid, and to no extent void or voidable; the known lodes being exceptions, reservations, exclusions, even as the like in any grant or deed. Congress has vested the Land Department with exclusive jurisdiction, so far as finality is concerned, to determine the character of public lands. No court decision thereon is binding upon said Department. Despite the decree in the instant case, the Land Department can determine that the lode is a 'known lode'—can patent it. And if it does so, not ex parte, but upon due notice and hearing, its decision is final, binding everywhere, and makes of said decree a scrap of paper. Vide the case first cited, wherein subsequent to placer patent issued by it, and within the patent's bounds, the Department issued 12 patents for lodes by it determined to be 'known lodes'!"

The views so expressed we think erroneous, for two reasons: First, because they entirely overlook or ignore the conclusive effect of the final decree that has been alluded to; and, secondly, because of the notion thereby indicated that—

"Despite the decree in the instant case, the Land Department can determine that the lode is a 'known lode'—can patent it. And if it does so, not ex parte, but upon due notice and hearing, its decision is final, binding everywhere, and makes of said decree a scrap of paper."

Iron Silver Mining Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155, presented a case in ejectment, where both parties had a patent from the government; the defendant to the action a patent for a placer claim, and the plaintiffs a patent for a lode claim on the same ground. The case was tried in the lower court without a jury, resulting in findings of fact and a judgment for the plaintiffs. The findings and conclusions of the trial court were in part as follows:

"That the mining ground and property described in the pleadings in this action were a part of the public domain of the United States until the title thereof passed out of the United States by the issuing of patents, as hereinafter set forth.

"That the said patent of the Sierra Nevada lode mining claim was issued to the said plaintiffs and their grantors and predecessors in interest at the time thereto stated, and by duly executed and recorded deeds of conveyance the title to the land mentioned and described in the said patent and the complaint in this action has been conveyed to and is seized, owned, and possessed by the said plaintiffs, and was so seized, owned, and possessed by them at the time of the commencement of this action.

"That on the 13th day of November, 1878, said William Moyer duly made application in the proper United States land office to be allowed to enter and pay for a patent for said William Moyer placer mining claim, being survey lot No. 300 and mineral entry No. ——; that on the 21st day of February, 1879, said William Moyer was allowed to and did make entry in said land office of the United States, and paid for the said placer claim, and that on the 30th day of January, 1880, the said William Moyer placer patent was issued to the said William Moyer for the tract of land described in said placer patent, and that by virtue of duly executed and recorded deeds of conveyance the said defendant company has become the owner of and seized of all the right, title, and interest in and to the said tract of land described in and conveyed by the said placer patent.

"That the ground described in said patent of plaintiffs for the said Sierra Nevada lode claim is principally located or situated within the exterior boundaries of the tract of land described in said placer patent for the said William Moyer placer claim and is a part of the same land, and the maps introduced in evidence and contained in the bill of exceptions and record correctly delineate the surface of the ground comprised within the exterior boundary lines of the said placer patent and the said lode patent, respectively.

"And the court finds, as conclusions of law from the foregoing findings of fact, that it is conclusively presumed and found, from the face of said Sierra Nevada lode patent, that the said Sierra Nevada lode claim had been duly discovered, located, and recorded, and owned by the said patentees in said Sierra Nevada lode patent and their predecessors in interest (the said plaintiffs) within the exterior boundaries of the said tract of land described in said William Moyer placer patent, before the time of the said application for the said placer patent, and the mining ground described in the said complaint and conveyed by the said lode patent is excepted out of the grant of the land described in and conveyed by the said placer patent."

In reversing the judgment for the plaintiffs, the Supreme Court said, among other things:

"The real principle on which the plaintiffs relied to establish the superiority of their claim for the lode in controversy is that it was a known lode, within the meaning of the act of Congress on that subject, at the time of the application for the Moyer patent, and therefore, by the act of Congress on that subject, the title to it did not pass to the grantee in that patent. If the fact were proved that the Sierra Nevada lode was a known lode, within the limits of the placer patent obtained by Moyer at the time of his application, the contention of the plaintiffs is sound. But notwithstanding nearly all

the testimony, particularly all the oral testimony found in the bill of exceptions, was introduced for the purpose of proving the existence of this lode, and that it was known to Moyer or his grantor, and in refutation of that proposition, the court in its finding of facts makes no finding on that subject. It was obviously the opinion of the court, and it is the ground on which defendants in error support its judgment here, that the patent issued by the government is conclusive evidence that such vein was known, so as to authorize the Land Department to issue a patent for it as being reserved out of the grant in Moyer's patent.

"It is very singular that the patent to Campbell and others for the Sierra Nevada claim makes no reference to this reservation in Moyer's patent, and no statement that the existence of the lode was known to anybody at the time the Moyer patent was applied for or when it was granted. There is nothing on the face of this patent to show that there was any contest before the Land Department on this question of the existence of the vein, and the knowledge of it on which the validity of the patent is now supposed to rest. We have, therefore, the junior patent, which is held to defeat the prior patent, with no reference to any contest between the different claimants before the land office, and we have the court, in deciding the present case, while hearing the testimony which would defeat or sustain that patent, utterly ignoring it, and making no finding upon the subject which the defendants in error believe to be involved in the issue.

"The reason of this action by the court is very plain. It proceeds upon the idea that it is conclusively presumed and found, from the face of the Sierra Nevada lode patent, that the said lode claim had been duly discovered, located, and recorded within the exterior boundaries of the land described in the said Moyer placer patent before the application for the said Moyer patent. As there is not a word said on the face of the Sierra Nevada lode patent on this subject, we must look for some inference of law, rather than to the statement of facts, upon which this presumption conclusively arises.

"That presumption of law, as explained by counsel, is that, since the law under which the Moyer patent issued reserved from its operation any known vein or lode within the exterior boundaries, it is presumed that, when the officers of the Land Department issued the patent for the Sierra Nevada lode, they made such inquiries into the question of the existence of this lode, and its being known to the grantee in the Moyer patent, as authorized it to decide that question, and that that decision is binding and conclusive forever upon all parties. We are not able to agree with this statement of the law. * * *

"We are not ignorant of the many decisions by which it has been held that the rulings of the land officers in regard to the facts on which patents for land are issued are decisive in actions at law, and that such patents can only be impeached in regard to those facts by suit in chancery brought to set the grant aside. But those are cases in which no prior patent had been issued for the same land, and where the party contesting the patent had no evidence of a superior legal title, but was compelled to rely on the equity growing out of frauds and mistakes in issuing the patent to his opponent.

"Where each party has a patent from the government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, we think it is competent, in any judicial proceeding where this question of superiority of title arises, to establish it by proof of these facts. We do not believe that the government of the United States, having issued a patent, can, by the authority of its own officers, invalidate that patent by the issuing of a second one for the same property. If it be said that the question of the reservation of this vein as a known lode under the law on that subject makes a difference in this respect, and that the land office has a right to inquire whether such lode existed, and whether its existence was known to the patentee of the first patent, we answer that a patent, issued under such circumstances to the claimant of the lode claim, may possibly be such prima facie evidence of the facts named as will place the parties in a condition to contest the question in a court.

"But we are of opinion that it is always and ultimately a question of ju-

dicial cognizance. The first patent conferred upon Moyer the right to this vein and to all other veins within the limits of his fifty acres of placer claim. There is excepted from that grant any lode existing and known at the time application was made for his patent. Whether such a lode did exist, and whether it was known to him, is a question which he has a right to have tried by a court of justice, and from which he cannot be excluded by the subsequent action of the officers of the Land Department."

If, as the court in that case distinctly adjudged, the fact as to whether or not, at the time the placer claimants made their application for a patent, there was within the boundaries of their claim an existing vein or lode, was a matter for judicial cognizance, and not a matter for the determination of the officers of the Land Department, where both the placer and the lode claimants had a patent duly issued by the government, manifestly all the more is such fact of knowledge a question for judicial cognizance where the placer claimant has a patent and the lode claimant has none.

[3] For the reasons stated the judgment is reversed. The case is therefore remanded, and it follows that the appellees must be adjudged guilty of contempt. The failure of the record to show contumacy on the part of the appellees cannot affect the judgment of this court, but is a circumstance proper for the consideration of the court below.

MORRIS v. JOHNSTON, Commanding General, Camp Lewis.

(Circuit Court of Appeals, Ninth Circuit. October 18, 1919.)

No. 3355.

ESTOPPEL ⊜62(5)—JURISDICTION TO SUBJECT RESIDENT ALIEN UNDER SELECTIVE DRAFT ACT NOT LOST BY ESTOPPEL OR WAIVER.

Jurisdiction to subject a resident Canadian registrant to the draft *held* not lost by estoppel or waiver, because after his exemption under the first call, afterward revoked, he was sent back to Canada by the immigration authorities as having unlawfully entered, where he returned on a permit and remained until after the Canadian-American Convention went into effect.

Appeal from the District Court of the United States for the Western District of Washington; Edward E. Cushman, Judge.

Habeas corpus by Bernard Patrick Morris against Maj. Gen. W. H. Johnston, Commanding General, Camp Lewis, Wash. Judgment denying writ, and petitioner appeals. Affirmed.

This was an appeal from an order of the District Court of the United States for the Western District of Washington, Southern Division, on a writ of habeas corpus, denying the discharge of the appellant, who was held as a deserter by the military authorities at Camp Lewis, Wash. The facts material to be considered may be thus stated:

The appellant, a British subject, born in Canada, August 21, 1890, entered the United States through the port of Marcus, Wash., in November, 1915, stating to the immigration officials that he was on the Seattle hockey team, and that he was coming to this country temporarily to play a few games of hockey and would then return to Canada. He remained in the United States, and on June 5, 1917, he registered under the Selective Draft Act (Act May 18,

1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2044a–2044k]), with local board No. 6, in the city of Seattle, giving his residence as 616 Seneca street, in that city, and was by that board given order No. 123 and serial No. 1066. He filed his claim of exemption before that board on the ground that he was an alien, which claim was denied by the local board. On October 3, 1917, appellant was due to appear before the local board for physical examination; his claim for exemption as an alien having been denied by that board, and his appeal not having been passed on by the district board. Before the hour fixed for the physical examination, appellant applied at the office of the district board and was informed that his appeal would be immediately acted upon, and on the same day his exemption was allowed, and the certificate of exemption on form 159 was issued to him.

Morris thereupon communicated with Whitney, the chairman of the local board, and advised him that the district board had granted his exemption whereupon Whitney instructed the arresting officer to release him, but instructed Morris to appear at the office of the local board on the morning of October 4th. When Morris reported, he was told by Whitney to report to the United States immigration officer at Seattle, for the purpose of being examined as to his right to remain in the United States. Morris reported to Sargent, the immigration officer, and after examination as to being unlawfully in the United States and subject to arrest and deportation, he thereupon asked Sargent not to issue any warrant, stating that he would return of his own accord to Canada. Sargent assented to this, and directed Morris to report his return to Canada to the United States immigration officer at Vancouver, B. C., and Morris reported to this officer on November 3, 1917. On the same day he reported to the officer in Vancouver, Morris applied for permission to leave Canada for a month and was granted a permit. This permit was extended from time to time, and on it Morris made several trips to the United States, the last of which appears to have been made August 17, 1918.

In December, 1917, the second draft, governed by a new set of rules, began. These regulations revoked all exemptions and discharges made prior to December 15, 1917, and provided that a questionnaire should be sent every man who had registered on June 5, 1917, who had not actually been inducted into the military service. A questionnaire was duly mailed to Morris at the address given by him, and which he had never changed by any communication to the local board. This questionnaire was received by Morris, and on its receipt he took it to the office of the local board and asked Whitney if he had to fill it out, and was informed that the board held that it was his duty to do so. He then informed Whitney that he was in the United States on a limited time permit of the Canadian authorities, and was informed by Whitney that he must fill out the questionnaire and comply strictly with the law. Morris protested, but filled out his questionnaire and swore to it, and again claimed his exemption as an alien. The local board again denied the claim of exemption, and on January 9, 1918, Morris again appealed to the district board, which on January 16, 1918, granted his exemption and placed him in class V–F, resident alien, not enemy.

This exemption of Morris as an alien, class V–F, continued in effect down to July 28, 1918, when the Canadian-American Convention (40 Stat. 1624) went into effect. Article 1 of this convention provides that all Canadian subjects, in the United States on the date the convention became effective, "shall, unless before the time limited by this convention they enlist or enroll in the forces of their own country, or return to the United States or Canada, respectively, for the purpose of military service, be subject to military service and entitled to exemption or discharge therefrom under the laws and regulations, from time to time in force, of the country in which they are."

Article 2 of the convention provides: "Americans and Canadians within the age limits aforesaid who desire to enter the military service of their own country must enlist or enroll or must leave Canada or the United States, as the case may be, for the purpose of military service in their own country, before the expiration of 60 days after the date of the exchange of ratifications of this convention, if liable to military service in the country in which they are at the said date, or, if not so liable, then before the expiration of 30 days after the time when liability shall accrue."

Acting under this convention and the regulations issued for its enforcement, the local board, on September 28, 1918, reclassified Morris and placed him in class A–1; mailed him a notice of his reclassification under the convention under date of October 3, 1918, and an order to report for physical examination on October 8, 1918. Morris testified that he never received any of these notices and failed to report for examination, and was thereupon reported to the state executive officer as a delinquent. That officer mailed him an order to report for induction at Olympia on November 5, 1918, failing which he would become a deserter. Morris claimed that he did not get this notice, and, failing to report, was declared a deserter, and a reward offered for his arrest. On March 5, 1919, Morris was arrested as a deserter, taken before the local board, given an examination, and committed to the military authorities as a willful deserter.

Believing that he was illegally restrained, Morris on March 19, 1919, filed his petition for a writ of habeas corpus, which was heard before Hon. Edward E. Cushman, District Judge, and an order was entered denying the writ, and an appeal was taken to this court. Subsequently the counsel for the respective parties entered into the following stipulation:

"It is hereby stipulated and agreed between the petitioner and respondent, by their respective counsel, that the sole question involved in this appeal is whether the acts of the two executive agencies of the United States government, to wit, local board No. 6, Seattle, Washington, and the United States Commissioner of Immigration at Seattle, Washington, during the months of August to November 1917, inclusive, with respect to petitioner, canceled his registration and released and discharged said petitioner from all duties and obligations whatsoever under the act of Congress of May 18, 1917, entitled 'An act to authorize the President to increase temporarily the military establishment of the United States,' and all acts, resolutions, and conventions amendatory thereof and supplementary thereto, and all rules and regulations prescribed by the President of the United States under the authority contained in said act.

"It is further stipulated and agreed that, if the acts of the two executive agencies of the United States as aforesaid did not cancel said registration of petitioner and release and discharge him from all duties and obligations whatever under the Selective Service Act aforesaid, then he was, for the purposes of this case, duly and regularly inducted into the military service, and was properly and legally in the custody of respondent herein, at the time of the filing of said petition and the hearing of said cause."

Both the petition for the writ and the return are unduly prolix and contain much of the evidence instead of the ultimate facts.

Albert Moodie, of Seattle, Wash., for appellant.

Annette Abbott Adams, U. S. Atty., and Charles W. Thomas, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

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

SAWTELLE, District Judge (after stating the facts as above). Pretermitting for the present the question whether this court is bound by the stipulation entered into by counsel, we will consider the question as thus presented.

The contention of the appellant is that the United States is estopped by the acts of Whitney and Sargent in causing Morris to leave the United States to escape deportation, and that because of such action the registration of Morris was canceled and he was released of all duty to the United States. It is beyond question that Morris entered the United States illegally and that he was subject to arrest and deportation. It is equally beyond dispute that on June 5, 1917, when he

was registered, he was subject to all rules and regulations made to execute the Draft act.

Section 5 of that act (Comp. St. 1918, § 2044e) provides:

"That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President, * * * and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided."

It is thus clear that on June 5, 1917, Morris was, subject to the provisions of the act, liable to registration, and by the express terms of the act he remained subject to draft, unless exempted or excused therefrom as provided by the act. There is no claim that he was exempted or excused, as provided in the act. The contention is that by the acts of its executive agencies the government of the United States has estopped itself to demand compliance with its laws and absolved Morris of his duty to respect and obey them. The estoppel is sought to be based on the idea that Whitney and Sargent, by their actions, waived for the United States the undoubted jurisdiction of the local board over Morris, and that this jurisdiction, thus waived, is gone forever. The fact seems to be ignored or forgotten that Whitney had neither the duty nor the power to order the deportation of Morris. It is equally evident that Sargent had no duty to perform and no authority conferred upon him by the Selective Draft Act; his duties and powers were derived from the immigration laws of the United States, and it was because Morris had violated these laws that he was subject to arrest and deportation.

Coming here in violation of the immigration laws conferred upon Morris no immunity from the requirement to register under the Selective Draft Act. All that was necessary to impose upon him the duty of registering was that he was a resident of the United States, of military age, and that he was such resident by his own act on June 5, 1917, is beyond question. Having thus registered, he became subject to all the duties and responsibilities imposed by law upon residents. His rights to exemption and discharge could then only be secured by the means and in the manner sanctioned by that act, and they were unaffected by any action which might be taken under other laws, unless such action put and kept him beyond the reach of the laws of the United States. No action of the immigration officer in the enforcement of the immigration laws went further than to send him back to Canada. He did not stay there, for on the very day that he reached Canada he applied for and obtained a permit by virtue of which he returned to the United States.

It is a fundamental principle of estoppel, even between individuals, that the acts relied on to create estoppel must be done by persons authorized or apparently authorized to do such acts, and in the exercise of duties or rights which clearly belong to them, and must be acted on by the party claiming the estoppel in good faith, and the situation must be such that it would be inequitable to allow the right asserted by the party estopped to be then enforced.

Tested even by the principles of estoppel which apply between individuals, the facts set up by petitioner fall short of showing a case in his favor. First, Whitney had neither authority nor duty to deport him. He was powerless as chairman of the local board to order his deportation. Neither he nor the board had any power or duty in regard to the enforcement of the immigration laws, and their jurisdiction was complete under the Draft Act. The petitioner had voluntarily put himself within its influence, and his rights and his duties, so far as military service due the United States are concerned, were to be weighed and determined by the terms of that act and the instrumentalities created by it.

It is also to be noted that the act of the immigration officer in causing Morris to return to Canada in no wise forbade him to return to the United States in a proper manner, and that in spite of such compulsion to return to Canada we find him, on the very day he arrives there, making preparations for his legal return to the United States and returning at times to suit his convenience.

The action in sending him to Canada did not deprive him of any means or opportunity to have his rights and duties determined by the Selective Draft Act, and we find him cognizant of and using these instrumentalities after his voluntary return, for when his questionnaire was answered and the local board again held his claim of exemption invalid, he again appealed to the district board and it again declared him to be exempt, and he again accepts and uses the certificate of exemption. Having thus claimed and used the exemption thus secured, he cannot now repudiate the authority whose protection he then sought. His situation then was of his own choosing; he was claiming and receiving the benefit of the exemptions of the Selective Draft Act, and it was only when his situation was changed by the Canadian-American Convention, and he found the means provided by the Selective Draft Act insufficient to longer protect him in his claim of exemption, that he seeks to avoid his obligations to the law whose protection he had invoked and obtained. This lacks every element of good faith.

The enforced return of Morris to Canada and his return to the United States in a legal way in no wise changed to his hurt his relations to his obligations of military service to the United States. He had and exercised the same rights which he would have had if he had been permitted to remain, and he was subject to no duty or responsibility which would have been his, had he remained undisturbed in this country, and thus the claim that his status was changed to his hurt is shown to be without foundation.

Counsel for appellant has called our attention to various cases which discuss the doctrine of estoppel with regard to the title and claim of property, but he cites none where it has been decided that the government of the United States is estopped to use its governmental powers by the acts of its agents. Great stress is laid on the case of United States v. Willamette Valley & C. M. Wagon Road Co. (C. C.) 54 Fed. 807. That case involved the title to certain lands granted by Congress in aid of a road, and sought to cancel certain patents issued by the

United States. Speaking of the doctrine of estoppel, as applied to the government of the United States, Judge Gilbert said:

"The government is not ordinarily bound by an estoppel. While individuals may be estopped by the unauthorized acts of their agents, apparently within the scope of their agency, the sovereign power, being the trustee of the people, is rarely, if ever, bound by the acts of its agents; but, while it is true that for the neglect or the illegal or unauthorized acts of its agents the government should not ordinarily be estopped to show the truth, there is good authority, based upon sound reasoning, to support the doctrine that where the government has acted by legislative enactment, resolution, or grant, or otherwise than through the unauthorized or illegal acts of its agents, and the parties dealing with the government have relied upon the same, and in good faith have so changed their relation to the subject-matter thereof that it would be inequitable to declare such action or grant illegal, the government will be estopped."

Thus by the very authority cited by appellant it is shown that the government is not estopped by the unauthorized acts of Whitney and Sargent set up in his petition. If this be true in a case where only property rights are involved, how much more must it be true where there is involved the right of the government to compel a resident to perform military duty while the country is engaged in war.

The Selective Draft Act, and the rules and regulations made under its authority, must furnish the only standard by which the powers of the government are to be measured, and the instrumentalities created by that act must be free from interference by the courts until it clearly appears that the party complaining has been deprived of some right which flows to him from the constitution and laws of the United States.

The court feels constrained to hold that the acts set up in the petition, even if true, would furnish no ground for holding that the government was estopped to assert any lawful power conferred upon it by the Selective Draft Act, or release the appellant of the duties he owed under that act.

The facts set up must be considered in the light of the conditions which surround them. This country was at war. It was marshaling its man power for the purpose of carrying on that war. Upon the instrumentalities created by the Selective Draft Act was devolved the duty of carrying out this purpose, and these instrumentalities were given power commensurate with the duty imposed upon them. They were intended to be the tribunals before which any person called on to render military service could have determined the extent of the liability he was under to perform such service. The alien who chose to seek residence here had his rights declared by the act and the regulations, and had the right to appeal to these instrumentalities for their ascertainment and enforcement.

It was not declared or contemplated that any decision of any of these tribunals would create a vested status, which would not yield to changed conditions of service or exemption, and the right of the government to change either the rules of exemption or to enlarge the classes of residents who became liable to render these services was neither limited nor defined.

It is beyond question that the appellant was of military age and did not choose to join the forces of his native land. He did choose to come to the United States and make his residence here, and his claim of exemption had been rejected. By the terms of the Canadian-American Convention he was liable to service in the United States, and it must be held that he is accountable to its laws, and subject to the jurisdiction of the instrumentalities provided for their enforcement.

The result is that the District Court did not err in its judgment and order, and its action is affirmed.

ANZINE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919. Rehearing Denied December 1, 1919.)

No. 3300.

1. CRIMINAL LAW ⟸338(3)—EVIDENCE OF REPUTATION OF PLACE AS HOUSE OF ILL FAME ADMISSIBLE.
   In a prosecution for keeping a house where prostitution is practiced within a prohibited distance from a military post, where there is other evidence tending to show that the house was a house of ill fame, evidence of its reputation as such is admissible.
2. DISORDERLY HOUSE ⟸16—EVIDENCE OF PHYSICIANS AS TO DISEASED CONDITION OF INMATES ADMISSIBLE.
   In a prosecution for maintaining a house of ill fame, it was not error to admit the testimony of a health physician as to the diseased condition of certain women found at the house.
3. CRIMINAL LAW ⟸1177—SENTENCE FOR CONTINUOUS OFFENSE CHARGED IN SEPARATE COUNTS NOT REVERSIBLE ERROR.
   That a defendant was convicted and sentenced under separate counts for what was in fact but one continuous offense is not reversible error, where the aggregate of the punishment imposed did not exceed that which might have been imposed for a single offense.

In Error to the District Court of the United States for the First Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Criminal prosecution by the United States against Andrew Anzine. Judgment of conviction, and defendant brings error. Affirmed.

Frank J. Hennessy and Sidney P. Robertson, both 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.

GILBERT, Circuit Judge. The plaintiff in error was found guilty under five counts of an indictment charging him with maintaining a house of ill fame at 83 Eddy street, in San Francisco, in violation of section 13 of the act to authorize the President to increase temporarily the military establishment of the United States, approved May 18,

1917 (40 Stat. 83, c. 15 [Comp. St. 1918, § 2019b, Append.]), and the order of the Secretary of War made in pursuance thereof on July 25, 1917.

[1] Error is assigned to the admission of testimony to prove the general reputation of the house maintained by the plaintiff in error. It is urged that at common law such testimony is hearsay and inadmissible, and that such is the rule in the federal courts. The decisions of the federal courts on the question are few and very briefly reported. In none of them is any ground of decision stated. In United States v. Gray, 2 Cranch, C. C. 675, Fed. Cas. No. 15,251, it was held that in a prosecution for keeping a disorderly house the general character of the house is in issue and may be given in evidence; but Judge Cranch was in doubt, and subsequently in United States v. Jourdine, 4 Cranch, C. C. 338, Fed. Cas. No. 15,499, the court held otherwise, and also held otherwise in United States v. Rollinson, 2 Cranch, C. C. 13, Fed. Cas. No. 16,191, and United States v. Nailor, 4 Cranch, C. C. 372, Fed. Cas. No. 15,853. In 14 Cyc. 503, it is said:

"Under common-law principles it would seem that evidence of the general reputation of a house would be inadmissible upon the issue of whether it is a bawdyhouse, and so a number of authorities hold; but very many authorities hold that the reputation of the house is admissible."

Among the leading cases applying the common-law rule are Henson v. State, 62 Md. 235, 50 Am. Rep. 204, State v. Plant, 67 Vt. 454, 32 Atl. 237, 48 Am. St. Rep. 821, and Wooster v. State, 55 Ala. 217. In the latter case it was said:

"The rule is that hearsay evidence—and such is the evidence of reputation—is inadmissible to establish any specific fact, capable of direct proof by witnesses speaking from their own knowledge; and when the rule is relaxed, it is from necessity alone."

The court there recognized an exception to the rule against the admission of hearsay testimony, and we think that within that exception properly comes evidence of the reputation of a disorderly house, and that the better doctrine is that testimony as to such reputation should be admitted for the value which it may have in determining the question of the guilt or innocence of the person charged with maintaining the house in all cases where, as here, there is other evidence tending to establish that the house was a house of ill fame. In Wigmore on Evidence, § 1620, the author says:

"Nevertheless, having regard to the circumstances from which such a reputation arises, and the difficulty of obtaining other evidence in the ordinary way from unimpeachable witnesses, it seems unquestionable that reputation should be admitted as trustworthy and necessary evidence."

In State v. Bresland, 59 Minn. 281, 61 N. W. 450, it was said:

"Such evidence is not mere hearsay. Reputation is often admissible to prove a continued practice, when it would not be to prove a single act. It is often competent evidence of a continuing condition, or a continued repetition of the same or similar acts or practices, when it would be mere hearsay as proof of a single act or occurrence. Thus reputation is competent evidence of good or bad character, or solvency or insolvency, of custom, usage, etc. In all these cases the continued nature of the fact to be proved and the necessities of the case render competent evidence of reputation."

In line with these views are State v. Brunell, 29 Wis. 435; State v. Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666; Hogan v. State, 76 Ga. 82; Betts v. State, 93 Ind. 375; Drake v. State, 14 Neb. 535, 17 N. W. 117; O'Brien v. People, 28 Mich. 213; United States v. Johnson (C. C.) 7 Fed. 453.

Error is assigned to the denial of the motion for a new trial, one ground of which was that the verdict was not supported by evidence to show that the house maintained by the plaintiff in error was within five miles of any military camp, station, fort, etc. This absence of proof was not presented in any way to the court below prior to the motion for a new trial. It is so well settled that the ruling of the court below on a motion for a new trial is not assignable as error that we need cite no authorities. But the plaintiff in error contends that this court should take notice of this omission of evidence as a plain error, although no exception was taken in the court below. It is true that in rare cases the federal courts may, in the absence of an exception, in the court below take notice of a plain error; but this is permissible only in cases where it is evident that serious injustice has been done to the rights of plaintiff in error. Here no injustice has been done. The jury doubtless knew, and the court below might properly take judicial notice, that a house at 83 Eddy street was less than five miles from the Presidio and Ft. Mason.

[2] It was not reversible error to permit the physician of the city board of health to testify as to the diseased physical condition of certain women found on the premises of the plaintiff in error. It is well settled that in prosecutions of this nature testimony is admissible to show the character of the inmates, as evidence tending to prove the character of the house (14 Cyc. 506), and the testimony so admitted had its value as tending in some degree to show the nature of the house maintained by the plaintiff in error.

[3] It is contended that the court below erred in sentencing the plaintiff in error to imprisonment on each of the five counts of the indictment, the terms to run consecutively, and that he pay a fine of $100 on each count, for the reason that the offense with which he was charged was one continuous offense, and not susceptible of division into several offenses by counts charging the maintenance of a house of ill fame "during the month of August and on or about the 27th day thereof," "during the month of September and on or about the 1st day thereof," and "during the month of September and on or about the 3d day thereof," etc. If it be conceded that the indictment charges but one continuous offense, and that for its punishment one count would have been sufficient, it would follow that if the aggregate punishment which was imposed on the various counts exceeded the punishment fixed by the statute, to wit, imprisonment for one year or a fine of $1,000, or both, it would be proper to remand the case to the court below, with instructions to arrest judgment, so far as it imposed punishment beyond that which the statute permits. But here the aggregate imprisonment is less than one year and the aggregate fine is less than $1,000.

In re Snow, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658, cited by plaintiff in error, is authority for the proposition that, where separate

offenses charged in an indictment constitute in reality but one continuous offense, instead of separate and distinct offenses, on a verdict of guilty on each count the court has no power to inflict punishment greater than that allowed for one offense. In that case the act under which the defendant was found guilty of cohabiting with more than one woman provided for a punishment by fine of not more than $300, or by imprisonment for not more than six months, or by both. The defendant therein was found guilty of having committed the act prohibited by the statute at three stated dates in three consecutive years. The court held that the crime charged was one continuous offense.

We find no error. The judgment is affirmed.

OAKSHETTE v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 15, 1919.)

No. 3187.

POISONS ⊂⊃9—EVIDENCE IN PROSECUTION FOR VIOLATION OF HARRISON NARCOTIC ACT SUSTAINING CONVICTION.

In a prosecution for violation of Harrison Narcotic Act Dec. 17, 1914, § 2 (Comp. St. § 6287h), by selling narcotic drugs, not in pursuance of written orders on the prescribed forms, evidence that defendant, although a physician registered under the act, did not dispense the drugs in good faith in the course of his professional practice, which would bring him within exception (a) of the statute, but sold the same to gratify the appetite of the purchasers, was competent and relevant, and such issue was properly submitted to the jury.

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Criminal prosecution by the United States against J. C. Oakshette. Judgment of conviction, and defendant brings error. Affirmed.

James L. Anderson, of Atlanta, Ga., for plaintiff in error.

Hooper Alexander, U. S. Atty., of Atlanta, Ga.

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

GRUBB, District Judge. The plaintiff in error was tried and convicted in the District Court of the Northern District of Georgia, for violations of the Harrison Narcotic Law (Act Dec. 17, 1914, c. 1, 38 Stat. 785 [Comp. St. §§ 6287g–6287q]), under two consolidated indictments. He first assigns, as error, in this court, that the District Court overruled a demurrer to the indictments upon which he was tried. The demurrer assailed the constitutionality of the Harrison Act, but the Doremus Case, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493, has determined that question adversely to him. The demurrer also questioned the sufficiency of the indictments because they failed to negative the exceptions which are set out in section 2 of the act (Comp. St. § 6287h). This court has held that the government was excused

under section 8 of the act (section 6287n), from negativing the exceptions set out in section 2 of the act. Melanson v. United States, 256 Fed. 783, — C. C. A. —.

The plaintiff in error also complained of the District Judge's charge, in that it was not responsive to the only issue presented by the indictments. The indictments charged the sales to have been made by the plaintiff in error, not in pursuance of written orders, given by the purchasers, on forms prescribed by the Commissioner of Internal Revenue. The proof showed that plaintiff in error was a physician and had registered with the collector of internal revenue. He was authorized to administer the prohibited drugs, without obtaining a written order, if they were administered "in the course of his professional practice," but not otherwise. The government contended that the drugs administered by him were not administered in good faith, in the course of his professional practice, but to gratify the desire or appetite of the patients or purchasers. The plaintiff in error contended that they constituted legitimately medical treatment for his patients. The District Judge submitted the issue so made to the jury.

The contention of the plaintiff in error is that it was not within the issues presented by the indictments, since they merely charged sales illegal because not in pursuance of written orders. The only prohibitions of the statute are (1) sales by unregistered persons and (2) sales by registered persons not in pursuance of written orders. The plaintiff in error could only be charged with having made the one kind or the other. As he had registered, he was not guilty of the first. If, having registered, he made sales or dispensed the drug without obtaining a written order, he was guilty of the second kind, unless because he came within one of the excepted classes. If he administered the drug only in the course of his professional practice, he came within one of the excepted classes, and was not guilty. If, however, he administered the drug, not in the course of his professional practice, then he did not bring himself within any of the excepted classes, and so came within the operation of the prohibition of section 2, against selling or dispensing, not in pursuance of a written order, and was properly charged with that offense. As a registered person he could have been charged with no other offense, since the act creates no other out of the act of selling or dispensing by registered persons. It does not make it a separate offense, for a physician to administer the drug when it is not done in the course of his professional practice. His doing so merely removes him from the classes exempted from the operation of section 2 and leaves him subject to the punishment prescribed by section 2.

Dispensing the drug, though by a physician, if not in the course of his professional practice, is in legal effect a sale, and, being one, can only be legally made in pursuance of an order form and the offense of doing it without one, is necessarily that of selling or dispensing, not in pursuance of a written order, in violation of section 2 of the act. The indictments properly so charged the offenses, and proof tending to show that the drugs were not dispensed in the course of defendant's professional practice tended to sustain the charges, and the court properly held that the issue so made was presented by the indictment and

properly submitted it to the jury. In the case of Melanson v. United States, 256 Fed. 783, 785, — C. C. A. —, this court said of the indictment:

"The second count charged a joint sale by the physician and druggist without the use of the order form, required by the law to be used and filed in making sales, other than to patients in the regular practice of a physician on prescription, or by personal administration."

A conviction under the second count of the indictment in that case was sustained upon proof like that in this case, tending to show that the defendant physician administered the prohibited drugs, under the guise of treatment, but in fact to gratify the appetite of his supposed patients.

Plaintiff in error also complains that the evidence was insufficient to convict him. That there is evidence in the record from which the jury might well have inferred that the plaintiff in error administered the drug, not in good faith to cure his patients or alleviate their present suffering, but to satisfy their craving, as addicts, for the drug, is clear from the constant quantities over periods of as much as three months, during which the record shows it was furnished to a number of persons by defendant. The sufficiency of his explanations as to why he failed to reduce the amounts, especially as to those he testified he was attempting to cure of the drug habit by the method of reduction, was for the jury to determine.

There being no error in the record, the judgment of conviction is affirmed.

BAENDER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919. Rehearing Denied December 1, 1919.)

No. 3285.

COUNTERFEITING ⇐16—CRIMINAL INTENT INFERRED FROM POSSESSION OF COUNTERFEIT DIES.

Under Criminal Code, § 169 (Comp. St. § 10339), making it an offense for any person without lawful authority to have in his possession any die in likeness or similitude as to the design or inscription of any die designated for making United States coins, a criminal intent is to be inferred from such unlawful possession, and need not be averred in the indictment.

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

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

Charles L. Baender, of Oakland, Cal., and Nathan C. Coghlan, of San Francisco, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

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

GILBERT, Circuit Judge. The plaintiff in error pleaded guilty and was sentenced upon an indictment which charged that at a date and place named he did then and there unlawfully, willfully, knowingly, and feloniously and without lawful authority have in his possession six complete steel dies, each of which was then and there in the likeness and similitude as to the design and the inscription thereon of a die designated for the coining and making of the genuine Indian head design gold coins of the United States, that had theretofore and are now coined at the mints of the United States, and known as and called $5 pieces or half eagles. The plaintiff in error by writ of error seeks to review the judgment, and he contends that the judgment is void for the reason that the indictment fails to allege an offense against the United States, in that it contains no averment that the plaintiff in error had possession of the dies with the intent to defraud, or to use the same in making counterfeit coins. The statute under which the indictment is brought is Act March 4, 1909, c. 321, § 169, 35 Stat. 1120 (Comp. St. § 10339), which provides that:

"Whoever, without lawful authority, shall have in his possession any such die, hub or mold, or any part thereof, or shall permit the same to be used for or in aid of the counterfeiting of any of the coins of the United States hereinbefore mentioned, shall be fined," etc.

Act Feb. 10, 1891, c. 127, § 1, 26 Stat. 742, which was in force prior to the enactment of the act of 1909, had denounced as unlawful the possession of the prohibited dies, etc., with intent to fraudulently or unlawfully use the same. In amending the law by the later act, the report of the committee on revision shows that the words "with intent to fraudulently use the same" were "intentionally dropped from the statute"; the committee believing that a person who has in his possession dies which may be used for counterfeiting any coin shall be required to show that his possession is lawful, and that the government should not be required to prove that he has them in his possession with the intent to use them fraudulently and unlawfully for counterfeiting. Congress evidently intended that the unlawful possession of such dies should be sufficient evidence to warrant a conviction, unless the accused could explain the possession to the satisfaction of the jury.

The statute here involved has analogy to Act Jan. 17, 1914, c. 9, 38 Stat. 275, amending Act Feb. 9, 1909, c. 100, 35 Stat. 614 (Comp. St. 1918, §§ 8800–8801f), and providing that possession of imported opium shall be deemed sufficient evidence to warrant conviction, unless the defendant shall explain the possession to the satisfaction of the jury. Under that statute convictions have been sustained on proof of possession; the courts ruling that the statute provides for a presumption of prima facie proof of the offense which, while sufficient to sustain a verdict of guilt, may or may not be sufficient to satisfy the jury of the guilt of the accused, applying the doctrine of Luria v. United States, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. Ed. 101, where it was held that the establishment of a presumption from certain facts prescribes a rule of evidence, and not one of substantive right, and that if the inference is reasonable, and opportunity is given to controvert the presumption, it is not a denial of due process of law. United States v. Yee

Fing (D. C.) 222 Fed. 154; United States v. Ah Hung (D. C.) 243 Fed. 762; Gee Woe v. United States, 250 Fed. 428, 162 C. C. A. 498.

It is true that, in all cases in which a specific intent is made part of the offense by the statute creating it, it must be alleged, but in cases where the act includes the intent it is sufficient to charge the offense in the language of the statute, and the intent will be inferred. 22 Cyc. 329; King v. Philipps, 6 East, 464; People v. Butler, 1 Idaho, 231; People v. O'Brien, 96 Cal. 171, 31 Pac. 45; State v. McBrayer, 98 N. C. 623, 2 S. E. 755; Commonwealth v. Hersey, 2 Allen (Mass.) 173, 180. In the case last cited it was said:

"When by the common law, or by the provision of a statute, a particular intention is essential to an offense, or a criminal act is attempted, but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegation by proof. On the other hand, if the offense does not rest merely in tendency, or in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed and need not be alleged, or, if alleged, it is a mere formal averment, which need not be proved."

In enacting the statute under which this indictment is brought, Congress intended that it should express all the elements of the crime, and that the prosecution, having shown the unlawful possession by the accused, should not be required to prove what was in the latter's mind as to future use of the things so possessed, and that a criminal intent is to be inferred from the unlawful possession.

It is well settled that under the section of the statute which makes unlawful the forging of coins it is unnecessary to allege an intent. United States v. Otey (C. C.) 31 Fed. 68; United States v. Russell (C. C.) 22 Fed. 390; United States v. Peters, 2 Abb. (U. S.) 494, Fed. Cas. No. 16,035. But counsel for the plaintiff in error attempts to distinguish the present case by asserting that the offense which is here charged is not an act of the accused, so that intention may be imputed to it. To this we cannot agree. To have possession is to maintain in physical control, and it implies both will and action on the part of the possessor. Kaye v. United States, 177 Fed. 147, 100 C. C. A. 567, is not in point. That case arose under the statute of February 10, 1891.

The plaintiff in error admitted by his plea in the court below the truth of the indictment. We hold that the indictment is sufficient to sustain the judgment. People v. White, 34 Cal. 183; Sutton v. State, 9 Ohio, 133; Reg. v. Harvey, 11 Cox, C. C. 662.

The judgment is affirmed.

CHICAGO, M. & ST. P. RY. CO. v. McCAULL-DINSMORE CO.*

(Circuit Court of Appeals, Eighth Circuit. September 22, 1919.)

No. 5314.

CARRIERS ⊂=180(1)—LIMITATION OF LIABILITY; LIABILITY FOR LOSS OF INTERSTATE CARRIERS.

Under Interstate Commerce Act, § 20, as amended by Cummins Act, § 1 (Comp. St. § 8604a), providing that an interstate carrier of property shall issue a bill of lading therefor and be liable for any loss or damage to the property caused by it or any other carrier when carried under a through bill of lading, and that no contract limiting such liability shall be valid, a provision of such bill of lading fixing the carrier's liability at the value of the property at the place and time of shipment is a limitation, and is invalid, and not enforceable.

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

Action at law by the McCaull-Dinsmore Company against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff (252 Fed. 664), and defendant brings error. Affirmed.

F. W. Root, of Minneapolis, Minn. (Nelson J. Wilcox, of Chicago, Ill., on the brief), for plaintiff in error.

J. O. P. Wheelwright, of Minneapolis, Minn., for defendant in error.

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

STONE, Circuit Judge. Action for loss of interstate shipment of grain. The facts were stipulated. The shipment was made under a bill of lading or shipping contract wherein it was provided that:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid."

The contract was in a form like that included in the legally published tariffs filed with the Interstate Commerce Commission, which tariffs provided, among other things, a rate of transportation based on and controlled by said form of bill of lading, and that, in cases where the shipper was not agreeable to shipping under the terms of such form, then a higher rate was to be charged. The fair market value of the shipment at destination at the time when it should have been delivered, with interest, and less freight charges, was $1,422.11. The railway has paid thereon $1,200.48, the value at origin at time of shipment. From a judgment for the difference the railway has taken its writ of error.

The controversy is over the difference, and the sole question here presented is whether the origin value or the destination value should govern where the shipment was under such a form of interstate bill of lading. At the time of this shipment the so-called Cummins Amendment of March 4, 1915 (38 Stat. 1196, c. 176 [Comp. St. § 8604a]),

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari granted 250 U. S. —, 40 Sup. Ct. —, 64 L. Ed. —.

contained the law in this respect governing form of contracts for interstate shipment. That statute provided:

"That any common carrier, railroad, or transportation company subject to the provisions of this act receiving property for transportation from a point in one state or territory or the District of Columbia to a point in another state, territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one state, territory, or the District of Columbia to a point in another state or territory, or from a point in a state or territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided further, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law."

The railway seeks to avoid the application of this provision by contending that it, in the present instance, has not sought to limit its liability, but has, on the contrary, defined liability for the full, actual loss, and has by its tariffs thus crystallized the method of arriving at the actual loss. We deem such contention unsound. There was no uncertainty as to the time or place of estimating value under the rule of common law—it was the destination. The evident purpose of the provision in the bill of lading was not to introduce certainty, but to avoid the rule existing at law, for the obvious object of escaping a higher valuation which would often arise at destination. Such a provision is unquestionably a limitation, since it forbids application of the established rule.

The railway also says:

"The rule, as we contend, was that, *in the absence of contract*, destination value would apply, but that it was not unlawful to *agree upon origin value*."

Whether the parties could so agree at the common law is not material. The Cummins Amendment was not concerned alone with preventing contracts already illegal under the common law, but with prohibiting all agreements having the effect defined by that statute. Congress passed this act to remedy the defects in the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [Comp. St. §§ 8604a, 8604aa]), as developed in the case of Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, and intended thereby to fully and finally prevent all limitations of this character. Congressional Record, 63d Congress, 3d Session, Vol. 52, pp. 5446-5451.

The judgment is affirmed.

SOUTHERN PAC. R. CO. v. MUENTER et al.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919.)

No. 3286.

INTERNAL REVENUE ⇐7—WHAT CONSTITUTES "LOSS ACTUALLY SUSTAINED" IN DETERMINING INCOME STATED.

A sum set aside annually on its books by a corporation as the pro rata amount for that year of the discount at which it sold an issue of bonds, to be distributed throughout their term, is neither a "loss actually sustained" during the year, nor "interest paid," and may not be deducted in determining net income for that year, under Corporation Excise Tax Act Aug. 5, 1909, § 38 (2).

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 Southern Pacific Railroad Company against August E. Muenter, formerly Collector of Internal Revenue, First District of California, and Justus Wardell, present Collector. Judgment for defendants, and plaintiff brings error. Affirmed.

E. J. Foulds, 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., for defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The court below sustained a demurrer to the complaint brought by the plaintiff in error to recover certain items of corporation income tax paid under protest upon its net income for the years 1909, 1910, and 1911. The complaint alleged that during the years 1906, 1907, and 1908 the plaintiff in error borrowed various sums of money, and as security therefor issued and sold interest-bearing bonds, each of the par value of $1,000, drawing interest at 4 per cent. per annum, and maturing on the 1st day of January, 1955, which bonds it was necessary to sell at a discount. The amount involved in the action is the sum of $1,392.22, income tax

upon reserved sums of money which the plaintiff in error had set aside as the pro rata amount of the discount for the years in question, distributed over the entire period until the maturity of the bonds; the plaintiff in error contending that the discount is to be regarded as a portion of the interest which it pays upon the loans. The question presented is whether or not money so reserved and set aside by book entries to meet the final payment of the discount could be deducted from net income of the corporation under the Income Tax Law of 1909. 36 Stat. 112, c. 6, § 38. That act, so far as it pertains to this question, provides that the net income upon which the tax is to be assessed is ascertained by deducting from the gross income, second, all losses actually sustained within the year and not compensated by insurance or otherwise; third, interest actually paid within the year on its bonded or other indebtedness.

The plaintiff in error refers to Baldwin Locomotive Works v. McCoach (D. C.) 215 Fed. 967, and the same case on appeal, 221 Fed. 59, 136 C. C. A. 660, as sustaining its contention. In that case the bonds were 31-year bonds, and the assessor thought it proper to deduct $^1/_{31}$ of the total discount from the gross income of each taxable year. The controverted question in the case, however, was whether or not the corporation could deduct for the year 1910 the total discount upon the bonds which it had sold at 5 per cent. discount. The court held that a book charge because of the sale of an issue of bonds at less than par is not a part of the "expenses actually paid within the year out of income," so as to be deducted from gross income. There was no discussion of the question whether $^1/_{31}$ part of the total discount deducted for the year had been deducted lawfully, as that deduction was not involved in the controversy.

We think the present case is determined adversely to the plaintiff in error by the plain language of the statute. The money set apart upon the books each year until the maturity of the bonds to meet the loss which came from selling the bonds below par was the application of a prudent and proper system of business, and was a wise provision for the future; but it was not the payment of interest, nor did it represent a loss actually sustained within the year. The money was not in fact paid out. Notwithstanding the books of the plaintiff in error, the money is still in its possession and subject to its control. A system of bookkeeping will not justify the government in claiming taxes, nor will it justify the taxpayer in claiming exemption from taxation. The facts must control. Baldwin Locomotive Works v. McCoach, 221 Fed. 59, 137 C. C. A. 660; Mitchell Bros. v. Doyle (D. C.) 225 Fed. 437.

The judgment is affirmed.

WESTERN FUEL CO. v. GARCIA.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1919.)

No. 3195.

MASTER AND SERVANT ⊂=200—WINCHMAN AND STEVEDORE AS FELLOW SERVANTS.

A stevedore, helping to unload coal from the hold of a ship, and the winchman and hatchtender, also engaged in the same work, *held* fellow servants.

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

On rehearing. Reversed.

For former opinion, see 255 Fed. 817, —— C. C. A. ——.

Ira S. Lillick and Hartley F. Peart, both of San Francisco, Cal., for appellant.

Henry Heidelberg and Chris M. Bradley, both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The case was stated when last under consideration here (255 Fed. 817, —— C. C. A. ——), which statement need not be repeated. The numerous preceding and conflicting decisions of both federal and state courts with respect to the provisions of state statutes at variance with the general maritime law in suits for personal injuries were finally disposed of by the decision of the Supreme Court in the case of Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, so that we think it unnecessary to make further reference to those cases. The Jensen Case grew out of the alleged wrongful death of a person, a right of action for which was given by a state statute. The later case in the same court of Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, grew out of personal injuries not resulting in death, but in neither of those decisions of the Supreme Court was the slightest distinction made between cases for wrongful death and those for personal injury not resulting in death.

It is clear, we think, that no such distinction exists, and that a right of action not given by admiralty, but by a state statute, while enforceable in a court of admiralty under the law as established by the Supreme Court in the cases above cited, and by other of its decisions there referred to, will be enforced only in accordance with the recognized principles of the maritime law. Regarding that question we are entirely satisfied of the correctness of our former decision in the present case. The error into which we then fell grew out of our not treating the deceased, Souza, and the winch driver and hatchtender, through whose negligence the accident occurred, as fellow servants. That they were such fellow servants, for which reason the appellant cannot be held responsible, was decided in a similar case by this court in

The Hoquiam, 253 Fed. 627, 165 C. C. A. 253. See, also, the similar decision of this court in the case of Olson v. Oregon Coal & Navigation Co., 104 Fed. 574, 44 C. C. A. 51, and the cases there cited.

We see no escape from the conclusion that the judgment appealed from must be reversed, with directions to the court below to dismiss the action, at the cost of the libelant; and it is so ordered.

WILSON et al. v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. October 14, 1919.)

No. 5148.

1. CRIMINAL LAW ⟸351(2)—EVIDENCE OF CIRCUMSTANCES OF ARREST.
In prosecution for introducing intoxicating liquor from without the state into that part of Oklahoma which was formerly Indian Territory, evidence that, when defendants were arrested with liquor in their possession, they denied having arms in their possession, but an automatic was found in the motorcar in which they were transporting the liquor, was admissible as an incident of the arrest.

2. CRIMINAL LAW ⟸507(4)—OFFICER NOT AN ACCOMPLICE.
In a prosecution for introducing intoxicating liquor from without into that part of the state of Oklahoma which was formerly Indian Territory, where an officer of the government stationed at Joplin, Mo., whose duty it was to aid in the enforcement of the liquor law, testified that defendants were in Joplin on the day preceding their arrest, and that they procured liquor there, a requested instruction that the officer's testimony should be considered with caution, and was not sufficient without corroboration to convict, was properly refused.

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

T. C. Wilson and another were convicted of introducing intoxicating liquor from outside the state of Oklahoma into that part of the state which was formerly Indian Territory, in violation of Act March 1, 1895, c. 145, and they bring error. Affirmed.

William Pfeiffer, of Oklahoma City, Okl., for plaintiff in error.

Cliff V. Peery, Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

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

HOOK, Circuit Judge. Wilson and Provine were convicted and sentenced for introducing intoxicating liquor from outside the state of Oklahoma into that part of the state which was formerly Indian Territory. Act March 1, 1895, c. 145, 28 Stat. 693.

The contention that there was no substantial evidence that the large quantity of bottled liquor found in their possession in an automobile in the prohibited district was brought by them from outside the state is so devoid of merit that we need not review it. Against Provine

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

*Rehearing denied February 10, 1920.

it was overwhelming, and as to Wilson there was plainly enough to sustain the verdict against him in an appellate court.

[1] Complaint is made that the government was allowed to show that when the arrest was made the accused denied having arms in their possession, that they were required to keep their hands up, and that the officers found an automatic in the car. There is nothing substantial in this, nor prejudicial. Though perhaps not so closely connected with the litigated act, the denial of arms, and yet possession, was an incident of the arrest.

[2] An officer of the government stationed at Joplin, Mo., whose duty was to aid in the enforcement of the law charged to have been violated, gave testimony tending to show the presence of the accused and their automobile in Joplin on the afternoon of the day preceding their arrest, and that they got the carload of liquor there. The accused asked that the jury be instructed that the officer's testimony should be considered with caution, and that, though competent, it was not sufficient, without corroboration, to convict. The court rightly denied the request. Evidently the rule as to the testimony of accomplices was in the mind of counsel, but even as to that the request went too far; besides, the government officer was far from being an accomplice.

There are other assignments of error, most of which do not conform to the rules of this court. We have examined all that seemed to suggest something serious, but have found nothing to disturb the result below.

The sentences are affirmed.

PARAMOUNT HOSIERY FORM DRYING CO. v. MOORHEAD KNITTING CO.

(Circuit Court of Appeals, Third Circuit. October 13, 1919.)

No. 2433.

PATENTS ⇐328—PROCESS OF DRYING AND SHAPING HOSIERY ARTICLES INVALID.
The Collis patent, No. 1,204,945, for a process for finishing and shaping hosiery articles, *held* invalid, as covering nothing more than the function of an apparatus, not patentable in view of the prior art.

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Suit in equity by the Paramount Hosiery Form Drying Company against the Moorhead Knitting Company. Decree for defendant (251 Fed. 897), and complainant appeals. Affirmed.

Robert F. Rogers, of New York City, Charles H. Howson, of Philadelphia, Pa., and Edmund H. Parry, of Washington, D. C., for appellant.

Henry N. Paul, Jr., and Joseph C. Fraley, both of Philadelphia, Pa., for appellee.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

HAIGHT, Circuit Judge. In the court below the appellant sued the appellee for an alleged infringement of two patents, numbered 1,114,966 and 1,204,945, granted to it as assignee of one George Collis, on October 27, 1914, and November 14, 1916, respectively. The last patent was issued on a division of the application for the first. The earlier patent will hereafter, for convenience, be referred to as "the apparatus patent," and the later one as "the process patent." Generally speaking, one covers an apparatus for simultaneously drying and finishing hosiery articles, in the sense of stretching, shaping, smoothing, and creasing, and the other a method for accomplishing the same purpose.

In the court below, the claims in suit of both patents were held to be invalid, and a decree dismissing the bill was entered. The appellant has acquiesced in the decree so far as its effect was to invalidate the apparatus patent, and appeals from only that part which dismissed the bill as to the process patent. Infringement is not seriously denied. Some question as to an estoppel was presented in the court below, and decided adversely to the appellant, as was likewise decided adversely to the appellee a counterclaim interposed by it. The appellant has abandoned its claim that the appellee is estopped to deny the validity of the process patent, and the appellee has not appealed from the decree dismissing its counterclaim. The only question, therefore, to be considered on this appeal, is the validity of the process patent.

The original application for the apparatus patent was filed on June 27, 1911. After a rather stormy career in the Patent Office, a patent containing 45 claims was issued on October 27, 1914. Three days before its issue a division of the original application was filed, which eventuated on November 14, 1916, in the process patent, containing 5 claims, the last 3 of which are in the suit. The learned judge of the court below accepted the month of September, 1910, as the date of the Collis invention. We shall do likewise. Passing for the moment the exact state of the art at the time Collis made his alleged invention, we will refer briefly to what Collis assumed that he had invented.

It had been for many years the custom to remove as much as possible of the moisture, with which dyed or bleached hosiery and other similar textile articles become saturated in the dyeing or bleaching process, by means of a centrifugal machine known as a "whizzer," and to finish the drying by drawing the articles over wooden forms or boards and then depositing them in dry boxes. The latter were compartments supplied with interior heating coils and fans to insure circulation of the air. After the articles had been thus thoroughly dried, they were removed from the boards, and finally shaped, smoothed, and given the crease necessary to make them marketable, by placing them in a press and there subjecting them to pressure for various periods of time, depending upon the character of press used. The apparatus described in the Collis patents was designed to, and in practice actually did, accomplish the ultimate drying and finishing in one operation.

Without referring to the supplemental housing or casing described in the patents (which is of no materiality in this case), the Collis apparatus consists of hollow metal forms, similar in shape to the wooden forms before mentioned, and internally heated by steam or other means. Over these the wet hosiery article is drawn. The forms are narrow relatively to their width, and have their opposite narrow edges substantially sharp. The forms being heated internally, the hosiery mounted on them is dried, and the sharp edges produce the beforementioned finish. The utility of the apparatus of the first patent, and the advance which its use in the art of finishing hosiery made, was fully recognized by the court below; and is not, as indeed it could not very well be, disputed. The court below found, however (and, as before stated, the appellant accepts such finding), that Collis was not the first to conceive and practically develop the apparatus covered by his patent, and therefore the apparatus patent was held to be invalid. Indeed, as appears from the opinion of the learned judge of the court below, appellant abandoned during the trial any claim to the validity of that patent.

The patented prior art, as Collis admitted during the prosecution of his application for the apparatus patent, exhibits several examples of hollow metal forms designed to dry hosiery and textile articles by the application of internal heat. The evidence also abundantly demonstrates that, long prior to the earliest date claimed for the Collis invention, internally heated metal forms with sharp edges, to produce the necessary creases, had been designed and used, although not patented, by several concerns for the finishing of silk gloves and silk hosiery. The proof of the prior uses of an apparatus similar to, if not identical in all respects with, that covered by the patent, in a suit instituted by the present appellant against one Walter Snyder and the Walter Snyder Company, was so overwhelming as to cause the appellant to voluntarily abandon that suit, although the forms manufactured and sold by the alleged infringers unquestionably infringed the Collis apparatus patent.

The process patent, in the language of the specification, describes the method sought to be covered by it as follows:

> "A method of treating hosiery articles, consisting in heating, from within, and to a predetermined fabric-drying temperature, a metallic form having its sides relatively narrow in cross-section and converging into substantially reduced, crease-producing edges; then superposing upon said form a hosiery article and subjecting the same to the action of heat imparted internally thereto by the form for producing a substantially flattened and creased article."

Notwithstanding the invalidity of the apparatus patent because of anticipation, it is sought to avoid a like result as to the process patent on the theory that, although it was old in the finishing of silk gloves and silk hosiery to smooth and crease them on internally heated metallic forms with sharp edges, and although the prior art exhibited internally heated metal forms for the drying of hosiery, the method or process of simultaneously drying (in the sense of extracting the excess moisture acquired during the dyeing or bleaching process and not re-

moved by the "whizzer" and ordinary evaporation) and finishing (in the sense of stretching, smoothing, and creasing) hosiery through the use of internally heated metallic forms, with crease-producing edges, had not been conceived by any one before Collis.

It will be noted that the court below based its judgment that the process patent was invalid, both upon the ground that it covered nothing more than the function of the patented apparatus, and that the beforementioned prior use of the forms covered by the apparatus patent anticipated the method or process of the process patent. If it be true, as appellant contends, that these sharp-edge, crease-producing forms of the prior art were not designed or used for drying hosiery in the sense before mentioned, although capable of performing that function, but only for finishing and creasing silk gloves and hosiery from which all moisture had been extracted, and which it was necessary to again dampen before the finishing, and that the process patent was not, therefore, anticipated by their prior use (Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 424, 22 Sup. Ct. 698, 46 L. Ed. 968), it is apparent that the invention of that patent, if any there is, resides simply in taking that part of the prior art which exhibits apparatus for drying wet hosiery and coupling it with that part of the prior art which used the same forms, different only in that their edges were sharp, to produce the necessary crease or finish on articles which had already been dried.

We shall not pause to consider whether this constituted patentable invention; or whether the use of the prior art crease-producing forms to finish textile articles which had already been dried, but which proper practice required should again be moistened, in order that they could be properly finished, was the practicing of the process or method of the Collis process patent, or whether the process patent can relate back to the date of the filing of the original application for the apparatus patent, and thus avoid anticipation due to the use of Ermentrout's forms, because we think that the decree of the court below must be affirmed on the other ground, namely, that the process patent covers merely the function of the apparatus described and covered by the apparatus patent. In this connection, it may be well to briefly review some of the circumstances surrounding the acquisition of the Collis application by the appellant, and some of the events that transpired thereafter.

It appears that one Ermentrout, of Reading, Pa., having seen a circular put out by a concern known as the Curtin-Hebert-Anthony Company, which had before the earliest date claimed for the Collis invention manufactured and sold internally heated, sharp-edged, crease-producing metal forms, to certain concerns engaged in manufacturing silk gloves and silk hosiery, began in the autumn of 1911 the manufacture of internally heated hosiery forms, substantially identical with those shown in the two Collis patents. They were designed to be used for the same purpose as the forms of the patent. Some of them found their way into the factory of the Paramount Hosiery Company, and worked so well that the officers of that concern determined to purchase

Ermentrout's business and a limited patent, relating to a specific type of coupling between the form and a steam supply pipe, which he had secured. A company was subsequently formed for the purpose of carrying on the business which had been begun by Ermentrout. In the course of selling some of such forms, the original Collis application, which was then pending in the Patent Office, was discovered. The appellant thereupon, on December 24, 1913, in order to protect itself, purchased the same for a comparatively small sum, and thereafter prosecuted the original application and the subsequent division thereof. It was not until the following June, although the application had then been pending for three years, that the division was suggested. In the meanwhile, the prior art, so far as it was accessible to the Patent Office, had been quite thoroughly reviewed, and the slight field of invention left open to Collis made manifest. In the early or middle part of 1914, Walter Snyder, who was engaged in manufacturing laundry machinery in Philadelphia, began the manufacture of drying forms for laundry purposes, and subsequently extended his business to the manufacturing of these forms for hosiery manufacturers.

In 1916, the present appellant began suit against Snyder and the Walter Snyder Company, alleging that the forms which were thus being manufactured by them infringed the apparatus patent in suit in this case. That suit was voluntarily discontinued under the circumstances before mentioned. Most of the forms manufactured by the appellant are distributed to those who use them, under license agreements which provide for the payment of certain royalties, based on the amount of hosiery articles dried on the forms. The appellee had acquired, under such an agreement, a number of the appellant's forms. Subsequently it acquired some of the forms manufactured by the Walter Snyder Company, and used both in its business. After the appellant abandoned its suit against the Snyder Company, it began this suit, basing the alleged infringement upon the appellee's use of the forms which it had purchased from the Snyder Company. It is thus apparent that the appellant is attempting in this suit by means of the process patent to secure a monopoly in the use of an apparatus which admittedly could not be the subject-matter of a valid patent at the earliest date at which it is claimed that Collis invented it, because the only way shown in the patent, or otherwise, for practicing the method covered by the process patent, is the use of the particular apparatus described and covered by the apparatus patent. The process is, in reality, nothing but the use of the apparatus. That is manifest by reference to the before-quoted portion of the specification of the process patent, as well as the following extract therefrom, viz.:

"From the foregoing, it will be seen that the procedure followed, in treating hosiery articles under my improved method, is first to effect a heating (from within and to a predetermined drying temperature) of a hollow form, preferably constructed of metal, and having its sides narrow in cross-section and converging into substantially reduced-edge portions; then manually stretching a hosiery article longitudinally thereon and retaining the same on the form for the fabric-drying period, during which the fabric of the article is simultaneously dried, shaped, and creased at two oppositely disposed portions, and then removing or stripping the article from the form."

Moreover, the apparatus patent specifies, and in fact claims, the function of the apparatus as the simultaneous drying, creasing, and finishing of the textile article mounted on the exterior thereof. It is impossible for us to perceive how this process can be considered in any other light than the mere function of the apparatus. The inevitable result of any other conclusion would be to give validity to a patented process which consists solely in the use of an apparatus which cannot be the subject-matter of a valid patent.

It would serve no useful purpose, and would unduly burden this opinion, to review the authorities which have differentiated between the mere function of a machine or apparatus and a patentable process, which could be practiced by the use of the apparatus or machine, and to attempt to distinguish those cases from this. It is sufficient, we think, to refer to Busch v. Jones, 184 U. S. 598, and particularly to the remarks of Mr. Justice McKenna on page 607, 22 Sup. Ct. 511, 46 L. Ed. 707. In the case at bar, the dependence is the process upon the apparatus, and not the apparatus upon the process, just as the process in that case was dependent upon the press. It is equally true that the process in this case is as clearly the whole value, the sole purpose of the apparatus, as in that case "the process was the whole value, the sole purpose of the press." We are accordingly of the opinion that the claims in suit of the process patent cover nothing but the mere function of a machine or apparatus, and hence are invalid.

The decree appealed from is therefore affirmed, with costs.

CORONET PHOSPHATE CO. v. UNITED STATES SHIPPING CO.

(District Court, S. D. New York. March 14, 1917.)

1. PLEADING ⟸8(2)—ON PLEADING FOREIGN LAW, SUBSTANCE MUST BE SET OUT.
   In pleading a foreign law or ordinance, it is not sufficient to state the pleader's conclusion as to its effect, but its substance at least must be set out.

2. SHIPPING ⟸51—DEFENSES TO SUIT FOR BREACH OF CHARTER.
   In a suit for breach of a charter to carry tonnage, it is not a defense that the owner had the right to fill the ship with other merchandise, which could not be obtained.

3. SHIPPING ⟸51—DEFENSES IN SUIT FOR BREACH OF CHARTER.
   In a suit for breach of a charter to carry merchandise, it is not a defense that contracts which libelant had for sale of the merchandise had been canceled.

4. ADMIRALTY ⟸61—PLEADING MATTER IN MITIGATION OF DAMAGES.
   In admiralty, matter in mitigation of damages should not be pleaded in the answer.

5. SHIPPING ⟸51—CONSTRUCTION OF PENALTY CLAUSE OF CHARTER NOT LIMITING RECOVERY FOR DEFAULT OF OWNER.
   A provision of a charter party, "Penalty for nonperformance of this agreement, proved damages not exceeding estimated amount of freight," cannot limit recovery by the charterer for failure of owner to enter on performance of the charter.

6. ADMIRALTY ⟸64—INTERROGATORIES TO FISH INTO EVIDENCE OF INTERROGATING PARTY NOT ALLOWED.

Interrogatories in admiralty serve two purposes; First, to amplify the pleadings of the party interrogated; and, second, to procure evidence in support of the libel or defense of the party interrogating. But they may not properly be used merely to fish into the evidence which the party interrogated may produce in support of his own allegations.

In Admiralty. Suit by the Coronet Phospate Company against the United States Shipping Company. On exceptions to answer and interrogatories. Sustained in part.

Max Shoop, of New York City, for libelant.
John M. Woolsey, of New York City, for respondent.

LEARNED HAND, District Judge. [1] The first defense is contained in the forty-eighth article of the answer. It alleges that the charter party under which the carriage was to be made contained the usual provision against restraints of rulers, princes, and people. It then goes on to allege that, in consequence of the Great War, "restraints, restrictions, and limitations have been placed on shipping, both under neutral and belligerent governments," among them being Great Britain and her allies, on shipments destined to Sweden and Holland, and that by reason of these restraints, limitations, and restrictions respondent was prevented and restrained from performing the charters mentioned in the libel and furnishing the tonnage.

This allegation is certainly bad as it stands. I do not mean to pass upon the question whether the British Orders in Council excused the respondent from the voyage; but I do mean to say that in pleading foreign ordinances having the force of law the pleader is bound to allege more than his conclusion of the effects of the ordinance. Lomb v. Pioneer, etc., 96 Ala. 430, 11 South. 154; Valz v. First National Bank, 96 Ky. 543, 29 S. W. 329, 49 Am. St. Rep. 306; Gibson v. Railroad, 225 Mo. 473, 125 S. W. 453. He is bound to set out its substance, so that the court may judge whether it has the effect which he ascribes. Without passing, therefore, upon the question as to whether shipments to Sweden and Holland were excused by the Orders in Council, or any other ordinances promulgated by any of the powers, the exception is sustained.

[2] The second defense is set up in the forty-ninth article of the answer. It alleges that the steamer had the option of carrying cotton or other lawful merchandise to fill the ship, and that thereby the owner was excused.

It is, of course, not an implied condition upon a charter party that it should be profitable to the owner, or of any contract of carriage that the ship should be filled. That is the owner's lookout. It would be intolerable to impose such a condition upon the shipper. The further allegation is not relevant, that the charter party was made in pursuant of a regular course of business for many years past, and that the phosphate freights were fixed upon the assumption that the ship would fill. This is far from an allegation that the charterer agreed to excuse

the owner if he could not fill. The allegation at most comes to no more than that the charterer knew that the owner expected to fill with light freight, which is not the equivalent of an undertaking to share that risk with the owner, who was in the business, and who knew what he could and what he could not do. Any change in the general market must fall upon the person who engages in the business of carriage. The exception is sustained.

[3] The third defense is contained in the fiftieth article of the answer. It alleges that the charter parties were part of an agreement between the libelant and phosphate buyers of Europe, and that the contracts for the sale of the phosphate were in commercial effect part of the same transaction as the charter parties; that the contracts for the sale of phosphate had all been canceled, and the libelant had suffered no damages from their cancellation, so that it had not suffered any damages, and it was not entitled to sue.

The defense is bad in law. If it had alleged that the charter party was only for the carriage of phosphate to fulfill a given contract, and that the contract was terminated, it might have been good; but the charter parties contained no such provision. There is no excuse for saying that they should be limited to deliveries under existing contracts only, and indeed nothing of the sort is pleaded. Furthermore, if the defense only touches damages, it is not good. It would by no means follow that the libelant could not recover damages merely because it was not sued for failure to deliver under the existing contracts. Phosphate might still be more valuable at the place of destination than at the place of shipment, and the carriage therefore of value, even if the contracts had been repudiated. Second, there is no propriety, even in admiralty, in pleading evidence in mitigation of damages in the answer to the libel, as appears below. The exception is sustained.

[4] The fourth defense, in the fifty-first article, asserts that the libelant did not have any contracts, market, or sale for its phosphate in Europe, and was not prepared to ship and deliver any phosphate at the places mentioned in the charter parties; that it has not chartered or sought to charter any other steamers to lift the phosphate.

This matter would be material on damages; but even though admiralty will dismiss a libel where the libelant proves only nominal damages, it has never been suggested that matter in mitigation of damages must be pleaded, nor is there any reason why it should be pleaded. The whole matter of damages is reserved for a reference usually, and to introduce matters of damages into the pleadings is merely to confuse the issues, as though it raised an issue which could properly arise upon the trial. The exception is sustained.

[5] The fifth defense is contained in the fifty-second article of the answer, and arises under the clause:

"Penalty for nonperformance of this agreement, proved damages not exceeding estimated amount of freight."

As matter of law this has been held not to be good in limitation of damages. Wall v. Rederiaktiebolaget, [1915] K. B. 66; Aktieselskabet Korn-Og v. Rederiaktiebolaget Atlanten (D. C.) 232 Fed. 403; Mit-

sui & Co., Ltd., v. Watts, Watts & Co., 115 Law Times Rep. 248. The same objection applies as to the third and fourth defenses, that the matter is only relevant in mitigation of damages. The exception is sustained.

The sixth defense is set forth in the fifty-third article of the answer. Like the last three, it goes only to mitigation, and it is therefore improper in the pleading. It is likewise improper because the letter in question was in no sense an accord and satisfaction between the parties, nor was it an estoppel so as to bind the respondent in any way. The exception is sustained.

[6] The other exceptions, except the last two, touch the interrogatories. Interrogatories in the admiralty serve two purposes, to amplify the pleadings of the party interrogated, and to procure evidence in support of the libel or defense of the party interrogating. Bock v. Int. Nav. Co. (D. C.) 124 Fed. 711; The Baker Palmer (D. C.) 172 Fed. 154. They should not, however, be used merely to fish into the evidence which the party interrogated may produce in support of his own allegations. This limitation upon discovery has remained even in the most modern rules of procedure. A party is of course entitled to know whether his opponent admits the truth of his own allegations, and how far, so as to avoid unnecessary preparation for trial. He is not entitled to know what evidence his adversary will produce to prove the adversary's allegations, and what evidence he must himself produce to overcome the case so made. The result will, of course, be, as it has been in the past, that he must go to trial somewhat in the dark as to what he must meet. The pleadings are intended to advise him of that, and interrogatories are proper to reduce those allegations to very specific form. They should be encouraged for that purpose, but so far as they call upon the pleader to go further, and give, not only the details of his allegations, but the evidence by which he means to prove them, they are liable to abuse. If there develop on the trial a case of genuine surprise, the court, especially where there is no jury, has ample power to protect the party surprised.

The first, second, and third interrogatories are directed to the method of computation of the libelant's damages. There can be no propriety in these inquiries: First, because they are directly contrary to the rule; and, second, because, since they only touch damages, they can in any case properly come up only after interlocutory decree. Even then they are unnecessary, as the libelant must put in its case first before a commissioner.

The fourth and fifth interrogatories make inquiries as to the contracts for the sale of phosphate in Europe, and whether they were canceled without the payment of any money by the libelant. They can be material only in the event that libelant should attempt to charge the respondent for the damages for the loss of profits under those contracts. As the libelants have alleged nothing of the sort, they may not recover special damages, and the whole inquiry is irrelevant to any issue in the case, even under damages. The exceptions are sustained.

The only relevancy of the sixth, seventh, and eighth interrogatories by any possibility is to show that the charter parties were limited to a

carriage of such phosphate as was in performance of some contract of sale, and do not survive the exception to the attempted defense in that respect. In so far as they touch damages, the same considerations apply to them as to the fourth and fifth.

The ninth interrogatory is too vague to be of any value. If the respondent shall allege any specific ordinances or regulations which are material to the controversy, possibly an interrogatory may lie directed to the respondent to require its admission that the ordinances alleged had in fact been promulgated. The pleadings are in no condition at the present time to justify such interrogatories. The exception is sustained.

The tenth interrogatory may well become material at some future stage of the proceeding. If the respondent tenders issue upon ordinances or regulations exposing a ship to search or capture which carries goods to Sweden or Holland, inquiry as to the shipments proposed and permits obtained may be relevant, because the interrogatories would then be pertinent to the respondent's case as pleaded. The exception, therefore, is sustained.

There remain the seventeenth and eighteenth exceptions to the traverses of the answer. I think the denial of the allegation of the third article of the first cause of action and the first article of the other causes of action is bad. These articles allege that the charter party was executed and that a copy is annexed to the libel and made a part of the allegation. The answer denies in general that the terms of the charter party are correctly set forth, or that the charter party annexed to the libel is a full and correct copy. The allegation is that the charters were made by the respondent's agents, and the respondent must specifically deny those provisions of the charter which are incorrectly pleaded, unless they are willing to plead ignorance. O'Keefe v. Staples Coal Co. (D. C.) 201 Fed. 135.

The eighteenth exception is good in part and bad in part. The libelant is entitled to a categorical admission or denial of the allegation that the respondent has failed, refused, or neglected to name or furnish a steamship to the libelant, and it is not a categorical answer to say that it has not carried the precise cargo mentioned. As to the allegation of demand, that is sufficient, and payment must be pleaded affirmatively, if the respondent is to rely on it, no matter what the pleading of the libelant may be. The exception is sustained as indicated, but no further.

The decree, therefore, will be that all the exceptions are sustained in toto, with the exception of the eighteenth, which is sustained to the extent noticed. The respondent will have leave to plead over within 10 days after the order is entered.

UNITED STATES v. TWENTY-FIVE PICTURES.

(District Court, S. D. New York. July 7, 1919.)

1. CUSTOMS DUTIES ⟸133—TECHNICAL DEFECTS IN PROCEEDINGS FOR FORFEITURE DISREGARDED.
   Technical defects in an information for forfeiture of merchandise for importation in violation of the customs laws will be disregarded, unless timely objection is made.

2. CUSTOMS DUTIES ⟸130—EVIDENCE SUFFICIENT TO SUSTAIN FORFEITURE FOR FRAUDULENT IMPORTATION.
   Under Rev. St. § 3082 (Comp. St. § 5785), providing for forfeiture of merchandise fraudulently or knowingly imported contrary to law, failure of the importer to produce a consular invoice or other evidence required by statute as to the character or value of the merchandise or to declare the same is sufficient to establish a fraudulent importation, regardless of whether or not the merchandise is in fact dutiable.

3. CUSTOMS DUTIES ⟸38(13)—FREE LIST—WORKS OF ART—"REPLICAS"—"REPRODUCTIONS."
   In Tariff Act Oct. 3, 1913, § 1, Free List, par. 652 (Comp. St. § 5291), permitting free importation of original paintings in oil, including not more than two replicas or reproductions, the words, "replicas or reproductions" are intended to embrace only works of the artist who made the original.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reproduction.]

Forfeiture for Violation of Customs Laws. Libel by the United States against Twenty-Five Pictures. Judgment for the United States.

Francis G. Caffey, of New York City (Julian Hartridge, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Charles H. Griffiths, of New York City, for claimant.

AUGUSTUS N. HAND, District Judge. This is a libel to forfeit certain pictures for violation of the customs laws. They were purchased by one Kahn in Russia and brought in by one Macbeth, as Kahn's agent, who did not mention them in his baggage declaration, produce a certified consular invoice for entry, or otherwise disclose their existence. The inspector testified that he asked Macbeth if he had brought over anything obtained abroad, and he said he had not. The goods were landed on the wharf in three packages and evidently escaped notice. They were seized some 6 months afterwards. The appraiser thought that 7 of them were oil paintings over 100 years old, 13 were original paintings, and 2 were copies over 100 years old. The remaining 3 designs were not paintings, and were classified as "three designs of manufactured paper," apparently under paragraph 332 of Act Oct. 3, 1913, c. 16, § 1, schedule M, 38 Stat. 146 (Comp. St. § 5291), subject to duty at 25 per cent. It may be they should have been classified as originals or replicas under paragraph 652 below, and free.

The Tariff Act provides:

"Section 376 (Schedule N), Works of art, including paintings in oil or water colors, * * * 15 per centum ad valorem."

"Free List.

"Paragraph 652. Original paintings in oil, * * * including not more than two replicas or reproductions of the same. * * *"

"Paragraph 656. Works of art (except rugs and carpets), collections in illustration of the progress of the arts, works in bronze, marble, terra cotta, parian, pottery or porcelain, artistic antiquities, and objects of art of ornamental character or educational value which shall have been produced more than one hundred years prior to the date of importation, but the free importation of such objects shall be subject to such regulations as to proof of antiquity as the Secretary of the Treasury may prescribe."

Article 395 of the Customs Regulations, 1915, requires that works of art produced more than 100 years prior to the date of importation shall have accompanying the invoice certificates and affidavits bearing on the age and character of the goods.

It is evident from the foregoing that imported oil paintings are subject to a 15 per cent. duty ad valorem, unless they are originals or copies (not exceeding two) by the same artist, or unless they are over 100 years old. In the last case proof of antiquity must accompany them.

Under section 3 E of the Customs Administrative Act (see Underwood Tariff Act Oct. 3, 1913, c. 16, 38 Stat. 182 [Comp. St. § 5522]) it is provided:

"That, except in case of personal effects accompanying the passenger, no importation of any merchandise exceeding $100 in value shall be admitted to entry without the production of a duly certified invoice thereof as required by law. * * *"

Plainly the importation did not come within the term "personal effects," and the exception and limitation were not applicable.

The failure of Macbeth to produce a duly certified consular invoice, coupled with his false statement to the inspector that he had purchased nothing abroad, have established probable cause for the seizure and impose the "onus probandi" upon the claimant. It is possible that he has established that 13 of the paintings were originals or replicas, and were consequently not dutiable. If so, he has done this upon the mere opinion of Mr. Hecht, the government appraiser, given at the trial, and by no original or direct proof of the facts. The alleged antique paintings were improperly introduced into the country, because they were neither invoiced nor accompanied by documentary proofs of their age, as required by paragraph 656, supra. As the case stands, they are prima facie dutiable, irrespective of whether by proper procedure they could have been entered as free or not.

There is no proof that the 3 remaining articles were not dutiable, and Mr. Hecht classifies them as subject to duty. All the merchandise was brought in contrary to law, because not accompanied by the certified invoice required under section 3 E of the Customs Administrative Act.

Section 3082 of the United States Revised Statutes (Comp. St. § 5785) provides that:

"If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, * * * such merchandise shall be forfeited."

[1] The fourth count of the information, on which the government chiefly relies, is based upon this section, and merely alleges a violation of the section in the statutory language, without stating how the goods were imported "contrary to law." At the trial this count was discussed, and my impression has been that the government made the contention that the failure to produce a duly certified invoice was the ground of forfeiture relied on in that count. No motion to dismiss was made because the fourth count of the information was technically insufficient, and the case was closed under the apparent understanding of both sides that the issues were sufficiently defined. Thus the claimant fully apprehended, and had every opportunity to meet, the contentions of the government, and the trial was had upon the theory that the failure to produce a certified invoice and secure proper entry was the feature of illegality relied on in this count. Doubtless such a general allegation of violation of section 3082, supra, would have been held insufficient on demurrer, but defects of this kind in an information are waived unless objection is made in season.

The result of a trial surely ought not to be allowed to turn upon mere questions of pleading, further than may be necessary to secure an orderly presentation of the issues and to maintain the substantive rights of the parties. It is one thing to insist upon precise pleading when the parties, before testimony is taken, say they need such pleading to define the issues, and it is quite another matter to upset an entire trial, or, worse still, finally to determine the result upon a technicality of pleading, where the case was tried with an understanding of the issues, and no one was surprised or injured by the form of the information. Defects in informations, unless raised by timely objection, have been frequently disregarded. Friedenstein v. United States, 125 U. S. 225, 8 Sup. Ct. 838, 31 L. Ed. 736; Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684. Moreover, this count was added without objection by the claimant. Since the trial I have given counsel for claimant an opportunity to open the case upon allowing an amendment to the government pointing out the precise objection, but counsel has said he did not care to offer further evidence or argument on this point. The question remains whether the words of section 3082, supra, "fraudulently or knowingly," make it necessary to show intent to violate the law on the part of the claimant, or his agent, in order to establish a cause of forfeiture under the fourth count.

[2] It was held by Judge Ray in the Case of Fifty Waltham Watch Movements (D. C.) 139 Fed. 291, and by the Supreme Court of Arizona, in Six Parcels of Placer Gold v. United States, 8 Ariz. 389, 76 Pac. 473, that a failure to comply with the customs provisions as to entry would not be excused in a proceeding to forfeit merchandise merely because the goods were not in fact dutiable. By both courts it was apparently thought than an intention to defraud the United States of customs revenues was not a necessary ingredient of the crime covered by section 3082. See, also, United States v. McKim, Fed. Cas. 15,693. I am inclined to think that proof of purpose to do the forbidden act is enough to satisfy the requirements of the provisions of section 3082. But if the addition of the word "fraudulently" (though

in the disjunctive) requires proof of an intention to defraud the government, the requisite fraud need not consist of deprivation of customs revenues. The collation of information in order to pass upon the classification of merchandise, and the question often most difficult as to whether it is dutiable, and, if so, just what duty is imposed, is an important function of the revenue department of the government. Without such information, the Customs Act cannot really be enforced or the revenues collected.

By the failure of the importer to comply with section 3 E and produce a consular invoice, any part of the shipment that was not original paintings or replicas or works of art over 100 years old apparently escaped duty, and the antiquities also escaped duty because the importer did not furnish satisfactory proof of age. Indeed, in the case of all this merchandise, any exemption and classification was dependent on proof. To deprive the United States of the information it was entitled to, and of the opportunity for investigation and classification afforded to it by the express provisions of section 3 E, was to defraud the United States. In Haas v. Henkel, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112, which was an indictment for a conspiracy to defraud the United States by bribing an employé of the Department of Agriculture to furnish secret information, the Supreme Court says that it is enough to defraud the government if an act is done calculated to obstruct or impair its efficiency and destroy the value of its operations and reports as fair, impartial, and reasonably accurate. See, also, Stager v. United States, 233 Fed. at page 511, 147 C. C. A. 396. It seems clear from the conduct of the importer that he avoided submitting the merchandise to the investigation which the production of a proper consular invoice and a regular entry would have involved, and that he did this deliberately and clandestinely, because he wished to take no chances of paying duty. Under such circumstances the fourth cause of forfeiture is clearly established.

[3] It has been urged by counsel for the claimant that all of the merchandise should have been classified under section 652, which covers, not only original paintings, but original drawings and sketches in pen and ink, "including not more than two replicas or reproductions of the same." It is contended that the words "replicas" and "reproductions" mean any copies, and that this statute is intended to place on the free list all works of art of this kind, whether wrought by the original artist or another. In other words, an importer could bring in free an original and two copies by any one of the same thing. A "replica" is defined by the Standard Dictionary as a "duplicate executed by the artist himself and regarded equally with the first as an original." I think a "reproduction," while it is sometimes loosely used as meaning a copy, does not really differ from a replica, within the meaning of the above section. It suggests the idea of a second effort by the same artist. Any other interpretation would make the word "original," as well as the clause "providing for replicas or reproductions," though not strictly meaningless, entirely unnecessary.

Moreover, the Tariff Act, under paragraph 376, subjected "works

of art, including paintings in oil, or water colors, pastels, pen and ink drawings, or copies, replicas or reproductions of any of the same," to a duty of 15 per cent ad valorem. Here it is to be noticed the word "copies," a word of much broader significance than "replicas" or "reproductions," is added. I think this shows that any of the paintings which were not originals, or were not reproductions made by the same artist, were subject to duty, unless they had been "produced more than 100 years prior to the date of importation"; but in the last case the free importation was "subject to such regulations as to proof of antiquity as the Secretary of the Treasury may prescribe." The prescribed regulations were not complied with and they therefore became dutiable. When paragraph 376 provides that works of art, including paintings, water colors, and pen and ink drawings, or copies, are in general subject to a duty of 15 per cent. ad valorem, it cannot be contended that the court can take judicial notice of the fact that the merchandise may be on the free list if the real facts were known, because it may be an original painting or a replica. If such is the law, the government would have to prove a negative in the case of the importation of any painting.

It is also to be remembered in this case that ample probable cause for the seizure of the merchandise has been shown. Under such circumstances, the burden of proof is shifted, and the claimant must satisfy the court that the seizure was not justified. Locke v. United States, 7 Cranch, 339, 3 L. Ed. 364.

The first count of the libel, which is for a false baggage declaration, must be dismissed; and it is ordered accordingly. The merchandise was not baggage, and not necessarily included in a baggage declaration.

The second count is upon the charge that the importer did knowingly and willfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce. Undoubtedly to establish this count there must have been an intent to defraud the revenue. The importer may have hoped or believed the goods were not dutiable, but he preferred to take his chance of smuggling in his goods, rather than to rely upon his ability to satisfy the government as to the law or the facts. Three of the articles were dutiable under the ruling. The antiques have become dutiable because proof of age was not offered as required by law. Where in this merchandise there were certainly some dutiable articles, and there was a secret introduction of all the parcels at the same time for the plain purpose of avoiding examination and classification, I think enough has been shown to establish forfeiture under this count of all the things. This is especially so when the only ground for regarding any of the goods as free is the opinion of the government appraiser, Mr. Hecht, and not the slightest direct proof. It seems to me that the claimant has really done nothing to sustain the burden of proof resting on him. I accordingly direct a verdict for the government upon the second count of the libel as to all articles.

The third count, for not declaring these articles alleged to have been

found in the baggage, is dismissed, because there is no proof that they were so found, or were in any sense baggage.

A verdict is directed for the government upon the fourth count, and as to all articles, for the reasons already stated.

CHIPMAN, Limited, v. THOMAS B. JEFFERY CO. *

(District Court, S. D. New York. August 13, 1919.)

CORPORATIONS ⇐665(3)—LIABILITY TO SUIT OF FOREIGN CORPORATIONS AFTER ABANDONING BUSINESS IN STATE.

A foreign corporation *held* not subject to suit in New York after it had ceased to do business in that state, on a cause of action arising in another state, although when doing business in New York it had designated an agent on whom service might be made, in compliance with General Corporation Law, N. Y., § 16, which designation had not been revoked.

Action by Chipman Limited, against the Thomas B. Jeffery Company. On motion by defendant to set aside service of summons. Granted.

Hays, Hershfield & Wolf, of New York City (Ralph Wolf, of New York City, of counsel), for plaintiff.

Philip B. Adams, of New York City (Thomas M. Kearney, of Racine, Wis., of counsel), appearing specially for defendant.

AUGUSTUS N. HAND, District Judge. The defendant moves to set aside the service of the summons in this action upon the ground that the defendant is a foreign corporation organized under the laws of the state of Wisconsin, and since August, 1916, has transacted no business in the state of New York, and had no office or place of business therein.

It appears that in August, 1916, the defendant sold all its property to the Nash Motors Company, a Maryland corporation, and thereupon discontinued business. Prior to that time it had been engaged in business in the state of New York, and in 1914 designated Philip B. Adams, Esq., as the person upon whom process might be served, and on July 6, 1914, filed papers with the secretary of state of the state of New York as a basis for the issuance to it of a certificate to do business within that state.

The action is based upon contracts made in Wisconsin and to be performed in that state. Section 432 of the Code of Civil Procedure, subd. 2, authorizes service of process upon a foreign corporation by delivering a copy thereof to "a person designated for the purpose as provided for in section 16 of the General Corporation Law." Section 16 provides:

"Such designation * * * shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this state or until the filing in the same office of a written revocation of such consent executed by the person so designated." General Corporation Law (Consol. Laws, c. 23).

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

*Judgment affirmed 250 U. S. —, 40 Sup. Ct. 172, 64 L. Ed. —.

Section 1780 of the Code of Civil Procedure provides that:

"An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action. * * *"

Mr. Justice Holmes, in the recent case of Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U. S. 93, 37 Sup. Ct. 344, 61 L. Ed. 610, points out the distinction between the case where jurisdiction is obtained over a foreign corporation doing business in the state where there has been a consent on the part of the corporation to be sued, and where there has not been any such consent. If the corporation is doing business within the state without appointing an agent according to the requirements of the statute, or if the statute provides for service upon some public official, jurisdiction is acquired if the statutory service is made irrespective of consent as to causes of action arising within the state.

Jurisdiction in this case is based upon a so-called estoppel on the part of the corporation to object to service in actions based upon local transactions. This estoppel has been held to be "limited to causes of action which owe their origin to the transaction of business in defiance of the statutory restrictions." See Bagdon v. Philadelphia & Reading C. & I. Co., 217 N. Y. at page 437, 111 N. E. at page 1077, L. R. A. 1916F, 407, Ann. Cas. 1918A, 389; Smolik v. Philadelphia & Reading C. & I. Co. (D. C.) 222 Fed. 148. But it was quite consistently held in the foregoing cases that a designation by a corporation of an agent to receive process takes from the case any question of due process of law and leaves nothing for the court to consider but the proper construction of the consent which the corporation has given to be sued within the jurisdiction in view of the statutory provisions.

No cases allowing actions against foreign corporations not engaged in doing business within the state have gone beyond the insurance cases where the right to sue after the company had ceased to do new business has been founded upon obligations accruing within the state. Mutual Reserve v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; Johnston v. Mutual Life, 104 App. Div. 544, 93 N. Y. Supp. 1048. The receipt of premiums from residents of the state, or the adjustment of losses upon policies issued to residents when it was doing a business therein, is regarded as a continuance of business within the state, even if the corporation has abandoned issuing new policies. Mutual Life v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569. It is undoubtedly within the power of the state to exclude the corporation from doing business within its borders and to allow it to do business upon such terms, as it may prescribe, and if the corporation consents to these terms and designates a person upon whom service may be made, the process may issue against that person even upon causes of action arising outside the jurisdiction.

I can, however, discover no authority which subjects a corporation to actions not arising within the state when it has ceased to do business therein. No case is cited in which the consent to be sued has been interpreted as broad enough to cover actions against the cor-

poration which have arisen since it ceased to do business. The question is not one of constitutional law, but of the construction of a statute of the state of New York. It is in my opinion a quite unnecessary inference to be drawn from the designation of an agent that such designation was to cover actions arising outside of the state after the corporation had ceased to do business therein.

In the case of Smolik v. Philadelphia & Reading C. & I. Co., supra, Judge Learned Hand said:

"* * * There is no reason that I can see for imposing any limitation upon the effect of section 1780 of the New York Code, and as a result I find that the consents covered such actions as these."

I think the words "any limitation" must be read as applying to such facts as were before the court in that case, namely, causes of action arising outside the state, where the corporation had a duly designated agent within the state and was transacting business therein.

The motion to vacate the service of the summons is therefore granted.

THE BRABANDIER.

THE L. O. STENSLAND.

(District Court, E. D. Virginia. September 30, 1919.)

COLLISION ⇐82(2)—VESSEL FAILING TO STOP ON SIGNAL IN FOG LIABLE FOR COLLISION.

A collision at sea at night in a dense fog between the steamships L. O. Stensland and Brabandier, on crossing courses, *held* due solely to fault of the Stensland under evidence warranting findings that the Brabandier, on hearing the fog signals of the Stensland, stopped as required by the rules and gave the prescribed signals, and that the Stensland, although hearing the signals, approached at such a speed that she struck the bows of the other vessel.

In Admiralty. Suit for collision by E. J. Saunders, master of the steamship Brabandier, against the steamship L. O. Stensland. Decree for libelant.

Hughes, Little & Seawell, of Norfolk, Va., for the Brabandier.

Hughes, Vandeventer & Eggleston, of Norfolk, Va., for the L. O. Stensland.

WADDILL, District Judge. The steamship Brabandier, 2,467 tons net register, 300 feet long, 40 feet beam, 26 feet depth, loaded with a full cargo of 5,200 tons of grain, bound on a voyage from New Orleans, via Hampton Roads, for bunker coal, was on her way to Hampton Roads, and the Stensland, 285 feet long, 37 feet beam, and 20 feet depth, was also bound to Hampton Roads from Gibraltar. The ships came into collision in a fog, about 3:10 to 3:20 on the morning of September 22, 1916.

The evidence is that the Brabandier was on a course of northwest by west, and the Stensland on a course of southwest. One was ap-

proaching the whistling buoy off Cape Henry from the south; the other from the northeast. They each ran into the fog at about the same time, and the evidence of each steamer is that, upon entering the fog, the engines were put at half speed and later slowed down.

The case of the Brabandier is that as she approached the whistling buoy, about 2 o'clock in the morning, being in a dense fog, too early for entering Cape Henry to get a pilot, the chief officer and his stand-by man went forward to the forecastle head and got the anchor ready, preparatory to putting it over at the whistling buoy. The vessel was proceeding on a course northwest by west at slow speed, blowing her fog signals at regular intervals. She had approached so close to the whistling buoy as that the whistle of it was heard, when the signal of the Stensland was heard off the starboard beam, some distance away. Immediately upon hearing the signal, the engines of the Brabandier were stopped, and she then changed her signal from one prolonged blast to two prolonged blasts, indicating a vessel not under way—under way, but not making headway. She continued to blow this signal for some minutes, when the masthead lights of the Stensland were seen off the starboard beam.

The dispute in the evidence as to what occurred is chiefly from that time on to the collision; the Brabandier's witnesses testifying that they saw the Stensland's lights in a line, indicating that she was going practically in the same direction in which the Brabandier was moving; that, after seeing the Stensland's lights, they noticed her change her course as if under a starboard helm, and shortly afterwards she threw her red light on the starboard bow of the Brabandier, and came across the starboard bow and over to the port side.

The Stensland denies that she made any such change in her course, but that she was on a southwest course from the time she got on that bearing, several hours before, until the ships were in close proximity, and she ported her helm for the purpose of swinging the other way. She admits that she heard the fog signal of one whistle from a ship that turned out to be the Brabandier, when she was a mile or more away; that she heard her change from one to two blasts of her whistle, indicating that her engines were stopped; that she heard the whistles several times before the masthead light of the Brabandier appeared in the fog some four to five ship lengths away on the port side, when she hardaported her wheel, but the Brabandier came into and struck her on the port side.

The issue between the parties is sharply drawn as to what happened immediately preceding the vessels coming together; the Brabandier's position being in effect that while at a standstill in the water, where she had been for some 10 or 15 minutes, because of hearing on her starboard bow the fog signal of another vessel, which turned out to be the Stensland, the latter ship loomed up on her starboard side, and under a starboard wheel crossed her course, striking the Brabandier's stem, causing it to twist to port, and scraped her port side against the Brabandier's beam, as a result of which she received the injury.

The Stensland says she was proceeding on a southwest course, making barely more than steerage way, having theretofore for some time

slowed down in the fog, after hearing a mile or more away the fog signals of a vessel that turned out to be the Brabandier, indicating that the same was at a standstill, when the latter vessel loomed up in the fog some four or five ship lengths away, making considerable speed; that she immediately put her wheel hard aport, and did everything possible to avert the collision, but was run into and struck by the Brabandier.

The true solution of the facts between the parties and the determination of whether the ships properly conformed to the rules and regulations prescribed for their movement in the circumstances in which they were respectively placed will alone decide the issue between them. The International Rules of Navigation applicable to vessels navigating in fog are as follows:

"Art. 15. In fog, mist, falling snow, or heavy rain storms, whether by day or night, the signals described in this article shall be used as follows, namely: (a) * * * (b) A steam vessel under way, but stopped, and having no way upon her, shall sound, at intervals of not more than two minutes, two prolonged blasts, with an interval of about one second between."

Article 16 gives the speed, and prescribes the conduct of those navigating vessels in fog, as follows:

"Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to 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, § 1, 26 Stat. 325, as amended by Act June 10, 1896, c. 401, § 1, 29 Stat. 381 (Comp. St. §§ 7853, 7854).

The evidence is undisputed, so far as the signals were concerned, that the Brabandier was conforming to subsection (b) of article 15. The Stensland's navigators all admit hearing the two signals, and the navigators of the Brabandier testify to their having been regularly given, and that their ship was at a standstill as directed by the rules. The actual movement of the ship alone seems to be in dispute, and has to be solved after full consideration of all the testimony.

The court's conclusion is that the Brabandier was doing what she naturally would have been doing to conform to this rule, prescribed for the safety of herself and other shipping, and that it is highly improbable that she would have taken the precaution to have given the two signals, indicating the fact that she was at a standstill, and then pursued the reckless course of navigating entirely to the contrary. Moreover, the general circumstances surrounding the collision, and the coming together of the ships, strongly tend to support the Brabandier. The Stensland's contention, that while she supposed the Brabandier to be at a standstill in the water, some distance away, she suddenly loomed up on her port beam, some four or five ship lengths away, making considerable speed, and that she hardaported her wheel with a view of avoiding the risk of collision, but the Brabandier nevertheless ran into and collided with her, is not supported by the testimony.

The collision could not well have occurred in the manner claimed. It is not borne out by the physical evidence of the collision on both vessels. The testimony is that the Stensland was hit on her port side first slightly forward of the bridge and about amidship; and, second, slightly abaft of amidship, receiving considerable injury from each lick. Had the Stensland been moving to starboard, as claimed by her, it would have been exceedingly difficult for the collision to have occurred in this way; and had she been struck end on, as claimed, by the Brabandier, making the speed insisted upon, the heavily laden ship would have cut well into and through the Stensland, probably sinking her at the first impact. The Brabandier's claim to the effect that the Stensland crossed her course from starboard to port, raking her port side against the Brabandier's beam, and severely twisting her stem to port, is far more likely, and is just how, in the judgment of the court, the collision was brought about.

Considering the navigation of the Stensland, it does not seem that she conformed to the rules of navigation prescribed for her movement, as she should have done under the circumstances. She makes no claim to have done anything more than slowed down and continued her navigation in the fog. It is true she claims that she was only making some three miles an hour, necessary for steerageway, but the facts do not bear her out in that respect; that is, that she was proceeding at the moderate rate of speed contemplated for her movement. She was proceeding in a dense fog, in the dead hour of the night, on the high seas immediately outside of the Virginia capes, with knowledge of the presence of other vessels around and about her, and she is in fault for having failed to so reduce her speed and conduct her navigation as to enable her to avoid collision with the Brabandier, whose fog signals she had confessedly heard after the latter ship, herself proceeding with due care and speed, if not still-dead in the water, loomed up some 1,200 to 1,500 feet away. The Umbria, 166 U. S. 404, 417, 17 Sup. Ct. 610, 41 L. Ed. 1053; The Julia Luckenbach, The Indraquala (D. C.) 219 Fed. 600, 604, affirmed Indra Line v. Palmetto Phosphate Co., 239 Fed. 94, 152 C. C. A. 146; The Mina, The Attualita (D. C.) 241 Fed. 530, 534.

The court, upon the whole case, is of opinion that the Brabandier was free from fault in bringing about the collision, and that the Stensland is solely responsible therefor, and a decree so ascertaining will be entered upon presentation.

THE MAUMEE.

(District Court, E. D. North Carolina. September 30, 1919.)

No. 150.

1. SHIPPING ⟸42—WARRANTY OF SEAWORTHINESS IN CHARTER PARTY.
Where a charter party warranted a vessel to be tight, staunch, and strong, and in every way fitted for the voyage, the owner is bound to see that the vessel is seaworthy and suitable for the service for which she is employed, and is not excused even for latent defects.

2. SHIPPING ⟸42—WARRANTY OF SEAWORTHINESS FOR PARTICULAR KIND OF FREIGHT.
Where a charter party warranted that the vessel was tight, staunch, strong, and in every way fitted for the voyage, which was for the transportation of a cargo of nitrate of soda, the owner was bound to furnish a vessel which was seaworthy for that cargo, even though it was a heavy cargo which put a great strain on the vessel.

3. SHIPPING ⟸141(3)—"DANGERS OF THE SEA."
By the term "dangers of the sea," which were excepted in a charter party, is meant those accidents peculiar to navigation that are of an extraordinary nature or arise from irresistible force or overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Dangers of the Sea.]

4. SHIPPING ⟸58(2)—PRESUMPTIONS IN CHARTER PARTY.
Where a charter party warranted that the vessel was tight, staunch, and sound, certificates of seaworthiness issued by underwriters are presumptive evidence, though not conclusive, that the vessel was in the condition represented.

5. SHIPPING ⟸42, 141(3)—LIABILITY ON WARRANTY IN CHARTER PARTY.
Where a vessel chartered for the transportation of a cargo of nitrate of soda which was warranted tight, staunch, and strong, and fitted for the voyage, sprung a leak so that a large amount of the cargo was lost, *held* that, though the weather was rough, yet, as it was not unusual, the owner must be deemed liable on the ground that the vessel was not as warranted, and cannot escape liability on the ground that the rough weather was one of the dangers of the sea.

In Admiralty. Libel by W. R. Grace & Co. against the steamship Maumee. Decree for libelant.

Robert Ruark, of Wilmington, N. C., for plaintiff.

Barry, Wainwright, Thacher & Symmers, of New York City, and Rountree & Davis, of Wilmington, N. C., for defendant.

CONNOR, District Judge. Libel filed by owners of cargo of nitrate of soda for the recovery of damages alleged to have been sustained by reason of a leak in the steamship Maumee on her voyage from Caleta Buena, Chili, to Wilmington, N. C.

On April 4, 1918, the owners of the steamship Maumee, as agents for the United States Shipping Board, signed a charter party with W. R. Grace & Co., for the carriage of a cargo of nitrate of soda from Caleta Buena, Chili, to the port of Wilmington, N. C., in which the steamer was warranted to be "tight, staunch and strong, well and suf-

ficiently manned and victualed, and in every respect fit to perform the voyage."

The cargo was to be "not more than 4,200 and not less than 3,780 tons—English gross weight."

On May 9, 1918, pursuant to the terms of the charter party, the Maumee took on board at Caleta Buena, 40,118 bags for which her captain issued bill of lading.

The libel alleges, and the answer admits, that—

"Upon the 26th day of May, 1918, while the Maumee was proceeding from Colon to Wilmington a leak suddenly occurred which resulted in some sea water entering the after hold of the vessel and doing some damage to cargo stored therein, the extent of which damage unknown to claimants."

Upon arrival at Wilmington, N. C., the cargo was taken from the vessel where, after unloading, it appeared that it was short 328,035 pounds of the value, claimed by libelants, of $13,449.43.

Claimants allege that the leak was caused by the "perils of the sea," within the exemptive terms and provisions of the charter party and bill of lading; that the vessel was, at the time of taking on the cargo and at all other times, until May 26, 1918, seaworthy.

The libel, answer, and evidence disclose that the steamship Maumee is a steel ship 315 feet long, 42 feet beam, built at Hartlepool, England, 1897. She received from the Bureau Veritas, Copenhagen, July 19, 1915, a certificate that she was "in good, efficient working order, classed in first division." She made a voyage from New York to Rotterdam, February, 1918, carrying a cargo of wheat for the Belgian relief, sustaining some injury from heavy weather, and on February 27, 1918, went on dry dock.

She was examined by Myer and Young and surveyed by the surveyor of the Bureau Veritas, who was on the ship every day and prescribed such repairs as he deemed proper to entitle her to a certificate of seaworthiness. His orders in regard to repairs were obeyed. He supervised the work examined and examined her hull. She was then under requisition of the Shipping Board of the United States. On March 8, 1918, the surveyor of the Bureau Veritas issued to her a certificate that she had been examined, "and that all repairs on deck and to the bottom, recommended by the undersigned have been carried out to his satisfaction, etc. Class confirmed."

She returned to New York without accident or injury, and on April 8, 1918, a certificate was issued to her by the chief inspector of the Bureau Veritas, at New York:

"That she was being maintained in accordance with the rules and terms of the certificates which she then carried and which indicates her entry with Class I—3/3 L//. That this class is the highest for ocean service and covers trading on all oceans."

She was ordered, by the Shipping Central Committee, April 2, 1918, to proceed to Hampton Roads and take on a cargo of coal for Panama Canal, and directed to take up with W. R. Grace & Co. for a cargo of nitrate on her return voyage. In accordance with this order, she went to Norfolk, took on the cargo of coal, and proceeded to Colon.

On this voyage she had, "during the first four days, very bad weather"; after that "fair weather" until she reached Colon, April 18, 1918. She did not leak during the voyage. She proceeded, under order, to Caleta Buena with "very fine weather," where, on May 2, 1918, she began taking on cargo of nitrate of soda. Her chief officer says that while at Caleta Buena, and before taking the cargo, he was in charge of the loading and was in the holds every day; that none of the frames of the vessel were broken at that time; the frames were 24 inches apart. The vessel left Caleta Buena May 9th, and reached Balboa May 19, 1918; had "little swell, not much fair weather." She went from Balboa to Colon. Left there May 20, 1919, for Wilmington, N. C. The chief officer is, in respect to the course of the vessel to this point, corroborated by all of the officers and crew. The second mate had been on the Maumee a little over two years; says that he was in the holds every day on the way down; that they were cleaned out; did not leak; that he was in holds Nos. 3 and 4; it was his business to look out for them; none of the frames were broken; he looked at them.

The carpenter testified that he was on the Maumee when she docked at Rotterdam; was on her return voyage to New York, Norfolk, Colon, and Wilmington. She did not leak until May 26, 1918. Took the soundings every morning; found average water there, three or four inches; pumps will leave an inch or two; the bottom of the wells is three feet, six inches below the ceiling of the hold. He cleaned out the holds of the Maumee while she was at Caleta Buena. She was light. There was no break in the frames. Used a small hand-brush. Cleaned down the sides, sweeping the coal dust off. Did this personally. Vessel did not leak at all. The bags containing the nitrate were piled in pyramid form in the holds of the ship. This was the usual and proper way to load it.

The ship's log contains the following entries:

"First day had fair weather, took up anchor 6:30 a. m., steering north-northeasterly course, no wind in the forenoon, during afternoon north-northeasterly wind, force 2—wind increased in the night 4. May 20th, cloudy afternoon, clear at night. May 21st, wind increased from 4 to 5—sea was 5—continued all day, steering northeasterly course, wind northeast. May 22d, swell from southeast—ship rolling considerably and shipping quantities of water—all day May 23d, sea is same—5—call that rough sea—ship rolling considerably—shipping quantities of water, weather squally, until noon. Afternoon wind 3—sea 3—in lea of land then. In the afternoon get clear of land, pass the land again and the ship is pitching heavily, large quantities of water, midnight May 24th, sea was 6, continued all day on 24th—between 8–12.

"Ship is rolling heavily and shipping much water over deck and hatches, weather overcast and squally." Continued until May 26th, when "at about ten a. m. the chief engineer, C. R. Hensen, reported that the water was streaming into the tunnel, apparently coming from the after hold. No. 4 hatch was immediately opened and the chief engineer and chief officer went down and found the hold floating about four feet of water all over; leakage was found by the sound of the instreaming water; it proved to be a broken frame and a rivet hole on the starboard side between No. 3 and No. 4 hatchways, the middle string, say five feet under water edge. Large quantities of water were streaming in, commenced pumping at once and tried to stop the leakage by driving wooden plugs and wedges in between the frames and the ship's side. Holes were made in the watertight bulkheads between the engine room and No. 3 hold to give the in-streaming water a more free access

to the pumps. At about noon the leakage was so far stopped that the water did not increase any more; kept the pumps going as fast as posssible. During the afternoon the water was observed to be disappearing; good deal of the cargo seems to have been melted away. By further examination it was found out that thirty-six frames on starboard side and six frames on the port side had been bursted at about the middle stringer, probably caused by the heavy laboring of the ship during the voyage."

The chief officer and second mate, immediately upon hearing of the leak, went into No. 4 hold; found water about four feet deep. The captain was there at the time. Could see and hear the water rushing in; saw daylight through hole, rivet hole. Made inspection of ship at once; found broken frames. Could see edges of broken frames; breaks were fresh. Could see the white metal. If old, break would be rusty. Vessel not rolling very much at that time. No water got into the ship until May 26, 1919. Soundings were taken daily by the carpenter and registered. Witness is corroborated by all of the officers and crew who were examined. When the leak was discovered on the morning of May 26th, upon examination, a hole "about the size of a nickel" caused by the loss of rivet was found. Witness expressed the opinion that this was caused by the breaking of the frame, resulting from the "heavy laboring of the vessel." The plate "was out a little," caused by the breaking of the frame. Each plate is riveted onto several frames. So, "if one of the frames broke and broke a rivet, that would loosen the contact between the frames and the plate at the point where the rivet was broken." The frames were not bent in; they were cracked. Neils Anderson, the carpenter, says:

"I think the frames were of sufficient strength. The cause of their break was the heavy laboring of the vessel; that is all I can attribute it to. It was no unusual, but a heavy sea, big swells; such as it is usual to encounter on a voyage. We had it right along every day. The same kind of weather we would have on any voyage; but exceptionally heavy for summer months. It was a beam sea a good deal of the time. That made her roll a good deal more than if it had been a head sea."

The evidence shows that the vessel was free from leaks, or water, until some time during the morning of May 26th. That the frames broke at, or about, that time, causing a rivet which riveted the plate to the frame to break and fall out, leaving a hole which the witnesses estimate to have been about the size of a nickel. It is difficult to fix the exact time during which the leaking continued before it was discovered. Prompt, effective measures were resorted to upon discovery. There is no evidence of negligence either as to the time of making the discovery or the means adopted for stopping the leak. The damage was, to a large extent, sustained before the leak was discovered. Liability of the claimant depends upon the question whether the vessel was seaworthy at the beginning of the voyage. All of the witnesses for claimant, who were on the vessel, concur in their testimony regarding the physical condition at that time. They say that the break was fresh, new; that the frames were not broken before the morning of May 26th. They describe the frames as in good condi-

tion, painted. That there was a little rust on them. The chief officer says:

"You will never find any ship without a bit of rust unless it is brand new. They might have broke if they had been brand new on the same voyage with the same pressure put on them. I cannot say as to that. * * * So far as I know she was entirely seaworthy when she took on her cargo at Caleta Buena. The carpenter says that the break in the frames was fresh, not rusted. When the water got into the hold where the nitrate of soda was stored, it will rust the iron if it was not painted."

When the leak was discovered, the boatswain took the watch down and built a platform, prepared wedges, and the second mate drove them in, between the frame and the side of the ship, just back of the frame, on both sides of the frame. Found 36 frames on starboard and 6 on the port side broken; clean, fresh breaks; still fresh and clear. Could see where the breaks were by the flashlights. He says:

"In my judgment, the heavy laboring of the vessel and the cargo we had caused the frames to break. The plates and frames were riveted together, and the rivet broke. The plate was 'out a little.' * * * If one of the frames broke and broke a rivet that would loosen the contact between the frame and the plate at the point where the rivet was broken. The frames were not bent, cracked, not twisted. * * * I think that the frames were of sufficient strength, but for the heavy rolling of the sea. It was such a sea as it is usual to encounter on a voyage, but we had it right along almost every day. It was an exceptionally heavy sea for the summer months. Not unusual weather, same kind as you get on almost any voyage. Something more than average for summer months. Beam sea—vessel rolls more than if it had been a head sea."

When the ship reached Wilmington, N. C., May 28, 1918, upon request of her captain, a survey was made.

H. Stewart, introduced by libelants, says:

That he was called upon to make a survey of the ship, upon her arrival in Wilmington. That he has been in the business for many years. He began to make the survey with Capt. Edgar Williams, harbor master. Made a preliminary examination when he was called to New York and called on W. N. Harris to take his place. Found a number of ribs, or frames, broken; not simply cracked, but broken. "The condition of the frame was very rusty, looked like it had not been painted for scale in a long time; showed neglect. Nitrate of soda, as a cargo, does not support the sides of the ship. It only comes up to a certain point, and consequently there is not support to the sides of the ship from the inside. The breaking of the ribs would cause the rivets to loosen and cause water to come in. * * * The rivets and frames were badly rusted, heavy scales on them, and that weakens the strength of the material. An inspection within six months would have discovered the condition. We knocked off some of the rust. Saw no evidence that any one else had done so. Made no written report. Knows William Compton and Charles E. Rose; both well known surveyors. Would have good deal of confidence in their judgment."

David H. Scott went on the ship as representative of Mr. Smallbones, first person who went on after her arrival at Wilmington. Went into hold No. 3. Looked at the rivets. Saw empty bags lying in the hold where water shipping through had gotten into the nitrate. Also saw broken ribs. Did not count them. They were very rust eaten. Examined them in company with the mate. Know Finley. He is a competent surveyor. Witness has been engaged in shipping in Wilmington ten years. Been around shipyards since he was a boy.

Joseph S. Newton holds a master's license for several years. Was present during unloading of the Maumee. Saw her ribs. All of them were very rusty. Any one could see that they were rusty, unless he was blind. The bags of nitrate were piled pyramid. That is the usual way in which they are stowed.

W. N. Harris had been a surveyor of ships for many years. Acted for Lloyds at the port of Wilmington. Is now clerk of superior court and one of the port wardens. Went on board Maumee. Made examination of her holds. The ship showed a general rundown condition. There were quite a number of rivets (ribs) broken on the port side, in hold No. 3. They were very badly rusted. "The ship was very badly rusted all around the beams and all around the hatch combings, and what we call runways, and in fact the ship was generally rundown and showed lack of attention. The ribs were badly rusted. The effect was that, when a sea struck against the side of the ship, and a heavy cargo in the bottom such as nitrate of soda, it runs in the hold of the ship, and when a heavy sea would strike her it would cause the ribs to break. The pressure of water on the outside, in my opinion, caused the ribs to break. * * * There was some corrosion. Could be seen. Ribs were rust eaten."

James S. Williams, one of the port wardens, at Wilmington, also contracting stevedore, contracted to unload the Maumee:

"Went on her with Mr. Harris. Was called upon by the resident agents of the ship to make an inspection of her to ascertain whether she was seaworthy, after cargo was taken out, to proceed light to another port. Was on board before the cargo was taken out, and while it was being taken out. Between 30 and 40 ribs were broken on the starboard side and less number on the port—8 or 10. They were corroded, rusty, very badly rust eaten. The fact of the matter was, the ship was in bad condition, but I didn't make any thorough inspection of any part except the part where they had the trouble. The rust had eaten into the ribs to an appreciable extent, so as to diminish their strength or thickness. Did not see any evidence of their having been painted recently, nor of the interior part of the ship at all. Did not see any evidence of chipping of the ribs indicating inspection. Ship looked like it had been carrying kainitt or sulphur ore. Ship did not look like she had proper care taken of her. There was nothing to prevent a man seeing the condition if he inspected the hold of the ship. There was no covering and nothing to prevent seeing the rust and corrosion. From an observation of that aft hold it did not look like it had been painted in a year at least, or perhaps a greater length of time. The ribs on the inside of the ship. There were no boards at all between the sides of the ship and the cargo hold. In my opinion the sides of the hold had not been painted in a year; beyond that I cannot say. * * * Made a very careful inspection of her before we issued that certificate. Was satisfied after the examination that it was perfectly safe for the Maumee to proceed in ballast to a northern port for permanent repairs. Iron vessels will always corrode, more or less. Cannot very well prevent it. There is always some corrosion and some depreciation in the frames of any vessel that has been in service for some time. A fair test is to say whether there is a substantial amount of strong metal left in the frame. * * * I made a particular examination of the ribs in the part where the damaged cargo had been."

Libelant introduced Chas. E. Ross, naval architect and engineer; consulting engineer and surveyor, since 1889; graduate of the University of Pennsylvania:

"Has examined a very large number of iron vessels; averaged one a day. Have surveyed large number for United States Shipping Board. Made a survey for owners of vessel in company with Mr. William Compton; made a written report. Examined the log of vessel and took extracts from it, showing that she 'had very heavy weather on certain specified days and that damage had been sustained.' * * * We went down in holds Nos. 3 and 4. Found that 36 frames along starboard side were broken. In some instances both cracked and fractured. The line of fracture was directly in the way of the middle string of the vessel, roughly speaking, about two inches above the line of the stringer, would vary a little bit, following the line of the shear of the vessel. On the port side there were eight frames broken. The same general description applies there. The forward plate of the after peak tank—at the extreme end of the vessel—about where it joins the second stringer was cracked about on the same line of the stringer. On the line from the side of the tank, double bottom tank, it does not go all the way across from shell to shell; it stops a distance of three or four feet from the side of the vessel, and there is a margin there that connects the skin proper of ship by means of brackets or knees or rivets. A large number of these down below the top of the flood line were loose and started; think 45 of these rivets. The margin brackets on the starboard side of the after hold were loose and started. These rivets did not go through the shell of the vessel. * * * They were the connection that connects the frame to the shell. It was not possible for any water to go through these rivets into the hold. In addition to that, in the afterhold on the starboard side of the vessel, there was one frame rivet that was broken off between three and four hatches, about midway of the hold. Some wedges had been driven between the shell of the vessel and the heel of the frame.

"The breaks in all of these frames were of very recent origin. In my opinion they occurred as of the same time, all of the breaks and broken rivets at the same time. The large number of frames that were broken in consecutive line, the broken rivet, the nature and extent of the damage, breaks were all new breaks, one rivet missing from a plate in the side of the vessel portion of the rivet that goes through the shell plate was missing; the portion of the rivet that goes through the frame was there. I had the wedge taken out. Looked at the rivet that was broken off. The function of the rivet to hold the frame and plate in joining them together. It was a new break; was not wasted away or a deteriorated rivet. On the frames there was some corrosion, some parts a considerable amount of corrosion. The body of the metal had not been seriously reduced in the way of these breaks referred to. It was recommended that 36 frames on the starboard side be repaired by fitting and back bars and eight frames on the port side. In my judgment it was not necessary to take out any of the fractured frames and put in new ones; not so much deteriorated as required them to be taken out. There was considerable amount of strength left there, sufficient in my opinion. I could have condemned the frames but did not. We all concurred in that opinion; no other leak of any magnitude that I saw. The frames were not corroded to such an extent that, in my judgment, had the fractures not been there, as to render the vessel unseaworthy. From the conditions which I found, it is my opinion that stress of weather caused the frames to break. The breaking of the frames might have a tendency to break the rivets—removing the support behind—the rivet which I found broken was just behind the broken frame. Did not see any evidence that the broken rib had been tested. The condition of the rib may be tested by tapping. That is a common method."

William Compton, a surveyor to large underwriters, graduated at Durham Technical College (England) 1900. Went to sea as marine engineer. Was manager of Dry Dock Ship Repair Company. Have surveyed a great many vessels, mostly steel. Surveyed the Maumee in the interest of American Underwriters in dry dock, Baltimore, with Mr. Ross and Mr. Lass. States the condition as described by Ross. He tested the frames with hammer. From this test and appearance,

considered there was sufficient metal there to make repairs which were suggested by owner, representing the underwriters. I felt justified in acceding to that method of repair. In my judgment it was sufficient to make the vessel absolutely seaworthy. Did not condemn any frame. In my opinion when the repairs were effected the underwriters would be protected. I made a careful examination of the frames. Found them in fair condition considering the vessel's age and seaworthy after the repairs were made.

Capt. Edgar Williams had been port warden at Wilmington nearly 20 years. Has been pilot since 1866. Has frequently made surveys of ships. Made survey of Maumee with Stewart. Found some of the frames on the starboard side broken; wedges driven in where the rivet was broken. Considering the age of the ship, the frames were in fair condition. There would be some corrosion with water coming in with cargo of nitrate of soda; not sufficient to render her unseaworthy. Did not complete survey; was taken sick.

Referring to the entry in the log, he says that it indicated that the ship had not encountered any extreme weather, but had encountered "heavy swells." That they were to be expected at sea most any time. "Vessels expect most any kind of weather; they take their chances." The owners and captain know that, when she encounters swells, the ship will roll. Nitrate of soda being a heavy cargo, there is bound to be a heavy strain on the ship when she encounters a heavy swell heaving against the side of the ship. If he encounters swells, there is going to be more strain on the vessel with that cargo than if he had a cargo that filled the cargo space.

[1, 2] Eliminating, for the present, the contention of libelants that the sounding pipe in the afterhold was broken, the determinative question upon the decision of which the case must be disposed of is whether the vessel was seaworthy at the time she entered upon her voyage, within the terms of the charter party. As no claim is made for loss or damage to the cargo, resulting from faults or errors in navigation or in the management of the vessel, the question as to whether the owners exercised due diligence to make her seaworthy, in all respects, as provided by section 3 of the Harter Act, Act Feb. 13, 1893, c. 105, 27 Stat. 445 (Comp. St. § 8031), does not arise. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241.

We are thus brought to the consideration of the question whether the Maumee was in fact seaworthy and the measure of liability in that respect imposed upon her owners. The discussion by Chief Justice Fuller in The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688, is enlightening upon the question. He says:

"By the charter party, it was agreed on the part of the vessel that she should be tight, staunch, strong, and in every way fitted for the voyage [the same language found in the charter party in this case], and the rule is well settled that the charterer is bound to see that his vessel is seaworthy and suitable for the service for which she is to be employed, while no obligation to look after the matter rests upon the owner of the cargo. * * * If there be a defect, although latent and unknown to the charterer, he is not excused."

The rule announced by Judge Gray in The Caledonia (C. C.) 43 Fed. 681, is quoted with approval, which concludes:

"The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence."

In The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644, the language of Mr. Justice Gray, who heard the case on the circuit, is approved, and it is said by the Chief Justice:

"After renewed consideration of the subject, in the light of the able arguments presented at the bar, we see no reason to doubt the correctness of the rule thus enunciated"—thus rejecting the argument which sought to relieve the owner from liability for damage sustained to the cargo, by reason of latent defects.

The English and American decisions are reviewed, and the conclusion reached that the Circuit Court rightly held that the warranty was absolute. Hughes, Admiralty, 145.

This warranty of seaworthiness is construed to obligate the owner to furnish to the shipper a vessel seaworthy for the purpose and the cargo which she is to take and carry. The charter party in this case is entitled, "Nitrate Charter Party," and the warranty is that she is, "in every respect, fit to perform the voyage hereinafter mentioned"; that is, to receive "at Caleta a full and complete cargo of nitrate of soda in bags, etc." The warranty of seaworthiness, therefore, must be interpreted in the light of the cargo and voyage.

" 'The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.' This is the commonly accepted definition of 'seaworthiness.' As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that a vessel must be able to transport the cargo which it is held out as fit to carry, or it is not seaworthy in that respect." The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241; The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65, citing The Thames, 61 Fed. 1014, 10 C. C. A. 232 (Fourth Circuit).

The owner is bound to furnish a seaworthy and properly equipped vessel for the purpose of the voyage. Kent, Com. 305; The Wildcroft, 201 U. S. 378 (388), 26 Sup. Ct. 467, 50 L. Ed. 794; The Jeanie, 236 Fed. 463, 149 C. C. A. 515.

This being the standard or measure of obligation assumed by the owners of the Maumee, it is sought to relieve her from liability for the damage sustained by the cargo in the charter party. The only provision, in this respect, in which we are concerned, is found in the exception of liability for "perils of the sea." In the construction of this clause it is said: "There is a mass of learning and refinement of distinction." Hughes on Admr. 154.

[3-5] The following definition of this exception has been quoted with approval:

"By the dangers of the sea is meant those accidents peculiar to navigation that are of an extraordinary nature or arise from irresistible force or overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence." Tuckerman v. Stephens & Credit Trans. Co., 32 N. J. Law, 320.

Justice Story in The Reeside, 2 Sumn. 567, Fed. Cas. No. 11,657, says: "The mere rolling of a vessel by cross seas is not such a danger."

In The Edwin I. Morrison, supra, the findings of the Circuit Judge in regard to the weather encountered by the ship, were approved. It was said:

"It was for them (the owners) to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated. We do not understand from the findings that the severity of the weather encountered by the Morrison was anything more than was to be expected upon a voyage, such as this, down that coast and in the winter season, or that she was subjected to any greater danger than a vessel so heavily loaded, and with a hard cargo, might have anticipated under the circumstances."

The findings of the judge are set out at length, paragraph XIII, 153 U. S. 205, 14 Sup. Ct. 826, 38 L. Ed. 688.

In The Caledonia, supra, the question upon which liability was made to depend was stated to be:

"Was the vessel at the time of her sailing in a state, as regards the stowing and receiving these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season from Hull to Cronstadt?"

In The Newport News (D. C.) 199 Fed. 968, Judge Hough says:

"In order to find peril of the sea, the losses sustained need not be extraordinary in the sense of necessarily arising from uncommon causes. Rough seas are common incidents of a voyage, yet they are certainly sea perils and damages arising from them are within the exception if there has been no want of reasonable care and skill in fitting out the ship and managing her."

The log, which the learned judge accepted as true, discovered "violence of the sea sufficient to pick up and throw overboard whole barrels of rosin, of great weight. The barrels were broken and the contents spread over the deck. High seas breaking away rail of coal bulkhead and post of bridge deck. Vessel pitching and rolling heavily, etc." The Ninfa (D. C.) 156 Fed. 512; United States v. N. Y. O. & S. S. Co., 216 Fed. 61 (71), 132 C. C. A. 305; The Giulia, 218 Fed. 744, 134 C. C. A. 422.

In view of these authorities the question comes: Was the damage to the nitrate attributable to "perils of the sea"?

The certificates of seaworthiness held by the vessel are presumptive evidence in her favor and may justly be treated as strong, but not conclusive, evidence, of her condition. The evidence of the master, mate, and other members of the crew, may and should, so far as it relates to specific facts, be taken as true. Conceding this, the question yet remains open whether, in truth, the condition of the ship measures up to the standard fixed by her charter party and the law.

Giving to the certificates issued to her by the Bureau Veritas the weight to which they are entitled, there is a presumption that, at the time of her examination, March 8, 1918, she was seaworthy. This, of course, is subject to be rebutted by competent and credible testimony. She was 21 years of age. The officers and crew are interested in maintaining their contention that they made careful exam-

ination of the holds of the ship at the time she took on the cargo, and their evidence as to what they did in that respect is to be weighed in the light of that fact. Whether they made so thorough and careful examination as the conditions demanded is doubtful. The vessel did not leak at that time, there was "no break in the frames," and the nitrate was "piled" in the "usual and proper way."

It is more diffcult to reconcile their statement that the frames were free from rust, with the testimony of the witnesses who examined her at Wilmington, and the Experts Ross and Compton. There was certainly, on her arrival at Wilmington, May 28th, some rust, some corrosion, on the frames. The testimony of James M. Williams and W. N. Harris, corroborated by the others who made the survey, cannot be rejected. They are men of high character and experience in making surveys of iron ships. Ross and Compton are intelligent experts and men of high character. They concur in saying that—

"On the frames there was some corrosion, some parts a considerable amount of corrosion. * * * It was reduced in sections some, but not seriously reduced in the way of these breaks referred to."

Ross says:

"Could have condemned the frames, but did not. In my opinion the stress of weather caused the frames to break."

Compton says:

"There was rust on the frames. We tested them with a hammer. In fair condition, considering the vessel's age. Rust did not so weaken frames as to render her unseaworthy."

Capt. Edgar Williams, witness for claimant, says that there was corrosion on the frames; "considering age of the ship, they were in fair condition."

James S. Williams made careful examination of the ship for the owners, called on by resident agents, for the purpose of ascertaining whether she was seaworthy, after cargo was removed, to go to another port, light. He says the frames were corroded, rusty, very badly rust eaten. Rust had eaten into the ribs to an appreciable extent, so as to diminish their strength or thickness. Did not see any evidence of shipping, indicating inspection. Iron vessels will always corrode more or less; can't very well prevent it. There is always some corrosion and some depreciation in the frames of any vessel that has been in service for some time, made a particular examination of the ribs in the part where the damaged cargo had been. He is corroborated by Harris, Stewart, Scott, and Newton. I am constrained to find that there was rust on the frames, corrosion, which reduced their strength. This is not inconsistent with the testimony of the crew and other witnesses who say that the breaks were "fresh." I am satisfied that the breaks occurred at the time of, and caused, the breaking of the rivet, which held the plates to the frames. Of course, as said by all of the witnesses, this was caused by the weather which the ship encountered at the time. The experts say that, in their opinion, the vessel was seaworthy notwithstanding the rust or corrosion, and that they did not condemn nor require the frames to be removed, but di-

rected them to be supported in the manner described by them. Notwithstanding these opinions, we are confronted with the fact that some 40 of these frames broke under the conditions described in the ship's log, which are taken to be correctly recorded.

Were these conditions such as to exempt the owners from liability from damages sustained by reason of perils of the sea; in other words, were these conditions so "extraordinary, unusual, of such irresistible force and overwhelming power as could not be guarded against by the ordinary exertions of human skill and prudence," or was the vessel in respect to the frames, or ribs, at the time she began the voyage, in a condition as reasonably fitted her to encounter the ordinary perils that might be expected on a voyage at that season, with the cargo which she carried? Was she strong and seaworthy within the meaning of the warranty contained in the charter party? Until May 22d, she had fair weather, smooth sea. On October 23d, swell; rolling considerably and shipping quantities of water. At midnight of the 24th of May, ship is pitching heavily; shipping large quantities of water; this continued until May 26th, when leak was discovered. The chief officer says:

"It was such a sea as it is usual to encounter on a voyage, but we had it right along, almost every day. It was exceptionally heavy weather for the summer months. Not unusual weather; same kind as you get on almost every voyage; beam sea; vessel rolls more than if it had been a head sea."

The other members of the crew testify to the same conditions. The vessel sustained no other injury than the breaking of the frames. The weather conditions as found by the court in The Morrison, supra, were much more severe than here. The court held that they did not come within the exceptive provisions of the warranty, although the vessel encountered "adverse winds and heavy weather."

In The Wildcroft, supra:

"A severe storm was encountered and some damage was done by salt water finding its way into hold No. 3, because of the tearing away of the tarpaulin over the hatches and washing off the starboard ventilator cover."

This was held a damage caused by the perils of the sea.

In The Tjomo (D. C.) 115 Fed. 919, the vessel encountered "terrific storm of wind and heavy seas, * * * 'a very heavy hurricane,' with wind from 90 to 100 miles an hour." The mate, with ten years' experience, said that "it was the most terrible storm he ever saw." Held within the exemptive terms of the warranty. In the British King (D. C.) 89 Fed. 872, the evidence upon which the court found the damage due to perils of the sea clearly distinguishes this from that case, "the weather was extraordinary, etc."

In The Julia Luckenbach, 235 Fed. 388, 148 C. C. A. 650 (C. C. A. Second Circuit), the District Judge found, and the Circuit Court approved his finding, that the vessel "encountered strong winds and rough seas, so that [she] rolled and pitched a good deal, and shipped water in and over decks. She encountered that degree of strain to be expected in frequent Atlantic weather and no more."

In The Carisbrook (D. C.) 247 Fed. 583, the court found that the

owners had used due diligence to make the ship seaworthy, and the damage was sustained by the management of the crew, and therefore within the provisions of the Harter Act.

After a careful examination of the decided cases, illustrating the views of admiralty courts, respecting conditions which bring instant cases within the definition of "perils of the sea," used in charter parties, recognizing the fact that to a large extent each case is dependent upon the specific facts, I am brought to the conclusion that, in respect to the cargo which she undertook to carry, the frames of the Maumee were, at the time she took it, rusted to an extent which disabled them to resist the ordinary conditions of the sea which should have been anticipated on the voyage; that those which she encountered were not "extraordinary, or such as were the result of irresistible force or overwhelming power which could not have been guarded against by ordinary exertions."

I do not deem it necessary to discuss the evidence respecting the condition of the sounding pipe. It is sufficient to say that I am of the opinion that such injury as it sustained is attributable to accidents occurring during the voyage, and not to any defect in its condition at the commencement of the voyage, nor any negligence on the part of the crew. I am also of the opinion that whatever injury it sustained did not cause or contribute to the damage of the nitrate of soda.

I am of the opinion that the libelants are entitled to recover of the claimant the amount of damage sustained by the nitrate of soda. The statement shows this to be $13,449.43. The quantity of shortage is admitted.

The claimant does not press the suggestion that because the Maumee was, at the date of the charter party, and receipt of the cargo, under requisition of the United States Shipping Board, she was immune from the libel. A decree may be drawn in accordance with this opinion.

FRAZIER v. HINES, Director General of Railroads.

(District Court, E. D. South Carolina. May 30, 1919.)

No. 142.

1. REMOVAL OF CAUSES ⇐89(1)—EFFECT OF REFUSAL BY STATE COURT.
   Where a cause is removable, it is removed by the mere filing of the bond and petition in the state court, even though the state court may refuse to grant an order of removal, and the application to the state court for an order of removal is a mere matter of comity or courtesy.
2. REMOVAL OF CAUSES ⇐89(2)—SUFFICIENCY OF NOTICE OF PETITION AND BOND.
   In view of Judicial Code, § 29 (Comp. St. § 1011), requiring written notice of the petition and bond for removal to be given the adverse parties prior to the filing of the same, no notice need be given the state court.

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

3. REMOVAL OF CAUSES ⟸107(6)—AMENDMENT TO PETITIONS.
An amendment to a petition for removal may be permitted by the federal court, where the amendment is one to cure technical defects, or to merely amplify the allegations of the petition.

4. REMOVAL OF CAUSES ⟸97—DETERMINATION OF FACT ISSUES FOR THE FEDERAL COURT.
When the right of removal depends upon the existence of controverted facts, they must be determined by the federal court, and in such case it is the duty of the state court to defer all action until such fact issue has been passed on by the federal tribunal.

5. COURTS ⟸508(8)—AFTER REMOVAL TO FEDERAL COURT PROCEEDINGS IN STATE COURT ENJOINED.
After a case has been adjudged by the federal court to have been properly removed, or where the question of removal depends on fact questions to be determined solely in that court, the federal court may protect its jurisdiction by enjoining any further proceedings in the state court.

6. REMOVAL OF CAUSES ⟸107(6)—CAUSE ONE BETWEEN CITIZENS OF DIFFERENT STATES.
Though the complaint in an action against the Director General of Railroads alleged facts bringing the case within the federal Employers' Liability Act, the cause was removed to the federal court on the ground that the parties were citizens of different states, *held* that, where the petition for removal did not allege fraudulent purpose in any of the allegations of the complaint to defeat removal, a proposed amendment setting up that plaintiff was not an employé of defendant, and therefore that the action did not fall within the federal Employers' Liability Act (Comp. St. §§ 8657–8665), which would preclude removal, must be denied.

7. REMOVAL OF CAUSES ⟸3—ACTIONS UNDER FEDERAL EMPLOYERS' LIABILITY ACT.
An action under the federal Employers' Liability Act (Comp. St. §§ 8657–8665), though between citizens of different states, is not removable from state to federal court.

8. MASTER AND SERVANT ⟸86—FEDERAL EMPLOYERS' LIABILITY ACT APPLICABLE ONLY TO INTERSTATE COMMERCE.
For a case to come within the scope of the federal Employers' Liability Act (Comp. St. §§ 8657–8665), two things must concur: First, the common carrier by railroad must be engaged in interstate commerce; and, second, the injury must be suffered by the employé while engaged in such commerce.

9. COMMERCE ⟸8(6)—FEDERAL EMPLOYERS' LIABILITY ACT EXCLUSIVE WHEN APPLICABLE.
Where the facts bring the case within the federal Employers' Liability Act (Comp. St. §§ 8657–8665), the statute is exclusive, and the rights and remedies of the parties are referable to it alone; hence though a complaint did not specially rely on the act, such statute will govern, where the facts alleged showed that it was applicable.

10. COMMERCE ⟸27(8)—APPLICATION OF FEDERAL EMPLOYERS' LIABILITY ACT.
An employé, engaged in maintaining in proper condition the tracks used by a railroad company for interstate trains, comes within the protection of the federal Employers' Liability Act (Comp. St. §§ 8657–8665), even though the tracks were used also for intrastate commerce.

At Law. Action by Wesley Frazier against Walker D. Hines, Director General of Railroads, begun in state court and removed to the federal court. On motion to permit defendant to amend both petition for removal and answer. Motion denied.

H. Klugh Purdy, of Ridgeland, S. C., and Logan & Grace, of Charleston, S. C., for plaintiff.

W. Huger Fitz Simons, of Charleston, S. C., for defendant.

SMITH, District Judge. A motion has been made in this case, after due notice, to permit the defendant to amend both the petition for removal and the answer herein, and counsel on both sides have appeared and been heard.

It appears from the record that the plaintiff, on the 10th day of March, 1919, commenced an action in the court of common pleas for Jasper county, in the state of South Carolina, against the defendant, to recover damages for an alleged personal injury committed by the negligence of the employés of the defendant. Thereafter, and within the time allowed by law, the defendant filed his petition and bond in the state court, for the removal of the cause to this court, on the ground that the action is a controversy between citizens of different states. Thereupon notice was given by the defendant to plaintiff that he had filed his petition and bond for removal, and would apply to the state court for an order removing the cause as provided by law, and an exemplified copy of the record in the state court has been filed in due time in this cause.

The defendant thereafter served and filed in this court his answer to the complaint, and now makes this motion to be allowed to amend both the petition for removal and the answer, by inserting therein an allegation that the plaintiff, Wesley Frazier, on September 27, 1918, at the time of the alleged injury, was not an employé of defendant, but at that time was in the employ of W. Z. Williams Contracting Company, Incorporated. No order has been obtained from the state court removing the cause, nor has any application yet been made to that court for such an order.

[1] The first question suggested is that this court will not consider any motion in the cause until an application has been made to the state court for an order to remove it to this court. Such has been, in a general way, the practice of this court, in removal cases, for many years. The general rule of law, however, is undoubtedly that if the case be a removable one, the mere filing of the bond and petition in the state court removes the case. Traction Co. v. Mining Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; Iowa Cent. Ry. v. Bacon, 236 U. S. 310, 35 Sup. Ct. 357, 59 L. Ed. 591.

It is the duty of the state court to thereupon accept the petition and bond, and proceed no more in the cause. Whether, however, the state court accepts the petition and bond, or whether it grants or denies an order for removal, does not affect the fact of removal. The cause is removed, if it be a removable cause, although the state court may refuse to grant an order of removal. Donovan v. Wells Fargo & Co., 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250; Chesapeake & Ohio Ry. v. McCabe, 213 U. S. 207, 29 Sup. Ct. 420, 53 L. Ed. 765.

Under such rule, the requirement of the submission of the matter to the state court for an order of removal before any action is taken by this court is a mere matter of comity or curtesy, and not a matter of

right; and if the case presented is one in which some action should be taken, and in the opinion of this court it has been properly removed, it is the duty of this court to take action upon the application, whether the state court has granted, or refused an order of removal, or whether or not any application for such an order has actually been made to it.

[2] Further, it is to be observed that the practice requiring application to the state court, and the decisions made thereunder, are very much affected by the requirement of the Judicial Code of 1911, § 29 (Act March 3, 1911, c. 231, 36 Stat. 1095 [Comp. St. § 1011]), which prescribes that written notice of the petition and bond for removal shall be given the adverse party or parties (not the state court) prior to filing the same. This written notice appears to have been given in the present cause, and under the terms of the statute it would not appear that any further notice or application to the state court is required, either as a matter of law or comity, but any proper action in the cause should be taken by this court, without regard to any action of the state court. Hansford v. Stone-Ordean-Wells Co. (D. C.) 201 Fed. 185; Cropsey v. Sun Printing & Publishing Ass'n (D. C.) 215 Fed. 132.

The next question is whether an application of the character now made to amend the petition for removal should be granted. An inspection of the record shows that the amendment sought to the petition is a very substantial one. The theory of the amendment proposed is that the complaint in the state court is brought to obtain a recovery under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. § 8657–8665]), and to obtain the benefit of that act; and the amendment now sought is one to introduce a new allegation of fact in the petition for removal filed in the state court to the effect that the party plaintiff was not an employé of the defendant and therefore not an employé within the terms of the federal statute, and as such not entitled to the benefit of that statute, and the cause of action being between citizens of different states, the action is not within the inhibition of that statute, which forbids the removal from the state court of actions brought under that statute.

This would be an amendment of a substantial character, as interposing an allegation of fact denying an allegation in the complaint, which on the face it is apprehended will defeat a removal. The original petition for removal placed the ground for removal upon the sole fact that the plaintiff and defendant were citizens of different states. This amendment proposes to introduce an allegation of fact which is matter of defense on the merits, to wit, that the plaintiff was not an employé of the defendant, and therefore not entitled to claim the benefit of the federal Employers' Liability Act, and not being entitled to sue in that capacity, the cause could be removed.

[3] The rule as to amendments to petitions for removal is that these amendments may be permitted in this court to a petition filed for removal in the state court, where the amendment is one to cure technical defects or to amplify the allegations of the petition for removal; that is to say, where the amendment does not more than set forth in proper form what has been before imperfectly stated in the petition. Carson v. Dunham, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992;

Kinney v. Columbia Savings & Loan Ass'n, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103. The rule may be said to be summed up in the case of Southern Pacific Co. v. Stewart, 245 U. S. 359, 38 Sup. Ct. 130, 62 L. Ed. 345, that amendments have been permitted so as to make allegations of the removal petition more accurate and certain, when the amendment is intended to set forth in proper form the ground of removal already imperfectly stated.

[4-6] The amendment as proposed to the petition for removal would affirm the ground stated in the petition for granting the removal, by showing that the cause is not within the terms of the federal statute, by a traverse of the fact alleged in the complaint (if it be therein sufficiently alleged) that the plaintiff was an employé of the defendant.

The defendant's position is that this makes the removability of the cause depend upon a question of fact, which must be determined in this court; and the rule is that, when the right of removal depends upon the existence of certain facts, they must be determined by the federal court, which alone can determine controverted issues of fact on which the right to removal depends. It is the duty of the state court, in such cases, to defer all action until such issues have been passed upon by the federal court. The state court must accept as true all allegations of fact in the petition for removal. Kansas City R. R. v. Daughtry, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963; Chesapeake & Ohio R. R. v. McCabe, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765; Texas & Pacific Ry. v. Eastin, 214 U. S. 153, 29 Sup. Ct. 564, 53 L. Ed. 946; Chesapeake & Ohio Ry. v. Cockrell, 232 U. S. 146, 34 Sup. Ct. 278, 58 L. Ed. 544.

After a case has been adjudged by the federal court to have been properly removed, or where the question of removal may depend upon issues to be determined solely in that court, the federal court may protect its jurisdiction by enjoining any further proceedings in the state court. Traction Co. v. Mining Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U. S. 146, 34 Sup. Ct. 278, 58 L. Ed. 544; Chesapeake & Ohio Ry. Co. v. McCabe, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765; Donovan v. Wells Fargo & Co., 169 Fed. 366, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250; Alabama Great Southern Ry. v. American Cotton Oil Co., 229 Fed. 11, 143 C. C. A. 313.

But the issue of fact the proposed amendment seeks to import goes to the merits of the defense as well as to the right of removal. It would amount in effect to this court determining in advance of the trial on the merits before a jury that the plaintiff was not an employé of the defendant, and not entitled to the benefits of the federal Employers' Liability Act.

The very question came up in the case of Southern Railway v. Lloyd, 239 U. S. 496, 36 L. Ed. 210, 60 L. Ed. 402. There the complaint was brought for a recovery under the federal Employers' Liability Act. The defendant sought to remove on the ground of diversity of citizenship, and, to avoid the inhibition of the act against a removal alleged that the plaintiff was not engaged in interstate commerce at

the time of the injury. The Supreme Court held the petition insufficient, for—

"In no case can the right of removal be established by a petition to remove, which amounts simply to a traverse of the facts alleged in the plaintiff's petition, and in that way undertaking to try the merits of a cause of action good upon its face." Chesapeake & Ohio Ry. v. Cockrell, 232 U. S. 146, 34 Sup. Ct. 278, 58 L. Ed. 544.

The doctrine here laid down has been approved again in the case of Great Northern Ry. Co. v. Alexander, 246 U. S. 276, 38 Sup. Ct. 237, 62 L. Ed. 713, where it is held that it is settled:

"That a case arising under the laws of the United States, nonremovable on the complaint, when commenced, cannot be converted into a removable one by evidence of the defendant or by an order of court upon any issue tried upon the merits, but that such conversion can only be accomplished by the voluntary amendment of his pleadings by the plaintiff, or, where the case is not removable because of joinder of defendants, by the voluntary dismissal or nonsuit by him of a party or of parties defendant."

With the exception mentioned in all these cases, that where there is a fraudulent purpose to defeat a removal, then upon proper allegations of fact showing that fraudulent purpose duly set forth in the petition, this court can entertain the decision of the issues involved on the question of a fraudulent purpose to defeat removal, and hold the cause removed, if such fraudulent purpose be established. No allegation is made in the petition for removal herein that there was any fraudulent purpose in any of the allegations of the complaint to defeat a removal to this court, and it follows that the application to amend the petition for removal should be and is hereby refused.

[7] The last question is whether the motion to amend the answer should be granted, and that depends upon whether in the opinion of this court the case has been properly removed, and that depends upon whether upon the face of the complaint and the face of the petition, so far as the allegations of fact in the petition for removal can be considered, a removable cause is shown.

The petition for removal sets up in proper form that the action is one between citizens of different states. That would constitute a good and sufficient ground for removal, except that the question here is whether upon the face of the complaint the cause is a removable one under the terms of the federal Employers' Liability Act, even though it may be between citizens of different states. Although an action between citizens of different states, if the complaint shows that it is an action brought under and within the scope of the federal Employers' Liability Act, it would not be removable. Kansas City Southern Ry. v. Leslie, 238 U. S. 599, 35 Sup. Ct. 844, 59 L. Ed. 1478; Southern Ry. Co. v. Lloyd, 239 U. S. 496, 36 Sup. Ct. 210, 60 L. Ed. 402; Great Northern Ry. Co. v. Alexander, 246 U. S. 280, 38 Sup. Ct. 237, 62 L. Ed. 713.

[8] And this reduces the ultimate question to whether or not the complaint upon the face of it shows that it is a case brought under and is within the scope of the federal Employers' Liability Act. To come within the scope of that act, two things must concur: First, the of-

fending common carrier, by railroad, at the time of the injury, must be engaged in interstate commerce; second, the injury must be suffered by the employé while employed by such carrier in such commerce. Unless the allegations of the complaint show a case covering both of these requirements, it is not a case brought under the terms of the federal Employers' Liability Act, and would be subject to the ordinary provisions for the removal of causes between citizens of different states. Pederson v. Del., Lack. & West. R. R., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 152; North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159.

[9, 10] The complaint in this case alleges in article 2 that on September 27, 1918, the plaintiff was an employé of the defendant, working on and repairing the railroad track of the defendant, over which interstate trains operate, and over which interstate commerce is hauled. That is the only allegation in the whole complaint from which arises any inference or implication that it is charged that the defendant was at the time of the injury engaged in interstate commerce, and that at the same time the employé was employed in interstate commerce.

The complaint does not purport to be drawn specially under the Employers' Liability Act; it does not even refer to that statute, nor claim the benefit of it. Upon the face of the complaint, it is a complaint at common law to recover damages resulting from the negligence of the defendant, unless the allegations in the second article of the complaint are sufficient to charge the essential ingredients of a right to recovery under the federal Employers' Liability Act, to wit, that at the time of the injury the defendant was engaged in interstate commerce, and at the same time, the plaintiff was employed by the defendant in such commerce. Is the allegation that the plaintiff was working on and repairing the railroad track of the defendant, over which interstate trains operate and interstate commerce is hauled, sufficient to cover both of these requirements?

In the case of Great Northern Ry. Co. v. Alexander, 246 U. S. 276, 38 Sup. Ct. 237, 62 L. Ed. 713, the complaint alleged specifically that the defendant was an interstate carrier at the time the accident occurred, and that the person injured by the accident was employed by the defendant in interstate commerce at the time. In the case of Smith v. Camas Prairie Ry. Co. (D. C.) 216 Fed. 799, the very question was made here that is now sought to be made by this amendment, that at the time of the accident the plaintiff was not an employé of the defendant; but in that case the complaint distinctly alleged that at the time of the accident the plaintiff, who was the party injured, was employed in interstate commerce, and that the defendant was engaged as a common carrier in interstate commerce, and it is further alleged that the plaintiff as administratrix prosecuted the action under the federal act.

The rule is that, if the facts appear to bring the case under the act, the statute is exclusive, and the rights and liabilities of the parties are referable to it alone, and that, the statute superseding all other remedial provisions, no recovery can be had as in common law. North Caro-

lina R. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159.

In the case of Pederson v. Del., Lack. & West. R. R., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, it was held that an employé engaged in maintaining tracks in proper condition, after it has become and during its use as an instrumentality of interstate commerce, is engaged in interstate commerce, even if that instrumentality is used in both interstate and intrastate commerce. In Shanks v. Del., Lack. & West. R. R., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, the inference is that one employed in repairing or keeping in usable condition a roadbed then in use for interstate transportation is engaged in interstate commerce. See, also, the decision just rendered by the Supreme Court of the United States in the case of Phil., Balt. & Wash. R. R. Co. v. Smith, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. Ed. ——, filed May 19, 1919, and Kinzell v. Chic., Mil. & St. Paul Ry., 250 U. S. 130, 39 Sup. Ct. 412, 63 L. Ed. ——, filed the same day.

The same definition, somewhat extended, is followed in Atlantic Coast Line R. R. Co. v. Woods, 252 Fed. 428, 164 C. C. A. 352. The allegations of the complaint may be imperfect, even carelessly drawn; but they appear to set up a case wherein the plaintiff, at the time the injury was caused, was engaged in repairing a railroad track as the employé of defendant, a common carrier by railroad, whose track was used for purposes of interstate transportation, and the case thus presented is one within the scope of the federal Employers' Liability Act. Should the plaintiff hereafter abandon this position, and seek to recover as if in an action at common law, independent of this statute, it may become a matter for action as indicated in Smith v. Camas Prairie Ry. Co. (D. C.) 216 Fed. 799.

The application to amend the answer is refused.

ATLANTIC COAST LINE R. CO. v. FEASTER.

(District Court, E. D. South Carolina. July 24, 1919.)

No. 209.

1. COURTS ⟸508(8)—FEDERAL COURT INJUNCTION TO STATE COURT.
   Where plaintiff refused to file in the state court his pleadings, etc., seeking in that way to prevent removal of the cause to the federal court, as proper transcript could not be made up, the federal court may enjoin plaintiff from further proceedings in the cause; but, where plaintiff by stipulation agreed to a method of curing the deficiency, no injunction on that ground can be issued.

2. COURTS ⟸508(8)—ON REMOVAL, FEDERAL COURT MAY ENJOIN FURTHER ACTION IN STATE COURT.
   Where the cause is a removable one, and a proper transcript has been filed, it has been removed to the federal court, and that tribunal may properly enjoin the parties from further action in the state court.

3. REMOVAL OF CAUSES ⟸36—JOINDER OF DEFENDANTS.
   Where plaintiff might properly join two defendants, his motive in joining them is not pertinent, nor will the mere fact that he did join them, to

prevent one of the defendants from removing the cause, establish a fraudulent joinder to defeat removal.

4. REMOVAL OF CAUSES ⟸50—ACTION NOT ON A SEPARABLE CONTROVERSY—STATE DECISIONS.

An action brought by an employé in a South Carolina state court against a Virginia railroad corporation and another for personal injury claimed to have been inflicted through the joint negligence of the defendants is not removable, in view of the decisions of the South Carolina Supreme Court, because the liability of the railroad company would be governed by the South Carolina Employers' Liability Act, while the responsibility of the individual defendant would be measured by the common law; the holding of the local court being that, although a different rule of law would be applied as measuring the liability of the two defendants, that would not be sufficient to change the general nature of the tort.

In Equity. Bill by the Atlantic Coast Line Railroad Company against H. E. Feaster. Injunction denied.

Rutledge & Hyde, of Charleston, S. C., for plaintiff.
Logan & Grace, of Charleston, S. C., for defendant.

SMITH, District Judge. This matter came up to be heard upon the notice of motion given on behalf of the complainant to the defendant, for an order restraining and enjoining the defendant, his agents and attorneys, from proceeding in any manner whatever in the court of common pleas for Charleston county in the action entitled "H. E. Feaster v. Atlantic Coast Line Railroad Company and R. S. Jones," pending in this court, in so far as the Atlantic Coast Line Railroad Company is concerned.

It appears that an action has been brought by the defendant, H. E. Feaster, in the court of common pleas for Charleston county, against the Atlantic Coast Line Railroad Company and one R. S. Jones, jointly, alleged to be jointly liable to the plaintiff, H. E. Feaster, for personal injury inflicted through their joint negligence in the operation of an engine of the complainant Atlantic Coast Line Railroad Company.

[1] Therefore it was sought by the defendant in that action, the Atlantic Coast Line Railroad Company, to remove the cause to this court upon the ground that the defendant Richard S. Jones has been fraudulently joined in that action as a defendant in order to prevent the removal of the same to this court; the cause, without the presence of the said Jones, being one between citizens of different states, and to remove it further upon the ground that inasmuch as the right of the plaintiff, H. E. Feaster, to recover against the railroad company depended solely upon the statute law of the state of South Carolina, known as the Employers' Liability Act (Act April 14, 1916 [29 St. at Large, p. 970]), and the right to recover against the codefendant, Richard S. Jones, if any, depended entirely upon the common law as administered by the courts of South Carolina, there existed a wholly separable controversy between the plaintiff, H. E. Feaster, and the defendant, the Atlantic Coast Line Railroad Company, which could be wholly determined between them without the presence of the other defendant, Jones, and therefore the case was removable.

It was further alleged in the bill, and is set up as one of the grounds for the motion for injunction herein, that upon seeking to have the transcript made for the purposes of the removal, it was ascertained that the plaintiff, H. E. Feaster, had failed to file the summons and complaint in the record in the state court, and without those no transcript could be made up for removal, and that although demand had been made upon the attorneys of the plaintiff, H. E. Feaster, to file these papers, so that a transcript could be made up for the purposes of removal, they had failed and refused to do so. If this were the ground for the injunction, an injunction would unhesitatingly be granted by this court until this summons and complaint were filed, or until the lack of them could be supplied, so as to permit a proper transcript to be brought over into this court, for it to pass upon the question of removability.

It is manifest that the removal of a removable cause cannot be prevented by the failure of a party to the action to be removed to perform his duty and to file his pleadings, so as to permit the clerk to make up the proper transcript for removal. To hold otherwise would mean that the removal of a removable cause might be defeated by the refusal of a party to the cause to be removed to perform his duty and file the pleadings, or could be defeated by the action of the state court which would refuse to direct him to file the pleadings so as to afford the basis for a proper and sufficient transcript upon the application for removal.

Upon the hearing of this motion it was stipulated in writing, on behalf of the plaintiff in the action in the state court, H. E. Feaster, by his counsel, that the deficiency should be supplied, by filing in this court a copy of the summons and complaint admitted to be true copies, and the same should be treated by this court as if they had been duly certified hereto by the clerk of the state court, as a part of the transcript. That having been done, there is no longer any reason for granting an injunction on that ground.

[2] After this was done, however, by consent of counsel, the case was argued as if the proper transcript was in the court upon the question whether or not an injunction should be granted. This depends upon whether the case is a removable one. If the case is a removable case, and a proper transcript has been filed, and the case, in the opinion of this court, has been removed, it would be entirely proper to grant an injunction against the parties to the action in the state court, from doing anything further in that court under the principles of the decision in this court in the case of Frazier v. Hines, 260 Fed. 874, filed May 30, 1919.

[3] But whether or not this case is removable depends upon whether there is a separable controversy—a separable controversy which can be determined wholly and entirely between the plaintiff, H. E. Feaster, and the defendant Atlantic Coast Line Railroad Company, independent of the codefendant, R. S. Jones, and independent of the right of the plaintiff in this case to have the action tried as an action in which both parties were jointly liable to him. If the plaintiff had the right to bring his action against the defendants jointly, then his

motive in joining them is not pertinent, nor is the mere fact that he did join them, when he had the right to do so, any sufficient evidence to establish a fraudulent joinder to defeat a removal. There does not appear established any actual fraudulent joinder to defeat a removal.

[4] The position of the Atlantic Coast Line Railroad Company is that the statute known as the Employers' Liability Act passed by the state of South Carolina, on the 14th day of April, 1916, supersedes all law relating to the relations of the employer and employé in a case such as this, where the employer is a common carrier by railroad, and the right of the employé to recover depends entirely upon the terms of that act; whereas, his right to recover as against the other defendant, R. S. Jones, depends entirely upon the common law, making both employer and employé liable to the party injured in a case of injury caused by joint negligence; for this court cannot in the same cause administer a different rule as to liability to different defendants, the one being the liability imposed by the common law and the other being the rule as to the liability imposed by the Employers' Liability Act.

There are some aspects in which this position would appear to be logical and reasonable and there are decisions of respectable courts supporting it; but the Supreme Court of South Carolina, in the case of Powell v. Southern Railway Co., 110 S. C. 70, 96 S. E. 292, decided on the 15th of April, 1918, has decided explicitly that, although a railway company may be liable as an employer under the act of Congress entitled "Employers' Liability Act" (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657–8665]) the language of the South Carolina statute being the same, while the other defendant in that case may be liable under common law, yet that where the complaint alleged that the transaction was one and that both defendants had concurrent part in the transaction, it did not matter that the law cast upon each defendant a different duty thereabout; that that consideration does not separate them in the performance of the same act, and that the complainant had a right to allege the existence of a joint tort, and to recover upon the tort as a joint one, although a different measure of liability might be imposed by the court upon the separate defendants; that although a different rule of law would be applied as measuring the liability of the two separate defendants, that would not be sufficient to change the general character of the tort and convert the right against each defendant into a separable one.

This being a matter of local law under the practice in the state courts, it would appear to this court that it should be more controlling in this court, as the rule to be followed, than the diametrically opposite conclusion arrived at by the Supreme Court of Georgia in the case of Lee v. Central of Georgia Railroad Co., 21 Ga. App. 558, 94 S. E. 888. The conclusions of the Supreme Court of Georgia and the Supreme Court of South Carolina are absolutely irreconcilable.

In view of what appears to be the tendency of the Supreme Court of the United States to hold that, in these cases of liability for negligence, the local law of the place where the alleged tort was committed

should control, it would be safer to follow the rule laid down by the Supreme Court of South Carolina; and the injunction accordingly is refused at this time, without prejudice, however, to the right of the Atlantic Coast Line Railroad Company, upon argument for a remand or for the trial of the action in this court, to again bring the question before this court.

UNITED STATES v. AMERICAN SOCIALIST SOC. et al.

(District Court, S. D. New York. March 18, 1919.)

1. ARMY AND NAVY ⟸40—CORPORATIONS ARE WITHIN ESPIONAGE ACT.
   Corporations are within Espionage Act, tit. 1. § 3 (Comp. St. 1918, § 10212c), declaring a punishment for "whoever" in time of war willfully obstructs the recruiting or enlistment service.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Whoever.]
2. CORPORATIONS ⟸526—CAN BE GUILTY OF SPECIFIC INTENT TO VIOLATE ESPIONAGE ACT.
   A corporation can be guilty of a specific intent involving an evil purpose to do a wrongful act, as to violate the Espionage Act.
3. ARMY AND NAVY ⟸40—EVIDENCE SUSTAINING CONVICTION FOR OBSTRUCTING RECRUITING.
   Evidence *held* to warrant verdict that one defendant, in publishing and distributing a book, willfully obstructed the recruiting service, while at the same time acquitting the author.

Prosecution of the American Socialist Society and another for violation of the Espionage Act. On motions by defendant American Socialist Society (1) to set aside the verdict against said society and for a new trial, and (2) in arrest of judgment. Motions denied.

See, also, 252 Fed. 223.

Seymour Stedman, of Chicago, Ill., and Walter Nelles, I. M. Sackin, and S. John Block, all of New York City, for the motion.

Francis G. Caffey, U. S. Atty., and Earl B. Barnes, Asst. U. S. Atty., both of New York City.

MAYER, District Judge. American Socialist Society and one Nearing were tried on an indictment containing four counts, two for alleged conspiracies and two for alleged violations of section 3, title 1 of the Espionage Act (Act June 15, 1917, c. 30, 40 Stat. 219 [Comp. St. 1918, § 10212c]). The court dismissed the conspiracy counts and sent the remaining counts to the jury, which returned a verdict of not guilty in favor of Nearing and of guilty on both counts against defendant society.

On the coming in of the verdict, the court set aside the verdict on the third count and reserved decision on the motion in respect of the fourth count. The third count charged defendant with willfully attempting to cause insubordination, disloyalty, mutiny, and refusal to duty in the military or naval forces of the United States; but, in view of the court's construction of the language of the statute and

of the character of the acts necessary in that connection to prove, inter alia, intent to accomplish the serious results safeguarded against it was and is thought that the evidence did not justify the verdict as to this count. No further mention, therefore, need be made either of the third count or of that part of the statute the violation of which it charged.

The fourth count charged acts by both defendants alleged to have violated the following provision of section 3, title 1 of the Espionage Act, viz.:

"Whoever, when the United States is at war * * * shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

It was proved at the trial that Nearing wrote and the society published and distributed a pamphlet entitled "The Great Madness," but, as will appear infra, the part played by each was not the same. In order to convict, it was necessary to satisfy the jury beyond a reasonable doubt (1) that the effect of the pamphlet was to obstruct the recruiting and enlistment service and (2) that it was willfully intended so to do.

Various arguments were presented and requests to charge submitted on the propositions: (a) That obstruction meant physical obstruction, and not impeding, hindering, retarding, or putting an obstacle in the way of recruiting or enlisting, as defined in Masses Pub. Co. v. Patten, 246 Fed. 24, 158 C. C. A. 250, L. R. A. 1918C, 79, Ann. Cas. 1918B, 999; (b) that recruiting and enlistment service did not include those male persons between 18 and 40 who could volunteer (under the relevant statute) for service in the army and navy, but referred only to the military and naval recruiting officers and men; (c) that what defendants did was within their constitutional rights of free speech as secured by the First Amendment; and (d) generally, that the acts complained of represented a state of mind and an expression of opinion, rather than offenses denounced by the statute.

Since the trial, all these questions have been set at rest by the recent decisions of the United States Supreme Court in 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. At the time of the trial there was a diversity of opinion in the courts as to whether the recruiting and enlistment service included those subject to the Selective Service Law (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2044a–2044k]), as well as volunteers, and, as the court, giving the defendants the benefit of the doubt as to the law, charged the jury to confine its consideration to the effect of the pamphlet on those contemplating volunteering and to exclude those subject to the draft, the charge was more favorable to defendants in that regard than the recent decisions supra seem to require.

Thus, the instructions as to the law were well within the authoritative holdings of the United States Supreme Court, and the pam-

phlet was such that the jury was well justified in deciding, as matter of fact, that its effect was to obstruct the recruiting and enlistment service of the United States within the meaning of the statute.

The remaining question is whether the evidence supported the conclusion of the jury that defendant society published and distributed "The Great Madness" with the specific intent of violating the statute.

[1] Preliminarily, it is contended that the word "whoever" refers only to human beings and not to corporations. This point may be speedily disposed of (1) because the word has been construed by courts as including corporations (40 Cyc. 928, and cases cited); and (2) because the obvious intent of the Congress was to reach corporations as well as individuals who did the acts prohibited by the Espionage Law. It is difficult to imagine that, in enacting a statute deemed necessary and vital for the protection of the country when at war, and in realizing that dangerous violations could be accomplished by publications issued and distributed by persons operating in corporate form, the Congress intended to let such corporations escape the consequences of their acts, while it held individuals to strict responsibility for precisely similar acts.

[2] It is contended, further, that a corporation cannot be guilty of a specific intent where such intent involves an evil purpose to do a wrongful act; but that contention successfully made in the earlier history of the law and, indeed, until comparatively recent times, has now been fully discarded, and it is sufficient to refer to three decisions, one by the Supreme Court of the United States, and the other two by courts of high authority, which effectually dispose of the argument that a corporation cannot form and manifest the intent to violate a statute such as that now under consideration. N. Y. Central R. R. Co. v. United States, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613; People v. Rochester Ry. & L. Co., 195 N. Y. 102, 88 N. E. 22, 21 L. R. A. (N. S.) 998, 133 Am. St. Rep. 770, 16 Ann. Cas. 837; Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280.

[3] The sole remaining question which calls for comment is that which is concerned with the suggested inconsistency of the verdict; i. e., the verdict of guilt against the publisher and distributer on the same counts on which the author was acquitted. As matter of law, such a verdict does not per se afford grounds for a new trial. As stated in 16 C. J. 1176:

"The fact that the verdict was rendered only after long consideration and was apparently the result of a compromise is not ground for a new trial, where there is no showing that it was obtained improperly."

Counsel for defendants fairly and frankly agree with this proposition for in their brief they state:

"We do not urge as a matter of law that there is an obligation upon the court to see that an inconsistent verdict should not stand."

Their position is that they "advance the proposition as one of simple justice." It is desirable, therefore, that some of the essentials of the situation shall be outlined and made clear because in cases of

this character it is almost as important that the result shall be believed to be just as that it shall be just.

In indictments for crime, where human beings are jointly tried with corporations, the human interest naturally centers around the living individual. During a trial the corporation is a sort of abstraction, and seems rather a secondary figure. The human being may lose his liberty if convicted, while the worst that can happen to the corporation is the imposition of a fine. When, therefore, the jury rendered its verdict, the first impression was one of inconsistency and compromise. Yet the events of the trial and the extended deliberation of the jury invited a careful analysis in order to ascertain, not only as matter of law, but also, as counsel have put it, as matter of simple justice, whether the verdict should stand. The jury had been out for nearly 30 hours and away from home overnight, and yet, during this long period, it had not once requested to be discharged, nor once—as is not infrequently the case to the contrary—informed the court that it was unable to agree. Certainly, no jury could have been more conscientious in seeking to arrive at a conclusion. Nearing had taken the stand and subjected himself to examination and cross-examination. He had insisted that, whether his views were right or wrong, he had not intended to obstruct recruiting and enlistment; that his personal history and career were such that he had never failed to do by direct appeal what, from his point of view, he thought he ought to do; that in writing the pamphlet he had wished to show that war was wrong, and that this war in particular was wrong, and that the propositions put forth in the pamphlet were consistent with his writings on economic subjects, both before and during the war.

From the evidence it appeared that he did not join defendant society until after his pamphlet was submitted and first published, and that he had no part either in the detail of publication or of distribution, nor in the plan of defendant society to publish and distribute publications hereinafter referred to, directed against the war and its prosecution by the United States. All this, with other testimony unnecessary to recite in detail, presented a question of fact to the jury, i. e., whether Nearing intended to obstruct the recruiting and enlistment service, and this it could decide either way.

The same question of fact was presented to the jury in respect of the defendant society, but on a very different state of facts. The American Socialist Society is a membership corporation organized under the laws of the state of New York. Its objects are stated in the by-laws to be:

"To promote social intercourse and friendship between its members, to study and discuss political science, to expound the theories of modern socialism by lectures and publications, to conduct a school, reading rooms, library, and clubhouse, and to do such other things and engage in such other enterprises as are calculated to promote the principal objects of the society."

The membership is confined as follows:

"Only persons who formally declare themselves in full accord with the principles and tactics of the modern Socialist movement shall be eligible to membership."

Under the by-laws, the society has an annual meeting in February and regular membership meetings in May, September, and December. There is a board of directors, consisting of nine members, and the powers of the board are thus defined in section 5 of the by-laws:

"The board of directors shall carry out the orders and resolutions of the society, manage its executive affairs, see to the proper investment of its funds, supervise and direct the officers in the performance of their duties, hire and engage employés and fix their salaries, appoint standing or special committees, and submit reports of their proceedings and of the affairs of the society to all regular meetings of the membership."

The society has the usual complement of officers. This society has become known, through the name of its school, as the Rand School of Social Science, and it also conducts a bookstore known as the Rand School Bookstore. The society sells books on general literature and also on political and economic subjects, including writings of various kinds, both advocating and opposing Socialism and its doctrines. In addition, from time to time, the society publishes pamphlets, which it sells and distributes.

In order to understand the testimony in the case at bar, the sequence of events should be remembered:

On April 6, 1917, the United States declared war against the Imperial German government. At the national convention of the Socialist Party at St. Louis, held April 7 to 14, 1917, there was passed what has been called the "majority resolution," which was, in effect, an anti-war resolution, the details whereof need not be set forth at length. Part of the program of the Socialist Party was "resistance to compulsory military training and to the conscription of life and labor." On May 18, 1917, the Selective Service Law was passed, and on June 5, 1917, registration was had throughout the country, in respect of all those persons subject to the act. On June 15, 1917, the Espionage Law was passed. Between the time the Selective Service Law was passed and the time the Espionage Law was passed, to wit, on June 6, 1917, an authorized committee of defendant society, known as the "publication committee," according to the minutes of the board of directors, made the following report:

"The publication committee reported that they had decided to print the following three pamphlets:
"1. On the position of the party with reference to the war.
"2. On the Russian Revolution.
"3. On militarism.
"The report was approved."

After this report had been made, three pamphlets were published and distributed by defendant society. They were entitled "The American Socialists and the War." "The Menace of Militarism," and "The Great Madness." The first-named pamphlet was edited by the director of the department of labor research of the Rand School of Social Science, and preceded by an introduction by Morris Hillquit, a member of defendant society and the international secretary of the Socialist Party.

The position of the Socialist Party at St. Louis was approved in Hillquit's introduction, and all three pamphlets set forth in extenso denunciations of the war and of the part which the United States had undertaken. Other publications of defendant society, such as the Catalogue at the Rand Bookstore and the Bulletin for 1917 and 1918, reiterated in one form or another some or all of the positions taken in the three pamphlets above referred to.

In August, 1917, according to the testimony, the manuscript of The Great Madness was found in a desk in the Rand School and the evidence is that at one time or another one Karp, the manager of the bookstore, Cohen, the chairman of the publication committee, and Mrs. Mailly, the executive secretary of the Rand School, saw the manuscript prior to publication. The manuscript was published by authority of the defendant society acting through the officers and agents to whom such matters were officially confided in the ordinary conduct of the affairs of the society. Each of those who saw the manuscript testified in one way or another that he or she did not fully read the same, but it appeared from the testimony that any article or pamphlet by Nearing would be published and that the active and responsible officers and agents of defendant Society were fully conversant with Nearing's views, in respect of the war. The first edition of 10,000 copies of The Great Madness was published and paid for in September, 1917, and a second edition of 10,000 copies was published and paid for in October, 1917. The pamphlet was sent to various Socialist local organizations and to bookstores or distributers, and was also sold over the counter at the Rand School in the city of New York. Of the 20,000 which were printed, the testimony showed that some 19,000 had been distributed and had gone into general circulation.

During the summer and early fall of 1917, pending the working out of the elaborate detail of the Selective Service Law, it will be remembered that the government was straining every effort to obtain as many recruits and volunteers as possible. It is a matter of common knowledge that recruiting stations were established, posters extensively distributed, public meetings widely held, and a nation-wide appeal made to men of enlistment age, to enlist in the army and navy. It was while that situation was prevailing that The Great Madness was published and distributed.

At the February, 1918, meeting of defendant society the publication committee reported the publication of two pamphlets by Nearing, and, on the evidence, these pamphlets unquestionably were The Menace of Militarism and The Great Madness. In the Year Book, which defendant published early in 1918, the position taken by the majority resolution of the Socialist Party at St. Louis was strongly approved in the following language:

"The American Socialist Party was never confronted with so grave a crisis as that which it faced in St. Louis. That the crisis was faced bravely and without flinching is a tribute to the courage and clear-sightedness of the delegates. That the stand taken at St. Louis was the right one is evidenced by the tremendous enthusiasm evoked by the decision of the convention, and by the extraordinary growth of the party since April."

From the foregoing, and more to the same effect, which will be found in the testimony, the jury had the right to conclude that on the part of the society there was a plan and program whereby its anti-war attitude in various aspects should be consistently and persistently expressed by means, among other things, of the publication and distribution of pamphlets, and this was all the more plain because, in the main, defendant society was concerned more with the sale than with the publication and distribution of writings.

The jury was instructed, in effect, that the principles of the Socialist Party were not under consideration, and that its sole duty was to ascertain whether or no defendants were guilty of the offenses charged beyond a reasonable doubt. A brief extract from the charge is as follows:

"With the principles of the Socialist Party you have no concern any more than the court. Those principles may be, so far as they deal with economic and philosophic questions, right or wrong. With them we are not concerned. But you have a right to look at these various previously issued documents, to see what was in the mind of both of the defendants, what was there concerning them, so far as the war situation was involved, in order to determine whether or not, when Nearing wrote 'The Great Madness,' it was his purpose to violate the statute, and, when the corporation printed and published it, it was its purpose to violate the statute. Now, that is for you to determine."

In Debs v. United States, supra, Mr. Justice Holmes, speaking for the United States Supreme Court, said:

"The main theme of the speech was Socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do, but if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service, and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech."

The jury was also charged, in accordance with familiar principles, that every one is presumed to intend the natural and probable consequences of his own act, and, when any one does any particular act, he is presumed to intend the natural and probable consequences of that act. In Debs v. United States, supra, in commenting upon the speech of the defendant in that case, the court stated:

"The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended, and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief."

And in Schenck v. United States, supra, the court held:

"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. Bucks 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 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."

In the case at bar, the instructions which went to the question of intent were of the same character and at times almost in the same words as those upheld in the recent decisions of the Supreme Court. and the evidence was ample to sustain the finding of the jury and to authorize the jury in differentiating on the evidence between the case of defendant society and the case of the individual defendant. The jury was charged that it was at liberty to acquit both defendants on the counts submitted, or to acquit one and convict the other. The jury has made its decision, and I find nothing in the record which would justify the setting aside of the verdict against defendant on the fourth count, either as matter of law or, to use counsel's phrase, as matter of simple justice.

The case was tried by able counsel on both sides with courtesy, clearness, and force. There were no digressions to lead the jury into strange paths. The fundamental questions involved were repeatedly stated both by court and counsel, and there can be no doubt that the jury was fully possessed of the controversy and understood perfectly the duty which it was called upon to perform. It could have decided either way, and, having decided as it did on the evidence and the law, it is the duty of the court to sustain the verdict.

The motions, therefore, must be denied.

NOTE.—The date for sentence is set for March 21, at 2 p. m., in Room 235, Post Office Building. A reasonable stay will be granted, so as to give counsel for defendants an opportunity, if so advised, to submit a proposed writ of error in connection with the bill of exceptions, and the writ of error will be allowed, if presented.

In re RAMMAGE.

(District Court, S. D. California, S. D. October 8, 1919.)

No. 3229.

BANKRUPTCY ⇐407(5)—OBTAINING GOODS BY FALSE STATEMENT GROUND FOR DENIAL OF DISCHARGE.

Discharge will not be denied bankrupt druggist, under Bankruptcy Act, § 14b (3) being Comp. St. § 9598, on the ground he "obtained * * * property on credit upon a materially false statement in writing, made by him" to representative of wholesale drug company "for the purpose of obtaining credit" from such company, where the written statement of assets and liabilities prepared by the bankrupt for such representative, although failing to show bankrupt's indebtedness to members of his family, did not on its face purport to include all his indebtedness or to state that no other indebtedness was subsisting.

In Bankruptcy. In the matter of W. H. Rammage, bankrupt. On report of referee recommending denial of discharge in bankruptcy. Report overruled, and discharge granted.

W. T. Craig and H. R. Archbald, both of Los Angeles, Cal., for trustee.

J. W. Morin, of Pasadena, Cal., for bankrupt.

BLEDSOE, District Judge. The referee, as special master, has recommended that the discharge of the bankrupt be denied; but upon a consideration of his report, together with the exceptions thereto, I am constrained to conclude that he was in error in his conclusion, and that a discharge should be granted.

The objection to discharge urged by the trustee was based upon the ground, stated in the statute—Bankruptcy Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550 (Comp. St. § 9598)—that the bankrupt had "obtained * * * property on credit upon a materially false statement in writing, made by him" to a representative of the Western Wholesale Drug Company "for the purpose of obtaining credit" from such company. The controlling facts are without conflict. For some time the bankrupt had been conducting a drug store, doing business with the wholesale house known as the Western Wholesale Drug Company. On the 1st of October, 1917, the credit manager of the company, examining the then current monthly account owing by the bankrupt, wrote him a letter of the following tenor:

"The inclosed statement does not make the most favorable showing, and I trust that you can get a substantial remittance to us at this time. You will remember that you were going to prepare a financial statement for us, and I will appreciate it if you be good enough to do so, and then if possible, come in so that we may talk over the situation."

Some days later, in response to such communication, the bankrupt called upon the credit manager and had a talk with him about his business, prospects, etc. He took with him to this conference a certain memorandum concerning his business, all in his own handwriting, in so far as handwriting was made use of, but not signed by him. The

memorandum was made upon a sheet, obviously taken from a loose-leaf book of some sort, headed in printing, "Inventory" and containing various columns respecting "quantity," "description," "price," etc., and evidently being a sheet of lined and ruled paper that the bankrupt had casually picked up and made use of for the particular purpose in mind. The written matter in his handwriting was as follows:

Mdse. on hand	4,500.00
Fixtures	1,500.00
Fountain carbonator, etc.	1,250.00
	7,250.00
Owe for Mdse. not due	200.00
" " " due	700.00
" bank	500.00
" Marshall	225.00
" Western note	975.00
" " Drugs	3,785.00
" Fountain	1,030.00
	7,415.00
Insurance	1,000.00
" fixtures	1,500.00
" Mdse.	2,500.00

Rent 61.00 mth.

The testimony shows that upon a consideration of this "statement" the situation was canvassed at some length, the credit manager expressing dissatisfaction, but the general result being that the business was to go on as theretofore, and probably, although this matter is not free from doubt, a general understanding was arrived at that the bankrupt should continue to receive credit from the drug company. In any event goods were thereafter in due course ordered by him on credit, and credit was extended to him thereafter for a month or so, and until the filing by him of a voluntary petition in bankruptcy.

The gist of the controversy is that, despite the so-called "statement" failing to show any obligations other than those specifically mentioned and above set forth, the bankrupt at the time was indebted to members of his family for moneys borrowed wherewith he purchased the business in the first place, in a sum in excess of $3,000. The objection to his discharge is founded upon this feature of the transaction—his neglect to incorporate in the statement any account of these family debts. In my judgment, however, an essential feature of the precise offense described in the statute is absent.

The statement prepared by the bankrupt did not, on its face, in any wise, by writing in the hand of the bankrupt or at all, purport to contain a complete and exhaustive account of his business with respect either to his assets or to his liabilities. It did contain a statement of certain things—merchandise on hand, etc., and certain other things; bills owing by him, etc. If there had been any statement in writing, made or signed by him, to the effect that the items given constituted all of his then present indebtedness, a situation would have occurred which would have justified a denial of his discharge; or if he had stated that he had $6,000 of "merchandise on hand," instead of $4,500

worth, as was the fact, a similar result would have been reached. The statute requires, however, in order that discharge may be denied, that the bankrupt must have obtained property on credit "upon a materially false statement in writing made by him." The "materially false statement" thus required is not to be found in writing, in the statement of his business tendered by the bankrupt. There is nothing in the statement at all, as heretofore suggested, to the effect that the figures given were inclusive of all indebtedness, or that no other indebtedness was subsisting. In other words, there is no "false" statement upon the face of the writing.

It may be, although there is little justification for such conclusion, that the bankrupt intended to misrepresent the situation with respect to his total indebtedness, and intended wholly to conceal the debts owing to his family; but, whether that be the case or not, he has not violated the express language of the statute. He did not incorporate a "false statement" into the writing made by him. He may not lawfully be denied a discharge because of mere implications or inferences arising out of his verbal expressions, or even out of the general situation. There must have been falsity evidenced in writing.

This conclusion seems to be sustained by the well-considered opinion of the Circuit Court of Appeals of the Eighth Circuit in International Harvester Co. v. Carlson, 217 Fed. 736, 739, 133 C. C. A. 430.

The report of the referee is overruled, and a discharge of the bankrupt will be granted as prayed for.

BREITUNG et al. v. PACKARD et al.

(District Court, D. Massachusetts. October 21, 1919.)

No. 1069.

COURTS ⊂=342—PRACTICE; EQUITABLE DEFENSES IN ACTIONS AT LAW.

A defense to which a third person is obviously a necessary party cannot in an action at law be set up by equitable answer, under Act March 3, 1915, c. 90 (Comp. St. § 1251b); but it authorizes only such equitable defenses as can be adequately made between the original parties to the action.

Action by Edward N. Breitung and others against Azel A. Packard and others, on demurrer to answer. Demurrer sustained.

Storey Thorndike, Palmer & Dodge and Harold S. Davis, all of Boston, Mass., for plaintiffs.

Charles H. Beckwith, of Springfield, Mass., for defendants.

MORTON, District Judge. The gist of the alleged equitable defense is that the plaintiffs agreed with a third person to buy from it certain stock at a price more than sufficient to pay the entire issue of the notes in suit, and that the third person agreed with the defendants to apply the proceeds of said sale to the payment of the notes. The

questions are: (1) Whether such facts constitute in equity a defense; and if so (2) whether the defense can be set up by equitable answer in an action at law, under the Act of March 3, 1915, c. 90 (38 Stat. 956 [U. S. Comp. St. 1918, § 1251b]).

Discussing the second of these questions, it is obvious that the third person is a necessary party to such a defense, and that the defense ought not to be allowed unless the third party can be brought into the case. The ordinary practice in actions at law affords no way of doing so. It cannot be done under the act unless the answer be given the effect of a bill in equity to restrain the action at law. There is a dictum in U. S. v. Richardson, 223 Fed. 1010, 1013, 139 C. C. A. 386—a jury-waived case—which perhaps sustains that view. But the point has never been decided, and the practical difficulties which such a construction of the act would create in jury trials are so great and apparent, that it seems to me unlikely Congress could have so intended. Bills setting up equitable defenses are often complicated, involving many parties, and raising many questions. A jury trial is not a flexible proceeding, nor well adapted to the determination of complicated and confused issues. If the act be given the broad construction suggested, cases can easily be imagined which it would be impossible to try properly before a jury.

Massachusetts has had a statute allowing equitable defenses in actions at law since 1883. Rev. Laws Mass. c. 173, § 28. The point under discussion seems not to have been raised under it; but I have found no decision in which a third party was brought into an action at law by an equitable answer. It seems to have been assumed that the statute only applied to such defenses as could be adequately made between the two parties to the original action.[1] That seems to me to be the sound construction of the act in question.

It follows that, as this answer discloses the necessity of a third party in order to establish the defense which it sets up, it is not good under the act; and the demurrer to it should be sustained.

It is not necessary to pass on the other grounds of demurrer, nor upon the question whether the facts disclosed in the answer constitute an equitable defense.

[1] See Barton v. Radclyffe, 149 Mass. 275, 279, 21 N. E. 374; St. Jean Bap. Soc. v. Worcester Co. Inst., 228 Mass. 556, 561, 117 N. E. 921; Jump v. Leon, 192 Mass. 511, 78 N. E. 532, 116 Am. St. Rep. 265; and also suits in equity referring to the statute, Eustis Mfg. Co. v. Saco Brick Co., 198 Mass. 212, 217, 84 N. E. 449; Spaulding v. Backus, 122 Mass. 553, 23 Am. Rep. 391.

AMERICAN GUARANTY CO. v. AMERICAN FIDELITY CO.*

(Circuit Court of Appeals, Sixth Circuit. November 11, 1919.)

No. 3298.

1. APPEAL AND ERROR ⊂=1008(2)—REVIEW OF FINDINGS OF FACT BY THE COURT.
Where jury was waived, findings of fact by the judge, who heard the witnesses, will not be disturbed by the appellate court, where there was substantial evidence to support them.

2. CUSTOMS AND USAGES ⊂=3—BINDING EFFECTIVE CUSTOM.
Where defendant claimed that a contract of reinsurance was affected by custom, the custom must be clearly established, or shown to have been reasonable, definite, and uniform, before it will be presumed that the parties referred to it in making the contract.

3. CUSTOMS AND USAGES ⊂=17—WILL NOT AVOID TERMS OF UNAMBIGUOUS CONTRACT.
Where plaintiff, who became surety on the bond of a bank conditioned to indemnify city against any loss of deposits, entered into a contract of reinsurance with defendant, notifying defendant that it was its purpose to reinsure as much of the risk as it could, defendant cannot defeat liability on the ground that by custom and usage the primitive insurer might not reinsure all of the risk, as custom and usage cannot change or avoid terms of a clear, unambiguous contract.

4. EVIDENCE ⊂=448—PAROL EVIDENCE RULE AS TO CONTRACTS.
Except where the terms of a written contract are obscure, uncertain, and indefinite, oral evidence is not admissible to add to, change, or contradict them.

5. CUSTOMS AND USAGES ⊂=15(1)—UNAMBIGUOUS REINSURANCE CONTRACTS.
Where a clause of a reinsurance agreement between plaintiff, the primitive insurer, and defendant, the reinsurer, stated that any loss shall be payable by the reinsurer pro rata with the reinsured, that is to say, in the proportion which the amount of the reinsurance bears to the reinsured's total liability, parol evidence of custom and usage is inadmissible to show that the clause was an agreement by the reinsured to retain part of the risk; the clause being unambiguous.

In Error to the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Action by the American Fidelity Company against the American Guaranty Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Smith W. Bennett, of Columbus, Ohio, for plaintiff in error.

H. B. Arnold, of Columbus, Ohio, for defendant in error.

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

McCALL, District Judge. In this case a jury was waived by proper stipulation and the case heard before the District Judge. Separate findings of fact and conclusions of law were made by the District Court, and a judgment rendered against the defendant below, from which it prosecutes error to this court. For convenience we shall refer to the Fidelity Company, defendant in error, as plaintiff, and to

the Guaranty Company, plaintiff in error, as defendant, as they appeared in the court below.

These undisputed facts appear on the pleadings: In December, 1913, the plaintiff became surety on a bond in the sum of $75,000, running to and in favor of the city of Chicago, indemnifying that city against any loss sustained by it on account of any acts or defaults of the La Salle Street Trust & Savings Bank (hereafter called the bank) as a depository of the moneys of the city of Chicago, on and after January 1, 1914. On January 10, 1914, plaintiff made and entered into a contract of reinsurance with the defendant, whereby, in consideration of a certain premium then paid, the defendant covenanted and agreed to pay to the plaintiff not exceeding $25,000, or one-third of the total amount of the primitive bond, for which plaintiff might become liable or be compelled to pay on account of any default of the bank, and in addition defendant agreed to pay to plaintiff a pro rata portion of all expenses, costs, and counsel fees incurred by plaintiff, arising out of its obligation on the primitive bond. About June 13, 1914, the bank became insolvent and went into the hands of a receiver. Demand was thereafter made by the city of Chicago on plaintiff for $75,000 on account of insolvency and default of the bank. Plaintiff notified defendant of the failure of the bank and of the demand made by the city for the payment of the full amount of the primitive bond; at the request of defendant, plaintiff refused to make the payment demanded, and thereafter suit was commenced by the city against plaintiff to recover the full amount of the bond, resulting in a judgment against the plaintiff for $81,172.35, the full amount of the bond, including interest and court costs. In addition plaintiff incurred expenses in and about defending said action, amounting to $6,258.26. This judgment and these expenses were paid by plaintiff, and it made demand of the defendant for $29,146.87, which was one-third of the total amount paid by plaintiff by virtue of the original bond. Defendant refused payment, and this action was brought to recover it with interest.

The defendant practically admits the material averments in the declaration, and pleads several special defenses, of which the following are relied on here: (1) The knowledge of plaintiff of facts detrimental to the risk and its failure to disclose same to defendant, which as averred was a constructive fraud; (2) the plaintiff reinsured all the primitive risk, which was in violation of custom and usage, without advising defendant of its action in the premises; (3) failure of the city of Chicago to apply the proceeds of certain securities deposited by the bank with the city as security for the payment to the city of any deposits made by it in the bank to the payment pro tanto of the amount of the default.

As has been seen, the District Court, after hearing and considering the pleadings, the evidence, and the law applicable to the case, found against the defendant, and entered judgment accordingly. The plaintiff in error assigned errors, and relies here on five of them, which we will state and dispose of in the order presented.

[1] The first assignment is, in substance, that the District Court erred in not finding and decreeing that the plaintiff had knowledge of facts detrimental to the risk and failed to disclose them to the defendant, and was thus guilty of perpetrating a fraud on defendant by inducing it to contract a liability which it otherwise would not have done. In so far as this assignment questions the finding of facts, the judgment will not be disturbed, if, under the well-settled rules of this and federal appellate courts generally, there is any material evidence to sustain it.

The evidence plaintiff in error relied on to support this assignment relates to an oral communication between E. E. Bailey, of Chicago, and his nephew, B. B. Bailey, of Montpelier, Vt., vice president of the plaintiff, to the previous action of the plaintiff in declining to reinsure certain risk on the La Salle Street Trust & Savings Bank which was offered to it by the New England Casualty Company, to the question of plaintiff's intention to reinsure the entire primitive risk, and to the contents of the form of reinsurance used in this case. Clearly there is direct and circumstantial evidence in the record relating to this matter, which was heard in open court by the District Judge, when and where he heard and saw the witnesses and thus had every opportunity to understand and weigh the evidence of each witness, that tends to support his finding. Judge Warrington, speaking for this court in The Elenore, 217 Fed. 753, 133 C. C. A. 447, said:

"Such opportunities always afford distinct advantage in determining the value of testimony; and, unless there is a decided preponderance against a decree or judgment rendered under such circumstances, the rule in this court is not to disturb it. Monongahela River Consol. C. & C. Co. v. Schinnerer, 196 Fed. 375, 379, 117 C. C. A. 193; In re Snodgrass, 209 Fed. 325, 326, 126 C. C. A. 251; Carey v. Donohue, 209 Fed. 328, 333, 126 C. C. A. 254."

Here, as in that case, the evidence does not warrant a departure from this rule.

[2] Assignments 2 and 4 relate to questions of custom and usage in writing reinsurance, and they will be disposed of together. It is insisted that by custom and usage the primitive insurer may not reinsure all of a given risk, but must retain a part thereof, and the District Court erred in not so holding.

Here again we are confronted with a finding of the district judge, that the evidence does not establish the existence of custom or usage that the reinsured shall retain a part of the risk, and there is material evidence which, if believed warrants the finding. So if we assume that the law as to custom and usage is as contended for by plaintiff in error, it has no application in a case, as here, where the jury or the judge, when a jury is waived, finds the evidence fails to establish custom or usage.

Custom or usage, to be binding, must be definite or certain, uniform, reasonable, and well known, and it must be established by clear and satisfactory evidence, so that it may be justly presumed that the parties had reference to it in making their contract. Bowling v. Harrison, 6 How. 248, 12 L. Ed. 425; United States v. Buchanan, 8 How. 83, 12 L. Ed. 997; Berry v. Cooper, 28 Ga. 543.

[3] But, aside from all this, defendant was informed that it was the purpose of the plaintiff to reinsure as much of this particular risk as it could, which is another way of saying that it would reinsure all, if it could. With this information defendant made the contract of reinsurance in question, and it may not in such circumstances escape liability by virtue of custom or usage, even when proven, which tends to change or avoid the terms of a clear, definite, and unambiguous contract, made at arm's length and with full knowledge of its contents.

[4, 5] What is called a "retention clause" in insurance parlance does not appear in the contract of reinsurance under consideration, and it is insisted that the absence of this clause makes the insurance agreement unintelligible, and that the District Court erred in excluding certain testimony tending to show custom and usage, for the purpose of explaining paragraph 2 of the conditions contained in the reinsurance agreement. The paragraph reads as follows:

"Any loss hereunder shall be payable by the reinsurer pro rata with the reinsured; that is to say, in the proportion which the amount of this reinsurance bears to the amount of the reinsured's total liability, and under the same conditions by the reinsurer as the reinsured shall pay"

We perceive no ambiguity or uncertainty here. The paragraph seems to be clear and certain. The meaning of the clause, "any loss hereunder shall be payable by the reinsurer," the defendant, "pro rata with the reinsured," the plaintiff, is made entirely clear by the following clause—"that is to say, in the same proportion which the amount of this reinsurance bears to the amount of the reinsured's total liability." The clause, "reinsured's total liability," refers to, and could not refer to anything other than the total amount of the primitive bond for which plaintiff was alone liable to the city.

Except where the terms of a written contract are obscure, uncertain, or indefinite, oral evidence is not admissible to add to, change, or contradict them. Reid v. Diamond Plate Glass Co. (6) 85 Fed. 193, 29 C. C. A. 110; Jenkins v. Preston (6) 186 Fed. 609, 108 C. C. A. 473; Hirsch v. Georgia Iron & Coal Co. (6) 169 Fed. 578, 95 C. C. A. 76; De Witt v. Berry, 134 U. S. 307, 10 Sup. Ct. 536, 33 L. Ed. 896.

We have considered the remaining assignments and find them equally without merit, and we deem further elaboration unnecessary. It results that the judgment must be affirmed, with costs.

THE J. L. MINER.

THE JEREMIAH GODFREY.

(Circuit Court of Appeals, Sixth Circuit. November 11, 1919.)

No. 3257.

1. COLLISION ⊜57—NONLIABILITY OF BARGE FOR IMPROPER NAVIGATION OF TUG.
   In navigating a tow, the tug is the dominant mind and will, and a barge in the tow is not responsible for improper navigation on the part of the tug.
2. COLLISION ⊜73—PRESUMPTION; DUTY OF NAVIGATING VESSEL TO AVOID ONE AT ANCHOR.
   It is the duty of a navigating vessel to avoid one at anchor, and where the vessel at anchor is in a proper place, the presumption of fault in case of collision arises against the navigating vessel; but this presumption does not obtain when the anchored vessel is not in a proper place.
3. COLLISION ⊜73—REBUTTAL OF PRESUMPTION OF FAULT AGAINST ANCHORED VESSEL.
   The prima facie fault of an anchored vessel, arising from the fact that it was anchored in an improper place, may be rebutted by competent proof that its anchorage could not have been the sole cause of a collision; but the burden of rebutting the presumption is in such case on the anchored vessel.
4. COLLISION ⊜95(7), 144—LIABILITY OF ANCHORED AND NAVIGATING VESSELS, DIVISION OF DAMAGES.
   In a libel by the owners of a houseboat, which was struck by the tow of a tug proceeding down the river, *held* that, though the houseboat was not anchored in a proper place, the collision was not due solely to that fact, and the damages should be divided between the houseboat and the tug.
5. ADMIRALTY ⊜118—REVIEW; WEIGHT OF CONCURRENT FINDINGS OF COMMISSIONER AND JUDGE.
   The concurrent findings of a commissioner and judge in an admiralty case will not be disturbed on appeal, unless there is a decided preponderance against the decree or judgment.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Libel by Frank G. Wetherell and another against the tug J. L. Miner, claimed by Alexander Ruelle, and the barge Jeremiah Godfrey, claimed by the Grace Harbor Lumber Company. From a decree for claimants, libelants appeal. Affirmed as to the barge Jeremiah Godfrey, and reversed and remanded as to the tug J. L. Miner.

Hugh M. Edwards, of Detroit, Mich., for appellants.

John C. Spaulding and Sherwin A. Hill, both of Detroit, Mich., for appellees.

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

McCALL, District Judge. This is an appeal from a decree of the District Court of the United States, in admiralty, dismissing the libel filed by Frank G. Wetherell and Charlotte Wetherell against the tug J. L. Miner and the barge Jeremiah Godfrey.

On the 23d day of October, 1915, the houseboat Halcyon, owned by libelants, was lying in the River Rouge, moored to a dock at the foot of Copeland avenue, Detroit, Mich., when the barge Jeremiah Godfrey, being towed down the river by the tug J. L. Miner, drifted against the houseboat, crushing it, and causing such injuries that she sank.

These specific charges of negligence were made against the tug: First, those in charge of her navigation were careless, incompetent, and inattentive to their duties; second, the tug slowed down waiting for the bridge to open without signaling to the Godfrey in tow; third, the tow line connecting the tug and the barge was too long for use in said river; fourth, the tug passed too close to the houseboat and negligently permitted the barge to drift over and collide therewith.

In the view we have taken of the case it is not necessary to state the specific negligence charged against the barge. The owners of the tug and barge admit the collision, but deny the specific allegations of fault and negligence alleged in the libel, and aver that the collision and damage resulting therefrom to the Halcyon were due to the fault of the houseboat and those in charge of her, and that the damage sustained by the Halcyon was increased by those in charge abandoning her and allowing her to sink and remain at the bottom of the river.

The issues raised by the pleadings were referred by the District Judge to a special commissioner to take testimony and make findings of fact and conclusions of law. No testimony was taken on the question of damages. The commissioner found, and so reported, that the houseboat was negligently moored in a dangerous place and recommended that the libel be dismissed. Exceptions were filed to the report of the commissioner. The District Judge overruled them and a decree was entered dismissing the libel, without written opinion. The effect of this decree was to sustain the commissioner's finding that the Halcyon was solely at fault.

[1] It is sufficient to say that the facts on the record place the barge Jeremiah Godfrey clearly within the rule that in navigating a tow the tug is the dominant mind and will, and, in so far as the proper navigation of the tow is concerned, the tug leads and commands (The Teaser, 246 Fed. 219, 158 C. C. A. 379) and is responsible for her navigation upon condition of the tow's prompt obedience to the directions of the master (The Heffelfinger, 201 Fed. 597). We think it is not shown by the greater weight of the evidence that those in charge of the barge were guilty of negligence in this or any other particular, and therefore the decree appealed from, in so far as it relates to the barge Jeremiah Godfrey, must be affirmed.

[2-4] The material facts, as found by the commissioner and approved by the District Judge, are substantially as follows: The Halcyon was 47 feet long and 14 feet beam; the tug J. L. Miner, 53.7 feet long, 13.8 feet beam, and 6.5 feet depth; the barge Jeremiah Godfrey, 190 feet long over all, 34.9 feet beam, and 14 feet depth. At the place where the houseboat was moored, the river runs in a gradual circle in a general southerly and northerly direction; the houseboat being located on the west bank and at the outer edge of a bend in the river,

which here runs from the southeast to the northwest of the place where the houseboat was, and thence towards the northeast, this bend resembling an elliptical arch. The width of the river at this point is about 125 feet, and the width of the dredged channel about 100 feet. Nine hundred feet below, and in a northeasterly direction from the houseboat, was a drawbridge of the Detroit, Toledo & Ironton Railroad, which spanned the river, with the draw on the southeast side, which could be swung in either direction for the passage of boats. The bridge was usually slow in opening, which was well known to those operating vessels on the river. On account of this slowness it was customary for vessels to be checked down several hundred feet before reaching the bridge, to avoid or lessen the danger of reaching the bridge before its draw had been opened, and vessels proceeding downward toward the bridge frequently check their speed, for the reason stated, at or before reaching the point where the houseboat was located. In this case the tug slowed down some 600 feet above the Halcyon, thus being 1,500 feet above the bridge.

From these facts it is difficult to find ourselves in agreement with the court below, in its decree that the houseboat, closely moored to the dock at the foot of Copeland avenue, was solely at fault. The distance between the houseboat and the east bank of the river was 111 feet and a clear channel of 100 feet through which to pass. When, however, we examine the evidence, and especially the blueprint of a survey of Rouge river at this point, it seems clear that those in charge of the houseboat were not solely at fault. The houseboat lay parallel to the bank, and was moored to the dock outside of the west bank of the channel, and thus left entirely clear the whole of the 100-foot channel for the navigation of the tug and barge. This impression is greatly strengthened when to this is added the fact, clearly established by the evidence, that the captain of the tug had been running out and in the Rouge river for 40 years, and was thoroughly familiar with the river at this point, and knew the houseboat had been moored for more than a year at this particular dock, and further he had navigated the tug, with and without tows, by the houseboat many times, and no collision ever previously occurred.

Why did it occur on the occasion in question? We think the evidence makes it entirely clear. The answer is that the master of the tug was proceeding down the middle of the channel, and failed to steer the tug to starboard until the tug was opposite the houseboat, when he saw the tow was about to collide with the houseboat. It was then too late to clear, because of the slow speed of the tug and the slight wind. The negligence was in navigating the tug too close to the houseboat before he undertook to direct the prow of the barge, which was drifting into it towards the east bank of the river. The barge had gotten so close to the houseboat that her stern did not clear, and crashed into it. Knowing, as he, the master of the tug, did, that the bridge would be slow in opening, and that he must slow down to avoid running into it, and that the barge, because of the bend in the river, the slight wind, and the loss of steerageway, would have a tendency not to follow the tug, prudence and proper care required that, when he

slowed down, he should have earlier steered the tug to starboard, and thus enabled the stern of the barge to clear the houseboat.

While we agree with the finding of the court below that the houseboat was at fault because of its location, we cannot agree that this fault was so gross as to deprive her of the right of protection, at least to the extent of requiring the master of the tug to exercise reasonable care and skill in navigating the tug, commensurate with the danger inherent in the situation which was well known to him. The rule is well settled in this country that a navigating vessel must keep away from one at anchor. The vessel at anchor being in a proper place in case of collision, the presumption of fault lies against the vessel in motion; but this presumption does not obtain when the anchored vessel was where she should not have been. The prima facie fault of the anchored vessel may be overcome by competent proof that its anchorage could not have been the sole cause of the collision. In such circumstance the burden is with the anchored vessel to meet and overturn the presumption by proof of actual fault or want of reasonable care on the part of the moving vessel. The Europe (D. C.) 175 Fed. 596, and cases cited.

We think the court below was warranted in decreeing that the houseboat Halcyon was moored at a dangerous place, and affirmance must follow as to the nonliability of the tug J. L. Miner, unless it clearly appears from a decided weight of the evidence that the tug was also at fault. We have carefully considered the evidence and exhibits thereto, and we cannot escape the conclusion that it does so clearly appear. There is no doubt that it is difficult for a navigator to negotiate the River Rouge at the point in question, with a tug and tow the length over all of the Miner and Jeremiah Godfrey; that is but to say that the degree of care to be exercised by the navigator must be correspondingly greater than it need otherwise be, and especially is this true in this case, when it clearly appears that the master of the tug was thoroughly familiar with the river, the docks and vessels moored along the banks at this point. As has been seen, the Halcyon had been moored at the Copeland avenue dock for more than a year, just as and where she was when the collision occurred, and the master of the tug had many times passed up and down the river in the prosecution of his business as a navigator, and never before had he collided with the Halcyon or any other vessel near her, so far as this record discloses. Indeed, his own evidence tends to show that, had he taken care earlier to have steered the tug toward the eastern bank of the channel, the collision would not have occurred.

If the master's effort to so steer the tug to starboard, after he saw the barge drifting upon the Halcyon, was for the purpose of clearing her, then in the exercise of that degree of care and skill required by the situation he should have so steered the tug earlier, and before the barge was in so close proximity to the Halcyon, and thus avoided the collision. If the situation was so fraught with danger as to have challenged the attention of the master, then it was his duty to have met that situation with a corresponding higher degree of care and skill, to the extent, if reasonably necessary of engaging another tug to hold

the stern of the Jeremiah Godfrey from drifting so far to port, and thus kept her away from the Halcyon.

[5] The rule in this court and generally is that concurrent findings of a commissioner and judge will not be disturbed, unless the evidence decidedly preponderates against the decree or judgment. The Elenore, 217 Fed. 753, 133 C. C. A. 447; Transit Co. v. Moore (6), 259 Fed. 490, — C. C. A. —, and case cited. We are of opinion that the evidence in this case decidedly preponderates against the decree below as to the first and last charges of fault alleged against the tug J. L. Miner, and so brings this without the rule just stated.

It follows that the decree below must be affirmed as to the Jeremiah Godfrey, and reversed and decree entered onerating the J. L. Miner with half the damages, when ascertained. The case will be remanded for that purpose, the Halcyon to recover its costs of this court against the J. L. Miner, no costs to be awarded for or against the barge.

OILFIELDS SYNDICATE v. AMERICAN IMPROVEMENT CO.

(Circuit Court of Appeals, Ninth Circuit. October 27, 1919.)

No. 3339.

1. BANKRUPTCY ⊜387—EFFECT OF CONFIRMATION OF COMPOSITION ON JUDGMENT LIEN.

Confirmation of composition in bankruptcy proceedings without adjudication of bankruptcy, under Bankruptcy Act, §§ 14c, 70f (Comp. St. §§ 9598, 9654), merely discharges bankrupt from personal liability on a judgment, a provable debt under section 63 (section 9647), and restores his property subject to lien of judgment acquired more than four months before petition in bankruptcy, and which therefore, under section 67, subds. "c," "f" (section 9651), would be unaffected by adjudication, the judgment creditor never having filed claim, nor voluntarily participated in the bankruptcy proceedings, nor received a dividend from the composition, as under section 17, as amended (section 9601), a discharge in bankruptcy would not affect the lien.

2. BANKRUPTCY ⊜433(7)—LIEN OF JUDGMENT MAKES CREDITOR "SECURED CREDITOR."

The lien on all property of judgment debtor in the county, which Code Civ. Proc. Cal. § 674, provides that filing of transcript of judgment gives, is enough to make the judgment creditor a "secured creditor," within Bankruptcy Act.

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

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suit by the Oilfields Syndicate against the American Improvement Company. From a decree for defendant (256 Fed. 979), plaintiff appeals. Affirmed.

Oilfields Syndicate appeals from a decree dismissing a complaint on the ground that the facts failed to state a valid cause of action in equity against the Improvement Company, appellee. The suit is to remove a cloud upon the

title to certain real estate in California and is founded upon these allegations: That on September 6, 1917, one Hammon conveyed the property involved to the Oilfields Syndicate, appellant, which now claims to be the owner; that on November 29, 1915, the appellee, Improvement Company, brought suit in the proper state court against Hammon and others to recover the principal of a note and interest unpaid, and on October 19, 1916, had judgment against Hammon and two coindorsers for the amount of the unpaid principal and interest of the promissory note, together with costs. The clerk of the state court entered the judgment and filed the judgment roll, as required by the California Code of Civil Procedure, and on October 20th made the proper entries of the judgment in the docket, and on November 8, 1916, a transcript of the judgment was recorded in the office of the county recorder of the county in which the real estate is situate. Under the statute of California (section 674, Code of Civil Procedure), the judgment thereupon became a lien upon all the real property of Hammon. No appeal was ever taken from the judgment, and the judgment became final. On September 27, 1917, petition in involuntary bankruptcy against Hammon was filed in the United States District Court. Thereafter in due form Hammon filed an offer of composicion to his creditors in satisfaction of all of his liabilities, however incurred, in the sum of $250,000, in addition to the money necessary to pay all debts which had priority and the costs of the proceedings in bankruptcy. The offer was accepted in due form and the consideration mentioned in the offer was thereupon deposited by Hammon, as required by the District Court. Hammon prayed for confirmation of the composition, his application was heard on August 31, 1918, and the court made an order confirming the composition. No order adjudging Hammon to be a bankrupt was ever made, nor was the application of the creditors of Hammon that he be adjudged a bankrupt ever granted or denied, although appellee herein knew of all matters in the proceedings in bankruptcy, but never filed objections to the composition or to any of the bankruptcy proceedings. Appellee, however, never filed a claim or voluntarily participated in the proceedings in bankruptcy. On September 19, 1918, appellee caused execution to be issued out of the state court. The sheriff advertised the property for sale, and was about to sell under the execution, when Hammon moved in the state court for an order to quash the execution and to declare all proceedings null and void, and for an order prohibiting the sheriff from proceeding further under the execution, upon the ground that the bankruptcy proceedings, the composition and the decree confirming the composition, had satisfied and discharged the judgment. The state court denied the motion. Sale was thereafter made by the sheriff on October 25, 1918, to appellee as purchaser.

Charles W. Slack, of San Francisco, Cal., and O'Melveny, Milliken & Tuller, of Los Angeles, Cal., for appellant.

William P. Hubbard, of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] Pertinent references to the statutes are as follows:

Under section 14c of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. § 9598]):

"Confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

Section 70f (Comp. St. § 9654) of the same act provides:

"Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him."

In Cumberland Glass Mfg. Co. v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042, the Supreme Court, after a general discus-

sion of the procedure with reference to offers of composition and orders made by the court in confirmation of composition, said that under section 70f, when confirmation of a composition is ordered:

"The order of confirmation becomes in effect a discharge, and is pleaded in bar with like effect. It operates to discharge the bankrupt from all debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge. * * * The effect of the composition proceeding is to substitute composition for bankruptcy proceedings in a certain sense, and in a measure to supersede the latter proceeding and to reinvest the bankrupt of all his property free from the claims of his creditors. True, the composition proceedings arise from the bankruptcy proceedings, and this part of the statute is to be construed with the entire act. Wilmot v. Mudge, 103 U. S. 217 [26 L. Ed. 536]. That the restoration of the estate to the bankrupt restores to him the right of action upon choses in action there is no question. Stone v. Jenkins, 176 Mass. 544, 57 N. E. 1002, 79 Am. St. Rep. 343, 4 A. B. R. 568."

Section 67c of the Bankruptcy Act (Comp. St. § 9651) provides in substance that a lien created by statute, including an attachment by mesne process which was begun against a person within four months before the filing of a petition in bankruptcy against such person, shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that the lien was obtained while defendant was insolvent or if its existence and enforcement will work a preference; or (2) the party to be benefited thereby had reasonable cause to believe defendant was insolvent and contemplated bankruptcy; or (3) such lien was sought and allowed in fraud of the provisions of the Bankruptcy Act; or if the dissolution of the lien would militate against the interest of the estate of such person, the lien shall not be dissolved, but the trustee, for the benefit of the estate, shall be subrogated to the rights of the holder of the lien and empowered to perfect and enforce the same as the holder might have done had not bankruptcy proceedings intervened. Section 67, subdivision "f," provides that all judgments or other liens obtained through legal proceedings against a person who is insolvent, or at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the judgment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall order that the right under the judgment or levy or lien shall be preserved, and thereupon the same may be passed to the trustee to be preserved by him for the benefit of the estate, provided nothing in the section shall operate to destroy or impair the title obtained by such levy, judgment, or other lien of a bona fide purchaser for value, who shall have acquired the same without notice or reasonable cause for inquiry.

In behalf of the appellant two theories are advanced: One, that if the provisions of subdivisions "c" and "f" apply to compositions, inasmuch as there has been no adjudication in the present case, the lien of the judgment was wiped out as an incident of the judgment by the satisfaction by the composition; another, that the lien of the judgment was extinguished by the satisfaction and discharge of the judgment by the composition under the sections of the act having to do with com-

positions, without regard to the question of adjudication. If either of these contentions is well founded, then the lien and judgment which were obtained and duly recorded more than four months prior to the filing of the petition in bankruptcy are discharged. A result in general would be that in a case where a bankrupt has availed himself of the composition statute, and has compounded with his creditors, and has obtained approval of the composition, but against whom there has been no adjudication in bankruptcy, a judgment creditor with a lien more than four months old, and who has not participated in the bankruptcy proceedings, has never filed a claim, and never received a dividend from the composition, occupies a position with respect to the right to preserve the lien of a judgment less favorable than he would have had if there had been an adjudication and discharge of the bankrupt from his debts.

We cannot believe that such is the true construction of the act. Section 17 of the Bankruptcy Act, as amended (Comp. St. § 9601), provides that a discharge in bankruptcy shall release the bankrupt from all of his provable debts, except such as due for taxes, liabilities for obtaining property by false pretenses, and for debts that have not been duly scheduled in time for proof and allowance, unless the creditor had notice of the bankruptcy proceedings. Section 63 provides that debts of the bankrupt may be proved and allowed against his estate which are: (1) "A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not," etc; (2) debts founded upon open account or upon contract; (3) debts founded upon provable debts reduced to judgment after the filing of the petition and before consideration of the bankrupt's application for a discharge.

In Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, the Supreme Court, after quoting section 67f of the act, said:

"In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy or a judgment, or an attachment, or otherwise, that is invalidated, and that, where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid preexisting lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so, the date of the acquisition of a lien by attachment or creditors' bill would be entirely immaterial."

And the court, in sustaining this view, referred to section 63a and to section 17 (Comp. St. §§ 9647, 9601), saying that they would be wholly unnecessary if section 67f were to be taken literally. First Nat. Bank v. Staake, 202 U. S. 141, 148, 26 Sup. Ct. 580, 50 L. Ed. 967; Globe Bank v. Martin, 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583.

It is clear, we think, that where there has been a composition, and an order of confirmation, the bankrupt takes back his property in the same condition that it was in when the bankruptcy was initiated, and that liens which would be valid and unassailable in the ordinary course

of bankruptcy proceedings are protected in composition arrangements and are not discharged or affected. In re Stowell (D. C.) 24 Fed. 468; Stewart Noble v. Bishop Co., 62 Colo. 197, 162 Pac. 159. It does not seem to be necessary at all that there shall be any order of discharge after an order confirming the composition, for the order of confirmation operates effectually to discharge the bankrupt from his debts other than those not affected by a discharge. In Stewart Noble v. Bishop, supra, the Supreme Court of Colorado, in considering the effect of a composition, said that the debt was discharged so far as the debtors were concerned, and that the creditors could no longer pursue the bankrupts personally, but that the right to demand that the property should be set aside for their benefit and should be applied was not relinquished. It was also held, that an order in the composition proceeding did not deprive a nonconsenting creditor of the vested right with which the bankruptcy court had no power otherwise to interfere. See, also, Alsop v. White, 45 Conn. 499; Hawthorne v. Hendrie et al., 50 Colo. 342, 116 Pac. 122; Griffin v. Smith, 177 Cal. 481, 171 Pac. 92; Collier on Bankruptcy (11th Ed.) pp. 402, 403; Remington on Bankruptcy, §§ 2670, 2673; Brandenburg on Bankruptcy, § 870. In Cottrell v. Pierson (C. C.) 12 Fed. 805, a judgment was obtained over two years before the commencement of the bankruptcy proceeding, and the owner of the judgment failed to prove its claim in the bankruptcy court. It was held by Judge McCrary that the lien of the creditor on the real estate of the bankrupt, as governed by the law of Nebraska, was not lost by failure to prove the debt, and that the creditor in such a case could rely upon his security and omit to prove his claim in bankruptcy, and by so doing lose only his claim against the general estate of the bankrupt. The court said:

"The law did not require the lienholder to prove his debt in order to save his lien. Having a judgment in the state court by which his lien was established, he had no occasion to apply to the bankruptcy court for aid in its enforcement." Houston v. Shear et al. (Tex. Civ. App.) 43 Am. Bankr. R. 462, 210 S. W. 970; Wilmot v. Mudge, 103 U. S. 217, 26 L. Ed. 536.

The appellant would draw a distinction between the discharge of an indebtedness, and its consequent effect upon a lien acquired in judicial proceedings by a discharge of the bankrupt after an adjudication in bankruptcy, where there has been no composition, and a discharge of the indebtedness by settlement pursuant to a composition. But, it being well settled that where a lien has been obtained through judicial proceedings prior to the four months period, the lien is not dissolved by the adjudication, and that an order of confirmation shall discharge the bankrupt from his debts other than those not affected by a discharge, the bankrupt who has made the composition finds that as to liens which were existing beyond the four months period he is in no better position than if there had been an adjudication in bankruptcy. In either case the effect is not to discharge the liens acquired. In either event the lien is intact. Metcalf v. Barker, supra. Personal liability on the judgment is discharged, but nothing more. 3 R. C. L. § 119; 7 C. J. § 311.

The case of In re Southern Arizona Smelting Co., 231 Fed. 87, 145

C. C. A. 275, is not of aid in determining the question before us, for there there was an adjudication, and with that fact established there was no need to consider what, if any, difference there might have been, had there not been an adjudication. Nor is the recent case of In re Lilienthal, 256 Fed. 819, — C. C. A. —, in point, for the discussion therein was predicated upon the fact that the attachment was levied within the four months period. By way of argument, appellant, in citing the Lilienthal Case, asks whether there is any difference in principle if the attachment is levied without the four months period. The answer is that Congress has seen fit to fix a definite time within which certain conditions shall have the effect of discharging debts and liens. In the Goldsmith Case (D. C.) 118 Fed. 763, it was said:

"If secured creditors elect to rely upon their security, they are not parties to the bankruptcy proceedings at all. There is nothing compelling them to make proof, and they may enforce their liens, if otherwise valid, subject to the power of stay set forth in section 11 of the act."

By the language of the sections referred to, which relate exclusively to liens acquired within four months of the filing of the petition, we take it that liens obtained prior to that time are to be preserved. The cases which have adopted this view seem to us to be correct in their interpretation. In Hillyer v. Le Roy, 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919, the court said:

"The declaration of the section [67f] is distinct that the lien therein referred to is only invalid where it has been obtained by the creditor within four months prior to the filing of the petition in bankruptcy, and equally distinct is its meaning that the validity of a lien obtained prior to that interval of time will be recognized. That construction has been given to the statute by the United States Supreme Court. Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122." Wicks v. Perkins et al., 1 Woods, 383, Fed. Cas. No. 17,615.

[2] It is further argued by the appellant that the nature of the lien is purely as provided by statute, and therefore not specific, but merely general, and that plaintiff's only right was to levy on the property to the exclusion of adverse interests subsequent to the judgment. As already said, under section 674 of the California Code of Civil Procedure, the filing of the transcript created a lien in favor of plaintiff. Such lien is enough to entitle plaintiff to be classified as a secured creditor. Black on Bankruptcy, § 556, writes that ownership of a judgment against a bankrupt constitutes the creditor a secured one within the meaning of the Bankruptcy Act, where there is property of the bankrupt upon which the judgment has attached as a lien. The record discloses that the lien of the judgment under examination attached to the specific property owned by Hammon in Santa Barbara county, Cal., more than four months prior to the commencement of the bankruptcy proceeding. Under the authorities this put the plaintiff in a position where he can claim that the confirmation of the composition has not destroyed the validity of the lien of the judgment. In Estate of Wiley, 138 Cal. 301, 71 Pac. 441, it was argued that there was a distinction between a special lien and a general lien, recognized by section 674 of the California Code of Civil Procedure, and that levy of execution was essential to the existence or continuance of a lien

created under that section. The Supreme Court, however, held that the lien was created by the act of filing the transcript of the judgment and not by levy of execution. Moreover, the statute itself provides that from the filing of the transcript—

"the judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire."

It is also provided by section 700 of the California Code of Civil Procedure that, if the judgment is a lien upon the real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor on or at any time after the day such judgment became a lien on such property. Collier on Bankruptcy (11th Ed.) pp. 1080, 1081.

Our conclusions are that the effect of the composition, regularly confirmed, became very like the effect of a discharge, and that the lien of the judgment obtained in the superior court of the state is valid. The certificate of sale made by the sheriff under execution in satisfaction of such judgment lien is therefore valid, and it follows that no cloud was cast upon any title in the appellant; such title having been acquired subsequent to the obtaining of the judgment lien of the Improvement Company.

The decree is affirmed.

WINE v. UNITED STATES.

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

No. 5290.

1. POST OFFICE ⟸35—USING MAILS TO DEFRAUD; DEFENSE.
   Under an indictment for violation of Criminal Code, § 215 (Comp. St. § 10385), by using the mails to obtain property by means of false and fraudulent representations, by which defendant induced others to pay for two ranches, one of which was conveyed to them and the other to defendant, in the belief that they were paying only their share of the purchase price, it is no defense that the ranch acquired by such others was worth the amount they paid.

2. FRAUD ⟸18—FRAUDULENT REPRESENTATIONS TO VENDEE AS TO COST.
   The misrepresentation to a vendee by the agent of the vendor, or by the vendor himself, of the cost to the vendor of land, made to induce the vendee to purchase, is a misrepresentation of a material fact, which, if relied upon by the vendee, to his damage, constitutes actionable fraud.

3. POST OFFICE ⟸35—USING MAILS TO DEFRAUD; PECUNIARY LOSS.
   Under Criminal Code, § 215 (Comp. St. § 10385), making it a criminal offense to use the mails for executing a scheme to defraud, or to obtain property by means of false and fraudulent representations, it is not an essential element of the offense that the victims of the scheme should have suffered pecuniary loss.

4. CRIMINAL LAW ⟸406(1)—EVIDENCE; ADMISSIONS.
   Admission in evidence of letters written by defendant, on trial for using the mails to defraud, containing admissions against interest, *held* not error.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Criminal prosecution by the United States against David G. Wine. Judgment of conviction, and defendant brings error. Affirmed.

T. J. Doyle, of Lincoln, Neb. (P. W. Scott, of Imperial, Neb., on the brief), for plaintiff in error.

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

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. Section 215 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. § 10385]) provides that:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, * * * addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, * * * shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[1] The defendant below was indicted, convicted and sentenced for a violation of this section, and he complains of many alleged errors in the trial, the chief of which are that the indictment fails to charge facts sufficient to constitute a violation of the statute and that there was no substantial evidence of such a violation because, although the indictment charged and there was substantial evidence to prove that the defendant by fraudulent pretenses, false representations and promises, induced William J. Van Dyke and Theodore F. Slifer to purchase and to agree to pay $30,000 to the owners for 1,760 acres of land and the assignment of a lease of 480 acres of school land in such a way that the defendant could obtain 1,560 acres of other like land from the same owners for nothing, and while the defendant used the mails to execute this scheme, yet because the 1,760 acres bought by Van Dyke and Slifer were worth all they agreed to pay for them, and they sustained no pecuniary loss from the transaction, the defendant was guilty of no violation of the statute. The indictment and the substantial evidence upon the trial disclosed these facts:

In 1914 and 1915 the defendant had possession under a lease from S. A. Keller, who, as owner or as agent of the owner, had the power to lease and sell all this land and to assign the lease of the school land, of 3,320 acres of land and a lease of the 480 acres of school land, situated in Nebraska, and consisting of two ranches. The east ranch comprised 1,560 acres, and on that ranch the defendant resided. The west ranch contained 1,760 acres and the 480 acres of school land. Van Dyke and Slifer resided in Kansas. Laying aside many corroborating circumstances and details, which are not material to the determination of the legal questions now at issue, the defendant devised and executed this scheme: He falsely represented to Van Dyke and Slifer that the cost of the entire 3,320 acres, including both ranches and the assignment

of the school lease, was $58,000, or $17.47 an acre for the 3,320 acres; that the owners would not sell a part unless they sold all of this land; that he wanted the east ranch, but that he was not able to buy both ranches; and that, if they would join with him in the purchase of the 3,320 acres and the lease of the school land, they three would divide the tracts, and he would take and pay for the east ranch, while they should take and pay for the west ranch at the same rate per acre. By these and other persuasive false representations and promises, such as that he was paying for the east ranch at exactly the same rate that they were paying for the west ranch, that he would not get a dollar out of this deal, and that the terms of his contract of purchase were the same as the terms of their contract of the purchase of the west ranch, and by manipulating deceitfully the contracts between himself and the vendors, and those between himself and Van Dyke and Slifer, he induced them to buy the west ranch for $30,000, to move their families and cattle from Kansas onto this ranch, and to pay a part and agree to pay the remainder of this $30,000, which was in fact the cost and the entire cost and price for which the owners agreed to sell and did sell the entire 3,320 acres comprising both the east ranch, which the defendant would obtain for nothing under this scheme, and the west ranch and the lease of the 480 acres of school land, which Van Dyke and Slifer obtained the contract for sale of.

There was no averment in the indictment, nor was there any evidence, that the west ranch was not worth the $30,000, which Van Dyke and Slifer agreed to pay for it, and the court below charged the jury that, although the land was worth the full $30,000, yet they might find, if the evidence convinced them thereof beyond doubt, that the defendant's representations as to the cost of the land were false, that they were reasonably adapted to defraud, and that the defendant was guilty of a violation of the statute. Counsel forcibly argue that this is an erroneous view of the law, and that there can be no violation of this section unless the misrepresentations, false pretenses or promises caused pecuniary loss to the victim or victims thereof.

[2] But even when parties are strangers, dealing with each other at arm's length, under the rule caveat emptor, the misrepresentations to a vendee of the agent of the vendor, or by the vendor himself, of the cost to the vendor of land or other property, made to induce the vendee to purchase, is a misrepresentation of a material fact, which, if relied upon by the vendee to his damage, constitute actionable fraud. Dorr v. Cory, 108 Iowa, 725, 78 N. W. 682; Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321, 69 N. W. 722; Yeoman v. Lasley, 40 Ohio St. 190; Thompson v. Koewing, 79 N. J. Law, 246, 75 Atl. 752; Hokanson v. Oatman, 165 Mich. 512, 131 N. W. 111, 35 L. R. A. (N. S.) 423.

The defendant was not a stranger to Van Dyke and Slifer. They were Dunkards, and he was a minister and their brother in the faith. He orally agreed with them that they three should purchase these 3,320 acres jointly, that each should pay $500 down in cash, and Van Dyke and Slifer did pay that amount down, and that the 3,320 acres should be divided between them, so that the defendant should have and pay the same rate per acre for the east ranch that Van Dyke and Slifer

should pay for the west ranch. He then negotiated the purchase from Keller for about $30,000, or $9.22 per acre, for the entire 3,320 acres, told them that the cost and price of these acres was $58,000, or $17.47 per acre, and by that misrepresentation induced them to pay and agree to pay about $17.47 per acre for the west ranch, so that he should obtain the east ranch without any payment. After this verbal agreement to purchase the 3,320 acres together and divide them, so that each should pay the same price per acre for the land he obtained, and after Van Dyke and Slifer had each paid down $500 in cash on this agreement, the defendant was in such a relation of trust and confidence with them that the legal duty was imposed upon him to inform them of every fact material to the purchase, and his misrepresentation that the price and cost of the land was $58,000, or $17.47 per acre, when it was in fact $30,000, or $9.22 per acre, was a misrepresentation of a material fact, and a breach of his plain moral and legal duty as a fiduciary.

And, since the record contains substantial evidence that this misrepresentation induced Van Dyke and Slifer to pay and agree to pay about $30,000, or $17.47 per acre, for the west ranch, when under their verbal agreement with the defendant, and their payment of $500 each thereon, they were required to pay only about $16,000, or $9.22 per acre therefor, this representation was an actionable fraud, which caused pecuniary damage to Van Dyke and Slifer to the amount of about $14,000, if their verbal agreement with the defendant was legally binding, and to the amount of the $500 each which they had paid down, even if it was not so, and this although the west ranch was worth the $30,000 they paid and agreed to pay for it. Walker v. Pike County Land Co., 139 Fed. 609, 71 C. C. A. 593; Johnson v. Gavitt, 114 Iowa, 183, 86 N. W. 256.

[3] Moreover, this statute declares that any one who devises a scheme "to defraud," or "for obtaining money or property by means of false or fraudulent pretenses, representations or promises," and uses the mails to execute it, shall be fined or imprisoned. The indictment and the evidence are alike replete with charge and the latter with proof that this defendant devised a scheme to obtain for himself the east ranch free of all cost to himself by means of false and fraudulent pretenses, representations and promises, and that he used the mails to execute that scheme. This was a plain violation of the literal terms of the statute, and even if this violation had caused no pecuniary loss or damage to Van Dyke or Slifer, the defendant could not escape punishment for so glaring a deceit without a repeal or disregard of this law; and it is the duty of the court not to repeal or disregard this statute, but to enforce it. This section of the statute does not make damage or loss to the victims of a scheme to defraud, or to obtain money or property by false pretenses, representations or promises, a sine qua non of its violation, and such damage or loss is not indispensable to the commission of an offense under it. Harris v. Rosenberger, 145 Fed. 449, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762; Durland v. United States, 161 U. S. 306, 315, 16 Sup. Ct. 508, 40 L. Ed. 709; United States v. New South Farm Co., 241 U. S. 645, 36 Sup. Ct. 505, 60 L. Ed. 890, Ann.

Cas. 1917C, 455; Chambers v. United States, 237 Fed. 521, 150 C. C A. 395. There was no error in overruling the demurrer to the indictment, in refusing to direct the jury to return a verdict for the defendant, or in charging the jury that they might find the defendant guilty, although the land he induced Van Dyke and Slifer to buy was worth what they agreed to pay for it.

It is specified as error that the court refused to permit the defendant to prove that during the year 1915 the west ranch was worth $25 per acre. Conceding that this evidence was material and admissible, its rejection was not prejudicial to the defendant, because the legal presumption was that the west ranch was worth all that Van Dyke and Slifer agreed to pay for it, there was no evidence to the contrary, and the case was tried and the jury was charged on that theory and assumption.

[4] Defendant's counsel complain of the admission in evidence of a letter dated April 21, 1915, written by the defendant to Van Dyke, in which the former inclosed a contract between himself and Van Dyke and Slifer, dated February 12, 1915, signed by himself for the purchase by them of the west ranch from him. The only objection to its admission made in the trial was that it was incompetent, irrelevant and immaterial. Counsel now contend that the letter should have been rejected because it was written after the purchase of the land and the payment of $1,000 of the purchase price by Van Dyke and Slifer. But the letter was not objected to at the trial on that ground, and the general objections made were insufficient to suggest that ground to the court. Not only this, but, if it had been suggested, it would not have been tenable, because, while Van Dyke and Slifer had orally agreed prior to the date of this letter to join with the defendant in the purchase of the 3,320 acres for $58,000, on the basis that each of the three should pay $500 in cash on the purchase price, and Van Dyke and Slifer had each paid $500, yet the defendant had not paid his $500, and no written, and hence no binding, agreement of purchase had been made by either Van Dyke or Slifer. Moreover, the letter was competent and material evidence, because in it the defendant wrote the false statement that the contract included in it was an exact copy of the one the defendant and Keller had entered into, and because in the letter he figured and wrote out the amount Van Dyke and Slifer were to pay, and the amount which, in the contracts he sent and they subsequently signed, they agreed to pay, on the basis of $58,000 for the entire 3,320 acres, comprising the two ranches.

Counsel argue that the admission of the defendant's letter of April 15, 1916, to Van Dyke, was erroneous, because that letter was immaterial; that objection, however, was rightly overruled, because that letter contained the false statement, "You will want, and I want you to have, a contract identical with mine."

Complaint is made of the admission in evidence, over the objection that they were immaterial, of two letters of the defendant to Mr. Keller, one dated November 30, 1914, and the other dated February 22, 1915. In the former he wrote Mr. Keller to remember to figure high enough in giving him quotations, so that his improvements, $1,800 on

the west ranch and $1,000 on the east ranch, could come out of the price, and that this was all the compensation he should ask for his work, should he be able to sell the property. This written statement of the defendant was material evidence, in the light of the fact that he told Van Dyke and Slifer that he was getting nothing, no commission out of the deal, and because it tended to prove that he was acting at the same time as agent for the sellers and for the purchasers in this transaction.

In the letter to Mr. Keller of February 22, 1915, he wrote him that he had made a written agreement with Van Dyke and Slifer for the sale of the land, and that he had set forth in this letter the text of that agreement. That text, as it appeared in this letter, read in substance that the defendant had agreed to buy for Slifer and Van Dyke the entire 3,320 acres, and an assignment of the school lease of 480 acres, for $30,000, and that Van Dyke and Slifer had agreed to pay therefor this $30,000 on certain terms therein set forth. This letter was material evidence of the defendant's scheme and intention to buy all the land for $30,000, and to have Van Dyke and Slifer pay for all of it, and it was also evidence of the inconsistent position of agent for the seller and for the purchasers, which the defendant occupied. These letters contained admissions of the defendant against his interest at this trial, and there was no error in overruling the objection to their admission.

Counsel for the defendant made 30 specifications of error. Those which they appear to have deemed most important have been discussed. All of the others have been carefully read and considered, among them some which counsel have not deemed of sufficient account to search out and cite the pages in the bill of exceptions where the exceptions and rulings they assign can be found; but no error that could have been prejudicial to the defendant has been discovered in the trial of this case.

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

THE MARTIN MULLEN.

THE HERBERT K. OAKES.

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

Nos. 3285, 3286.

1. COLLISION ⇐83—STEAMERS MEETING IN FOG; EXCESSIVE SPEED.
   A collision on Lake Superior in a fog between meeting steamers *held* due to faults of both vessels; one being in fault for entering the fog at excessive speed and without a lookout, and for failing, as required by the rules, to reduce to mere steerageway on hearing fog signals somewhere ahead, and the other for excessive speed in the fog.
2. COLLISION ⇐153—REVIEW OF FINDINGS OF FACT.
   A finding by a District Court, which heard the witnesses, as to the speed of a steamer in a fog, will not be disturbed by the appellate court, unless the evidence decidedly preponderates against it.

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

3. COLLISION ⇐S2(2)—EXCESSIVE SPEED IN FOG.

A speed of 8 miles an hour in a fog, made by a lake steamer on a frequented course, with the wind blowing from her toward any meeting vessel, *held* excessive.

Appeals from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in admiralty for collision by the Pioneer Steamship Company, owner of the steamer Martin Mullen, against the steamer Herbert K. Oakes, the Beaver Steamship Company, claimant, with cross-libel. Decree holding both vessels in fault, and both parties appeal. Affirmed.

Frederick L. Leckie and Lee C. Hinslea, both of Cleveland, Ohio, for Pioneer Steamship Co.

Harvey D. Goulder, of Cleveland, Ohio, for Beaver Steamship Co.

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

KNAPPEN, Circuit Judge. On July 7, 1916, the steamer Martin Mullen, owned by the Pioneer Steamship Company, and the steamer H. K. Oakes, owned by the Beaver Steamship Company, collided in Lake Superior during a fog. The Mullen, which had left the Portage Canal at 3:18 p. m., was bound for Ashland, Wis., and was light. The Oakes was downbound from Ashland and was loaded. Upon a hearing on testimony in open court, the District Judge found both vessels at fault. The damages to the respective ships were stipulated and division made accordingly. Each party appeals.

The court found that on entering the fog each boat blew fog signals regularly as required by the rule (the wind, which was light, was from the Mullen to the Oakes, and perhaps for this reason the Mullen failed to hear the Oakes' fog signals, while the latter heard several from the Mullen); that on hearing these signals the Oakes' speed was checked to dead slow and a two-blast passing signal given, the wheel being immediately put hard astarboard. No response to this signal being received, the Oakes a little later blew a second two-blast passing signal, which was answered by like signal from the Mullen. On hearing the Mullen's passing signal, which indicated that that vessel was dangerously near and slightly to the starboard of dead ahead, the Oakes' engines were reversed and put full speed astern. It was found that at the time of the collision the Oakes was going three miles an hour.

The court found that the Mullen entered the fog at 6:30 p. m.; that she was then considerably to the north of her regular course (she being, however, absolved from fault on that account); that she was running at her full speed of 13 miles an hour when she saw the fog bank ahead and immediately checked to 8 miles; that after running for a short time in the fog, and before her speed was quite reduced to 8 miles, she heard a two-blast passing signal from the Oakes which bore about a point on the Mullen's starboard bow, which signal was promptly answered with two blasts and the wheel put hard astarboard;

that almost immediately thereafter the Oakes was seen in the fog, whereupon the Mullen's engines were put full speed astern—her speed being still about 8 miles, neither her course nor speed having been much affected by the starboard helm or engine reversal. It was found that the boats approached each other on courses nearly parallel, but slightly converging. They collided on their starboard bows at an angle of about one point.

The Oakes was found at fault (1) for not having a competent lookout on duty when approaching and entering the fog and in the lookout's failure to properly perform his duty while in the fog; (2) in entering the fog at full speed, instead of checking when the fog could have been seen, so as to enter at moderate speed; (3) in the maneuver made after the dangerous nearness of the Mullen appeared. The Mullen was found at fault in running in the fog at a speed of 8 miles an hour which the court held immoderate. She was otherwise relieved from fault.

[1] 1. *The Fault of the Oakes.*—We think the Oakes was rightly held guilty of fault contributing to the collision. In our opinion she ran through the fog at an immoderate speed within the meaning of rule 15 pertaining to navigation on the Great Lakes. She actually entered the fog at her full speed of 11 miles an hour. After entering the fog the Mullen's fog signals indicated to the Oakes that she was, at the most, not more than one or two points from right ahead. The Oakes did not at once reduce her speed to bare steerage way, as the rule required, but contented herself with making such check as would ultimately bring the speed to dead slow. She had apparently run at least five minutes under that check and had not yet reached bare steerageway before she reversed, and this she did only (as the court found) on hearing the Mullen's passing signal, which indicated her dangerous nearness. Whether the reverse was made a half minute before receiving this passing signal is not important. Danger meanwhile was the more to be apprehended from the fact that the Mullen had not replied to the Oakes' first passing signal. Had the Oakes been at moderate speed when she entered the fog, and later reduced to steerageway when the Mullen's fog signals were heard, the collision would probably have been avoided.

We also agree with the District Judge that the Oakes was at fault in her maneuver after hearing the Mullen's passing signal. As said by the trial judge:

> "The wind was from the Mullen to the Oakes. The captain of the Oakes at the time suspected that the Mullen was failing to hear the whistles from the Oakes."

And we think it should have been evident to the Oakes that the two boats were rapidly approaching each other on converging courses. In our opinion there was then apparent ground for apprehension that a starboard to starboard passing was attended with danger, and that, instead of still insisting upon such passing, prudence required that the Mullen be advised of the situation by an alarm signal under rule 26. It seems, moreover, very plain that the backing of the Oakes at a time

when, as her master thought, the vessels were less than a half mile apart (and the distance was probably not much more than that), made the collision inevitable, for such backing, in spite of a faint suggestion to the contrary, would naturally cause the Oakes' bow to swing to starboard, and thus directly into collision.

The Oakes was also at fault, in our opinion, in respect of her lookout. The lookout (this was his first trip in that capacity) had not been on duty as such for several hours (being otherwise engaged), and was only called to his station as the fog was actually entered. There was testimony that such practice was not unusual in clear weather, and the weather was clear, except for occasional thick fog banks. However, the failure to have a lookout on duty at the least imposes a heavy burden on the Oakes of showing that his earlier presence at his post could not have prevented the collision. The George W. Roby (C. C. A. 6) 111 Fed. 601, 614, 49 C. C. A. 481. But as there is otherwise sufficient evidence of fault directly contributing to the collision we need not pursue this subject farther.

2. *As to the Fault of the Mullen.*—As already said, the trial court found that at the time of the collision the Mullen's speed was about 8 miles per hour. It was held that under the circumstances of this case an 8 miles speed was at least 2 miles in excess of moderate speed. Without finding it necessary to hold, as did the court below, that moderate speed in a fog can never be more than one-half of full speed, we have no difficulty in concluding that, under the peculiar circumstances of this case, the Mullen's speed was immoderate, if more than 5 to 6 miles at the outside, having regard to the density of the fog, the direction of the wind, which made it difficult (as the Mullen's navigator must have known) to hear for any great distance the fog and passing signals of approaching boats directly ahead, and the fact that she was sailing, in the height of the navigation season, in a much-frequented lane of Great Lakes commerce, where vessels were naturally to be expected. The Geo. W. Roby (C. C. A. 6) 111 Fed. 601, 608–610, 49 C. C. A. 481, and cases cited. She insists that her speed was no more than 3 or 4 miles an hour.

There was, however, testimony on the part of several of the Oakes' witnesses substantially tending to show that the Mullen's speed was fully as great as found by the court. The Oakes' master testified that he thought at the time and still thinks that the Mullen, when sighted shortly before the collision, "was going practically full speed. She carried the white foam in her mouth, and we heard the rush of the water under the bows plainly and distinctly before we saw her, and when she did get into view I believe she was from 800 to 1,000 feet away." The first mate, the boatswain, the wheelsman and the lookout all gave testimony of similar import. Mrs. Oakes, who was a passenger on the boat, said that "the thing that impressed me was the swishing sound made as it came right down on us and went past us in that same way." She says that the Mullen went "fast," and that "we all remarked about the boat's speed, and we remarked about her not turning around to come to us, because we of course expected that we would have to be taken off, and it seemed to be a long time before she

finally got around to us." The Mullen did in fact run past the Oakes, then turned around and came back alongside to inquire whether help was needed, and, receiving a negative answer, turned around again and started on her course.

The Mullen opposes to this evidence as to her apparent speed, not only the testimony of her own navigators of their own directions, as well as estimates of speed produced, but the testimony of her engineers, first, that on receiving the navigator's Chadbourne "slow" check 20 minutes before the collision the engine was throttled down to between 35 and 40 revolutions, and this engine speed retained until the reverse movement immediately before the collision; and, second, tending to show that such engine speed will actually result in ultimately checking the vessel's speed to between 3 and 4 miles per hour, and that before the Oakes was sighted her speed was so reduced. We think neither of these propositions so clearly established as to foreclose all substantial question of fact.

It is true that the engineer's log shows a check on account of fog at 6:30 p. m.; but it does not show whether the check was to slow speed or half speed, although it contains at 6:55 p. m. (5 minutes after the collision) the notation "ahead slow" and at 7:28 "full speed." It is also true that the engineer's log shows 1,200 revolutions between 6:30, when the check was given until the "ahead slow" at 6:55, and thus an average of 48 revolutions during the 25 minutes,[1] and counsel for the Mullen, allowing 22 minutes for the forward movement under check and 3 minutes for the reverse movement at 95 revolutions, make the average revolutions during the check about 40 per minute (it would be nearly 42); but no entry was made upon the log (after the fog check notation at 6:30) until 6:55; and the Mullen's engineer testified that she backed half to three-quarters of a minute before the collision. The period of reverse movement after the collision and before the actual entry was merely an estimate after the event. The engineer says he did not take the time he quit backing, but "should judge" he was backing "around about three minutes" and that he did not "figure these revolutions until we started and went ahead." The fact of reverse was never entered on the engineer's log, which also shows 45 revolutions per minute while under a 10-minute check passing through a fog bank about an hour before.[2] Had the engine (in the fog in which the collision occurred) proceeded under the ahead movement 19 minutes and under the reverse movement but 1 minute, the average revolutions during the 19 minutes would have been nearly 58, and if under the reverse 2 minutes an average of about 53 revolutions.

The proposition that a reduction of engine speed from 85 revolutions at full speed to 35 or 40 revolutions means an ultimate reduction of speed to between 3 and 4 miles is based upon the testimony of the Mullen's engineers, who say that to produce half and slow speed, respectively, they were in the habit of setting the throttle at certain

[1] The Mullen's chief engineer says 44 revolutions would give between 5 and 6 miles an hour.

[2] The engineer says that in the earlier fog he first checked to one-half speed for "about two minutes" and then to slow.

scratches on the quadrant placed there by a predecessor engineer; and the present engineers thought that the slow speed scratch meant about 35 to 40 revolutions, which they thought produced between 3 and 4 miles speed, and that 55 to 60 revolutions meant half speed through the water. But the engineers had never attempted an accurate testing out of these estimates. The chief engineer says the marking is not exact, and that he has never set his "throttle right dead on the mark." He could not show from his log that he had ever run as low as 35 revolutions in a fog. There was a lower check, called "half slow" which the engineer says "is practically the same as a stop; just enough to give her steerageway." It is not claimed that the speed was at any time on this occasion cut to "half slow."

Counsel for the Oakes cite certain standard works on navigation to the effect that, but for the so-called "slip," due to the instability of water, there is theoretically an exact ratio between engine revolutions and speed of boat, and that in the ordinary reciprocating engine propeller the higher the speed the greater the slip, and thus that the speed produced at lower rates of revolution is not less, but greater than the actual ratio of revolutions. Disregarding slip, 45 revolutions of the Mullen's engines would theoretically produce a speed of nearly 7 miles.[3] The Mullen's counsel stoutly challenge this rule as applied to the shallow draft and bluff bow construction of lake vessels, as compared with the deeper draft and sharper bows of sea-going vessels. The record here is not such as to enable an accurate determination of the actual relation between engine revolutions and speed through the water as applied to the Mullen, and the estimates of her engineers are consistent with the testimony of the Oakes' engineer as applied to that boat —each boat being, however, equally interested in cutting down its own speed; and if it is true (as the Mullen insists) that Judge Tuttle's conclusion of the Mullen's speed rested necessarily on the proposition that 45 engine revolutions meant 8 miles an hour through the water, we should find it difficult, if not impossible, to sustain it as this record stands.

[3] As indicating the lack of certainty of the engineers' estimates: The second engineer says at one time "I *don't think* it would go over 4 miles an hour between 35 and 40." The chief engineer, in answer to a question whether, if the engine speed was 86 and it was checked to 43, the speed would still be more than half speed, said: "Well, for the first little while it would be, but gradually coming down, after the boat got down to where she would answer for the turns of the engine, *I would judge* that it would be less than half speed." The second engineer, after saying that he did not think that when somewhere near full speed was reached the increase in speed through the water would be as great as the increase in revolutions, in answer to a question by the court, "Then does it not of necessity follow the other way back, as you decrease the speed of your engine, you do not decrease the speed of your boat as much as you decrease your engine, do you?" said, "Well, I could not say;" and in answer to further question by the court, "Whether or not when you increase the speed of your engine, making it twice or three times as much, whether you have made your march through the water twice or three times as much, or whether it falls below that, or what?" said, "I don't know;" and in answer to a further question, "And I take it the answer would be the same when you decrease the speed?" said, "I don't think I would be able to tell you about that." (All italics in this opinion ours.)

But we do not interpret his opinion as necessarily meaning that he would not have found the Mullen's speed as he did, but for the proposition that 45 engine revolutions produced 8 miles boat speed, notwithstanding the statement that in her course through the fog "the Mullen checked her engines from 85 revolutions, which was full speed, down to 45 revolutions, which would be a speed of 8 miles an hour through the water after losing her full speed momentum," and in spite of his statement on the trial that the testimony given in this case is "just the opposite of every case I have ever heard on the subject. They have all testified before that at full speed, whatever it is, if your engine is cut to half, you don't lose half speed, you get about two-thirds"—which latter statement is criticized by the Mullen's counsel as indicating confusion between one-half speed, as indicated by the Chadbourne (said to mean in practice from one-half to two-thirds boat speed) and engine speed indicated by revolutions. We understand the judge to reach his conclusion as to the Mullen's speed by taking into account the entire situation. Judge Tuttle said:

"The witnesses for the Oakes nearly all say they observed the water ahead of the Mullen, and they tell me about hearing the noise from the Mullen, and it does not seem that all of them could have confused it with the noise of their own ship. I have taken that into account; I have taken into account the log of the Mullen, the testimony from the Mullen, and the entire situation the best I can. I have tried to figure out the revolutions of the Mullen's engines while in this fog. They seem to be about what they usually were when she was in a fog. The problem is complicated by the fact that the Mullen's engine revolutions were not recorded from the time she checked until she was stopped after working full speed astern. Her usual check in a fog seems to have been to 8 miles on hour, *and everything in the case considered* I conclude that her speed was 8 miles in this fog. The witnesses have not been able to give me any reliable opinions as to speed through the water at given revolutions of the engine."

[2] This conclusion we are bound to accept, unless the evidence decidedly preponderates against it. City of Cleveland v. Chisholm (C. C. A. 6) 90 Fed. 431, 434, 33 C. C. A. 157; Monongahela Co. v. Schinnerer (C. C. A. 6) 196 Fed. 375, 379, 117 C. C. A. 193. Upon a careful consideration of the record, and giving due regard to Judge Tuttle's familiarity with navigation on the Great Lakes, we are certainly unable to say that the evidence decidedly preponderates against the conclusion that the Mullen's speed substantially exceeded 5 to 6 miles an hour.

We may add that the short time which elapsed between the Mullen's passing signal and the meeting of the boats tends to corroborate the court's conclusion as to the Mullen's speed.

[3] We may also add that, while the conclusion below that the Mullen was at fault was reached with announced reluctance, Judge Tuttle's doubt was not as to the Mullen's actual speed, but as to whether the speed found was immoderate; on this latter question we have no doubt.

But, assuming that the Mullen's speed was not immoderate up to the time the Oakes' passing signal was heard (although we are disposed to think she should long before have taken steps to reduce to bare steerageway), we think the Mullen plainly at fault in making the passing

agreement. The Oakes was completely hidden from view by the fog. But one signal was heard, and the master was unable to locate very definitely the direction of the sound. The best he could say was that the whistle bore from him "just a little on the starboard bow as near as I could tell, only hearing it once." At the most, he got no very clear impression as to the distance of the approaching boat. As he says:

"It was pretty hard to tell, only hearing the whistle once to locate it. You could not tell exactly how far it was off. * * * Probably it sounded half a mile, probably more, I could not say definitely."

He thought "somewhere around" half a mile. He says that not over a minute elapsed from the time he answered the passing signal until he saw the Oakes in the fog, not more than 500 or 600 feet away. The difficulty of accurately locating the direction of sound in a fog, especially from hearing but one signal, is well known. The Oakes was then, as it appeared to the Mullen's master, close at hand and nearly right ahead. If both vessels were going at the speed they respectively claim, and continued on those courses, they would meet in about four minutes. In this emergency we think the Mullen should have sounded an alarm and done her best to stop. The Geo. W. Roby, supra, 111 Fed. at pages 608–610, 49 C. C. A. 481, and cases cited. Had this been done, and especially had her previous speed been no greater than claimed by her, it is not unlikely that the collision would have been avoided.

It results that the decree of the District Court should be affirmed.

TRADER v. UNITED STATES.*

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

No. 2512.

1. POISONS ⟸4—HARRISON NARCOTIC ACT; INTENT IN SELLING.
Under an indictment for violation of Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), by selling morphine sulphate without the prescribed orders, and by buying it for illegal purposes, where defendant was a physician, but not registered as a dealer, the question of his guilt *held* to depend on whether he obtained and dispensed the drug in good faith, in the course of the legitimate practice of his profession.

2. POISONS ⟸9—HARRISON NARCOTIC ACT; INSTRUCTIONS.
Giving of an instruction, in a prosecution for violation of Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), that, while the act is a revenue measure, its clear purpose is to restrict the distribution and use of the drugs specified to medicinal purposes only, *held* not error.

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Criminal prosecution by the United States against Ellsworth J. Trader. Judgment of conviction, and defendant brings error. Affirmed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 250 U. S. —, 40 Sup. Ct. 119, 64 L. Ed. —.

James A. Wakefield and Charles H. Bracken, both of Pittsburgh, Pa., for plaintiff in error.

E. Lowry Humes, U. S. Atty., R. Lindsay Crawford, U. S. Dist. Atty., and John M. Henry, Asst. U. S. Dist. Atty., all of Pittsburgh, Pa.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

HAIGHT, Circuit Judge. Ellsworth J. Trader, the plaintiff in error, was indicted and convicted for violating certain of the provisions of the so-called Harrison Narcotic Drug Act of December 17, 1914 (38 Stat. 785, c. 1 [Comp. St. §§ 6287g–6287q]). The indictment contains 21 counts. The first 10 counts charge Trader with dispensing morphine sulphate, a derivative or salt of opium, to various individuals without the written orders required by section 2 of the act; the next 10 counts charge him with selling, as a dealer, the same drug to the same persons without having registered as a dealer in such drug and without having paid the special tax, as required by section 1 of the act; and the remaining count charges him with a violation of another provision of section 2, in that he obtained, by means of the order forms provided for in the act, large amounts of the drug for purposes other than the use thereof by him in the legitimate practice of his profession as a physician, namely, for sale by him as a dealer, although he had not registered as such a dealer and had not paid the special tax as required by the act.

[1] Although the bill of exceptions has brought before us only the indictment and the charge of the trial court, it may be fairly gathered therefrom that Trader was a practicing physician in the city of Pittsburgh, and was engaged in the dispensing or sale of morphine sulphate in such a way and to such an extent as to fairly raise a question of fact as to whether or not he was dispensing it in good faith, in the course of his legitimate practice as a physician, or whether he was using his license to practice as a physician as a mere cloak to cover the distribution or sale of the drug to drug addicts, not to effect a cure, but to satisfy their craving for it. That question was submitted to the jury with instructions that the defendant's guilt or innocence under the first 20 counts of the indictment (providing, of course, that in each individual case the act of dispensing was established) depended upon whether or not the defendant dispensed the drug to the persons therein named in good faith, in the legitimate practice of his profession as a physician, and under the twenty-first count upon the purpose for which he acquired it. The verdict has established that the defendant did not acquire the drug for use, and did not dispense it to the persons named in the indictment in the course of his legitimate practice as a physician.

It is not questioned, and was not at the trial, that the issues of fact were thus properly stated and submitted to the jury; nor is it denied that as a proposition of law the defendant's guilt or innocence depended upon the answer which the jury might make to the beforementioned questions of fact. As the defendant was not registered as

a dealer in the drug and had not paid the special tax, as required by section 1 of the act, and as he had dispensed the drug to persons without the written orders required by section 2, and also, by means of the statutory order forms, had obtained large quantities of the drug, he was unquestionably guilty of the violations charged, unless it appeared, in the one case, that the drug was dispensed or distributed in good faith, in the course of his legitimate professional practice, and in the other case that it was acquired for use therein. United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493; Webb v. United States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497; Melanson v. United States, 256 Fed. 783, — C. C. A. — (C. C. A. 5th Cir.); Thompson v. United States, 258 Fed. 196, — C. C. A. — (C. C. A. 8th Cir.).

The principal error assigned and relied upon is the refusal of the trial judge to charge, without qualification, one of the requests or points for instruction to the jury, namely, that the act "does not limit the amount of morphine sulphate which a physician may prescribe or administer to his patients." The learned trial judge charged the jury that, while the act "does not in specific terms" create such a limitation, "it does provide that such drug must be prescribed in the course of his professional practice only." It is true that the act does not in specific terms state how much morphine sulphate may be prescribed or administered by a physician to his patients. It does, however, exempt physicians, in the dispensing and distributing of the drugs covered by the act, from the requirements of section 2 only in such cases as are "in the course of his professional practice only."

The regulations promulgated by the Commissioner of Internal Revenue, pursuant to the authority conferred by section 1 of the act, provide for separate and distinct registration by dealers and physicians. Hence, if the defendant dispensed the drug in question not in the legitimate practice of his profession, he became a dealer in the drug and was required to register as such. Therefore whether he was a dealer depended upon whether or not he was dispensing the drug in the course of his legitimate practice as a physician. Likewise the legality of his acts in obtaining the drug by means of the statutory order forms was dependent upon whether he acquired it for use "in the legitimate practice of his profession." Manifestly, therefore, so far as the issues in this case are concerned, there is in the act just such a limitation as the learned trial judge stated. Accordingly the qualification which he made in the request or point for instruction to the jury was not only entirely proper, but, as it seems to us, was quite necessary in order that the jury might not be misled and confused. It merely reiterated in another way what had been before stated, and what admittedly was the decisive question in the case.

[2] It is next urged that the trial judge was not justified in stating, as he did in his charge, that, while the Harrison Act is a revenue measure, "its clear purpose * * * is to restrict the distribution and use of opium and its derivatives to medicinal purposes only." It is assuredly within the discretion of a trial judge, in charging a jury, to state the purpose, as he conceives it, that Congress had in passing any

given act. If an erroneous statement of such a purpose may be considered reversible error in any case, we are entirely clear that, although the Harrison Act was passed pursuant to the taxing power of Congress and is clothed in the garb of a revenue act, the learned trial judge did not misconceive or misstate the broad underlying purpose which Congress had in passing it (United States v. Jin Fuey Moy, 241 U. S. 394–402, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854), and therefore that no harm was done the defendant by the statement in question.

The only other alleged error relied upon is that certain of the language used by the trial judge—his choice of words, in reiterating to the jury the questions to be decided by them—was prejudicial to the defendant. This objection is, in our judgment, so utterly without merit as to need no discussion.

The judgment below is accordingly affirmed.

BIGGERSTAFF v. UNITED STATES.

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

No. 5342.

1. CRIMINAL LAW ⟸100(2)—INDICTMENT IN DIVISION OF DISTRICT OTHER THAN THAT IN WHICH CRIME WAS COMMITTED.

Though an indictment was found in a division other than that in which the offense was charged to have been committed, and to which division the case was transferred for trial, there was no violation of Judicial Code, § 53 (Comp. St. § 1035), requiring all "prosecutions" to be had within the division of the district where the crime is charged to have been committed, unless the prosecution be transferred to another division; the finding of the indictment and the proceedings leading up thereto not being a part of the prosecution.

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

2. PROSTITUTION ⟸1—COMMISSION OF IMMORALITY ON INTERSTATE JOURNEY NOT VIOLATION OF WHITE SLAVE ACT.

A violation of the White Slave Act (Comp. St. §§ 8812–8819) requires that the transportation in interstate commerce shall be for an immoral purpose, and the mere commission of an immoral act by defendant while on an interstate journey with a woman for a lawful purpose does not, where the immorality was merely casual, constitute a violation of the White Slave Act.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Henry Howard Biggerstaff was convicted of violating the White Slave Act, and he brings error. Reversed, and remanded for new trial.

E. J. Burkett, of Lincoln, Neb. (Burkett, Wilson & Brown, of Lincoln, Neb., on the brief), for plaintiff in error.

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

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

HOOK, Circuit Judge. Biggerstaff was convicted and sentenced for violating the White Slave Traffic Act of June 25, 1910 (36 Stat. 825, c. 395 [Comp. St. §§ 8812–8819]). The offense was charged to have been committed in the Chadron division of the district of Nebraska. The indictment was found and returned in the Omaha division by a grand jury drawn from the district at large, and thence transferred to the Chadron division for trial.

[1] A demurrer to the indictment, which was overruled, specified as a ground that the finding and return of the indictment in the Omaha division was contrary to section 53 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. § 1035]), which says:

"All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district."

The point made turns upon the meaning of the word "prosecutions" as employed in the statute; that is to say, whether a prosecution includes the inquiry of the grand jury and the finding of the indictment. It was proper to draw the grand jurors from the district at large. Clement v. United States, 149 Fed. 305, 79 C. C. A. 243. And if the indictment was lawfully found in the Omaha division, it was lawfully returned there, provided it was afterwards transferred to the proper division for trial. The return of an indictment is naturally made to the court and at the session where the grand jury is performing its functions. We think the term "prosecution," in this statute, means the proceedings which follow the finding and return of the indictment, and does not embrace the preliminary inquiry and the making of the accusation. Until the latter is done there is no case or cause against the accused to be prosecuted. While persons are sometimes held in bail or confinement to await the action of a grand jury, it is not always so. That is merely precautionary. It is the process on the indictment which brings them into court to answer the accusation. It does not necessarily follow that the proceedings of a grand jury are specially directed at the person finally accused. There may at first be no formal charge against any particular person. The probability of the commission of a public offense and of the identity of the perpetrator may not be disclosed until the conclusion of their investigations. Even the locality of the criminal act, whether in one division or another, may at first be in doubt. Except as to some fundamental requirements in respect of the constitution and conduct of grand juries, the persons finally indicted are not entitled to subject their proceedings to the scrutiny and tests of a trial. McKinney v. United States, 199 Fed. 25, 117 C. C. A. 403. In Blair v. United States, 250 U. S. 273, 39 Sup. Ct. 468, 63 L. Ed. ——, the court, in speaking of a grand jury, said:

"It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by

doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning."

While the inquisition of a grand jury is essential, it is preliminary, and not a part of the definite prosecution of any particular individual. It is in this restricted sense that the term is used in the statute, though in other relations it may have a broader meaning. As confirmatory of this it will be observed that the same section also authorizes the court or judge, upon the application of the defendant, to "order the cause to be transferred for prosecution to another division of the district." Doubtless the same meaning was intended in both connections. It is the cause which follows the indictment that is prosecuted. Still further, in the copies of the Judicial Code prepared under the direction of the Judiciary Committee of the Senate and published by authority of Congress, there is a note to section 53 which says of the provision we have last quoted:

"The purpose of this latter provision is to facilitate the early disposition of criminal cases, especially in minor cases, where the defendant is unable to give bail, and may, in view of the fact that in many divisions but one term of court is held each year, possibly be compelled to remain in jail nearly a year before a trial may be had or before an opportunity will present itself for him to plead guilty."

Manifestly this purpose might often be frustrated, where persons are confined in default of bail to await the action of a grand jury, if it were held that the proceedings of the grand jury, including the finding and return of an indictment, must be in the division in which the offense was committed.

[2] The accused was convicted of violating the first clause of the White Slave Traffic Act, which requires that the transportation in interstate commerce shall be for an immoral purpose specified. The mere fact that an immoral act was committed on an interstate journey does not of itself constitute that essential element of the offense. Its relevance in that respect is evidential, not substantive, and when relied on as evidence of a preconceived purpose care must be taken to regard it in a true perspective. The act may have been a casual incident in the journey, without forethought or anticipation at the time it was begun. Many things, good and bad, occur in that way.

The evidence in this case is so exceptionally coarse and revolting that it will not be discussed in detail. Upon a most careful consideration of it, giving to the verdict of the jury the full credit to which it is entitled, we are of the opinion that there was not sufficient proof of a purpose of the interstate transportation that brings it within the statute. That there was another purpose, lawful, insistent, and pressing, was admitted. It was openly declared and understood by all concerned. It was plain that some one had to accompany the woman on the first part of her journey, from her home to the nearest railroad town, and the accused was naturally the person to go. He was not a volunteer. To say that the journey was undertaken by him with the intention of creating an opportunity within the statute is, we think,

pure speculation. The time, the conveyance, the road, and the other circumstances do not warrant it as a reasonable inference upon which conviction for a crime may stand.

The sentence is reversed, and the cause is remanded for a new trial.

JONES v. CHICAGO, R. I. & P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1919.)

No 5367.

1. CARRIERS ⟸325—CARE REQUIRED OF PASSENGERS; "CRIMINAL NEGLIGENCE."
The expression "criminal negligence," as employed in Rev. St. Neb. 1913, § 6052, providing that every railroad shall be liable for all damages "upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured," means gross negligence, or such negligence as would amount to a flagrant and reckless disregard by the passenger for his own safety or a willful indifference to the injury liable to follow.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Criminal Negligence.]

2. CARRIERS ⟸247(4)—EXISTENCE OF RELATION; PASSENGERS ALIGHTING FROM TRAIN.
The phrase "passenger while being transported," as used in Rev. St. Neb. 1913, § 6052, providing that every railroad company shall be liable for all damages "upon the person of passengers while being transported over its road," includes passengers leaving the train for any necessary purpose incident to their journey, and also while alighting from the train at destination.
[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Passenger Being Transported.]

3. CARRIERS ⟸314(5)—SUFFICIENCY OF PETITION; INJURY TO PASSENGER ALIGHTING.
Petition in an action for injury to a passenger while alighting from a train at destination, alleged to have been due to the stopping of the train in an unsafe position, *held* to state a cause of action under Rev. St. Neb. 1913, § 6052, making railroads liable for all injuries to passengers, except where arising from criminal negligence of the passenger or violation of express rules.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action at law by Ida C. Jones against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

M. H. Weiss, of Hebron, Neb. (Anderson & Baylor, of Lincoln, Neb., J. P. Baldwin, of Hebron, Neb., and A. Moore Berry, of Lincoln, Neb., on the brief), for plaintiff in error.

E. P. Holmes and George R. Mann, both of Lincoln, Neb., for defendant in error.

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

HOOK, Circuit Judge. This is an action for personal injury under a Nebraska statute (section 6052, R. S. 1913), making every railroad company liable for all damages "upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured," or by their violation of some express rule or regulation actually brought to their notice. A demurrer of the railway company to plaintiff's petition was sustained, the plaintiff stood on her pleading, and the company had judgment.

[1, 2] The statute above quoted has been held constitutional by the Supreme Court of Nebraska. See Chicago, etc., R. Co. v. Young, 58 Neb. 678, 79 N. W. 556; Chicago, etc., R. Co. v. Zernecke, 59 Neb. 689, 82 N. W. 26, 55 L. R. A. 610. This latter decision was upheld by the Supreme Court in Chicago, etc., R. Co. v. Zernecke, 183 U. S. 582, 22 Sup. Ct. 229, 46 L. Ed. 339. The expression "criminal negligence," as employed in the statute, means gross negligence, or such negligence as would amount to a flagrant and reckless disregard by the passenger for his own safety or a willful indifference to the injury liable to follow. Omaha & R. V. R. Co. v. Chollette, 33 Neb. 143, 49 N. W. 1114; Clark v. Zarniko, 45 C. C. A. 494, 106 Fed. 607. The statutory phrase, "passengers while being transported," etc., includes those leaving the train for any necessary purpose incident to their journey (Chicago, etc., Ry. Co. v. Sattler, 64 Neb. 636, 90 N. W. 649, 57 L. R. A. 890, 97 Am. St. Rep. 666), and that would also include one alighting from the train at his destination.

[3] With the above constructions of the statute by the state court, which upon all questions not federal in character we should follow, let us look at the petition. Omitting an excess of detail, it sets forth that plaintiff bought of defendant a ticket entitling her to transportation from St. Louis, Mo., to Hebron, Neb.; that she took the journey, and in due course the train on which she was a passenger arrived at Hebron, her destination; that the station was announced, and the train was stopped in an unsafe position for passengers to alight; that it was in the evening, nearly dark, and no footstool was placed to lessen the distance from the coach step to the ground; and that in alighting she fell and was severely injured.

We think it quite clear that a cause of action under the statute was stated, even without the many averments that the acts and omissions of the defendant were negligently done and suffered.

The judgment is reversed, and the cause is remanded for a new trial.

GRAY v. GUDGER et al.

In re GRAY.

(Circuit Court of Appeals, Fifth Circuit. November 10, 1919.)

No. 3369.

1. BANKRUPTCY ⊜446—PRESUMPTION ON PETITION TO SUPERINTEND AND REVISE.
On petition to superintend and revise an order of the bankruptcy court, where the record did not contain a summary of the evidence or statement of the facts, it must be assumed that the evidence tended to support the allegations of the petition.

2. BANKRUPTCY ⊜146—AUTHORITY TO SELL UNSCHEDULED LIFE ESTATE OF BANKRUPT.
The bankruptcy court has authority to sell an unscheduled life estate belonging to the bankrupt.

3. BANKRUPTCY ⊜288(1)—JURISDICTION ON SUMMARY PROCEEDINGS.
Where the bankruptcy court ordered sold an unscheduled life estate, title which stood in the name of the bankrupt, and it was claimed by a son of the bankrupt, who asserted that the bankrupt had sold it to him, *held*, that the bankruptcy court has jurisdiction to summarily determine the controversy between the purchasers and the son.

Petition to Superintend and Revise Proceedings of the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

In the matter of the bankruptcy of R. T. Gray. Petition by R. M. Gudger and another against W. G. Gray, wherein petitioners prayed to be placed in possession of a life estate, which the bankrupt claimed to have conveyed to defendant, his son W. G. Gray. There was an order in favor of petitioners, and defendant petitions to superintend and revise. Petition to superintend and revise denied.

R. B. Blackburn, of Atlanta, Ga., for petitioner.

Sam P. Maddox, of Dalton, Ga., for respondents.

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

FOSTER, District Judge. In this case it appears from the allegations of a petition of respondents to the District Court that R. T. Gray, bankrupt, failed to schedule a life estate in a certain lot of land in Murray county, Ga., but it was nevertheless advertised and sold by the trustee at public auction to respondents. Not obtaining possession, in due course respondents filed a petition in the District Court alleging the purchase by them of the said life estate; that they found the bankrupt, R. T. Gray in possession; that he refused to surrender it; that in proceedings instituted to force him to do so he set up in his answer that some years prior to his adjudication as a bankrupt he had sold his life estate to his son, W. G. Gray; that he had made no deed to him, but that another son was in possession of the said life estate as a tenant of W. G. Gray; that said W. G. Gray was a party to the bank-

ruptcy proceedings as attorney for his father, the bankrupt; that he was present at the sale of the life estate, and bid on it, and several times raised the bid made by respondents; that there was collusion between W. G. Gray and R. T. Gray.

Respondents prayed that W. G. Gray be made a party to the suit, which was granted. Issue was joined on the petition, and after due proceedings an order was finally entered by Judge Newman placing the respondents, R. M. Gudger and J. L. Robinson, in possession of the life estate of the bankrupt. It is those orders which are sought to be reviewed in this proceeding.

The record does not contain a summary of the evidence or a statement of facts. Respondents have filed a motion to dismiss the petition on the ground of diminution of the record. The motion is not entirely without merit, but in the view we take of the case it is unnecessary to pass on it.

[1] In the absence of the evidence we must assume that it tended to support the allegations of the petition of respondents. The only questions, therefore, presented by the petition to review, are those relating to the jurisdiction and authority of the District Court to make the orders complained of.

[2, 3] Undoubtedly the District Court had jurisdiction to sell the life estate of the bankrupt, whether it was surrendered on the schedule or not. The court also had jurisdiction to determine in a summary manner whether or not the alleged sale of the bankrupt to his son was a real sale, made in good faith, or was merely a colorable claim. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. On the facts alleged by respondents, the order of the District Court was correct.

The petition to superintend and revise is denied.

HELD v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 25, 1919.)

No. 3376.

WITNESSES ⊂=357—IMPEACHING TESTIMONY AS TO CHARACTER.

Where witnesses testified that they were familiar with the general reputation for truth and veracity of a witness for the prosecution, whose testimony had to be relied on to support the criminal charge made, question as to whether, from such reputation for truth and veracity, the impeaching witness would believe him on oath, was proper.

In Error to the District Court of the United States for the Western District of Texas; William R. Smith, Judge.

Edgar Held was convicted of crime, and he brings error. Reversed.

William E. Loose and Jas. F. McKenzie, both of El Paso, Tex., for plaintiff in error.

W. H. Fryer, Asst. U. S. Atty., of El Paso, Tex.

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

WALKER, Circuit Judge. Witnesses for the plaintiff in error were examined for the purpose of impeaching the credibility of J. E. Monroe, a witness whose testimony had to be relied on to support the criminal charge made. After each of several of those witnesses had stated that he was acquainted with Monroe, that he knew Monroe's general reputation for truth and veracity in the community in which he lived, and that such reputation was bad, the following question was propounded:

"From your knowledge of J. E. Monroe's general reputation for truth and veracity, would you believe him on oath?"

Exceptions were reserved to the action of the court in sustaining objections to the questions. Defendant's counsel stated to the court that each witness, if permitted, would have answered, "No."

In our opinion the evidence which the action of the court excluded was admissible. The admission of testimony called for by such a question, asked under the circumstances stated, we think properly may be regarded as an allowable, possibly the only available, means of enabling the jury to determine whether the probative value of the sworn testimony of the assailed witness is destroyed, or so far impaired as to justify a rejection of it as a support for a finding on an issue of fact presented. This conclusion is supported by abundant authority and general usage in this country and in England. United States v. Masters, 4 Cranch, C. C. 479, Fed. Cas. No. 15,739; Hamilton v. People, 29 Mich. 173, 186; Crawford v. State, 112 Ala. 1, 21, 21 South. 214; Duffy v. Radke, 138 Wis. 38, 119 N. W. 811; Teese et al. v. Huntingdon et al., 23 How. 2, 16 L. Ed. 479; 5 Jones on Evidence, § 862; 3 Wigmore on Evidence, § 1985.

The court erred in sustaining the above-mentioned objections. Because of that error, the judgment is reversed.

CHAMBERLIN et al. v. Q. & C. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. July 2, 1919.)

No. 2688.

COURTS ⊜405(5)—REVIEW OF DISTRICT COURT—APPELLATE JURISDICTION.

The Circuit Court of Appeals is without jurisdiction of appeal from decree of District Court dismissing bill on the ground of want of jurisdiction depending on diversity of citizenship; but power to review is exclusively in the Supreme Court.

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

Suit by Walter H. Chamberlin and another against the Q. & C. Company and others. Bill dismissed and complainants appeal. Appeal dismissed.

David S. Wegg, of Chicago, Ill., for appellants.
Horace Kent Tenney, of Chicago, Ill., for appellees.

Before BAKER and EVANS, Circuit Judges, and FITZHENRY, District Judge.

PER CURIAM. Appellant's bill involved a controversy over which the District Court would have no jurisdiction unless there was the requisite diversity of citizenship. Appellees Quincy and Q. & C. Company moved to dismiss the bill, "upon the ground that it involves a controversy between citizens of the same state." The motion was sustained, and the decree which is brought here for review "dismissed the bill for want of jurisdiction."

Whether the facts set forth in the bill presented a case which under the Constitution and statutes of the United States was cognizable in a federal court is a question that has been elaborately discussed by counsel; but we are precluded from answering, because exclusive appellate jurisdiction of that question is in the Supreme Court. Raton Water Works v. Raton, 249 U. S. 552, 39 Sup. Ct. 384, 63 L. Ed. 768 (May 5, 1919); Blumenstock v. Curtis Publishing Co., 258 Fed. 927, — C. C. A. — (decided at the present session of this court).

On our own motion, the appeal is dismissed for want of appellate jurisdiction.

I. T. S. RUBBER CO. v. PANTHER RUBBER MFG. CO.

(Circuit Court of Appeals, First Circuit. May 26, 1919. Rehearing Denied July 23, 1919.)

No. 1383.

1. PATENTS ⊂⊃328—FOR MOLD FOR FORMING RUBBER HEELS VALID AND INFRINGED.
   The Tufford patent, No. 1,177,833, for a mold for making rubber heels, *held* not anticipated and to disclose patentable invention; also infringed.
2. PATENTS ⊂⊃165—EFFECT OF FAILURE TO STATE MODE OF OPERATION OF DEVICE.
   A patentee's failure to state in the patent the new mode of operation which his device in fact contains, and which produces a new and beneficial result, does not prohibit the court from taking these merits into consideration, in determining the scope of the invention or the validity of the patent.
3. PATENTS ⊂⊃167(1)—COURT MAY REFER TO SPECIFICATION TO CONSTRUE CLAIM.
   Where the language of a claim includes elements described in general terms, the court may look to the specifications for the purpose of construing the language and ascertaining its meaning.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit in equity by the I. T. S. Rubber Company against the Panther Rubber Manufacturing Company. Decree for defendant, and complainant appeals. Reversed.

F. O. Richey, of Elyria, Ohio, and Charles A. Brown, of Chicago, Ill. (F. A. Tennant, of Boston, Mass., on the brief), for appellant.

Horace Van Everen, of Boston, Mass. (Burton W. Cary, of Boston, Mass., on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. [1] The plaintiff, the I. T. S. Rubber Company, is the owner of United States letters patent No. 1,177,833, issued to John G. Tufford, and complains of its infringement by the defendant, the Panther Rubber Manufacturing Company. The patent is for a mold for making rubber heels. There are 12 claims in the patent, but the only one in issue is No. 11, which reads as follows:

"A mold for forming heel lifts including assembled parts, one of which is provided with a molding chamber having the general outline of a heel lift, one wall of the molding chamber being concave and the opposed wall of said chamber having a convex surface coacting with said concave wall, one of said walls being provided with washer supporting devices."

In the District Court it was held: (1) That the device was not patentably new as it was anticipated by the Nerger mold; (2) that, inasmuch as the claim in issue, by its terms, covered all concavo-convex molds whether the surfaces of the opposing walls were spherical or not, the claim was invalid; (3) that if the claim could be regarded as valid by being limited to the particular structure shown and described in the patent, the defendant's mold did not infringe it; and (4) if it could be regarded as valid without being thus limited, the defendant's mold did infringe.

The specification and claims as originally filed in the Patent Office related, not only to the mold to be employed in the manufacture of rubber heels, but to the method of acting upon the rubber to produce the heels. The claims for the method were later stricken out, and a patent was issued for the mold, but the description of the method was left in the specification.

In the specification the patentee declares:

"The object of the invention is to produce a resilient heel, which will have its attaching face concave throughout its area whereby, when the heel or lift is placed against the flat under surface of a leather or other shoe heel and pressure applied to the resilient heel or lift, a vacuum or suction cup may be formed whereby the heel or lift will be held to the shoe temporarily until the nails can be applied. A further object of the invention is to produce a heel which, when applied to a shoe, will have a flat tread surface, and which may be equipped with fastening devices so located that the heel can be easily trimmed down to a required size."

He further states that—

"The invention resides in certain novel features of a mold such as is illustrated in the accompanying drawings."

In the drawings he shows a base plate *1*, an intermediate plate *2*, and a top plate *3*, in which are co-operating instrumentalities whereby the complete heel is produced.

"The base plate *1* is provided in its upper surface with a recess or cavity *4* which is a true section of a sphere, and from the concave surface of which

rises pins *5* grouped near the deepest point or center of the recess or cavity and provided intermediate their ends with annular shoulders or supports *6*. The intermediate plate or mold member *2* is formed on its under side with a convex projection, indicated at *7*, of a curvature which will permit it to fit snugly in the concave recess or chamber *4* in the base plate. The upper face of the intermediate member *2* is provided with a circular depression or recess, indicated at *8*, and this concave circular recess or depression aligns axially with the convex projection *7* on the under side of the plate. A central opening *9* is formed through the intermediate plate or mold member, and this opening *9* has an outline corresponding to the usual outline of a shoe heel or lift. The said intermediate plate or mold member is further provided in its upper face with a shallow circular overflow cavity or recess *10*, the purpose of which will presently appear. The top plate or mold member *3* is provided on its under side with a convex projection *11* the convex surface of which is a true section of a sphere and an exact complement of the concave chamber or recess *4* and adapted to fit in the concave depression *8* of the intermediate member. Upon the apex or deepest portion of this convex projection *11*, I provide ribs *12* which preferably define a space of the same shape as a shoe heel and extend parallel or concentric with the walls of the opening *9*. Within the space so defined, I provide intersecting ribs *13*, the purpose of which will presently appear.

"In the practice of the invention, the several plates or mold members are superimposed, * * * and to cause them to align with exactness the intermediate plate is provided on both its upper and lower surfaces with studs or lugs *14* adapted to engage openings or sockets *15* and *16* in the top plate and the base plate, respectively."

In preparing the mold for operation, the specification states:

"The base plate *1* and the intermediate plate *2* are assembled in their proper positions. * * * Small metallic washers, indicated at *18*, are slipped over the ends of pins *5* so as to rest upon the shoulders *6* and project beyond the edges of said shoulders either before or after the said plates are assembled, and rubber or composition is then placed in the chamber formed by the cavity *4* and the opening *9* so as to completely fill the said opening. The top plate is then placed in position over the intermediate plate with its convex projection *11* entering the depression *8* and bearing directly upon the plastic mass in the opening *9*. The plates are steam heated at all times so as to be maintained at a high temperature, and after the several plates or mold members are assembled, pressure is applied to the plates by means of a hydraulic press or other machine so that the plastic mass in the opening *9* will be compressed and solidified, the heat of the plates serving to vulcanize the mass to such an extent that it will be rendered very tough and durable but, at the same time, will retain its resiliency.

"After an interval sufficient to permit the desired vulcanization of the mass, the several plates are separated," and the heel is removed.

It is further stated that—

"The ribs *12* and *13* upon the top plate will * * * produce grooves in the upper face of the heel, and these grooves will mark off separate suction areas at the center of the heel, while, at the same time, the entire upper attaching face of the heel will form a suction area so that the heel may be readily placed in position upon a shoe and will set positively in its position while nails or other fastening devices are being driven through the openings formed by the pins *5*"

and that—

"The heel produced * * * will have a concave attaching face and a convex tread face throughout its area and, when it is placed against a flat shoe heel, a sharp blow delivered thereon will flatten its opposite faces, so that the air contained between the attaching face of the rubber heel or lift and the leather surface of the shoe will be driven out, and the rubber heel or lift held to the shoe by the suction thus produced."

The evidence shows that in practice the device is operated as follows: Washers are placed upon the washer pins of the lower plate, forming what is termed a table; the intermediate plate is placed upon the bottom plate; a blank piece of rubber or composition, either circular in shape or having the general outline of a heel lift, and of sufficient volume to fill the cavity of the mold, is placed on the washer pins; the top plate is placed in position and held in alignment by the dowel pins shown in Fig. 1, so that the convex portion *11* engages the rubber; pressure is applied to the plates by means of an hydraulic press; the plates are kept steam heated at all times; and after a given time the pressure is released and again suddenly applied for the purpose of driving out the air and still further pressing and solidifying the material. The release and sudden application of the pressure is termed "bumping" and is repeated several times. This is the way in which the operator handles the mold, and is the way commonly pursued in the prior art, except that in operating the plaintiff's mold the bumping is repeated a greater number of times.

The evidence further shows, and we find, that the mode of operation peculiar to the plaintiff's device—that is, the treatment of the material by the mold—is as follows: The convex surface of the upper plate engages and forces itself into the center of the stock, driving the material toward the edges of the mold and trapping air beneath the stock and between it and the bottom of the cavity in the concave member of the mold; as the convex member is pressed further down, the trapped air resists the pressure and further tends to drive the material toward the edges; the pressure compresses and solidifies the plastic mass and the heat vulcanizes it; and as a result of this mode of operation the outer edges of the heel are rendered more dense but still retain their resilient qualities.

Rubber heels thus produced wear longer and are tougher and more durable at the edges. It is the air trapped in the cavity of the lower surface, acting in conjunction with other elements, that drives the material to the outer edges of the mold and there solidifies and compresses it. The mode of operation found to exist in the plaintiff's device does not depend upon the shape of the rubber blank at the time it is placed in the cavity of the mold, for it operates upon the stock in its plastic state and forces it to the outer edges of the mold. The essential characteristic of the rubber blank is that it shall be of sufficient volume to fill the cavity of the mold. It is at the edge of the heel that the greatest wear comes, and it is especially desirable to overcome this as far as possible and still keep the heel resilient. This result was accomplished in a substantial manner through the peculiar mode of operation of the plaintiff's device, and we think it involved invention.

[2] The patent is for a structure, and the plaintiff is entitled to the benefit of all the advantages which it possesses over the prior structures intended to accomplish a similar purpose; and the patentee's failure to state in the patent the new mode of operation which his device in fact contains, and which produces a new and beneficial result, does not prohibit the court from taking these merits into consideration

in determining the scope of the invention or the validity of the patent. Warren Steam Pump Co. v. Blake & Knowles Steam Pump Works, 163 Fed. 263, 277, 91 C. C. A. 19.

Another result accomplished was to give the heel the quality of closely attaching itself to a flat shoe heel by suction when placed against such heel and given a sharp blow. This was a beneficial result, as it did away with the necessity of using cement and excluded dirt and water, as the clinging effect continued after the heel was permanently affixed to the shoe with nails or other attaching means.

The proofs show that the heel produced by the mold met with immediate commercial success; that the number of heels manufactured a month in 1915 was 50,000; and at the time of the trial in May, 1917, about 100,000 a day, or 3,000,000 a month; that the number of molds in use increased from 13, with 600 cavities, in March, 1915, working 10 hours a day, to 68 molds, with 3,100 cavities, in May, 1917, working 22 hours a day; and that this was due to the merit of the article rather than business enterprise.

[3] It is contended on the part of the defendant that the claim in suit is invalid, that the words "concave" and "convex" are not limited in their application to surfaces which are spherical, and that so to limit the claim would be to read into it a new element. We recognize that it is not the province of the court to add to a claim an element not embraced within its language; but, where the language of a claim includes elements described in general terms, we understand that it is the province of the court, for the purpose of construing the language and ascertaining its meaning, to look to the specification. Bates v. Coe, 98 U. S. 31, 38, 25 L. Ed. 68; Stillwell-Bierce & Smith-Vaile Co. v. Eufaula Cotton Oil Co., 117 Fed. 410, 54 C. C. A. 584; Lamb Knit Goods Co. v. Lamb Glove & Mitten Co., 120 Fed. 267, 56 C. C. A. 547. The words "concave" and "convex," as applied to surfaces, in their more restricted and technical sense, mean surfaces every line of which and at every point are concave or convex, in the manner of a sphere (Century Dictionary), or of an eggshell (Webster's Standard Dictionary). They are also loosely used to define cavities or projections which do not possess concave or convex qualities throughout their surfaces. The meaning of the language employed in the claim being doubtful, we think resort may properly be had to the specification to ascertain the sense in which the words in question were used. The specification frees the matter from doubt, for there the concave and convex surfaces of the opposing walls are shown to be spherical throughout their areas.

The defendant further contends that the claim is anticipated by the prior art as shown in the mold of Nerger; but this is clearly not so when the claim is understood in the sense in which we have construed it. The surfaces of the opposing walls of the Nerger mold are not spherical, nor are they concavo-convex, in the more restricted meaning of the words. The line of the breast of the heel in both the upper and lower plates is, no doubt, concavo-convex across the heel; but no line drawn lengthwise of these plates possesses those qualities, and the outer edges of the surfaces are in the same plane throughout. On the

other hand, in the plaintiff's and the alleged infringing device of the defendant, the edges of the opposing surfaces at every point are concavo-convex. It is manifest that in the Nerger mold means for pocketing the air that will produce the mode of operation found in the plaintiff's device do not exist. We think, therefore, that neither the Nerger mold, nor any of the molds relied on in the prior art, anticipate the mold of the plaintiff.

It was found in the court below that the defendant's mold infringes claim 11 of the plaintiff's patent, if it could be regarded as valid without being limited to the particular structure shown and described in the patent. This claim does not embody certain special features shown and described in the specification pertaining to the upper and lower sides of the intermediate plate. These are mere details of construction, and not essential, as other means well known in the art may be employed. The essential means for producing this mode of operation are set out in the claim, and, as we regard it as valid, we have no hesitation in finding that it is infringed by the defendant's mold, the curvature of whose opposing surfaces are spherical throughout their areas and are mathematically the same.

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

FETZER & SPIES LEATHER CO. v. I. T. S. RUBBER CO.

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

No. 3268.

PATENTS ⊂⊃328—PATENT FOR RUBBER SHOE HEELS VALID AND INFRINGED.

The invention of the Tufford reissue patent, No. 14,049, for a rubber shoe heel, *held* sufficiently disclosed by the original specification, the application for reissue *held* timely, and the patent not anticipated and valid; also infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit in equity by the I. T. S. Rubber Company against the Fetzer & Spies Leather Company. Decree for complainant, and defendant appeals. Affirmed.

Burton W. Cary and Horace Van Everen, both of Boston, Mass., for appellant.

F. O. Richey, of Elyria, Ohio, and Charles A. Brown, of Chicago, Ill., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. We approve and adopt the opinion of the District Judge, save in the particulars to be inferred from what we later say;

but certain points have been pressed upon us by appellant with such force as to call for a summary statement of our conclusions.

1. Nerger discloses a form which we think essentially closer to Tufford than any other earlier patent shows. The substantial difference between Nerger and Tufford is that the lift of the former was scoop-shaped and that of the latter saucer-shaped. These are untechnical and not very accurate terms of description, but they serve to distinguish as well as any two words may. They may be made clearer by assuming that all the descriptive words are used with reference to the horizontally placed plane of the bottom of the permanent heel to which the lift is to be attached. It is characteristic of the saucer-shape that there should be a somewhat centrally disposed low spot, so that if the upper edges of the lift were put in contact with the horizontal bottom of the heel, as far as may be without using force to distort the normal shape of the lift, any contained liquid would be retained in this lowest spot, because the edge of the lift towards the breast of the heel would be higher. It is characteristic of the scoop shape, under the same conditions, that the line from the low spot to the edge of the lift at the breast would be substantially horizontal, and the liquid would run out. The effect of this distinction is that, when the central part of the depression is forced up against the bottom of the heel, there is a distinctly greater tendency with the saucer shape than with the scoop shape for the breast edges of the lift to maintain tight contact with the heel. If the surfaces are smooth enough, this excludes the air, the atmospheric pressure holds the lift, flattened out, against the heel, and we have the result called "suction."

We do not regard this suction as of decisive importance in itself, because after one or two leather lifts had been removed, the roughness of the leather and the overlapping by the rubber would make it doubtful whether the suction adherence would be of much practical use; but the suction test is of distinct value as determining whether the rubber lift has or has not that quality which distinguished Tufford from Nerger. The distinction between the two is fairly well expressed by the statement that Nerger is of concavo-convex form upon lateral cross-sections, while Tufford is of this concavo-convex form also upon longitudinal cross-sections. This advance made by Tufford over Nerger seems very small—in looking forward, it might have been thought unsubstantial; but the actual events seem to demonstrate that it was very important, and we have no doubt that it should be considered to involve invention. This conclusion is in accord with that of the Circuit Court of Appeals of the First Circuit in I. T. S. Co. v. Panther Co. (May 26, 1919) 260 Fed. 934, —— C. C. A. ——.

The best that can be said of Nerger's patent disclosure is that it is not inconsistent with a lift concavo-convex in longitudinal cross-section also, and that his lift therefore might or might not have had that form. This uncertainty was removed by the evidence as to what Nerger did. The lifts which he made and sold were scoop-shaped, and his business was not successful. We prefer to rest the elimination of Nerger upon the difference between his form and Tufford's rather than upon the ground of abandoned experiment.

2. The original specification sufficiently discloses the ideas to which the added claims of the reissue are directed, as these claims are interpreted in our opinion in United States Rubber Co. v. I. T. S. Co., 260 Fed. 947, — C. C. A. —, filed herewith. The drawing is rather blind, but the specification contains descriptive matter which appropriately applies to these features. If there were doubt about it, it would be solved by the proof that Tufford, from the beginning, never made any form of lift, excepting that form which contains these particular features, and samples of this form were the basis of the proceedings in the Patent Office. Hence it is clear that any such doubt will not defeat the reissue.

3. Plaintiff does not appeal from the award of only nominal damages, and the decree will be affirmed; but the affirmance will be without prejudice to further considering in the court below whether any of the defendant's forms escape infringement of claim 10, for the reason given in the U. S. Rubber Co. Case.

The opinion below of Westenhaver, District Judge, is as follows:

The bill in this case charges infringement by defendant of United States reissue letters patent No. 14,049, issued January 11, 1916, to complainant, as assignee of John G. Tufford. The defenses are: (1) That this reissue patent is void, because not for the invention covered by the original patent, and because the application therefor was unduly delayed without sufficient excuse; (2) that it is invalid for lack of invention and lack of novelty; and (3) that defendant's construction does not infringe.

Tufford's invention relates to rubber shoe heels. Technically and in the shoe trade it is called an elastic or resilient heel lift. A lift in the shoe trade is one layer of the leather making up the finished heel, and, as ordinarily applied, a rubber heel lift is approximately the depth of two layers of leather. The upper part or face of the lift is the attaching face. The forward edge is called the breast.

The rubber heel lift in common use, and the only one commercially known or sold prior to Tufford's, was of the flat type. Many disadvantages are said to exist in this type of heel lift. When attached, it has a pronounced tendency to separate at its edges from the leather heel, and also to spread and expand beyond the leather heel. This not only is unsightly in appearance, but produces a gap and offset between the rubber and leather into which dirt and water will enter. The heel becomes uneven, and its connection with the shoe heel proper is weakened. This is said to be due to several causes. One is that, if the nails be driven inwardly from the edge, so as to avoid the rows of nails in the leather, the compression in the center part of the rubber heel lift has a tendency to cause the lift at its outer edges to draw away from the leather. Furthermore, it is said, while cements are made which will firmly unite rubber to rubber and leather to leather, no cement is made which will firmly unite rubber to leather; when cement is necessary, and is used in attaching the flat type of heel lift, it is found that the action of wear and water destroys the cement and produces the objectionable gap between the rubber and leather above noted. Attaching the flat heel, in doing which cement is necessary, is also a relatively slow operation as compared with the attaching of heel lift of the Tufford type. Attaching a lift with cement requires a careful preparation of the attaching face of the heel lift and of the surface of the leather heel proper, and an interval of some 15 to 20 minutes between the application of the cement and the time when it has dried sufficiently to be attached must be allowed in the operation.

Tufford's rubber heel lift was invented by him to overcome these difficulties. Its most important features as claimed by him are its peculiar and original shape and the suction thereby obtained when it is attached. In form it is uniformly curved on all cross-sections thereof. The upper

face is concave, so that the entire heel lift lies below a plane passing through the rear upper edge and breast corners. It is of uniform thickness, and its lower or convex face lies parallel to the upper or concave face. A construction in this form of resilient or elastic rubber will, when compressed against a flat surface, adhere thereto. The air in the cavity between the concave face and the flat surface is thus excluded, and the air pressure called "suction" retains it permanently in place. The natural tendency of the heel lift thus constructed to assume its natural curved position is said to be likewise present, and, as a result of these forces, this heel lift adheres closely at the edges at all times to the leather heel proper, keeps its shape, and has unusual wearing qualities.

The specifications show other features or elements of the invention which it is not necessary to describe in detail, because the controversy here revolves around the features or elements above described. These additional features, it may, however, be noted, apply to the position of the nails distributed about the center of the heel lift and at a substantial distance from the edges, the shape and location of the washers imbedded in the heel lift in which the nails are to be driven, the diminutive size of the nail holes, which are sufficient only to act as guides for the nails, and so small as to prevent the escape of any appreciable amount of air to or from the suction area of the heel lift. In addition, shallow channels are cut or molded in the concave face in the form of a shield with a cross therein, which are said to create four additional separate and distinct suction areas co-operating with the suction area of the entire upper face.

On this hearing Tufford demonstrated the manner in which he made this invention. In 1913, and for many years prior thereto, he was a cobbler in a shoe store in Elyria, Ohio. In following his trade he came to know all the different forms of rubber heel lifts, and observed the respects in which, as he says, all were more or less unsatisfactory. He conceived the idea that, if a heel lift were made having the suction features claimed for his invention, it would be an improvement over all existing types of heel. In developing this conception he provided himself with the round or globular type of a newel post, and over this top he nailed a flat disc of rubber. In the exact top of the section of a sphere thus created, he outlined first a heel lift of the desired size, and then cut and filed away the rubber within these outlines to a perfectly flat surface. He next cut out the heel lift, which, when free, immediately assumed the concave shape of his patented invention, uniformly curved on each cross-section thereof. The other side was then cut, filed, and trimmed to a uniform thickness. The finished heel lift retained its shape, and, when applied to a flat surface, adhered thereto in the manner above described. This he applied to a pair of his own shoes, which he wore continuously, and which he says gave entire satisfaction, and demonstrated all the advantages now claimed for his invention. He made two other pairs by hand, which he applied to shoes worn by two different clerks employed in the same store with him. They also were found to be satisfactory. Later, and after he had completed his device by developing the form and location of the washers and nail holes and the channels or grooves in the form of a shield with a cross therein, as above described, he applied for a patent. His application is dated July 21, 1913, and was issued September 15, 1914.

Some time during the year 1914 Tufford presented samples of his heel to Mr. Richard Griffith, superintendent of the Miller Rubber Company of Akron, Ohio, in order to induce this company to make molds and engage in the manufacture of these heel lifts. Mr. Griffith refused, because the shape of the heel lift presented, he thought, unusual difficulties in constructing a mold, and he was not willing that the company he represented should itself undertake the task of making molds and guaranteeing a satisfactory product. He directed Mr. Tufford to invent a mold himself. Later Mr. Tufford returned with a single cavity mold of the desired shape and form, and thereupon the Miller Rubber Company had similar molds made, manufactured a number of sample heel lifts, and determined for itself that the heel lift could be made commercially in conformity to the sample presented.

The first heels for commercial use were manufactured for complainant by the Miller Rubber Company early in 1915. Complainant's first sales were

made in March of that year. The commercial success of this heel lift has been phenomenal. The prices agreed upon between complainant and the Miller Rubber Company at the beginning of their business relations have continued to the time of the trial and are still in force. The prices at which the heel lifts were first sold to the trade in February, 1915, have not been changed and are still in force. Complainant has not resorted to any method of advertising, except to furnish some cards to shoe dealers and to submit occasional exhibits at shoe-finding conventions. In the early months of 1914 Mr. Tufford himself, and perhaps others, made some trips to Cleveland and elsewhere to call the lift to the attention of shoe dealers and jobbers; but, except to that extent, no force of traveling or soliciting salesmen has been employed.

The sales of the Tufford lift in February, 1915, were 6,696 pairs, and for the entire year 748,189 pairs. The sales for the year 1916 were 4,529,518 pairs; for 1917 they were 12,733,567 pairs; and for the first six months of the year 1918, 13,893,245 pairs. For the month of June alone, 1918, the number sold were 2,279,045 pairs. Complainant has put in capital from first to last of less than $30,000. Its undivided profits January 1, 1918, were $800,000. Its net earnings alone for the year 1917 were $482,000. The Miller Rubber Company began with 10 or 15 persons in its press room in February, 1915, making these heel lifts; it now has 160 employés so engaged. Its investment for this purpose totals a half million dollars. It was making at the time of trial 75,000 pairs a day, and trying to reach an output of 120,000 pairs a day. Mr. Griffith says the company has never been able to keep up with the public demand for this heel lift.

Numerous witnesses support Tufford's contention that his invention has accomplished the results claimed for it. Its edges do adhere closely to the contacting leather of the heel proper. Its edges do not spread beyond the heel proper; the tendency of the edges of the flat rubber heel lift to gap from the leather is overcome, either by suction or by the tendency of the lift to crowd or compress towards the center. It may be applied quickly and easily and without the use of cement. It has unusual wearing qualities as compared with other forms of rubber heel lifts, and keeps its shape and form until it is worn down. The evidence also shows that its phenomenal sale is not due to advertising or business methods, but is exclusively due to its inherent excellence. The evidence also shows that the well-known O'Sullivan flat rubber heel has been extensively advertised in magazines and by street car placards, but that, during the period the sales of the Tufford heel have been growing so enormously, it has merely maintained a standard volume of sales.

Invention is presumed from the issue of the letters patent, and defendant does not, as I understand, contend that this patent would, standing alone in the art, be void for lack of invention, but does contend that, in view of the prior art it is not a sufficient advance to be patentable, and has been anticipated by that prior art. Defendant relies on United States letters patent No. 638,228, issued December 5, 1889, to Cara S. Ferguson, and United States letters patent No. 661,129, issued November 6, 1900 to Frederick Nerger. A brief examination of each of these patents needs to be made.

The prior art embodied in these two patents was taken into consideration by Tufford in constructing his original device. In the specifications of his patent he says that he is aware that a cushion lift having a concave upper surface to be applied to the lower face of the shoe heel proper has been proposed, but that he does not believe that any practical or satisfactory means has up to the time of his invention been discovered and employed for attaching the same. One of the methods he says has been to imbed circular washers in the lift and use nails or other securing elements driven through these washers into the shoe heel. These circular washers he says have been so arranged that after a short use the edges thereof will be exposed at the tread surface of the heel lift. This is an element of the Ferguson patent. His specifications and drawings disclose a circular washer of substantially the same outline as the heel lift with the center of it cut away.

Another method employed, Tufford says in his specifications, has been to imbed in the heel lift a metal plate conforming in contour to the cavity of the heel lift, and then secure the heel lift in place by driving nails or screws

through these plates and into the leather heel proper. In this form of construction he says that when pressure is placed on the heel it will tend to flatten out the plate, thereby causing its edges to cut through the lift, besides weakening and loosening the nails or screws. This is an element of the Nerger invention.

An examination of the drawings and specifications of the Ferguson patent shows a rubber heel lift substantially scoop-shaped in form. It is difficult to say, from an examination of the drawings and specifications, whether or not the upper face is concave on every cross-section thereof, or that it lies entirely below a plane passing through the rear edge and breast corners. Certainly it is not the shape and form of the Tufford heel. It is not uniformly curved on every cross-section, and the samples constructed of that form without the metal washer, introduced and demonstrated at this hearing, do not have the quality of adhesion or suction present at all times in the Tufford heel lift. Ferguson, it is true, anticipated in some degree Tufford's conception that a concavo-convex heel lift will cling closely to the leather of the heel, due to its natural tendency to assume its normal curved form. He depended, however, upon two important elements not present in Tufford's heel lift to accomplish this result. One of these is a raised marginal portion continuous about the margin or outline of the heel section on its concave side. Another is a metallic spring frame or washer, having the substantial outline of the heel section, with the center cut away, and which is curved or bent to correspond to the curvature of the heel lift. It was on these two elements that Ferguson relied to overcome the usual tendency of flat rubber heel lifts to draw away from the leather, creating a gap at the meeting edges. These features are both omitted from Tufford's heel lift, and are themselves wholly adequate to distinguish the two inventions.

The Ferguson patent has been considered by this court. The Panther Rubber Company, as assignee of the Ferguson patent, sued herein the I. T. S. Rubber Company, charging that the Tufford heel lift infringed the Ferguson patent. On hearing July 8, 1916, Judge (now Mr. Justice) Clarke held that it did not infringe. On appeal to the Circuit Court of Appeals this holding was affirmed in an opinion filed March 15, 1918. In a per curiam opinion that court says that the raised marginal portion in Ferguson's specifications is an important and controlling element of his invention; that not only are the two constructions very dissimilar in appearance, but that it is not conceivable that the depression in the form of a shield with a cross therein in the concave center of the lift can perform the same functions claimed for the depression within the raised marginal portion of Ferguson's heel; and that, notwithstanding it is insisted that Ferguson was original in bringing in the element of a concavo-convex lift, his patent has no claim for that feature, except in combination with the element of a raised marginal portion. This is true of the first claim, and of the second claim the element of the concavo-convex form is claimed only in combination with a correspondingly concaved spring metallic frame embedded within said heel section. Furthermore, on this hearing it appeared that the Ferguson heel had never been manufactured and sold commercially in the concavo-convex form of his patent, but that the commercial article was a flat heel with the embedded metallic frame, and with an abrupt depression in the center of the upper face; in other words, the patented construction has not been accepted by the public as a solution of the rubber heel lift problem.

Defendant's main reliance herein is on the Nerger patent. It is difficult to resist the impression that this reliance is not because Nerger more nearly anticipates than Ferguson, for the contrary is undoubtedly true, but is because of the decision of the Circuit Court of Appeals above noted. Nerger's heel lift is described as being of concavo-convex form, but not as being concavo-convex on every cross-section thereof. The upper face does not lie, however, below a plane passing through the rear upper edge and the breast corners. All the edges are substantially straight and the deepest part of the concavity is not in the center of the lift, but on the line of its breast. Heels of this form and shape were made and sold in small quantities at retail in Chicago in the years 1901 to 1902, and samples have been produced and demonstrated before me. It is manifestly impossible that this heel could have the suction or ad-

hering qualities of the Tufford heel, nor did the inventor attempt to obtain these qualities by the power of suction or adhesion. Nerger relied primarily on a spring metallic frame of the same curvature of the heel lift imbedded therein to perform this function and to obtain a close-fitting heel lift which would not in use gap away from the leather heel proper. This metallic frame has lateral arms extending outwardly towards the edges, and this frame, it is observed, in use has a tendency to weaken and destroy the heel and to obtrude through the wearing surface of the heel lift.

I have examined the testimony in deposition form showing previous sale and use of the Nerger heel. Nerger ordered from Morgan & Wright, rubber manufacturers of Chicago, during the years 1901 and 1902, some 600 pairs of heels. These were peddled by him or one or another of his sons to shoe cobblers in and about Chicago. Nerger, his sons, and one or two other witnesses also testify that these heels gave satisfaction, adhered closely at the edges, did not gap away from the leather, and did not spread beyond the leather and wore well. Giving full weight to these statements, but taking this testimony as a whole, I am convinced that the Nerger heel lift was neither successful nor practicable, that a limited number only were sold, and that, owing to the inherent defects therein, it failed to meet or solve the problem of a desirable heel lift. Nerger brought this heel lift to the attention of different persons in his efforts to enlist their co-operation in making and selling them, but always without success. His invention must be regarded as a practical failure.

Moreover, even if the Ferguson or Nerger heel lifts had, in practice, accomplished the same results as the Tufford heel lift, the latter is, in my opinion, still such an advance over the prior art therein disclosed as would amount to patentable invention. The metallic circular washer of the Ferguson and the metallic spring frame with lateral arms of the Nerger heel are obvious disadvantages, and the evidence shows that no rubber heel lift embodying these features is or could be successful in practice. They destroy in large part the resiliency of the heel, which is the main purpose of all rubber heel lifts. They shorten the life of the heel lift, and increase the rapidity with which it wears out. They enhance substantially the cost of manufacture, for a heel lift carrying a metallic plate cannot be molded at a single operation from one piece of rubber, but must be molded in two sections, with two operations.

I am of opinion that complainant's patent embodies invention and was not anticipated. The presumption of patentable invention flowing from the allowance of the application and the granting of a patent by the Patent Office authorities is strengthened to an unusual degree by the actual proceedings in this case. During the pendency of the reissue application Ferguson and Nerger were both cited against it. The examiner repeatedly rejected the application, first because of Ferguson and Nerger patents, and later on Nerger's alone, and it was not until after he had seen, inspected, and demonstrated the Nerger and Tufford heels that he passed the application. The applicant did not modify or limit his claims as a result of these repeated rejections and finally the examiner, upon further consideration, admitted his error and the patent was issued. In these circumstances, the granting of the patent carries more than the usual weight.

Furthermore, the distinctive change in shape, form, and proportion in the Tufford heel lift over both the Ferguson and Nerger form is so great as in my opinion to amount to invention. In these respects it falls within the class of cases of which the following are types: Faultless Rubber Co. v. Star Rubber Co. (C. C. A. 6) 202 Fed. 927, 121 C. C. A. 285; Diamond Rubber Co. v. Consolidated Rubber Co. (Grant rubber tire patent) 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527. In addition, the acceptance by the public and the phenomenal commercial success of the Tufford heel lift would, if the question of invention were otherwise doubtful, carry great, if not controlling, weight.

Defendant's contention that the reissue patent is invalid, because not for the same invention as was disclosed in the original, and because of undue delay in applying therefor, remains to be considered. Tufford's original application was filed July 21, 1913, and the patent thereon was issued September 15, 1914. The application for the reissue was filed June 22, 1915, and the patent was granted January 11, 1916; a period, it thus appears, of only nine months in-

tervened from the granting of the original to the application for the reissue patent. The evidence also shows that this rubber heel lift, as now manufactured and sold, is precisely the same heel lift as was originally designed and invented by Tufford, and that no changes have been made in its shape, form, or proportion since the first samples were made up by the Miller Rubber Company and sold to the public. The date of these first sales was February, 1915. In the interval between that date and the filing of the reissue application no patents were applied for or taken out by any other person embodying any of these features of the Tufford invention, nor did any person in this interval manufacture or sell any heel lift of like shape, form or proportion. Defendant's contention that there was undue delay in applying for the reissue, or that the reissue patent is void by reason thereof, cannot be sustained.

Defendant's contention that the reissue patent is for a new invention, not embodied in the original patent, is not sound. The original patent, it is true contained only four claims, and these are the first four of the reissue patent. The latter contains six additional claims, being 5 to 10, both inclusive. In the four original claims of the original patent the main features of the invention herein considered were not claimed; they are claimed in the new claims of the reissue patent. Tufford's original invention, however, not only included these features, but all of them were set out with reasonable clearness in his original specifications. The changes made in Figure 2 of the drawings of the reissue patent are slight and immaterial, and scarcely perceptible to the untrained eye. The additions made to the specifications are from lines 83 to 105, inclusive, on the second page. An examination of these added lines and a comparison thereof with the original does not show the introduction of any new idea not disclosed in substance in the original. These lines were added only to bring the same out with greater clearness.

Criticism is also made of the statement in these added lines that uniform pressure is exerted on the heel of a shoe when the lift is placed on the heel and the convex face thereof depressed to flatten the heel lift. This is said to be untrue, and, because untrue, the patent is invalid. That the pressure at the breast corners and at the rear edge of the heel is greater than at the other portions of the edges is probably true. Mechanically it is probably necessary that the heel lift should be circular in shape to get an absolutely uniform pressure. The heel lift, however, when applied as directed to a flat surface, does create the impression of producing uniform pressure. The statement of the application is approximately correct, and its departure from the exact truth is, it seems to me, without any material importance.

My conclusion is that claims 5 to 10 are not for a new invention, not disclosed in the original application. All the conditions justifying a reissue patent are here present, and none of the grounds upon which such patents have been held void have been here shown to exist. Adequate authority for this conclusion is found in American Automotoneer Co. v. Porter (C. C. A. 6) 232 Fed. 456, 146 C. C. A. 450.

Coming to the question of infringement, the rubber heel lift sold by the defendant was manufactured by the Foster Rubber Company and known as the "cat's paw" heel lift. Defendant is a shoe dealer in the city of Cleveland, Ohio. Immediately upon receipt of notice from complainant of the alleged infringement, it ceased to make sales, and later returned to the Foster Rubber Company such stock as it had on hand. Defendant did not, however, enter a disclaimer as to the charge of infringement, nor give any assurance of an intention to refrain therefrom in the future. On the other hand, the defense in this action was undertaken by the Foster Rubber Company, and the validity of complainant's patent put in issue and complainant put upon full proof thereof. The infringing heel lift is of a small size, corresponding to complainant's size "k," and is used on ladies' shoes and boots. It is an exact duplicate of complainant's heel of the same size. It is uniformly curved on every cross-section thereof. Its upper or concave face lies in a plane below the rear edge of the heel and the breast corners. It is of uniform thickness, and has the same qualities as complainant's heel lift of the same size. In my opinion infringement is fully shown.

A decree will be entered, sustaining the validity of claims 5 to 10, inclusive, of the patent, and awarding an injunction, but in view of the small sales

and necessarily insignificant profits made by defendant from the infringement, an order of accounting is not justified and will not be had. In lieu of an accounting, nominal damages of $1 are awarded, and may be included in the decree.

UNITED STATES RUBBER CO. v. I. T. S. RUBBER CO.

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

No. 3296.

PATENTS ⊜328—PATENT FOR RUBBER SHOE HEELS INFRINGED.

The Tufford reissue patent, No. 14,049, for a rubber shoe heel, as to the new claims incorporated in the reissue, *held* infringed on the showing made for a preliminary injunction, with the exception of claim 10.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit in equity by the I. T. S. Rubber Company against the United States Rubber Company. From an order granting a preliminary injunction, defendant appeals. Affirmed.

Charles S. Jones and Livingston Gifford, both of New York City, for appellant.

Charles A. Brown, of Chicago, Ill., and F. O. Richey, of Elyria, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. This is an appeal from a preliminary injunction upon the same patent involved in the case decided herewith. Fetzer & Spies Co. v. I. T. S. Rubber Co. (No. 3268) 260 Fed. 939, — C. C. A. —. All that is there said, and in the opinion of the District Court there adopted, with reference to the validity of the patent, we adopt for this case also. As to the points raised in this case, and not in that, a summarized statement of conclusions must suffice.

1. It is said that the substance of the additional claims secured by reissue was asked for and refused in the original application, and hence that the reissue was invalid. Grand Rapids Co. v. Baker (C. C. A. 6) 216 Fed. 341, 132 C. C. A. 485. We do not so interpret the history of the original application. Tufford's acquiescence was in the rejection of claims calling broadly for the concavo-convex form. They read exactly upon Nerger, so far as this feature is concerned. The reissued claims are limited to the precise distinction from Nerger, viz., to a lift concavo-convex in all cross-sections.

2. The lift indicated by the drawing of the Tufford reissue and that sold by defendant in the Fetzer & Spies Case had its upper edges touching the plane of the superimposed heel at three points—each breast corner and the center of the rear. Between each of these points the upper edge was upon approximately the depending arc of a circle. In the form made by defendant, the edge of the breast

has the same shape, but the upper edge of the sides and rear is all in the same horizontal plane as these three points. Hence it is said that the defendant does not infringe, because the language of claim 10 calls expressly for this three-point contact, and each of claims 5 to 9, inclusive, contains the limiting clause "the concave upper face lying entirely below a plane passing through the rear upper edge and the breast corners of the lift," and this limitation is said to be equivalent to the one incorporated in claim 10. Claims 5 and 10 are quoted in the margin.[1]

The words used in claims 5 to 9 do not naturally imply this limitation. The concave upper face, towards its outside, is constantly rising and eventually it meets the more or less vertical outer face. The line where these two faces meet is the edge of each. It is obvious that every part of the concave face of defendant's lift is below the plane in question, excepting this very upper edge, and defendant's contention is substantially to the effect that the very edge itself must be considered a part of the face to which the claim refers (and, hence, that not all of the face is below this plane). This does not impress us as the natural meaning of the words, but, rather, we think it would be natural to observe the distinction between edge and face, and not to intend that one term should include the other. The only question then is whether the patent itself or the file wrapper proceedings compel the inference that when Tufford here said "face" he meant to include edge. The usual rules of claim differentiation strongly tend to support our inference that the edge is not a part of the face. Each of claims 5 to 9, inclusive, describes the concave upper surface as "lying entirely below a plane passing through the rear upper edge and the breast corners of the lift"—in each case in connection with other elements of the invention, and which other elements are so varied that no two of these claims are identical in form. Claim 10, after transposing the order of the words, refers to "the upper side and breast edges of said concave attaching face" lying below the plane in which the rear upper edge and breast corners are disposed. One claim, therefore, is characterized by a stated location of the entire upper face, and the others characterized by the same location of the upper edges. The argument that these two things cannot be considered equal, because that would make the two claims the same, is not conclusive, because one elsewhere calls for "resilient material" and the other for "nonmetallic resilient material"; and though it is not easy to rest patentable distinction upon the presence or absence of metallic reinforcement, upon the whole the compar-

[1] Claim 5: "A heel lift of substantially non-metallic resilient material having its body portion of concavo-convex form on every line of cross-section, the concave upper face lying entirely below a plane passing through the rear upper edge and the breast corners of the lift."

Claim 10. "A heel lift of substantially resilient material comprising a body portion, the attaching face of which is concave and the upper tread face convex on every line of cross-section, the rear upper edge and breast corners of the concave attaching face of the lift being disposed in a plane above the upper side and breast edges of said concave attaching face."

ison of the claims confirms what we think the natural impression as to their meaning.

We find nothing in the history of the original application which has any bearing. Neither one of these phrases appears. If the structure intended to be shown by the drawing and referred to in the specification as the preferred form was what we think it probably was—the same as is shown more perfectly in the reissue—either phrase was accurately descriptive. In the reissue application, after rejection and discussions, oral and written, and amendments, claims 5 to 10 were formulated as the result of the examiner's orally expressed ideas as the proper broad statement of the invention. These two phrases then first appeared; one of them is in five claims, and the other in one claim. The applicant embodied them by amendment, in substitution for what he had been trying to get. This, again, confirms the impression above stated. On the other hand, it appears that, when these claims were put in, the applicant inserted in the specification some further description. He describes his construction in the terms of the phrase as found in claim 5, and then, with a connective, "in other words," proceeds to describe it in the terms of the phrase found in claim 10. The presence of this double and declaredly alternative use of the two phrases presents a serious question, and must challenge the rightfulness of the theory that they mean different things when found in the claims; but, in spite of this, we think the theory should be accepted. "In other words" does not necessarily imply exact equality. The words are often used to connect thoughts which are similar, but not identical, and to make them, in this case, a controlling declaration of identity, would be to permit what we think the substance of the invention, the advance which Tufford had made over Nerger, to be appropriated with impunity. We will not unnecessarily give claims a construction leading to that result.

3. Under the construction which we have given to claims 5 to 9, it is apparent that claim 10 is narrower, so far as it pertains to the location of the upper edge. The theory of contributory infringement is relied upon to justify including this claim among those sued upon. It is said that when the lift is attached and expanded laterally, and the edges of it trimmed down, as the manufacturer intends shall be done, it has such a shape that, if relieved from pressure, there would be only the three-point contact of claim 10. We cannot be satisfied that this is true. Of course, if the three points in question were untouched by the trimming knife, and a considerable depth at the sides between them were removed, the result would follow; but this seems an abnormal method of trimming and one which would not usually occur, and the testimony is rather general and vague. It is clear that, if the degree of the curve upon the concave surface is the same as it approaches these three points and as it approaches the intervening edges (and so far as the eye can judge, this seems to be the fact), the trimming of equal depth all around would leave the undistorted shape at the edge just what it was before. We think the present proofs are insufficient to justify including this claim in the order; but, since it is narrower than the others, we cannot now see that its

exclusion will make any substantial difference in the force of the injunction or in the effect of the accounting, and, consequently, the costs in this court will not be affected. The court below, upon final hearing, will consider claim 10 under the record as it then appears, and without prejudice from this action.

4. Infringement is also denied because defendant's device is said to be dominantly scoop-shaped, like Nerger, rather than saucer-shaped, like Tufford. This is thought to be demonstrated by applying a straight edge along the line from the center of the edge of the breast to the central low spot on top of the lift, and observing that it coincides with the face of the rubber, and hence it is said that the latter must have here a straight line, and so is not concave in longitudinal cross-section. We have some doubts about the perfection of this test, because a very slight pressure upon the elastic rubber would close any curve opening between the two. Some of defendant's samples appear to the eye and to the touch to be curved along this line. However, this is not controlling. We said, in the other case, that the true test of whether this was concave was to ascertain whether, when it was disposed in the right relation to the plane of the bottom of the heel, placed horizontally, there was a low spot which, at least theoretically, would retain liquid without running out at the breast. With this definition, it becomes unimportant whether the line which rises from this low spot to the center of the edge of the breast is curved or straight. The application of the suction test to defendant's samples indicates, if it does not demonstrate, that they have this central depression on the longitudinal cross-section, which causes the center of the edge of the breast to tend to hug the heel, and the application of the same test to the Nerger samples, made in the identical molds which he used, discloses an absence of this quality. We must therefore classify defendant's lifts with Tufford, rather than with Nerger.

The order will be affirmed.

AUTO PNEUMATIC ACTION CO. v. OTTO HIGEL CO., Inc.

(Circuit Court of Appeals, Second Circuit. June 13, 1919.)

No. 230.

PATENTS ⊂=328—FOR MECHANICAL PIANO VALID AND INFRINGED.

The Danquard patent, No. 766,601, for a manually or mechanically operated piano, *held* not anticipated, valid, and infringed.

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

Suit in equity by the Auto Pneumatic Action Company against the Otto Higel Company, Incorporated. Decree for complainant, and defendant appeals. Affirmed.

Kerr, Page & Hayward, of New York City (Thomas B. Kerr and Parker W. Page, both of New York City, of counsel), for appellant.

L. W. Southgate and O. Ellery Edwards, Jr., both of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The appellee has obtained an interlocutory decree, in equity, granting an injunction and accounting against the appellant for infringement of patent No. 766,601 granted on August 2, 1904, to Thomas Danquard. The invention is for a manually or mechanically operated piano, in which the piano action proper and the pneumatic playing mechanism are combined in one self-contained structure, the working parts of which are supported within an ordinary piano case and may be operated manually by fingering the keyboard. It may also be played mechanically by the operation of pneumatics upon parts moving the hammers of the piano action. It is generally known as a piano player, and a large industry has been established in manufacturing it.

The patent in suit has been before this court and was declared valid and infringed in Auto Pneumatic Action Co. v. Kindler & Collins et al., 247 Fed. 323, 159 C. C. A. 417. The present suit is upon claims 26, 27, and 31, which were in issue in the case referred to, wherein the patent was declared valid. In that action the defendants, Kindler & Collins, set forth 56 alleged prior uses and some 61 patents as an anticipation of the patent in suit. Among these was the Brown player piano, constructed under patent No. 581,390, issued to Brown. This court held that Brown did not anticipate the patent in suit. In the defense interposed in this action, the defendant in effect, asks for a reconsideration of the defense of Brown's patent as an anticipation, and has endeavored to amplify its proof, with the hope that it now demonstrates that Brown's patent was an anticipation of the patent in suit; and, further, it has offered as an additional part of the prior art the French patent to Thibouville-Lamy. It will only be necessary for us to consider the effect of this amplification of proof, together with what is urged in the present argument, and also the effect, if any, as part of the prior art, of the introduction of the French patent to Thibouville-Lamy.

The main problem of the manually played piano was the arrangement of sounding boards, frame, strings, and scale to obtain harmonious acoustic properties and the perfection of the piano action; that is, the operating mechanism between each key and hammer. As we look at the piano action to-day, it comprises a very complicated system of levers, cords, strings, and dampers balanced and accurately positioned, and so disposed that when a key is depressed, the damper will be raised from the string, the hammer thrown with a quick action against the string, and then quickly pulled away from in contact with the string, and the parts being further arranged so that, when the finger is raised from the key, the parts will assume their normal position and the damper will stop the vibration of the string. The piano action is comprised, in main part, of a rod called the manual abstract,

carried by a pivoted link and extending upwardly above the inner end of the key, which rod is pivoted to a wippen, which in turn carries a pivoted jack or trigger, which engages the butt of the hammer. The inner end of the wippen operates in a system of levers, which controls the action of the dampers, and its outer end carries a wire and cord to cause the hammer to rebound quickly, and a cushion for catching the rebound. By depressing a key of the piano, a hammer will strike and vibrate the string and play the note.

In the apparatus of the patent in suit, the striker is slotted so as to get an elastic action between the pneumatic and the action. The patent touches the connection between the exhaust bellows and the piano action and the integration of all the parts into one unital structure, which may be moved into and out of the piano case without any reorganization of its parts. An important feature is the upright rod or abstract, which, through the mediation of a pivoted piece of wood, referred to as a stricker, directly touches and moves the wippen of the piano action when the bellows is collapsed by a vacuum. By its construction, when the mechanical attachment is not in operation, the piano itself may be played as though the player was not attached, and this without any effect upon its tone.

The problem which this inventor solved was to incorporate the mechanically playing mechanism directly in the piano case itself and leave the keys in position, and uncover them, so that the piano can be played manually in the ordinary way and mechanically by operating the player mechanism. That he has succeeded is evidenced by the phenomenal success manufacturers have had under the Danquard invention.

At the trial below, Brown's relation of the manufacturer of piano players, and the result of the effort to manufacture and sell pianos made under the Brown patent, is given in considerable detail; but the result does warrant the conclusion that pianos made under the Brown patent were not successful, and they did not meet the demands of the trade. In the Brown structure, extending down from the pneumatics, are wire pullers on their bottom ends, which wires fit loosely into slots in brackets or to the keys. There is a separate angle lever on each manual abstract or piano key. Brown's mechanism could be removed and replaced as a unit, but replacement was an extremely difficult matter, for it involved the correct insertion of the ends of the wire pulleys, 65 in number, into the slots of the angle levers; and, while this could be accomplished, the difficulty was the fact that the installation of the player mechanism destroyed the touch of the piano action. The angle lever will affect the touch, for it adds weight. The manual abstract is a light vertically extending strip of wood, and there is difficulty in attaching these angle levers thereto, as they have to receive all the blows of the pneumatics when the instrument is playing mechanically. The touch will be affected by the fact that the angle levers have to slide on the wires when the piano is played manually. The patent says:

"In case the keyboard is played manually, the depression of the keys at their front ends will free the buttons on their rear ends, raise the abstract to operate the hammer, and the angle lever will slide loosely on the pin without moving the same."

There is also the danger of the wires being bent or rusted, and if this should occur to the least degree, the depression of the key might be impossible or gravely interfered with. If the player action should be taken out and put back, or if it should be attempted to handle the player action as a unit, it would be inevitable that some of these 65 wires would become bent.

Brown modified the action from that provided in the patent. Instead of putting the angle levers on the manual abstracts, the middle levers are carried by the lower ends of the manual abstracts, and are extended and made in the form of what is now called the boot jacks; but still the wires extend through the slots in these boot jacks, and when the action was put in place they had to slide therein during the manual playing, and this construction likewise spoiled the touch of the piano, particularly if the wires should be a little bent, so that they would not be perfectly safe. This would afford frictional interference to the playing of the key, and also frictional resistance against the rebound of the hammer, so that the quick repetition of the key would be difficult in actual playing, and would likewise give a lack of uniformity of touch throughout the entire keyboard. To attempt to get the modified device to operate properly, a series of stops were arranged as part of the piano above these boot jack levers. When the piano is assembled, they are inaccessible, and to adjust the same the player action has to be taken out, and an adjustment of mechanical playing cannot be made, as the mechanical mechanism is not in place. These stops not only come into action when the piano is playing mechanically, but they are operative when the piano is played manually by depressing the keys. They added another complication, and tended to spoil the touch of the piano keys, because they interfered with the action of the stops upon the front end of the keys. These were the reasons why the Brown modified structure was not successful or desired in the trade. We find nothing in this additional or amplification of the proof to warrant a change of the court's conclusion, in the Kindler Case, that the Brown patent did not anticipate the patent in suit.

The French patent was an effort to do away with the cabinet, and this the patentee states. There the inventor removes the front of the casing, the keyboard, and the keys of a manually operated piano. He removes the abstracts and supporting levers, and attaches a player mechanism solidly built into a new shaped casing. The player mechanism comprises a series of folding jointed leaves which are progressively carried across the front of the casing and which leaves trip little levers. This crosswise arrangement is necessary, owing to the length of the mechanism it takes to manipulate these folding cardboard leaves. By this construction there is built an auto piano without a keyboard, for the keyboard and keys have been entirely removed and the piano action has been mutilated; that is, the abstracts, supporting levers, and rail are removed to get the bellows and pneumatics in place in front of the strings below the piano action. It is not known what effect it would have upon the touch, for that is removed.

The appellant, however, insists that there might be rebuilt keys and keyboard in front of the actions, and thus retain the capability of manual playing, and therefore anticipate the patent in suit. The evidence does not warrant a finding that this could be done practically and that it would be operative. There is nothing to support the lower ends of the assumed manual abstracts. If they are spaced to be attached to the keys, the action will be ripped to pieces, if it were attempted to remove the supplemental casing. At any rate, it could not anticipate the Danquard, nor the claims here in suit. The structure has no grip devices adapted for removal together from the instrument case. It has no tracker and music sheet rolls, as provided in claims 26 and 27, and there are no adjustable stops regulating the movement of the action by the pneumatics and strikers, as stated in claim 27.

We think that this patent adds nothing new to the prior art over that which was previously considered by this court in the Kindler Case, and that it does not anticipate the patent in suit.

The only other patent which we deem it necessary to consider is that of the Gulbransen device. There the piano action abstracts were provided with angle levers, which, instead of being operated by pullers, were engaged by arms or wings attached to the underneath sides of the movable levers of the pneumatics. The efforts of Gulbransen to successfully manufacture any development of this idea have failed. Gulbransen says that, "while his construction is different, the principle is the same as that of the Brown patent," and the appellant has argued that it is a development of the Brown patent. It has no pins with buttons to pull up through brackets attached to the abstracts or keys as Brown has. In the Gulbransen structure, brackets were attached to the piano abstracts, and these brackets were engaged directly by wings or projections from the pneumatics and there were no pullers. Its nonsuccess resulted. A difficulty he was unable to overcome was in attaching these brackets to the abstracts. The attachments varied in weight, and, even if properly balanced by loading each of the three keys differently, the operation of each of the three adjacent keys would be different; the touch of the piano was spoiled, because it is essential to the touch of the piano that the operation of all of the keys on action would be exactly the same. Gulbransen tried for 11 years to make a practical device, and has not been successful.

We think the new evidence, or amplification of the old, adds nothing to that which has been previously considered.

Decree affirmed.

PAIGE v. BROWN et al.

(District Court, E. D. Pennsylvania. October 31, 1919.)

No. 1791.

1. PATENTS ⟸328—INFRINGEMENT OF MECHANISM FOR MAKING BIFOCAL LENSES.
The Paige patent, No. 1,260,022, for mechanism for making bifocal lenses, held not infringed.

2. PATENTS ⟸241—INFRINGEMENT BY MACHINE CAPABLE OF REACHING SAME RESULT.
That a machine of a different type from that of a patent is adaptable for use as the patented type does not establish infringement, in the absence of evidence that it has been or was intended to be so used.

In Equity. Suit by Arthur E. Paige against Andrew V. Brown and Mary E. Brown, trading as D. V. Brown. On final hearing. Decree for defendants.

Arthur E. Paige, of Philadelphia, Pa., in pro. per.

Harrison F. Lyman, of Boston, Mass., Joseph C. Fraley, of Philadelphia, Pa., and Fish, Richardson, Herrick & Neave, of Boston, Mass., for defendants.

DICKINSON, District Judge. The plaintiff is influenced naturally, and indeed necessarily, by a situation which has no evidential value and is not very clearly reflected by the evidence. It is, however, this: He had negotiated and reached an agreement, and had tentatively made it, with one of the counsel (none of the present counsel however) for the defendants. By this agreement, if defendants had made it, the defendants would have used plaintiff's machine under a license and upon terms accepted by both parties. We make no finding of this fact, because there is no evidence of it in the cause, and in the nature of things could not be. Without intending any play upon words, although there is no evidence of it in the record, it is none the less evident that the plaintiff dealt with the defendants in the reasonable expectation that some such agreement would be made. It was not made, and of course the defendants were within their legal rights in refusing to make a contract, no matter how far (short of an agreement) the negotiations had been carried. We have no thought of criticism of the defendants in mind. The to-be-expected effect of this and other things, however, was to make the plaintiff suspicious of the defendants, and, when he found they had put out what is known to this record as defendants' machine, he drew his own inferences of the motives and conduct of the defendants in doing whatever they did. His inference, as again to be expected, was that, instead of buying from him, they had taken the inventive ideas, which were his property, and which he had brought to them, and had designed a machine which was the equivalent of his machine, but had cleverly constructed it so that the principles of its construction would seem to differ from the principles on which his machine was made to operate.

This attitude and state of mind of the plaintiff, coupled with the other feature of the case, that he has himself conducted the trial without the assistance of counsel, has added to the difficulties of the trial judge. Being in the state of mind in which he was, it was impossible to keep down the expression of the feeling of injustice done him, with which he was filled, and although at all times he was careful to exclude, so far as possible, opposing counsel from incrimination (and the plaintiff and opposing counsel are to be commended for the dignity and courtesy which they have displayed throughout the trial), it was again impossible for the defendants to refrain from angry retort and recriminations. So far as could be done, these by suggestion and ruling have been kept out of the record. It is one of the duties of a trial judge to get into sympathy with each party to a controversy, so as to understand his attitude and through this his point of view. We in consequence, feel toward the plaintiff this measure of sympathy, even when we do not share his suspicions.

The trial of this cause, largely for the reason intimated, has taken a very wide range, and the discussion an even wider one. Many issues have been raised which ordinarily would call for discussion and length of discussion. The record is very voluminous, and as the argument was held some time after the trial, and time had to be given to prepare paper books, this necessitated taking the time to go over the entire record. We felt the duty of doing this, because the first impression received was that the one issue of infringement was the controlling issue in the cause, and none other need be considered. Before adhering to this first view, we felt that we should review the whole case, and this we have done. The result is our first impression is confirmed.

We state the conclusions reached with some diffidence, because they involve wholly a mechanical construction with its principles of mechanical operation. There is a type of mind which, if not wholly devoid of mechanical ideas, does not take kindly to them, and comprehends them with difficulty, and is without that power of imagination which, given the idea, at once constructs a machine embodying and applying it. To get the point upon which this case is ruled, we need to know only two types of machines with which this case concerns itself.

The machines with which we are concerned are mechanisms for shaping ophthalmic glasses. The letters patent are No. 1,260,022, bearing date March 19, 1918, and relating back to an original application filed March 4, 1915, and carrying the serial number 12,028. The original application was divided, and the application upon which the grant of letters was made was filed July 4, 1917, and bears the serial number 178,523.

To enable one unfamiliar with the art to get an intelligent grasp of the question of infringement involved, a number of general conditions and principles affecting the art must be understood. The motive (aside from the commercial one and entering into this) which induces the effort to promote the art is to provide artificial aids to and means for correcting defects in human vision. These objects are accomplished by

interposing between the eye and the objective of vision a transparent glass lens, to which has been given the proper form of surface. Generally classified, these forms are spherical, cylindrical, and toric. As the objective of vision may be near to or remote from the observer, we have the classification of near sight and far sight. This brings to those concerned with the development of the art, as one feature of the problem presented to them, the necessity of the convenience of providing for near sight and far sight in one glass or lens. A very common defect in vision is astigmatism, a correction for which must also be provided through and by the forming of the lens. The ultimate end to be reached by making glass adapted to the use of the individual user can be reached only through and by calling in the aid of the knowledge and skill of the oculist and predetermining the kind of glasses required. Out of this has grown the practice of making glasses to conform to prescription.

The general methods of the art are to first form the glass into plates of a convenient size and mold them into a rough similitude of the form they are finally intended to be given. They are then called "blanks." The glass is then, by grinding, made to assume common prescribed forms, at least approximately adapted to different desired uses. The lenses in this form are sold to opticians, who grind them to conform to what has been prescribed for the individual who is to use them. This art, as every other, has its own nomenclature. Those engaged in supplying lenses to the opticians are called manufacturers of lenses. The most generic term applied to the process of perfecting lenses is "surfacing," although "grinding" is also a term employed. Shop terms are employed to designate different steps of the process, and we have rough grinding, surface grinding, and polishing. To enable the user of glasses to look at objects near at hand, or at distant objects, or those intermediately placed, without changing his glasses to accord with the distance, he is given what are really two glasses in one. In the common phrase, when he looks through one part of the glass there is one focus, and when he looks through another part of the glass there is another focus. Devices enabling him to do this have been successively, and perhaps in merit progressively, brought into use.

The means of meeting the relatively simple problem of providing what are commonly called reading and distance lenses in the same glass may be used as an illustration of the different devices to which resort has been made. They are common in the respect that the reading lens is placed in the lower part of the glass. One device is to form the surface of the glass as a distance glass, and then above its lower edge to attach upon it a circle or segment of glass, the surface form or composition of which makes of it a reading glass. Another device is to cut out of this distance glass, in a like part of the glass, a circle or segment, and insert in this aperture another glass, which is fused with the distance glass, and forms in itself the reading glass. This make of glasses or spectacles is known by the trade-name of "Kryptoc."

Another device or method, and the one with which we are more particularly concerned, is to take one piece of glass, grind the upper portion into a surface form which will make of it a distance glass, and

grind the remaining portion, corresponding to the circle or segment before mentioned, into a surface form which will make of it a reading glass; the ridge formed by the meeting line being so disposed as, so far as it is possible, to minimize its effect as an obstruction of vision.

All these glasses have a common purpose and a common character, in that they are bifocal. They are designated in the art, and in the trade which follows the art, by appropriate names. One part of the art concerns itself with the making of means or mechanisms for doing what is above described as necessary to be done in giving to glasses, which reach the customer, their final form.

The principle of operation by which the surface of a glass is made to take a prescribed form is interesting to one who is a novice in the art. There are two principles of operation, either of which may be employed. One is known as the lap tool method, and the other as the ring tool. The operation by which each of these principles is brought into play, in the general use of it, is as follows:

The glass, the surface of which is to be ground into a shape, is brought into a closely approximated contact with the abrasive tool, with emery or other abrasive substance interposed, so as to make contact. The grinding power is supplied by having the tool attached to a revolving spindle, and the glass attached to a like tool, which is also revolved. The grinding tool and the glass to be ground must of course be kept in contact, notwithstanding the recession caused by the grinding of the glass and the wear of the tool. A method, although not a practical way of doing this, would be by successive manual adjustments from time to time as the progress of the operation called for them. Another method would be by providing some mechanism by which the glass and tool would be automatically kept in contact and adjust themselves to the proper relation as the work progressed. Another method would be to provide for such automatic adjustment required because of the recession of the surface of the glass, and manually readjust the tool when necessary because of its recession through wear.

Whatever method is employed, it is obvious that the mechanism must be so constructed as that the tool is made movable, so that it may approach the glass, or the glass be made to approach the tool, or both be capable of such advances. This brings in, at least theoretically, possible variations. The tool-carrying mechanism may be made rigid, and the glass-carrying mechanism thus movable, or these capabilities may be reversed, or both may be made movable.

There is also a difference, as before stated, in the tools used and in the principle upon which they operate. By the lap tool method the tool employed must have the form prescribed for the glass to be ground, because the form of the tool determines the form of glass surface produced. Reduced to its simplest statement, this process and method involves nothing more than bringing the glass into abrasing contact with the tool through the medium of emery or other grinding material. If the instruments employed in this process are conceived of as a tool having, for illustration, a concave, spherical face, and a piece of glass, together with emery or other abrasive material in proper placement, and the glass is rubbed upon the tool, or the tool upon the

glass, or both, and the pressure is applied, so that it may affect equally every part of the concave surface of the tool, the glass will take a convex form, exactly corresponding in reverse to the form of the surface of the tool.

It is clear that by this method the tool and glass cannot be held in any fixed relation with respect to the point or line of contact being indicated by the angle formed by the intersection of the axis of rotation of the tool and glass, respectively, but the tool and glass must be left theoretically and practically, as nearly so as possible, free to change such relation at any and all times.

A corollary proposition is that a different tool must be employed to grind when the surface to be ground is different. By the ring tool method this latter proposition does not hold good, and the same tool may be made to grind a surface of any prescribed curvature. This is because the form of the surface ground is controlled by the operation of a wholly different principle. The principle is this:

That when the line of the axis of rotation of the tool is disposed at an angle to the line of the axis of rotation of the glass, the form of the spherical surface generated is determined and measured as a spherical surface corresponding to a sphere, the radius of which is exactly equal to the distance from the point at which the line of these axes, if produced, would intersect, to the surface to be ground. The corollary proposition flows from this that the relation between the lines of these axes must be predetermined, so as to result in the prescribed form of surface, and must be kept theoretically, absolutely, and practically, as nearly as possible, fixed and rigid.

A further necessity of the use of these methods is that the parts of the mechanism required to be adjusted to different uses must be adjustable so that, for illustration, these axial lines may be concentric, may be eccentric but parallel (in which case a plane surface would be produced) or disposed at an angle by which a predetermined curved surface may be produced.

There may be another different or alternative feature of the operation of the tool, in that the line of the axis of the tool may be disposed of at an angle with the line of the axis of rotation of the spindle to which the tool is attached, so as to impart a planetary movement where the tool and glass come in contact. In such cases the contact of tool and surface is not a point contact, but a line contact. By the ring tool method the desired concavity or convexity is secured by the axial intersection referred to being above or below the surface to be ground.

The inclusion of the number of different features which are given to mechanisms of the general kind indicated brings into the make-up of these mechanisms a complexity which is confusing to minds untrained to the reception of ideas of mechanical construction.

[1] With the state of the art, such as above generally described, the plaintiff made his first application for letters patent. The novel, useful idea, upon which he claimed to have come, he describes in his application as an "improvement in mechanisms for making bifocal lenses." What he had in mind evidently was the construction of a mechanism which would produce curved surfaces and especially and more par-

ticularly two differing ones on the same glass, so related to each other that they would adjoin in the sense that the one would begin where the other left off, and each would carry the curvature peculiar to it up to the junction line, thereby sharply defining it. In this statement we have paraphrased the language of the application.

Another thought is that the operation of this mechanism takes in the expedient of grinding out of one piece of glass two bifocal lenses at the same time. This is accomplished by holding the glass to be ground in such manner that what becomes the minor area in one of the two lenses when ground is next to what becomes the minor area in the other lens when ground, and these minor areas are between what become the respective major areas of the lenses when ground. The grinding is accomplished by having as part of the means by which the grinding is done a tool which has an annular abrading surface, the line of contact movement between which and the glass is transverse. A sharply defined junction line between tthe minor and major areas of each lens is obtained by having the glass ground in a direction obliquely transverse to this line. This obliqueness is brought about by having the axial lines of rotation of the glass and the tool disposed to each other so as, if produced, to form an angle. In the grinding of the minor areas this axial relation is preferably maintained; but in the grinding of the major areas, in order to reduce the danger of the scratching of the glass the abrading material which travels with the tool should be moved crisscross of the movement of the abrading material which travels with the glass.

Another thought is to have the mechanism so adjustable as to afford the advantage of capacity to make compensation for the wear of the tool.

The claim is advanced that a conoidal shaped lap may be made to produce a spherical surface of the radius of curvature corresponding to the transverse curvature of the tool (without regard to its circumferential curvature), and to the extent to which use increases the convexity of the lap the line of contact may be shifted, so the spherical curvature may be changed from one which corresponds to the first radius of the curvature of the lap to the one which corresponds to the less radius. The limitation of this adjustment is controlled by the presence of the minor lens areas.

The claim of invention is for an "improvement in surfacing mechanisms." The mechanism claimed to have been invented is generally described as one so constructed and adjustable as to accomplish all the results before described which are gained when the ring tool method is employed, and, with one exception, all the features thus generally described, and as particularly described and illustrated in the drawings, call for a mechanism to be operated upon the ring tool principle.

The exception referred to is the modified arrangement by which the movement of the tool with respect to the glass may be planetary. This arrangement is illustrated in Fig. VII.

We need, because of this and the principle of operation of defendants' machine, inquire no further into that branch of this art, which concerns itself with the construction of machines, than to get firmly

into our minds this distinction between the two methods, known as the lap and the ring tool. The essential, or at least one essential, difference and distinction is this freedom of movement or "wabble" in the lap tool method, and this fixity of relation in the ring tool.

The defense to the charge of infringement is broadly stated that the plaintiff's machine belongs to the one class and the defendants' to the other. The reply is that this general character of defendants' machine is assumed for the sole purpose of escaping the charge of infringement, and that it is so constructed that by manipulation it can be and is intended to be operated as is that of plaintiff. To demonstrate this the plaintiff has shown how this, as he claims, may, and, as he charges, is intended to, be done.

The moment we get beyond this finding of infringement, and seek to follow the parties in their further controversies, we are lost in a maze, as well as multitude, of issues, the discussion of which is well-nigh interminable. We have given up in despair the attempt to adequately state, much less discuss, them. For this reason we content ourselves with a finding upon this question.

[2] We are not wholly sure that we are doing full justice to plaintiff's position in the view of it which we have taken, due to a failure to grasp the thought with which the plaintiff has met this defense of a denial of infringement; but it seems to come down to this: That the defendants' machine may readily and easily be changed from the type to which it in the first instance belongs to the type to which plaintiff's machine belongs. More than this possibility, or even adaptability, of use is required to establish infringement. Infringement is a fact, not an abstraction or a possibility. We are referring to the stop mechanism of which so much has been said. Whitney v. New York, 243 Fed. 180, 156 C. C. A. 46.

Plaintiff, of course, appreciates this, and seeks to have added to a finding of adaptability the further finding of an intent and purpose to have the infringing machine so used. This would bring the present case within the principle recognized in Henry v. Dick, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

Such intent and purpose, if it existed, would certainly bear fruit in such infringing use. Until some one has infringed, such intent and purpose, if it could be established, remains an intent to infringe, and is not an actual infringement, and clearly, in the absence of a confession, no finding of an intent to do a thing which it is averred can readily be done, which there has been ample time to do, would be justified, in the absence of evidence that the thing had been done. At all events, no injunction is ever awarded on the mere showing that the thing to be prohibited is within the power of the defendant to do, and this is emphatically so when there has been ample time and opportunity for him to act, and he has so far refrained, and still more emphatically is this so when the doing of the thing is something for which the defendant may be called upon to respond in damages, and money damage is the sole injury which plaintiff suffers.

This explanation should be given, in order that some of the foregoing statements may be intelligible. The defendants of record in

the case compose a firm doing business in Philadelphia. The machine alleged to be an infringement of plaintiff's machine is made by the American Optical Company of Southbridge, Mass. The latter company conducted the defense, and took upon itself the whole burden of the defense, so that the case was tried as if the Optical Company had been the defendant. The distinction between the nominal defendants and the real defendant, by the stipulation of the parties, has no significance. It is mentioned, as before stated, merely to explain why it is that the defendants are treated as if they had made the infringing machine.

We find against the plaintiff, on the ground that defendants have not infringed, and dismiss the bill solely on this ground, with costs to plaintiff.

We will follow the practice in this case of not now dismissing the bill, but granting leave to parties to submit a formal decree to this effect. This is done, so that the date of decree may be a definite one.

CHURCHWARD INTERNATIONAL STEEL CO. v. BETHLEHEM STEEL CO. (CARNEGIE STEEL CO., Intervener).

(District Court, E. D. Pennsylvania. October 30, 1919.)

No. 1491.

1. RELEASE ⊂=33—SCOPE OF ACQUITTANCE FOR INFRINGEMENT.
   An acquittance given one company for infringement of patent in manufacturing and selling up to a certain quantity construed as also acquitting its licensees and vendees.
2. PATENTS ⊂=129—ATTACK ON VALIDITY BY LICENSEE.
   Validity of a patent may not be questioned by one asserting license to operate under it.
3. TRIAL ⊂=387(3)—RULING ON QUESTION NOT MATERIAL TO CASE NOT NECESSARY.
   Whether a defendant, setting up a license to make up to a certain quantity under a patent, may as to the excess deny validity of the patent, will not be decided; it not being essential to a decision of the cause, and plaintiff not asking that the case be ruled on that point, but merely characterizing defendant's position as advanced with ill grace.
4. PATENTS ⊂=49—EVIDENCE OF UTILITY.
   That a patented process for manufacturing steel was used, and that a large manufacturer, through its officers, having the fullest knowledge of the science and art and having at their command the best experts, paid a large sum for infringement and right to use, is strong evidence of utility.
5. PATENTS ⊂=45—LETTERS PATENT SUFFICIENT EVIDENCE TO SHOW VALIDITY AS AGAINST CLAIM OF NO ADVANCE ON PRIOR ART.
   Letters patent, pertaining to a most important art, are prima facie evidence sufficient, in the absence of controlling evidence to the contrary, to support a finding of validity against a claim of no advancement on what was within the common knowledge of all familiar with the metallurgical science.

In Equity. Bill by the Churchward International Steel Company against the Bethlehem Steel Company; the Carnegie Steel Company

intervening as a defendant. Sur trial hearing on bill, answer, and proofs in suit for infringement of letters patent Nos. 845,756 and 868,327. Decree for plaintiff.

See, also, 233 Fed. 322.

Charles H. Duell, Frederic P. Warfield, and Holland S. Duell, all of New York City, for plaintiff.

Fraley & Paul, of Philadelphia, Pa., and Charles Neave and Clarence D. Kerr, both of New York City, for defendant.

R. V. Lindabury, of Newark, N. J., Henry P. Brown, of Philadelphia, Pa., and D. Anthony Usina, of New York City, for intervener.

DICKINSON, District Judge. In view of the interval between the commencement of this suit and the final hearing, it may be well to say a word in explanation, if not in justification, of the delayed trial of the cause. The bill was filed October 29, 1915, and was ready to be heard May 28, 1917. The complaint involves a charge of trespass upon the claimed patent rights of the plaintiff in the making of what are termed alloyed steels. The metal was made in part for the use of the United States, and the question arose of whether the rights of the plaintiff could be asserted in the manner sought to be asserted for such use of the patented product. The very question, or the general question involving it, which thus arose in the cause, was then before, or about to be presented, to the Supreme Court of the United States for determination. It was thought well, in view of this, to defer the trial of this cause until that question was determined, in the hope that when it was determined the parties would be able to adjust their differences. This has proven to be a "hope deferred," because, although the suggested question has been determined, it has not disposed of the cause, and it comes now before the court upon final hearing. Marconi v. Simon, 246 U. S. 46, 38 Sup. Ct. 275, 62 L. Ed. 568; Cramp v. Curtis, 246 U. S. 28, 38 Sup. Ct. 271, 62 L. Ed. 560.

In the view of counsel the following questions are involved:

(1) What effect the dealings between the plaintiff and the Carnegie Steel Company, the intervening defendant, and the agreements entered into between them, has upon the right of the plaintiff to recover against the Bethlehem Steel Company, defendant, for what would otherwise be a trespass upon the plaintiff's patent rights.

(2) Whether the interposition of the claim to a license or release of damages prevents the defendant from questioning the validity of the plaintiff's rights.

(3) The utility of the thing patented and the (in other respects) validity of the patents in view of the state of the art and of the accomplishments and practices of steel makers at the time the patentee developed the combination which enters into his make of metals; the question involving also what contribution the patentee had made to the art and the question of double patenting.

The suggested questions 1 and 2 arose out of this state of facts:

The plaintiff owned or controlled, not merely the letters patent here directly involved, but also patents which had been issued in other countries. The Carnegie Steel Company was charged by the plaintiff with a trespass upon the proprietary rights given by the United States

patents. This charge of trespass was withdrawn in pursuance of an agreement entered into between the plaintiff and the Carnegie Company, which was reduced to writing and executed by the parties to it. The consideration moving to the plaintiff was the payment of the substantial sum of $275,000, for which the Carnegie Company was given an acquittance of all claims of damages or otherwise for any trespass in this respect upon the rights of the plaintiff of which the Carnegie Company may have been guilty. The Carnegie Company was further given a license to operate under the foreign patents of the plaintiff, and the still further right to operate under the United States patents; such latter operation to be limited to the production of war materials.

It should be interpolated here, to make clear the scope of the subject-matter of the agreement, that the Carnegie Company had not merely manufactured and used what was averred to be an infraction of plaintiff's patent rights, but they had sold to others, who had themselves used, so that there was the charge of infringement, both direct and contributory. The acquittance was in consequence extended to include the licensees and vendees of the Carnegie Company.

This agreement has been set up directly by the Carnegie Steel Company as an intervening defendant interested in the cause, for the reason that it had warranted to its vendees and licensees the right to make, vend, and use that with which the Carnegie Company supplied them and had authorized them to make. The agreement is also set up as a bar by the Bethlehem Steel Company on the several theories which, for the purpose of the presentation of the question now being made, it is unnecessary to further set forth.

On the other hand, the doctrine is invoked by the plaintiff in support of its patent rights that the validity of a patent cannot be questioned by one who is operating under it through a license from the patentee. Hence it is that questions 1 and 2 arose. An attempt was made (now abandoned) to reform the agreement thus pleaded, by rewriting it, so as to expressly except out of its provisions the Bethlehem Steel Company and other companies.

It is conceded, as we further understand it, that this branch of the defense is limited to 600 tons of the total tonnage which is complained of by the plaintiff as a trespass upon its rights. If this release, license, or agreement, whatever it may be termed, operates to prevent the plaintiff from being successful in the assertion of its complaint, this branch of the defense is limited to this 600 tons. It leaves, however, of course, in the case the effect of such a defense upon the other question of whether the defendants are free to attack the validity of the patents.

[1] We do not deem it necessary to do more than state the conclusion reached with respect to this defense, so far as it is a defense. The attempt to rewrite the agreement having been abandoned, we must construe the agreement as it is written, and the construction given it is that it operates to acquit, not merely the Carnegie Steel Company, but the Bethlehem Steel Company of all right of recovery with respect to these 600 tons.

[2] So far as the effect of the pleading of this release or license affects the other question of the right of the lessee or licensee to attack the validity of patent rights, of which the Carnegie Steel Company are pro tanto asserting themselves to be owners, we are further of opinion that that company is within the doctrine invoked, and as a consequence cannot be permitted to be heard to deny validity.

[3] This leaves in that branch of the case only the question of whether the Bethlehem Steel Company is also within the application of the same doctrine. Inasmuch as the Bethlehem Steel Company, in asserting the rights of the Carnegie Steel Company, has made use of the paper referred to as a mantle of protection, it was urged at the argument at bar, on behalf of the plaintiff, that it must be visited with all the consequences of shielding itself under such protection. This was met by the Bethlehem Steel Company with the assertion that the definite ruling has been made that it may set up the defense of such a release or such a license without prejudicing its right to attack the validity of the patents, when charged by the patentee with an independent trespass by the Bethlehem Steel Company upon the patent rights asserted.

The case of Symington v. National (D. C.) 257 Fed. 564, and others, are cited as decisive of this question. It is to be observed that the Symington Case and the supporting rulings quoted in the opinion in that case plant the ruling made upon a fact situation which does not here exist.

The cases relied upon present the question of whether a defendant, who has accepted a license to manufacture one thing, which is asserted by the licensor to be within the claims of his patent, is estopped from making another and different thing merely because this second thing is also claimed by the patentee to be covered by the claims of his patent. The ruling made was that he is not so estopped. The fact situation here, however, is different, and in consequence the question presented differs from the one ruled. Here the question is whether a defendant, who has infringed the patent rights of the plaintiff by making something which it is the exclusive right of the plaintiff to make, is permitted to defend by setting up a license to make up to a limited quantity of the product, and as to the remainder to deny the validity of the patents under which he has been exercising the right to make.

We do not find, however, from the brief of the plaintiff, that the plaintiff relies upon the doctrine above suggested, nor is the court asked to declare and apply that doctrine to the facts of this case. Counsel for plaintiff seems to have contented himself with characterizing the position of the Bethlehem Steel Company as one advanced "with ill grace." Unless the logical necessities of a ruling of the case call upon the court to rule it upon a point or points not advanced by counsel, it is usually the part of practical wisdom not to so rule it.

Counsel engaged in this cause have had much more time and a very much better opportunity to analyze the case and its defense than the trial judge could possibly have, and we have that measure of confidence in the judgment of the able counsel who represent the respective par-

ties to accept what they deem to be its ruling points, and inasmuch as we are not asked to rule the case upon this point, and it is not essential to a decision of the cause, we leave the point as presented without a decision and without further discussion.

[4, 5] Upon the third question suggested, we have the following alignment of opposing views: The plaintiff relies largely and practically wholly upon the prima facie case, evidenced by the grant of the letters patent, and upon what the plaintiff regards to be the weakness of the attack made upon its rights, and asks for a finding that its patents are valid. There is no question of infringement.

Counsel for defendant deny the validity of the patents on a number of grounds, among which it is sufficient to enumerate those following: One is that the patentee made no contribution to the art, in that every substantial thought, at least every one which is definite enough to be grasped and comprehended, was a thought already well known to all who were informed as to the state of the metallurgical art, and was one which could be readily found in the literature of that art. Another ground is in large measure the same viewed in a somewhat different aspect. It is a denial of utility, in that all that was useful or helpful in the art, as disclosed in the patentee's applications and claims, was already among the possessions of the art, and that the only contribution which the patentee made was his idea of the proper relative quantity of the different metals which should go into the production of alloyed steel, and that a steel manufactured in accordance with the ingredients proposed by the patentee, and in the proportions suggested by him, was a product of no value to steel producers or users. Still another ground is that the second patent is in all essential respects the same as the first patent, except in the particular that one is an overlapping of the other, in the sense of being a mere extension of the quantitative range of the metals used in getting the product.

However much the very strong argument in support of the attack upon the validity of these patents might make upon the mind, if the defendants had done nothing more than do what is charged to be an infringement, we do not feel called upon to declare. Each and both of these defendants have had more than this to do with the patented product and with the patentee. This is emphasized in the case of the Carnegie Steel Company.

One ground of invalidity urged, and that very strongly, is that steel made in accordance with the patented process is without value. Some opinion evidence has been given in support of this denial of utility. It would be a bolder finding to make than we care to make, however, that something which at the very least was urged as a lever to pry $275,000 out of the grasp of the Carnegie Steel Company was something which was of no use. As has been repeatedly observed, an infringer is in the worst possible position to raise a question of the utility of that which he has without authority used. The query cannot be repressed, "If the thing is of no use, why did you make use of it?" We have the fact that the Carnegie Company were charged with the infringement of these patents; the further fact that the company paid $275,000 to escape the consequences of infringement, and the right to

manufacture under these patents to a limited extent; and the still further fact that afterwards, and after the infringement now complained of, they sought to buy the right to manufacture under these letters patent. We have in mind that there was included in the $275,000 payment the sale of the foreign patents, and that their request for a second license was after they had committed themselves by accepting the first license. We have the additional circumstance that the officers who negotiated for these licenses were men having the fullest knowledge both of the science and the art which had to do with this product, and that they had at their command the services of the best experts the world could produce. It may be that the real object they had in view in the first negotiation was an ulterior one, and was neither limited to nor did it have in view the question of value in these patents. We do not lose sight of the fact that what was paid included the purchase of the foreign patents, and that the Carnegie Company might have been willing to pay the whole sum paid for these patents, and attached no value to the United States patent.

We are not concerned at present, however, with any other question than the utility of the thing patented, and the payment of a large sum of money by a party to a cause of any patent granting the exclusive right to manufacture and sell a thing is evidence, and indeed evidence hard to overcome, that the thing patented was useful, whether the United States patents were of any value or not. Why should any one want the patent rights (irrespective of where the patents were issued) to make something which was not worth the making? What the Carnegie Company did in this respect is evidence, and indeed direct and persuasive evidence, of utility. It is not in the same sense, if indeed at all, evidence in the respect of being a reason for finding validity. Infringement, as before stated, is admitted. The letters patent themselves are evidence—prima facie evidence, it is true, but none the less evidence—to support a finding of validity. This evidence in a case of this kind is of more than formal value. The patented thing pertained to a most important art. The claims of the patent would in consequence at once challenge the exercise of the discriminating judgment of the experts in the patent office. More than that, the basis of the denial of validity is the common knowledge which was in the keeping of any one with any pretense of familiarity with metallurgical science.

The Patent Office, therefore, had before it all that we have before us, and the minds which passed upon this question were, minds which were trained to an appreciation of everything which pertained to this domain of science and to this art. The judgment then rendered must be regarded with more than a passing or merely formal respect. The defendants necessarily assume the burden of convincing us that the judgment then rendered was a wrong judgment and should be reversed. No one could easily assume the responsibility of deciding in a case of this kind and upon a question of this character that the experts in the Patent Office reached a wrong judgment upon questions which are peculiarly questions to be determined by those having a knowledge of this science and art, unless the person, reviewing the decision reached, finds himself to be a master of the subject.

What was passed upon, among other things, was that of whether the patentee had made any advancement in the art, whether his description of what he thought he had discovered was so set forth as that the thought could be grasped and comprehended, and whether the thing which was the subject-matter of the patent applied for was of any utility, and more particularly whether the applications and claims of the two patents so overlapped that they partook of the vice of double patents.

In a peculiar sense and to an unusual degree, these were all questions which the experts of the Patent Office are qualified to determine, and we do not care to take the responsibility of finding that they have reached a wrong decision, even if it be true that the conclusions reached by them differ from those which would have been reached by us, if the case had been one of the first impressions. Fortunately for all concerned, the law provides a means, to which resort will doubtless be had, for having the questions raised determined in accordance with sound principles of law and in the light afforded by a full knowledge both of the science and the art which bear upon these questions.

A frank avowal might as well be made of the view we have taken of this case. There is a homely saying to the effect that "the proof of the pudding is in the eating." The Carnegie Steel Company may be credited with an epicurean taste. This viand was eaten and most surely relished by them, for they paid $275,000 for the repast. More than that, after they had voluntarily paid this not inconsiderable sum for a very small portion of the dish, and indeed after the present controversy had arisen, they came back and asked for more, practically inviting the caterer to put his own price upon it. It may be, of course, that the food supplied had no food value, and was not even palatable; but any tribunal which made such a fact finding ought to be pretty sure of is ground.

We wish to be understood as having clearly in mind that the fact, even if it be the fact, that the highly trained and competent patent experts who were acting for the Carnegie Company thought these letters patent to be valid, is no ground for a judicial finding of validity. The fact is not even legal evidence upon the issue of validity (except in respect to one feature), and we so rule.

It would be idle, however, for any one to attempt to persuade himself that the fact would not influence his judgment. It has influenced the trial judge in this case, and most strongly impressed him. This confession is not needed, but the defendant has the right to have it frankly made. The plaintiff, on the other hand, has the right to the finding, which is made, that in all features of the case (except one) we have excluded this fact from judicial consideration. Practically, however, and unavoidably, it has had at least the weight which is attached to the opinion of some one whose opinion is of value, when we find that opinion to either confirm or be in conflict with our own. It induces us, if it differs, to do what is our duty to do anyhow, make sure that we are right in the opposite view taken. There is another popular saying which has a bearing. The saying is, "Money talks."

We apologize for being guilty of the offense against good taste which it usually is of quoting verse in a judicial opinion, but we have the authority of Byron for the statement "that most men, until by losing rendered sager, are willing to back their opinions with a wager," and the Carnegie people backed theirs with $275,000. This goes at least to their sincerity. The exception noted is to the utility feature. No objection was interposed to the evidence. We assume this was because commercial acceptance is evidence of utility.

A decree finding the validity of the claims in issue and infringement, and sustaining the plaintiff's bill, except to the extent to which the plaintiff's rights are affected by the agreement between it and the Carnegie Steel Company, may be submitted. In order that the date of the decree entered as a final decree for appellate purposes may be made definite, no decree is made until a formal decree shall have been filed in accordance with the findings above made. The decree submitted may carry the usual features, including costs to the plaintiff.

THE PROFESSOR KOCH.

(District Court, D. Massachusetts. October 27, 1919.)

No. 1703.

SALVAGE ⇐30—AMOUNT OF AWARD SUFFICIENT.

Where a barque stranded on a ledge during fair weather, and libelant was notified to send tugs to assist the barque, *held* that, though the towing service was performed skillfully and promptly, yet, as there was no risk of life, and a revenue cutter was ready to render assistance, an award of $10,000 for salvage, which was about four times the ordinary commercial price of the towage service, was proper, though the barque was worth $117,000 and the cargo $713,000, and it was in a dangerous position.

In Admiralty. Libel by Edwin M. Richards and others against the barque Professor Koch and cargo. Decree for libelants, which also provided for an award for intervener Barry.

Gaston, Snow, Saltonstall & Hunt and Russell, Moore & Russell, all of Boston, Mass., for libelants.

Blodgett, Jones, Burnham & Bingham and Frederick W. Eaton, all of Boston, Mass., for Jeremiah Williams & Co. and others.

Fitz-Henry Smith, Jr., Walter Shuebruk, and Wendell P. Murray, all of Boston, Mass., for Weinberg and others.

Wendell P. Murray, of Boston, Mass., for Carl Anderson.

MORTON, District Judge. This is a case of salvage. The Finnish barque Professor Koch, 236 feet long, 1,400 tons, steel construction, stranded on Cox's Ledge, near Scituate, at about 11 p. m. on April 29, 1919. The weather was fair at the time, with a moderate breeze, and not much sea. Just before the barque struck, her master had become suspicious of his surroundings and taken steps to check her headway. She struck the ledge lightly and slid into a depression on it,

which held her something like a cradle. There was no immediate danger; but it was a very bad position, exposed to the full force of the sea, if a storm should arise.

The stranding occurred near high water. After futile efforts to get the barque off by backing her sails, distress signals were displayed, and the Coast Guard came out to her. Her master requested them to send for tugs to come to his assistance. The Coast Guard accordingly notified the Boston Towboat Company, which received the message about 2 a. m. Steps were promptly taken by it to render help to the barque. Shortly after 8 o'clock the next morning two tugs belonging to the Towboat Company reached the barque and put lines to her, to steady her as the tide rose. About 9 o'clock a third tug came. The weather remained fine and the sea moderate. At high water, which occurred about noon, the tugs pulled the barque off the rock.

When she came clear, there was 4 or 5 feet of water in her hold and a bad slit in her bottom, running back about 10 feet from her forefoot. She had a collision bulkhead, which saved her from sinking; but she was down by the head and was making water at the rate of about 2 feet an hour. The problem of what to do with her after she came off had been talked over by Capt. Nickerson and Capt. Barry, both of whom were very familiar with that coast. They had decided that the best plan was to take her to Scituate harbor and get her as far up the entrance as they could. Accordingly, on clearing the rock, the barque was towed to that harbor, a distance of about a mile and a half, and grounded in the channel, at the entrance. In this position she was safe from sinking, but was unprotected from the waves and in danger of breaking up if a heavy sea should come on. Two of the three tugs returned immediately to Boston, where they arrived about 4 that afternoon (April 30th). The other tug, the Confidence, stayed by, and on the high tide that night moved the barque inside the north breakwater of Scituate harbor, where she again grounded. Her position was, however, greatly improved by this change, because she was protected against northerly and northeasterly storms. Thereafter she was reasonably safe. This completed the first stage of the salvage operations, which consisted in taking the barque from her position on Cox's Ledge to the position inside the breakwater. It was essentially a towing operation, not involving the use of wrecking apparatus or any special appliances, and not specially endangering the tugs engaged in it, the value of which was about $150,000.

The T. A. Scott Company was employed by the owners of the Professor Koch to patch her and pump her out, so that she could be towed to Boston, and at once proceeded to do so. No great or unusual difficulties were encountered, and on May 4th the repairs were sufficiently advanced to warrant attempting to take her to Boston. The Towboat Company was notified and sent down three tugs. With their assistance and that of the Confidence the barque was floated on the second attempt, and was towed to Boston. The night when she was taken out was very dark, and part of the work had to be done during a thunderstorm; but in other respects there were no unusual dangers or difficulties. The various tugs of the libelant Towboat Company were em-

ployed on the entire work, and in going to and from it, a little over 200 hours. Their combined value was, according to the libelant, about $175,000. They were subjected to no unusual perils or hazards. The per diem value of their services at their customary rates would have amounted to about $2,300. Several hawsers were broken, the value of which does not appear.

At the time when the Towboat Company was notified over the telephone of the wreck, there were several other concerns in Boston which either had, or could have arranged for, tugs to go down to the wreck. Whether any of them could have got tugs there in time to have pulled the barque off on the first high tide (as was done) is not certain. It was an important step in the salvage, for it is by no means impossible that, if the barque had lain on the rock over another high tide, she might have so filled that she could not have been pulled off, or would not have floated if she got clear, and her cargo was of such sort as to deteriorate rapidly after being wet.

The promptness with which the service was rendered by the libelant is, however, much diminished in importance by the fact that the revenue cutter Rogday, which was notified of the wreck, got to it long enough before high water to have pulled the barque off on that tide if the tugs had not done so. In fact the cutter was sending a small boat with a running line to the wreck when the tugs pulled her clear. The revenue cutter was by no means so well able to handle the barque after she got off the rock as were the tugs; and her master had no such knowledge of the coast as did Capt. Nickerson and Capt. Barry, and probably had not as good judgment as to what should be done. Nevertheless it seems reasonably certain that if the tugs had not been there the revenue cutter would have got the barque off, and would have placed her somewhere where her situation would have been greatly improved. There was nothing to prevent the cutter from putting the barque at the entrance to Scituate harbor, as was done, and sending for tugs to move her inside the breakwater on the next tide. That it would have been safe to attempt to bring the barque to Boston as soon as she came off the rock, I do not believe. The value of the barque in her damaged condition was $117,000; that of the cargo, $713,000.

The principles on which the award is to be made are well established. Most of the elements which lead to large awards are conspicuously absent in this case. The libelant did not discover the wreck; it was notified over the telephone, and took the matter up in a business way. Neither its tugs nor the men on them were subjected to any extraordinary hazards. After the barque had been placed inside the breakwater, where the Scott Company could work on her and repair her, the libelant's services contributed nothing further to her safety, and were no more than could have been obtained on commercial terms from other towing companies. The Confidence did little in the way of salvage work during the four days that she waited around Scituate harbor while the Scott Company was repairing the Professor Koch. She was there principally to hold a salvage claim for her owners and to forestall any suggestion that they had abandoned the salvage operations before completion. Obviously the barque and her cargo

should not be called upon to pay for that service. The element of uncertainty as to payment practically disappeared after the barque was landed inside the breakwater.

Concisely stated, what the libelant did on April 30th was to receive word over the telephone that the barque needed assistance, to dispatch tugs promptly to the place of accident, to pull the barque off at the next high water and ground her at the entrance of a nearby harbor, and on the next tide to move her inside the breakwater; all this work being done in moderate weather and within 15 miles of its home port. What it did on May 4–5 was to free the barque from her position behind the breakwater and tow her to Boston. The case is very different from that of a vessel deviating from her voyage to render assistance, or struggling with a wreck in a stormy sea at risk of life. The Annie Lord (D. C.) 251 Fed. 157. The most meritorious feature of the libelant's services, as I view them, is the good judgment and skill in handling and navigating the tugs and the wreck which was displayed by Capt. Nickerson (the libelant's manager) and his assistants. Their work seems to have been done exactly right from start to finish. But the libelants are not entitled to any such enormous toll out of the barque and her cargo as their libel claims. They are entitled to the market value of their services, plus a fair reward for the risk, which was little, for the promptness, which was excellent, but not exclusive, for the skill displayed, and for the success which resulted. The predominant consideration, as it seems to me, in awards for salvage service, where the property has not been abandoned, is that they should be sufficient to obtain again, if circumstances should repeat, the same, or adequate, service. The Samuel B. Hubbard (D. C.) 229 Fed. 843.

Applying these principles, I think that $10,000, which is more than four times the commercial value of the libelant's work, and many times that of its work in getting the barque from the rock where she stranded into Scituate harbor, is adequate, and is in harmony with awards in similar cases. The Tordenskjold, 255 Fed. 672, —— C. C. A. ——; The Devonian, 150 Fed. 831; The Jason (D. C.) 257 Fed. 438; The Teresa Accama (D. C.) 254 Fed. 637; The St. Charles (D. C.) 254 Fed. 509; The Lucia (D. C.) 222 Fed. 1015; The Western Star (D. C.) 157 Fed. 489; The Carroll (C. C. A. 4th) 167 Fed. 112 at the bottom of page 113, 92 C. C. A. 564.

For the reasons stated orally at the conclusion of the argument, the intervener Barry is awarded $250.

Decree accordingly.

METROPOLITAN S. S. CO. v. PACIFIC-ALASKA NAV. CO.

(District Court, D. Maine, S. D. October 28, 1919.)

No. 518.

1. ADMIRALTY ⟸25—JURISDICTION; MODE OF OBJECTING THERETO.
The usual way to raise the question of jurisdiction in admiralty is by motion to dismiss, although exceptions on that ground, if sufficient, may be treated as a motion to dismiss.

2. ADMIRALTY ⟸12—JURISDICTION; CONTRACT AS CHARTER PARTY.
A contract under which libelant delivered two steamships for a term of years into the exclusive possession of respondent, which was to operate them between designated Pacific ports, pay to libelant a stated sum per month, and one-half their net earnings after deducting such payments, and return them on termination of the contract in good repair and with an equal amount of apparel and furniture on board, *held* a charter party, and a suit for its breach within the maritime jurisdiction.

3. PARTNERSHIP ⟸20—RELATION; CHARTER OF VESSELS AS CREATING.
A contract by which libelant delivered two steamships for a term of years into the exclusive possession of respondent, which was to operate them and pay to libelant a share of their net earnings, *held* not to create a partnership.

4. ADMIRALTY ⟸7—JURISDICTION; INCIDENTAL ACCOUNTING.
A court of admiralty will not refuse jurisdiction of a suit on a maritime contract because it incidentally involves an accounting.

5. SHIPPING ⟸3½, New, vol. 8A Key-No. Series—FEDERAL CONTROL; EFFECT ON TIME CHARTER.
The requisitioning by the United States of ships under a time charter *held* a termination of the charter under the terms as pleaded, which entitled the owner to the full price paid for the vessels as against a claim of the charterer for the cost of repairs which, under the charter, it was required to make at its own expense.

In Admiralty. Suit by the Metropolitan Steamship Company against the Pacific-Alaska Navigation Company. On exceptions to libel. Overruled.

Bradley & Linnell and Nathan W. Thompson, all of Portland, Me., for libelant.

Verrill, Hale, Booth & Ives, of Portland, Me., and Haight, Sandford & Smith, of New York City, for respondent.

HALE, District Judge. The libelant, a New Jersey corporation, alleges:

That, on or about the 31st day of July, 1916, it entered into a charter party with the respondent, a Maine corporation, under which the libelant agreed upon the chartering to the respondent of the steamships Harvard and Yale, then owned by the libelant, and fitted for coastwise passenger and freight business, in which they were then engaged; that these steamships, under this indenture, were to be operated by the respondent for a term from September 1, 1916, to December 31, 1921, between certain ports, named in the contract, on the Pacific Coast; that, by virtue of the charter party, the respondent agreed to pay a certain part of the charter money in advance in month-

ly payments; that, among the other material provisions of the charter party, are the following:

"Third. That the net profits in each calendar year from the operation of said steamships, in excess of the amounts paid by said respondent to said libelant, should be equally divided between said parties, and that, in determining the amount of such net profits for such calendar year, said respondent should charge against the gross income resulting from the operation of said ships, and the conduct of said business, ten (10) per cent. of the gross earnings of said ships for that year; and said respondent, in consideration of said allowance of ten (10) per cent. of such gross earnings, agreed to pay out of its own treasury, and without allowance therefor, all overhead expenses, including the superintendence of the maintenance and repairs of said ships, and in addition to the aforesaid sum of ten (10) per cent. of the gross earnings, there should be charged as expenses of the business conducted by means of said ships, the following expenses, if actually and directly incurred in said business during said year, to wit: 'The proper actual direct cost on said ships of the maintenance and operation thereof.'

"Fourth. That the respondent would, at its own expense (chargeable as an expense of maintaining said ships under paragraph 3 of said charter party), except as such expense might be actually covered by then existing policies of insurance, during the whole term of said charter party and any extensions thereof, maintain, preserve, and keep each of said steamships Yale and Harvard, and all property of the libelant located on said ships, or appurtenant thereto, or used in said business, in thorough working order and repair, and make all needful or proper repairs, renewals, replacements, additions, and changes of every nature upon each of said steamships, and make all changes, additions, renewals, and repairs upon or about each of said steamships, which might be required for their most economical operation, or which might be required by any government inspector, or by any inspectors appointed by underwriters of said steamships, and fully comply with all other requirements of such underwriters, and with all the requirements of the American Bureau of Shipping, in order to maintain the class-rating then held by said ships.

"Fifth. That the character and value of certain perishable parts of the tackle, apparel, and furniture belonging to said steamships, were correctly shown by an inventory to be attached to said charter party as 'Schedule A,' which inventory, prepared and agreed upon by the parties to said charter party, and annexed thereto, the libelant begs leave to file in this proceeding, and to produce at the hearing of this cause."

That the respondent agreed:

"That at the end of said charter term, or upon the termination of said respondent's rights in said charter party, if sooner terminated, each of said ships (except in case of total loss thereof), should have on board, as the property of said libelant, similar articles to those included in said 'Schedule A,' which should be of the aggregate value of at least that shown upon 'Schedule A,' annexed to said charter party."

The libelant alleges:

"Sixth. That immediately after the making of said charter party said steamships were taken into the possession of said respondent under the terms and provisions thereof, and thereafter operated by it on the Pacific Coast between the ports and places hereinbefore stated; and such operations continued until on or about the 13th day of March, 1918, when said steamship Yale was requisitioned by the United States government under the provisions of an act of Congress relating thereto, and such operation of said steamship Harvard continued until the 21st day of said March, when she was also requisitioned by said United States government under the provisions of the aforesaid act; and at the time of the surrender of said ships by said respondent to said United States under and by virtue of the aforesaid act of Congress the perishable parts of the tackle, apparel, and furniture, belonging

to said ships, were of the value shown by an inventory then made on the part of said United States, but at the time of the delivery of said ships by said respondent to said United States, said property, inventoried, as aforesaid, was not of the aggregate value shown in said 'Schedule A,' which the respondent received from the libelant under said charter party, but was then of the value of only $106,350.77."

And:

"Seventh. That in consequence of the respondent's failure, upon the termination of its rights under the terms and provisions of said charter party, to have on board said ships, or deliver to said United States as the property of the libelant, articles similar to those embraced in said 'Schedule A,' and of the aggregate value of at least $214,054.80, being the appraised value thereof at the time said ships and the property mentioned in said 'Schedule A' came into the respondent's possession under the provisions of said charter party, the respondent became liable to the libelant for the difference between the aforesaid appraised value of said property at the time of the delivery of said ships or the sum of $214,054.80, less the value thereof at the time the same came into the possession of said United States, or the sum of $106,350.77, or the sum of $107,704.03."

Section 8 of the libel, as amended, alleges:

"That during the latter part of the time said steamships were in the possession of said respondent under the terms and provisions of said charter party it made certain repairs to the boilers of said vessels, and to other parts thereof, which, under the provisions of said charter party, it was legally bound to make at its own cost; and such repairs were paid for by said respondent from the moneys which it deducted from the earnings of said ships, under the terms of said charter party, and referred to in paragraphs third and fourth of this libel, yet, notwithstanding the obligation upon the part of said respondent to make such repairs at its own expense, and from moneys which it retained as aforesaid, when said steamships were requisitioned by said United States, said respondent claimed that it should be reimbursed for the repairs made as aforesaid to the extent of forty thousand (40,000) dollars. That by reason of said claim on the part of the respondent a decision was filed by the Secretary of the Navy, the substance of which provided that the sum of forty thousand dollars ($40,000) would not be paid over to any one until the claims were adjusted between the parties, whereupon, by a stipulation dated September 24, 1918, libelant and respondent agreed that, while reserving to themselves, and each of them, their respective rights as to the sum of two million eight hundred thousand ($2,800,000) dollars and the sum of forty thousand ($40,000) dollars, the United States government might pay the two million eight hundred thousand dollars ($2,800,000) to the libelant, and forty thousand dollars ($40,000) to the respondent, and be relieved from further liability to each in respect to said sums, all as shown by a copy of said decision of said Secretary of the Navy, and said stipulation between the libelant and respondent, which are together annexed hereto and made a part of this libel, marked 'Exhibit A.' Said sum of forty thousand dollars ($40,000) was thereupon, under the terms of said stipulation, paid by said United States government over to said respondent, and the same is now held by it, the said respondent, although said amount should have been paid to the libelant and now belongs to the libelant, and said sum is now held by said respondent in trust for the benefit of the libelant."

Section 9 alleges:

"That the aforesaid sums, amounting to the sum of $147,704.03, together with interest on said amount from the 17th day of October, 1918, is justly due the libelant, and it seeks to recover the same in this proceeding."

[1] The respondent says that this libel does not state a case of which this court in admiralty has jurisdiction; that, with respect to

either of the complaints alleged, it does not allege facts sufficient to constitute a cause of action. This question is raised by exceptions to the libel. The usual way to raise the question of jurisdiction is by a motion to dismiss. There is some authority for allowing such question to be raised by exceptions; the prevailing practice is to limit the use of exceptions substantially to that provided by rule 36 of the Rules of Practice in Admiralty (29 Sup. Ct. xliii), namely, to matters of "surplusage, irrelevancy, impertinence or scandal." But the exceptions, taken together with the specifications of exceptions, may be regarded as, in substance, a motion to dismiss, and as duly bringing the contention before the court. In matters of pleading, admiralty courts seek to get at the substance of a defense, and not to insist upon set forms.

The respondent says that the so-called "charter party" is no charter party at all, but a partnership agreement; and that, in any view of the case, the subject-matter of dispute between the parties, based upon this agreement, or growing out of it, is not of a maritime nature; and is not within admiralty jurisdiction; that matters for accounting are clearly presented; that the controversy between the parties can be adjusted only by means of accounting; and that such accounting requires a proceeding in equity. The respondent alleges, also, with respect to the matter stated in the eighth section of the libel, relating to the sum of forty thousand (40,000) dollars, claimed by the libelant, that no facts are stated in the libel sufficient to constitute a cause of action, and that with reference to this matter, also, the rights of the parties can be adjudicated only under a proceeding in equity.

Upon inspection, it will be seen that the libel states, as its first complaint against the respondent, that the indenture entered into between the parties, in July, 1916, provided that the libelant's steamships were to be operated by the respondent for a certain term of years, between certain ports enumerated on the Pacific Coast, under its exclusive control; that the respondent agreed to pay for their use a certain part of the charter money in advance, in monthly payments; that the net profits each year from their operation, in excess of the amounts paid by the respondent to the libelant, should be equally divided between the parties; that, in determining the amount of such profits for such year, the respondent should charge against the gross income from their operation and the conduct of the business 10 per cent. of their gross earnings for that year, and that, in consideration of this allowance of 10 per cent. of such gross earnings, the respondent agreed to pay, out of its own treasury, without allowance therefor, all overhead expenses, including the superintendence of the maintenance and repairs to the ships, and, in addition to the sum of 10 per cent. of the gross earnings, there should be charged as expenses of the business conducted by the ships, the actual direct cost of maintenance and operation; that the respondent should, at its own expense, maintain and preserve the ships and all property of the libelant on them, or appurtenant thereto, or used in the business, in thorough working order and repair, and make all needful repairs, renewals, additions, and changes of every nature upon them, which might be

needed for their economical operation, or required by any government inspector, or by any inspectors of underwriters, and all other underwriters or shipping agents, in order to maintain their classrating. In short, the full conduct and care of the ships was put in the charge of the respondent. The libelant parted with the possession of the ships and the respondent acquired actual and exclusive possession and control of them.

The agreement pleaded is alleged to contain the stipulation that the character and value of certain perishable parts of the tackle, apparel, and furniture of the ships is as shown in a certain inventory attached to the agreement as "Schedule A," and the respondent is alleged to have agreed that, at the end of the charter term, or upon the termination of the respondent's rights in the charter party, if sooner terminated, each of the ships (except in case of total loss thereof) should have on board, as the property of the libelant, similar articles to those included in "Schedule A," and which should be of the aggregate value of at least that shown upon "Schedule A." Then follows the allegation that, after the making of the charter party, under its terms the ships were taken into the possession of the respondent, and operated by it on the Pacific Coast, and that such operations continued until March, 1918, when both steamships were requisitioned by the United States government under the provisions of an act of Congress; that at the time of their surrender by the respondent to the United States the perishable parts of their tackle, apparel, and furniture were of a value shown by an inventory then made on the part of the United States, but at the time of their delivery by the respondent to the United States such property was not of the aggregate value shown in "Schedule A," but was of a much less value. That therefore, upon the termination of its rights under the charter, the respondent failed to have on board the ships, or to deliver to the United States as the property of the libelant, articles similar to those embraced in "Schedule A," and of the aggregate value of the full sum of $214,054.60, the appraised value thereof at the time the ships mentioned in "Schedule A" came into the respondent's possession; and that, therefore, the respondent became liable to the libelant for the difference between the appraised value of the property at the time of the delivery of the ships to the respondent and the value thereof at the time they came into the possession of the United States, and that such difference amounted to the sum of $107,704.03.

[2] 1. The initial defense raised by the respondent is that the contract stated is not a maritime contract. I cannot sustain this defense. The part of the libel to which I have called attention clearly presents a case of the hiring of the two ships for the carriage of persons and property on the Pacific Coast, between certain designated points, in navigable waters. It clearly presents something more than a mere foundation for future maritime contracts, to be made by the respondent, for the carriage of passengers and freight upon the ships. It states a case of the hiring of these ships to a charterer, such charterer to have exclusive possession of them, to keep them in repair, carry passengers and freight with them between certain designated ports

upon the high seas, to preserve their tackle, apparel, and furniture, and, upon termination of the contract, to have on board, for the benefit of the libelants, certain enumerated property. It states a failure on the part of the respondent to carry out the terms of this contract. I think this agreement, as stated, meets the requirements of a charter party. It is a maritime contract, entitled to be adjudicated in a court of admiralty. As Mr. Benedict has said, it is the substance of an undertaking, and not the mere form of words, which creates liability and confers jurisdiction. The substance of the undertaking, here stated, has reference to a specific, determined, maritime service of two ships hired to the respondent for the carriage of persons and property, upon navigable waters. Benedict's Admiralty, 4th Edition, § 200, p. 158. Insurance Co. v. Dunham, 11 Wall. 1, 20 L. Ed. 90; Morewood et al. v. Enequist, 23 How. 493, 16 L. Ed. 516; North Pacific S. S. Co. v. Hale Brothers Co., 249 U. S. 119, 125, 39 Sup. Ct. 221, 63 L. Ed. 510; Boutin et al. v. Rudd, 82 Fed. 685, 27 C. C. A. 526; The Richard Winslow, 71 Fed. 426, 428, 18 C. C. A. 344. In The Yankee Blade, 19 How. 82, 15 L. Ed. 554, the libelant had not hired the vessel, or any portion of it, nor had the masters or owners covenanted to convey any merchandise for the libelant, nor had he agreed to furnish them any. In that case the Supreme Court quoted the definition of a charter party, given by Abbott:

"A charter party is a * * * contract by which an entire ship, or some principal part thereof, is let to a merchant for a conveyance of goods on a determined voyage to one or more places."

On an inspection of The Yankee Blade, the case seems not to be an authority against my conclusion.

Many other cases have been brought to my attention, disclosing instances where courts have held that certain contracts, bearing some similarity to this agreement, were not of a maritime nature and did not give jurisdiction to an admiralty court. Upon examination, however, of the cases cited by the learned proctor for the respondent, I think they will be found to sustain the conclusion, which I have stated, that the contract before me is a maritime contract which may properly be adjudicated in an admiralty court.

[3] But the respondent says that, even though the contract may have maritime features, it is a contract of partnership, and that the rights under it cannot be adjudicated except under proceedings in equity. The libelant's statement of its case does not sustain this contention. Following the current of our federal decisions, the requisites of a partnership are, in substance, that the parties must have joined together to carry on a venture for their common benefit, each contributing property or services, and having a community of interest in the profits. In Meehan v. Valentine, 145 U. S. 611, 620, 12 Sup. Ct. 972, 36 L. Ed. 835, in speaking for the Supreme Court, Mr. Justice Gray discusses the question of how far sharing in profits will make one liable as a partner. He says that it was the former rule that a man who received a certain share of the profits, as profits, with a lien on the whole profits as security for his share, was liable as a partner for the debts, but that merely receiving compensation

for services estimated at a certain proportion of the profits did not render one liable as a partner. In this opinion he shows that partnership is founded upon the principles of agency. He says:

"A partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and for his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners he may as properly be deemed an agent. The principal distinction between him and a mere agent is that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership; whereas an agent, as such, has no interest in either."

He cites the crisp statement of Sir George Jessel:

"You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners, a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity."

In Commentaries on Partnership, first published in 1841, a classic upon this subject, Mr. Justice Story said:

"Every partner is an agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and in his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners he may as properly be deemed an agent. The principal distinction between him and a mere agent is that he has a community of interest with the other partners in the whole property, business, and responsibilities of the partnership; whereas an agent, as such, has no interest in either. * * *

"A participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances."

In deciding the case, Mr. Justice Gray held that a man who had loaned a partnership, composed of other persons, a sum of money, stipulating that he should receive legal interest and in addition one-tenth of the yearly net profits of the business, in view of the fact that he never exercised any control over the business, did not thereby become a partner. Ward v. Thompson, 22 How. 330, 334, 16 L. Ed. 249; Karrick v. Hannaman, 168 U. S. 328, 18 Sup. Ct. 135, 42 L. Ed. 484; Fechteler et al. v. Palm Brothers, 133 Fed. 462, 66 C. C. A. 336; Dwinel v. Stone, 30 Me. 384; Rogers v. Lawton (C. C.) 162 Fed. 203; Holmes v. Old Colony, etc., Co., 5 Gray (Mass.) 58; The Crusader, Fed. Cas. No. 3456; White Star Line v. Star Line Steamers, 141 Mich. 604, 105 N. W. 135, 113 Am. St. Rep. 551.

In the case at bar, the libel alleges a sharing of profits between the parties; but it also alleges other controlling and "opposing circumstances"; that the respondent was to operate the ships, and had the exclusive right to conduct the business relating to such operation. It follows, from the allegations of the libel, that the respondent had no right to incur liabilities which should bind the libelant, and that it became the owner of the ships "pro hac vice." The pleadings show no community of interest or mutuality between the parties. The existence of a "firm as a separate entity" is not disclosed. The only

characteristic of a partnership is that a share in the profits is provided for. But I think it appears that such sharing was intended for compensation for services and for the use of the property. I am of the opinion that the libel does not state a case of such relationship between the parties as constitutes a partnership.

[4] The respondent contends further that this court should not entertain jurisdiction of the contract stated in the libel, because the statement of the case shows that an accounting will be required between the parties, and that such accounting is not a subject-matter within the jurisdiction of an admiralty court.

It is true that admiralty will not take jurisdiction of accounting between parties, where such accounting arises in matters relating to strict partnership matters which cannot be adjudicated except in equity. But I have already held that this is not such a matter. The fact that final accounting will be required between the parties as incidental to the controversy between them will not cause admiralty to refuse jurisdiction in a maritime matter, but will rather induce it to extend its powers to include such incidental accounting. Judge Ware held that, if the accounting arises incidentally in a cause, it is a question of sound discretion whether or not the court will proceed with the cause. The Larch, 3 Ware, 34, Fed. Cas. No. 8086; The John E. Mulford (D. C.) 18 Fed. 456, 458. The Emma B (D. C.) 140 Fed. 771. Hughes on Admiralty, par. 189; Benedict on Admiralty (3d Ed.) par. 263a.

The Zillah May (D. C.) 221 Fed. 1016, and other cases, are brought to my attention, showing instances where courts have denied jurisdiction to courts of admiralty in the matter of an accounting between copartners or part owners. These cases, however, do not, I think, give any rule different from that stated in the cases already cited. The H. E. Willard (D. C.) 53 Fed. 599, decided in this district, merely reiterates the law that a court of admiralty will not assume jurisdiction in the matter of accounting between part owners; but it does not discuss cases where questions of account arise incidentally upon the final settlement of maritime transactions.

In the case at bar, it is clear that a final accounting may be required; but it is so required in many cases in admiralty. So far as the pleadings suggest a final accounting, they show that such accounting will be incidental to the main question and clearly allowable in admiralty proceedings.

[5] 2. Section 8, as amended, states the second complaint in the libel: That the charterer—the respondent—by the terms of the charter party was, at its own expense, to maintain, preserve, and keep each of the ships in thorough working order and repair, and make all needful repairs, renewals, replacements, additions, and changes of every nature upon them; that the term of the charter party was interrupted by the requisitioning of the ships by the United States, and that this constituted such a "termination" as was contemplated in the charter party; that certain repairs were required on the steamships to keep them in repair, up to the time of their being taken over by the government; that the repairs were made, but that, instead of making

them at its own expense, as provided by the contract, the charterer attempted to reimburse itself for them by obtaining from the United States government $40,000 of the money owed to the libelant. The libel proceeds upon the theory that, after the repairs, additions, and replacements were made upon the ships, the resulting value became the property of the libelant; that therefore the libelant was entitled to have it included in the sum paid by the United States for the ships; that by the action of the charterer the libelant was deprived of the $40,000 lawfully coming to it; and that therefore the charterer committed a breach of its covenant to repair at its own expense, because it used money belonging to the libelant to cover such repairs. In short, the libelant seeks to recover $40,000, alleged to have been paid over to the respondent, and held by it unlawfully and against the provisions of the charter party. It seems clear that section 8 states a case arising out of a material part of what I have already held to be a maritime contract.

The respondent says that, in this matter, the libel does not state a cause of action, because, under the contract, the respondent had an interest in the ships, for which it was entitled to be compensated, and that it is not alleged that the $40,000 was more than sufficient compensation. Nothing stated in the libel bears out the respondent's contention that the $40,000 was paid to it for an interest which it had in the ships themselves. Under the allegations of the libel, it was paid for the repairs which the respondent made; it appears that the respondent had the exclusive right of possession, and the right to receive profits from the operation arising from such possession. The libel does not state an interest of the respondent in the ships themselves. It appears, from the libel, that the rights of the respondent were to be regarded as having matured at the end of the charter term, or "if sooner terminated," and that this applies both to the property of the libelant to be found on board the vessels and to the provision with reference to repairs, upon which the claim of $40,000 is based. I think the taking over of the vessels by the government was such termination of the rights provided for in the contract as was contemplated by its terms. I am of the opinion that article 8 as amended, states a cause of action within admiralty jurisdiction.

The exceptions are directed, of course, only to the pleadings. The charter party itself is not made a matter of pleading. The libel states that a copy of the agreement will be filed and produced at the hearing of the cause; but that does not make it a part of the pleadings. When produced, it will be evidence. It is not before me, although it has been referred to by the learned proctors as if it were a matter now before the court. I have therefore followed only the allegations of the libel; I find these sufficient and well pleaded.

My conclusion is that the libel has sufficiently advised the respondent of a case against him, and that both causes of action, making up the case, relate to maritime transactions, and are within the admiralty jurisdiction of this court.

The court retains jurisdiction of the libel. The respondent's exceptions are dismissed. The respondent may file an answer, within the admiralty rules.

THE JOHN D. ROCKEFELLER. THE FALLS CITY.

(District Court, E. D. Virginia, September 30, 1919.)

1. COLLISION ⊜=91—VESSELS IN HARBOR—FAULT IN NAVIGATION BY TUGS.
A collision on the Mississippi river off New Orleans between steamships on meeting courses, but one of which had stopped some 75 feet off the piers, *held* due to fault in the navigation of the other by tugs, which attempted to take her between the stationary vessel and the piers.
2. COLLISION ⊜=59—LIABILITY OF VESSEL IN TOW.
A steamship *held* not liable for a collision which occurred through fault in her navigation when she was being towed by two tugs, the master of one of which was on board her and in full charge and control of her movements, although her engines were running and used as required under his direction.

In Admiralty. Suit for collision by the Standard Oil Company, as owner of the steamship John D. Rockefeller, against the steamship Falls City. Decree for respondent.

Kirlin, Woolsey & Hickok, of New York City, and Edward R. Baird, Jr., of Norfolk, Va., for the John D. Rockefeller.

Hughes, Little & Seawell, of Norfolk, Va., for the Falls City.

WADDILL, District Judge. [1] On the evening of the 15th of November, 1917, about 5:30 o'clock the collision, the subject of this litigation, occurred in the waters of the Mississippi river, at New Orleans, at a point approximately off and slightly below Poland street, and in the vicinity of Pauline street wharf, between two large ocean-going steamships, the John D. Rockefeller, 458.3 feet long, 60 feet beam, and 28.6 feet deep, and the Falls City, 397 feet long, 52 feet beam; the port quarter of the Falls City striking the port bow of the Rockefeller. Each ship was seriously damaged; the owners of the Rockefeller claiming $40,000, and of the Falls City $30,000.

The Rockefeller's case briefly is: That she was a large oil tank steamship, coming up the river light, and on reaching Pauline street wharf, and being about 75 feet out in the channel, she stopped for the purpose of changing pilots, and while lying there, kicking her engines only sufficient to prevent her from being carried down stream by the current, she was run into by the Falls City. That upon observing the Falls City rounding Algiers Point a mile or more away, coming on the opposite side of the river in tow of two tugs, one lashed to her port quarter, and the other to her starboard quarter, her pilot sounded one whistle, indicating his purpose to pass port to port. That, upon the second pilot coming aboard to relieve him, the retiring pilot advised him of the signal he had given and his failure to receive a reply, and the latter promptly sounded a second single blast of the whistle, indicating his desire to pass port to port, to which the Falls City, then some 500 or 600 feet away, responded with two signals, indicating her desire for a starboard passage; that is, to cross the course of the Rockefeller. That the Falls City was aided in her navigation by the tugs using her own power in part, in addition to that of their own. After receiv-

ing the two blasts from the Falls City, the Rockefeller promptly gave danger signals, and reversed her engines, and did all possible to avoid the collision, but too late to avert the same.

The Falls City's case is: That she had been at anchor at Westwego, in the port of New Orleans, and had taken on part of her cargo, and desired to shift to a point down the river known as Chalmette oil slip, to complete her loading, and for this purpose her agents at New Orleans employed the Bisso Towboat Company to move the ship, who furnished two large and powerful tugs, the Independent and the Capt. William Bud, to do so. The Independent, the larger of the tugs, was made fast to the starboard quarter of the Falls City, and the Bud to the port quarter, and the master of the Independent took command of the expedition, and directed the movement of the ship and tugs from the bridge of the ship. The ship's master was not on board, and the mate was in command, though he took no part in the navigation of the vessel after the tugs made fast. The movement, thus started down the river, proceeded regularly and without special incident, save that fog was encountered, which seems not to have materially affected her navigation so far as this case is concerned, until after rounding Algiers Point, when the Rockefeller was sighted coming up the river, and two blasts of her whistle were at once given, indicating a desire to pass starboard to starboard. No reply being made to this signal, the same was in a short time, when the vessels were within half a mile apart, repeated, and a reply of one signal was received from the Rockefeller, indicating her purpose to pass port to port; that is, gave the crossing signal. That thereupon the Falls City properly sounded danger signals and reversed her engines, and so continued until, when virtually in collision, and with a view of lightening the lick of the same, she hard-astarboarded, and put her engines full speed ahead, and did everything possible in her power to avert the same, but without avail. That at the time of giving the first signal the Falls City was heading directly down stream, and the Rockefeller was out in the stream some 300 or 400 feet. That she was not at a standstill then, or at the time of the collision, but, on the contrary, was proceeding rapidly at some 10 miles an hour.

The Falls City insists that the Rockefeller was on the wrong side of the river for an ascending vessel; that at bends in the Mississippi river the custom is for the down-coming vessel to run the bend, and the ascending to cut the point, the result being that the ascending vessel would miss the force of the current against it, and go up through the eddy water, while the descending vessel would move with the current.

The facts are less in dispute than is usual in collision cases, and, indeed, save as to just where the two vessels were in the river, and opposite which wharves and the existence or nonexistence of the custom respecting the passing of vessels at bends to the right, according to the narrow channel rules of navigation, there seems to be no serious controversy, and the case turns almost entirely on the correct determination of the law governing the rights of the vessels in collision, under the circumstances. The court thinks the testimony sustains the Rockefeller's contentions respecting the circumstances of the navigation, rather than those of the Falls City. It seems entirely clear that the

Rockefeller was not in the stream where the Falls City contends she was, but that she was approximately where she places herself; that is, much nearer to the shore; and it is manifest that the ship was virtually at a standstill at the time of the collision, and was not proceeding at the speed of 10 miles an hour, as claimed by the other side, or any appreciable speed. It is likewise apparent that the two vessels could not have struck each other as they did, if the Falls City's contention is correct; whereas, what happened could readily have occurred, had their movements been as claimed by the Rockefeller.

As to the existence or nonexistence of the custom respecting the navigation of ascending and descending vessels referred to, there does not appear any sufficient justification for the Falls City's navigation, admitting the existence of the custom, as it was manifestly impracticable for her, particularly with a tug made fast to either side of her, to have gone in between the Rockefeller and the wharves, and vessels made fast thereto, and it was too imprudent, reckless, and dangerous for her to have attempted to do so.

[2] For the purpose of passing upon the legal question determinative of this litigation, the court will assume the facts to be as stated, and that those in charge of, and directing the navigation of, the Falls City, were at fault, and, so considering, will determine whether or not the Falls City is liable to the Rockefeller under the circumstances stated, namely, whether she should be held liable, or the tugs navigating her solely responsible, for the collision.

This litigation is solely between the Rockefeller and the Falls City, and neither of the two tugs nor their owners are before the court. As respects the facts bearing particularly on this feature of the case, viz. the Falls City's navigation, there is no material dispute between the parties. The Falls City was being towed from one place to another in the harbor of New Orleans, for the purpose of loading, having lashed on either side of her stern a large and powerful tug; and while her motive power was in part used in the movement of the ship, she was under the direct command and control of the master of the Independent, who directed the movement and operation of the whole outfit. Red and green running lights were on the ship, and the regular towing lights on each tug, and both tugs seem to have been in all respects seaworthy and suitable, and able to perform the service in hand, and were properly equipped and handled by suitable and competent officers. Indeed, no suggestion is made against the navigators of the tug, save by innuendo as to the captain of the Independent.

The law applicable to and fixing the rights of the parties, upon the statements of facts indicated, seems, so far as the courts of the United States are concerned, too well settled now to admit of serious doubt or cavil, whatever may have been its uncertainty at any earlier time, or how much individuals may doubt as to its wisdom; that is to say, where a vessel, herself free from fault, and not contributing to the collision, is in tow of another, the latter having entire control and direction of the tow's movements, and itself capable and suitable for performing the work in hand, being operated and navigated by competent, skilled, and trusted navigators, and damage arises from the neg-

ligence of the towing vessel, or those having control of her, it is considered and treated as an independent contractor, and solely liable for the injury caused by its negligence and want of care, and the ship in tow is relieved from liability, although the collision may actually be with that vessel.

The Supreme Court of the United States in Sturgis v. Boyer, 24 How. 110, 16 L. Ed. 591, an opinion by Mr. Justice Clifford, declared this to be the law, and that court in a comparatively recent decision in The Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600, adheres to the same doctrine. The Circuit Court of Appeals for this circuit, in the recent cases of The Dorset, 260 Fed. 32, — C. C. A. — (but the District Court opinion is found in 250 Fed. 867), and in the case of The Cromwell, 259 Fed. 166, — C. C. A. — (the District Court opinion is found in 247 Fed. 207), strictly followed that doctrine. In the case of the Cromwell, Judge Woods, speaking for the Circuit Court of Appeals of this circuit, said:

"The owners of the tug having thus entered into an independent contract of towing, the tug alone would be responsible for negligence in the undertaking, unless officers of the Cromwell retained some control of the ship and were guilty of some negligence. It is true her master and crew were on the Cromwell carrying out the orders of Sanders, but they did nothing more; and in that relation they were mere instrumentalities or means used by Sanders to apply the wheel, engine, and other instruments of navigation—not participants in the navigation. Hence it seems evident that, if the injury to the bridge was due to negligence, it was that of the towing company, owner of the tug, as an independent contractor, for which the Cromwell was not responsible. Sturgis v. Boyer et al., 24 How. 110, 16 L. Ed. 591; The Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600.

In the Cromwell Case an able, comprehensive review of the authorities generally will be found in the opinion of Judge Conner in the District Court, 247 Fed. at pages 214 to 218, inclusive. See, also, Hughes, Adm. §§ 55, 58, and 59, where the same question is discussed and authorities cited.

Counsel for the Rockefeller insist that the Falls City should be held responsible, because her own power was used, when necessary, as auxiliary to that of the tugs in making her movements. This position is not well taken, as an examination of the authorities will show that that fact is immaterial, where the vessel was free from fault, does nothing to contribute to the disaster, and is in tow of and under the control and direction of a tug, staunch and seaworthy, and suitable for the service, and in command of skilled, competent, and trusted navigators.

Counsel moreover, invoke the doctrine applicable to the liability of ships for negligence of pilots, and urge that the captain of the tug Independent was but a pilot. The law is well settled that vessels are liable for the negligent acts of pilots as between themselves and strangers; but in this case that fact should not affect the Falls City prejudicially, since it is manifest from the whole testimony that she was in tow of two tugs, under regular contract for hire, and was in command of, and her movements controlled by direction of the master of the tug Independent, in his capacity as the tug's master, as distinguished

from a pilot in the technical acceptation of that designation. The Cromwell, supra.

The conclusion of the court is that at the time of the collision in question the Falls City was entirely under the control of the tugs navigating her, and subject to the order and direction of the chief tug master; that both tugs were seaworthy and entirely capable of performing the service in hand, and were under the command of competent navigators; and that she was guilty of no negligence for which she should be held liable under the law.

It follows that a decree may be entered, dismissing the libel, at the cost of the libelant.

In re MILITARY TRAINING CAMP IN PRINCE GEORGE COUNTY, VA.

(District Court, E. D. Virginia. October 23, 1919.)

1. EMINENT DOMAIN ⇐167(5)—POWER OF SECRETARY OF WAR TO INSTITUTE PROCEEDINGS.

Repeal of statutes by implication is not favored, and the power given the Secretary of War by Act July 2, 1917 (Comp. St. 1918, § 6911a), to cause proceedings to be instituted in the name of the United States, for the condemnation of land needed for fortifications, coast defenses, and military training camps, was not abrogated by the provision in Army Appropriation Act July 11, 1919, declaring that no part of the appropriations shall be expended for the purchase of real estate for the construction of army camps and cantonments, except where, in cases of camps in use prior to November 11, 1918, it has been found more economical, for the purpose of salvaging such camps, to buy real estate than to continue to pay rentals; hence a petition by the Secretary of War, filed June 24, 1919, to condemn land for a military training camp, cannot be denied on the ground that the Secretary of War was without authority.

2. EMINENT DOMAIN ⇐196—ON PROCEEDINGS BY SECRETARY OF WAR, PRESUMPTION THAT FUND EXISTS FOR PAYMENT.

Where Secretary of War filed a petition to condemn land for a military training camp, and landowners attacked the petition on the ground the authority conferred on him by Act July 2, 1917 (Comp. St. 1918, § 6911a), had been repealed by Army Appropriation Act July 11, 1919, forbidding the expenditure of appropriations for acquisition of land, except in connection with salvaging property on established military camps, it will be presumed there was a fund in existence with which to pay for the land, as asserted by the Secretary.

3. EMINENT DOMAIN ⇐66—ON PROCEEDINGS BY SECRETARY OF WAR, COURT DETERMINES QUESTION OF PUBLIC USE.

On petition by the Secretary of War to condemn property for military purposes, the judicial question to be determined is whether the use is a public one, and questions as to payment rest in legislative discretion, although the courts must see that just compensation is made before the property is taken.

4. EMINENT DOMAIN ⇐18—CONDEMNATION FOR MILITARY TRAINING CAMP A PUBLIC PURPOSE.

Where the Secretary of War, as authorized by that act, began proceedings to condemn land, under Act July 2, 1917 (Comp. St. 1918, § 6911a), for a military training camp, it must be held that the condemnation is for a public purpose; the establishment of training camps being for the purpose of public defense.

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5. EMINENT DOMAIN ⊂=169—IN CONDEMNATION BY SECRETARY OF WAR, NO DEFENSE THAT FUND FOR PAYMENT NOT ON HAND.
Where the Secretary of War, as authorized by statute, began proceedings to condemn land for a military training camp, the proceeding cannot be dismissed because specific sum was not then on hand to compensate the landowners, for title would not pass until compensation is made.

6. COURTS ⊂=284—JURISDICTION OF FEDERAL COURTS.
Under Act Aug. 1, 1888 (Comp. St. §§ 6909, 6910), federal District Court has jurisdiction of proceeding by Secretary of War to condemn land, as authorized by Act July 2, 1917 (Comp. St. 1918, § 6911a), for military training camp.

At Law. In the matter of the condemnation of lands, with all improvements thereon, and the appurtenances thereunto belonging, lying in the County of Prince George, in the State of Virginia, needed by the United States for the site, location, construction, and prosecution of works for a military training camp. On pleas to the jurisdiction, and demurrer filed to the petition. Pleas and demurrer overruled, and motion to dismiss denied.

Hiram M. Smith, U. S. Atty., of Richmond, Va., for the United States.

Wilson M. Farr, of Fairfax C. H., Va., George H. Lamar, of Washington, D. C., Wyndham R. Meredith and Meredith & Meredith, all of Richmond, Va., and James A. Hefflin and A. L. Jones, both of Hopewell, Va., for sundry landowners.

WADDILL, District Judge. On the 24th of June, 1919, the original petition in these proceedings was filed by the United States of America, having for its purpose the condemnation of 32 tracts or parcels of land, with the improvements thereon, in the county of Prince George, Va., in the Eastern district of Virginia, at and adjacent to Camp Lee, and on the 30th day of June, 1919, an amended petition, having for its object the same purpose, was also filed by leave of court. Subsequently, on the 10th day of September, 1919, an order was entered giving notice by publication to the tenants of the freehold, as required by law, made returnable before this court, at its courtroom in the city of Richmond, Va., on the 6th day of October, 1919, the first day of the next ensuing term.

On the return day of this process, sundry defendants appeared, some specially, and some generally, and by appropriate proceedings, by way of demurrer, by special plea, and motions to dismiss, raised the question of the jurisdiction of the court, and sought to contest the validity of the proceedings. The case is now before the court for consideration of the legal questions thus presented.

The government's petition sets forth that the same was filed by direction of the Attorney General of the United States, acting in this behalf in accordance with the request of the Secretary of War of the United States, who had certified that it was necessary and advantageous to the interests of the United States to acquire the lands described in and set forth in said petition; that the said lands were needed for the site, location, construction, and prosecution of works

for a military training camp, and that the Secretary of War was acting pursuant to the provisions of the act of the 2d day of July, 1917 (Fed. Stat. Ann. Supp. 1918, p. 166; U. S. Comp. Stat. Temp. Supp. 1917, p. 363; 40 Stat. 241, c. 35 [Comp. St. 1918, § 6911a]).

The petition further sets forth that the United States, acting through their proper officers and agents and duly authorized representatives, had made an effort to agree with the landowners upon the price and terms of purchase, but without avail. It is further averred that, at the time of the filing of the petition and amended petition, a state of war existed between the United States of America, on the one hand, and the Imperial German government and the Imperial and Royal Austro-Hungarian government, on the other; that the interests of the landowners proposed to be taken by the United States were the fee-simple interests in and to said properties; and that an appropriation to pay for said lands was available, contained in the act entitled "An act making appropriations for the support of the army for the fiscal year ending June 30, 1919," approved July 9, 1918 (Act July 9, 1918, c. 143, 40 Stat. 845).

The grounds of defense interposed are briefly: First, that this court is without jurisdiction to entertain the proceeding, and that the same can only be maintained in the circuit court of Prince George county, Va., where the lands lie; second, that the proceedings should not be entertained, because it is manifest that the lands are not sought for public use, such as is authorized by the Constitution and laws of the United States, warranting the exercise of the right of eminent domain in respect thereto; and, third, because no appropriation exists whereby the lands condemned can be paid for. These two last positions will be considered in the order named, and in connection with the authority of the Secretary of War to inaugurate the proceedings.

[1, 2] By Act July 2, 1917, 40 Stat. 241, being an enlargement of Act Aug. 18, 1890, 26 Stat. 316, c. 797 (Comp. St. § 6911), the Secretary of War is authorized to cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, or the temporary use thereof, or any other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, and military training camps; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted. The act further provides for the purchase of property when terms can be agreed upon, acceptance of donations in that connection by the Secretary of War, and for the taking of immediate possession of the property by the government in advance of the ascertainment even of the validity of the title, by reason of the imminence of war, etc., and an existing immediate urgency arising therefrom.

The defendants insist that, notwithstanding this plain provision of the act of Congress authorizing the Secretary of War to acquire property by condemnation, he is now prohibited from so doing, and that these proceedings cannot be maintained at his instance, because of the

provision in Army Appropriation Act July 11, 1919, c. 8, 41 Stat. 128, making the appropriation for the support of the army for the fiscal year ending June 30, 1920, which reads as follows:

"That no part of any of the appropriations made herein nor any of the unexpended balances of appropriations heretofore made for the support and maintenance of the army or the military establishment shall be expended for the purchase of real estate for the construction of army camps or cantonments except in such cases at National Army or National Guard camps or cantonments which were in use prior to November 11, 1918, where it has been or may be found more economical to the government for the purpose of salvaging such camps or cantonments to buy real estate than to continue to pay rentals or claims for damages thereon, and except where industrial plants have been constructed or taken over by the government for war purposes and the purchase of land is necessary in order to protect the interest of the government"

—and urge that the effect of this provision is that there is no appropriation for the payment of the land sought to be taken, and that the Secretary of War is only authorized to make purchases of real estate for the construction of army camps or cantonments, in connection with existing camps, having in view the salving of the camp and the property thus acquired as a whole, and that no authority is given to proceed by condemnation to acquire such additional land as may be thus needed; in other words, that the property here sought to be condemned is not for such a public use as the Constitution contemplates, but only to enable the government the better and more economically to salve the tracts and camp sites that it may own adjacent thereto.

That there may be serious question regarding the right to condemn for the purposes indicated—that is, for salving purposes—goes without saying; but that is a matter that the court need not pass upon here, as this proceeding on its face is not for such purpose. The government's petition sets out that the condemnation is sought for one of the purposes for which the Secretary of War is expressly given authority to proceed by condemnation, namely, to acquire land to be used for a "military training camp." The contention made would, in effect, be to treat the appropriation act of July 11, 1919, in the particular cited, as a repeal by implication of the statute authorizing the Secretary of War to cause condemnation proceedings to be commenced for the purposes named in the act of July 2, 1917; that is to say, for "fortifications, coast defenses and military training camps."

Repeals of statutes by implication are not favored, and certainly the same should not be adopted unless entirely clear in respect to a statute as important as the one under consideration here. In this connection, sight should not be lost of the fact that military training camps are an incident to, or necessary for, the maintenance and organization of the army in time of peace as well as of war. It is true that the amendment to the appropriation act in question provides that no part of the appropriation of the money claimed by the Secretary of War to be available for the acquisition of the lands for the training camp in question shall be used for the purchase of real estate for the construction of army camps or cantonments, save to purchase in connection with cantonments or camps in use prior to November 11, 1918, for salvage pur-

poses; but since this is a proceeding in which the Secretary of War is engaged in the condemnation of property for purposes within his discretion, and not for salvage purposes, the court should be slow to hold that he had not the authority to use the appropriation committed to him for the purpose. On the contrary, certainly at this stage of the proceeding, the court would assume that he had, or would exercise the authority reposed in him, in expending the appropriation in question, properly, wisely, and discreetly. Moreover, the court should not substitute its judgment for that of the Secretary of War as to the existence or nonexistence of the fund with which to pay for the property condemned, especially when he vouches the fact that he was possessed of such funds. In re Rugheimer (D. C.) 36 Fed. 369. This is particularly true as it would not follow, if he should be mistaken as to his position regarding his right to use this particular fund, that he would not be warranted in paying for the property from other sources at his command, or secure the necessary appropriation to meet the requirements of the condemnation.

[3] The judicial question to be determined is whether the use for which it is proposed to take the property sought to be condemned, is a public one or not. When that is done, the judicial function is exhausted, and the extent to which property may be taken, or just how it will be paid for, rests in the legislative discretion; the court, however, to see that just compensation is made before the property is taken.

[4, 5] The act of Congress under which the proceeding is inaugurated declares "training camps" to be one of the purposes for which condemnation proceedings may be commenced. That training camps are public purposes cannot be questioned. Shoemaker v. United States, 147 U. S. 282, 298, 13 Sup. Ct. 361, 37 L. Ed. 170. It does not follow that the fact that the exact sum of money with which to pay for property may not be in hand is necessary to the maintenance of the proceeding. This is apparent from the fact that not infrequently specific sums may be named at which the property may be acquired. The allowance of a larger or smaller sum neither affects the legality of the proceeding nor the right of the citizen to receive what is justly due him. Shoemaker v. United States, supra, 147 U. S. 302, 13 Sup. Ct. 361, 37 L. Ed. 170; In re Manderson (C. C. A. 3d Circuit) 51 Fed. 501, 2 C. C. A. 490.

The court should be jealous in every case to see that the property is only taken upon just compensation being paid therefor, and the condemnation does not pass title until the land sought to be taken is paid for. The case of United States v. Gettysburg Electric Ry. Co., 160 U. S. 668, 683, 684, and 685, 16 Sup. Ct. 427, 40 L. Ed. 576, will be of interest, as bearing on the necessity for an appropriation in the exercise of the right of condemnation.

[6] Recurring to the question raised as to the right to proceed in this court, it seems almost too well settled now to be the subject of serious consideration, Congress having by Act Aug. 1, 1888, c. 728, 25 Stat. 357 (Comp. St. §§ 6909, 6910), in terms provided that such proceedings instituted by the Secretary of the Treasury or any other officer of the government, seeking to acquire property for the United

States by condemnation, or under judicial process, may be instituted whenever it is necessary or advantageous to the government so to do, and that the United States District Courts of the district where the land lies, shall have jurisdiction of such proceedings.

In Chappell v. United States, 81 Fed. 764, 26 C. C. A. 600, a decision of the Circuit Court of Appeals of this circuit, it was held that under the provisions of the act of Congress under which these proceedings are inaugurated the Attorney General may, at his election, proceed in either the state or federal court. This case was subsequently passed upon by the Supreme Court of the United States and affirmed. 160 U. S. 509, 510, 16 Sup. Ct. 397, 40 L. Ed. 510.

It follows, from what has been said, that the pleas to the jurisdiction and demurrer filed to the petition should be overruled, and the motion to dismiss denied.

WHEELER et al. v. BADENHAUSEN CO.

(District Court, E. D. Pennsylvania. October 22, 1919. On Petition to Vacate Appointment of Receiver, October 30, 1919.)

No. 1855.

1. COURTS ⟸493(3)—CONTROL OF PROPERTY BY RECEIVER TEST OF JURISDICTION BETWEEN COURTS.
   Though suit for appointment of receiver of a corporation was begun in a Delaware state court before suit for such purpose was brought in a federal court for Pennsylvania, the appointment of receiver first made by the federal court will not be revoked, and the property turned over to the Delaware receiver, under the rule of comity as between courts of concurrent jurisdiction of the subject-matter of an action, all the corporation's property being in Pennsylvania and New Jersey, and being at the time of appointment of the Delaware receiver, in the possession and control of the federal court for Pennsylvania through its receiver, and of a court for New Jersey through its ancillary receivers, control over the property in controversy being the test of jurisdiction.
2. RECEIVERS ⟸14—DISTINCTION BETWEEN RECEIVERSHIP FOR INSOLVENCY AND FOR CONSERVATION AND REHABILITATION.
   There is a clear distinction between a receivership on the ground of insolvency and one for conservation of assets and rehabilitation for the benefit of creditors.
3. CORPORATIONS ⟸558—INTERESTS TO BE CONSIDERED ON APPLICATION FOR REVOCATION OF APPOINTMENT OF RECEIVER.
   Where a corporation, though insolvent under the Delaware rule, because unable to meet its obligations in due course of business, is not insolvent under the rule in Pennsylvania, where its principal office and most of its property is located, it having assets largely exceeding its liabilities, a federal court for Pennsylvania, which at suit for creditors appointed a receiver to conserve its assets and conduct its business, will not revoke its appointment, in favor of receivers appointed by a court of Delaware at suit of a single stockholder; comity not requiring it, and the creditors, whose interests are to be given the greater consideration, opposing it.

On Petition to Vacate Appointment of Receiver.

4. CORPORATIONS ⟸558—RIGHT TO QUESTION ELIGIBILITY OF RECEIVER.
   Decision on the question of jurisdiction having been against receivers for a corporation appointed by a state court, who petitioned a federal

court to revoke its appointment of a receiver for the corporation, basing their right to take possession of the property solely on the ground that the state court first acquired jurisdiction, they have no standing to attack the eligibility of the federal court's appointee.

In Equity. Suit by Morris Wheeler and other against the Badenhausen Company. A receiver for defendant was appointed in that suit, and petition for revocation of his appointment is made by receivers appointed for such company by a court of Delaware. Petition denied and dismissed.

Henry J. Scott, of Philadelphia, Pa., for Delaware receivers.

William W. Porter, of Philadelphia, Pa., for receiver Foulkrod.

M. Hampton Todd, of Philadelphia, Pa., for Morris, Wheeler & Co.

Wm. Y. C. Anderson, of Philadelphia, Pa., for United States Shipping Board Emergency Fleet Corporation.

THOMPSON, District Judge. [1] This petition is based upon the well-known rule that, where two courts have concurrent jurisdiction, it is the policy of the law that the jurisdiction of both shall not be concurrently invoked and exercised, and, as between two courts having concurrent jurisdiction of the subject-matter of an action, the court which first obtains jurisdiction has the right to proceed to its final determination without interference from the other. O'Neil v. Welch, 245 Fed. 261, 157 C. C. A. 453; Pitt et al. v. Rodgers, 104 Fed. 387, 43 C. C. A. 600; Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287.

The question comes up upon the petition of receivers appointed by the Court of Chancery for Newcastle County, Del. On August 28, 1918, Edgar Kidwell, an alleged stockholder, filed a bill in that court, setting forth that the Badenhausen Company, the defendant corporation, was insolvent; that its affairs were being mismanaged by its president, and its interests endangered by reason of fraudulent and dishonest practices upon his part, with the prospect of injury to creditors, stockholders, and contractors with the company, unless the corporation be taken from the control of its majority stockholders and placed under the supervision of the court; praying that the corporation be adjudged insolvent in that it was unable to meet its obligations in due course of business and that receivers be appointed with authority to continue the business to the extent of completing existing contracts.

To this bill the defendant filed its answer October 31, 1918, denying the charges of improper conduct on the part of the president and insolvency, and setting forth that its assets largely exceeded its liabilities and that it was amply able to meet and was meeting all of its just debts in the due course of business.

Thereafter, on January 20, 1919, a creditors' bill was filed in this court, averring that the Badenhausen Company had offices in the city of Philadelphia, and its business was there conducted; that it was engaged, inter alia, in the manufacture and sale of boilers, marine engines, heaters, separators, condensers, etc., with plants, at which the manufacturing business was conducted, located at Cornwells and Bridgeport, Pa., and at Bound Brook, N. J.; that its assets, includ-

ing real estate, aggregated upwards of $3,000,000, and its liabilities aggregated not in excess of $1,600,000; that by reason of the extraordinary financial conditions due to the war it was unable to provide for the payment of its obligations at that time maturing or about to mature, or to presently convert sufficient of its assets to secure the funds necessary for the prosecution of the present conduct of its business; that there was imminent danger that the property and assets of the company would be taken in execution by its creditors, and thereby values would be sacrificed, and the creditors of the company, whose claims were not yet due, and its stockholders would be greatly prejudiced and suffer loss and injury; that if the business of the company could be temporarily continued under a receivership and its property and assets thus conserved and protected from levy and sale, and existing contracts would be completed or adjusted, the creditors and stockholders thereof would be greatly advantaged and saved from any loss or injury. It was averred that the business had been highly profitable, and an interruption of its business at that time would destroy the values created by large expenditures. It prayed for an injunction restraining the Badenhausen Company from disposing of its assets within the jurisdiction of this court, and that a receiver be appointed to take possession of its assets within the jurisdiction of this court for the purpose of conserving such assets, with authority to continue the business.

On the same day, an answer was filed consenting to the appointment of a receiver as prayed for in the bill. On the same day, a receiver was appointed with authority and direction to take possession of the books, papers, moneys, choses in action, assets, and all other property, real and personal, of the company, within the jurisdiction of this court, for the purpose of conserving the assets of the company, and that the receiver be authorized to continue the business until further order of the court.

On February 7, 1919, a hearing was had before the Chancellor in the Court of Chancery, of Newcastle County, Del., upon bill, answer, and evidence produced. The evidence consisted of a certified copy of the bill, answer, and decree appointing a receiver for the Badenhausen Company in this court. On February 20, 1919, the Chancellor entered a decree, finding, upon the bill, answer, and evidence submitted, that the defendant corporation was insolvent, in that it was unable to pay its debts when and as they became due, appointing receivers and enjoining the company, its president, directors, officers, agents, servants, and attorneys from receiving, collecting, or compromising any debt due or belonging to the company and from paying out, selling, assigning, or transferring any property, estate, moneys, funds, lands, tenements, or effects of any description whatsoever belonging to the company to any person other than the receivers thereby appointed, and commanding that the company, its officers, agents, etc., surrender and hand over to the receivers all property, estate, moneys, funds, assets, books, papers, and documents of every sort belonging to or in the custody, possession, or control of the company, ordering discovery, and authorizing and empowering the receivers to take such proceed-

ings as might be necessary in the courts of any other state or the United States to secure the aid of said courts by the appointment of ancillary receivers or otherwise, in taking possession and charge of the property and assets of the Badenhausen Company.

An appeal from this decree was taken by the Badenhausen Company, upon which the Supreme Court of Delaware affirmed the decree of the Chancellor. 107 Atl. 297. The hearing upon the petition to vacate the appointment of receiver in this court had been continued pending the disposition of the appeal to the Supreme Court of Delaware.

Having due regard to the policy of the law and the rule heretofore stated, the first question which suggests itself is whether the United States District Court for the Eastern district of Pennsylvania and the Court of Chancery of Newcastle County, Del., had such concurrent jurisdiction as to render the appointment of a receiver by this court an interference with the jurisdiction acquired by the Delaware court. The Delaware court had already obtained jurisdiction over the defendant. To the extent, therefore, of having jurisdiction over the defendant, this court and the Delaware court had concurrent jurisdiction. The territorial limits of the jurisdiction of the Newcastle county court over the property of the defendant is restricted by the territorial limits of the state in which that court is established. The territorial limits of this court for the purpose of obtaining jurisdiction and control over the property of the defendant is restricted by the territorial limits of the state of Pennsylvania unless extended to the entire circuit as provided in section 56 of the Judicial Code March 3, 1911 (36 Stat. 1102, c. 231 [Comp. St. § 1038]).

The real estate of the defendant is located within the Eastern district of Pennsylvania. Its personal assets, its principal offices, its books and papers are within the Eastern district of Pennsylvania. Its manufacturing business is conducted partly in this district and partly in the district of New Jersey. As far as jurisdiction over the real estate or property of a fixed nature is concerned, therefore, the jurisdiction of this court and that of the court of Delaware is not concurrent. The pendency of the bill in Newcastle county, Del., had not brought within the control of that court any of the property of the defendant. The cause had not been brought on for hearing, although the bill had been filed many months before that filed in this court. At the time of the appointment of receivers by the Court of Chancery of Newcastle County, Del., this court had in its possession and control, through its receiver, all of the property of the defendant located within the Eastern district of Pennsylvania, and through the appointment of ancillary receivers by the District Court of New Jersey, that court had taken possession and control of the assets of the company within the state of New Jersey.

Control over the property in controversy is the test of jurisdiction. Riggs v. Johnson County, 6 Wall. 166, 18 L. Ed. 768; In re Johnson, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103; O'Neil v. Welch, 245 Fed. 261, 157 C. C. A. 453. Applying this test, this court had custody and control over all the property of the Badenhausen Company prior to

the appointment of receivers by the Delaware court and prior to any action to acquire such control upon the part of that court.

[2, 3] Coming, now, to the remedies to be administered, there is a clear distinction between a receivership on the ground of insolvency and a receivership for conservation of assets and rehabilitation for the benefit of creditors. Scattergood v. American Pipe & Construction Co., 249 Fed. 23, 161 C. C. A. 83. While the finding of insolvency by the Delaware court is accepted with due respect, under the facts appearing in this case the corporation would not be deemed insolvent in Pennsylvania, where the term "insolvency" generally signifies insufficiency of assets when turned into money to discharge existing indebtedness. Mueller v. Fire Clay Co., 183 Pa. 450, 38 Atl. 1009. A receivership for a concern not insolvent in that sense is recognized in Scattergood v. American Pipe & Construction Co., supra, as peculiarly appropriate.

The whole record in this case shows that the interests of creditors whose rights are superior to those of stockholders, and at whose instance the receiver in this district was appointed, ought to be regarded rather than those of the one stockholder at whose suit the receivers were appointed by the court of Delaware. As construed by the courts of Pennsylvania, the corporation is not insolvent, its assets largely exceed its liabilities, its receiver has taken possession, is conducting the business to the satisfaction of creditors and contractors, and the revocation of his appointment is opposed by contractors and others in interest, who have filed answers in the cause.

The bill filed in the Delaware court does not bring the case within the reason of the decision in O'Neil v. Welch, 245 Fed. 261, 157 C. C. A. 453, or Palmer v. Texas, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435, or McKinney v. Landon, 209 Fed. 300, 126 C. C. A. 266, where the intervention was by the Attorney General on behalf of the governmental authority of the state for the purpose of taking possession of and administering the property in the public interest. I see no sound reason in this case, either because of the rule of comity urged by counsel for the petitioner or because of the interests of the corporation, its creditors, its stockholders, and those concerned in contracts which the receiver is carrying out to relinquish jurisdiction by vacation of the appointment of the receiver and to turn over its property and business to receivers of a foreign jurisdiction.

The prayer of the petition is denied, and the petition is dismissed.

On Petition to Vacate Appointment of Receiver.

[4] Since filing the opinion in the above matter, the counsel for the petitioners has called attention to the fact that in the opinion the question of the eligibility of John L. Foulkrod, Esq., to be receiver raised in the brief of counsel was not passed upon.

The petition of the receivers appointed by the Court of Chancery of Newcastle County, Del., prays that Mr. Foulkrod's appointment be revoked, and that he be directed to turn over to the petitioners as receivers all the books, papers, documents, property, and assets of the Badenhausen Company. The standing of the petitioners is based sole-

ly upon their alleged right as receivers of the Delaware court to take possession and control of the property of the defendant corporation by reason of that court having first acquired jurisdiction. For the reasons stated in the opinion, this court has declined to relinquish jurisdiction by revoking the appointment of its receiver and ordering him to turn over to the petitioners the property of the defendant. The question of jurisdiction having been decided adversely to the petitioners, they are left without any interest as parties or any standing to attack the eligibility of the receiver appointed by this court. Because the petitioners have no standing as parties to the cause to raise the question, and a decision upon Mr. Foulkrod's eligibility is not germane to the question of jurisdiction, no reference was made in the opinion to the contention in counsel's brief.

The above reasons are now stated at the request of the counsel for the petitioners.

JOHN L. ROPER LUMBER CO. v. HINTON et al.

(District Court, E. D. North Carolina. August 23, 1919.)

1. EVIDENCE ⟸452, 460(7)—PAROL EVIDENCE ADMISSIBLE TO EXPLAIN LATENT AMBIGUITY IN DEED.
   A deed describing land as the Old Lebanon juniper swamp, etc., is sufficiently definite to admit parol evidence to fit the description to the land conveyed; the description being a latent ambiguity.
2. ESTOPPEL ⟸27—OF GRANTEE FROM PURCHASER UNDER WARRANTY DEED TO SET UP ADVERSE TITLE.
   Persons claiming through a grantor, who warranted title, are estopped from asserting as against his grantee title to lands included within the description of the first conveyance, regardless of whether grantor, who was their source of title, had title to the property included.
3. DEEDS ⟸114(1)—CONSTRUCTION OF DESCRIPTION REFERRING TO COUNTY RECORDS.
   Deed describing the land conveyed as the Old Lebanon juniper swamp, title to which the grantor derived from E., administrator, which made reference to the county records, etc., *held* not to include title two small parcels of highland within the general boundaries of the swamp, which the grantor had acquired from other sources; it appearing that the smaller parcels had for many years been distinguished from the remainder of the swamp.
4. DEEDS ⟸93—INTENT OF PARTIES SOUGHT IN CONSTRUCTION OF DEED.
   The courts will endeavor to ascertain and effectuate the intention of the parties to a deed, and such intention will be sought by reference to the language used by the grantor.
5. DEEDS ⟸90—AMBIGUOUS LANGUAGE CONSTRUED FAVORABLY TO GRANTEE.
   If the language in a deed is of doubtful meaning, capable of more than one construction, that construction most favorable to the grantee will be adopted.
6. DEEDS ⟸112(1)—OTHER DEED OR RECORD REFERRED TO CONSTRUED AS PART OF DEED.
   When a grantor, for the purpose of rendering a description of the property more certain, etc., refers to another deed or record, such deed or record so referred to will be treated as if embodied in the deed in which reference is made, and the premises therein described will pass under it as if written in the deed.

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

7. DEEDS ⊂⇒111—PARTICULAR DESCRIPTION CONTROLS GENERAL DESCRIPTION.
When a deed contains a general description, followed by a particular description of the premises granted, the latter will control the former.

8. DEEDS ⊂⇒95—EVERY CLAUSE GIVEN INTENDED EFFECT.
Every clause and part of a deed should be given that force and effect the parties must have intended.

9. DEEDS ⊂⇒118—EVIDENCE SUFFICIENTLY IDENTIFYING PARCELS NOT INCLUDED IN DESCRIPTION.
Where defendants claimed small parcels of highland within the general boundaries of the swamp, which their predecessor had granted to those under whom plaintiff claimed, *held*, that the small parcels of highland which were not included in the swamp were with reasonable certainty correctly located.

In Equity. Bill by the John L. Roper Lumber Company against C. L. Hinton and others to enjoin trespass and acquire title to land. Bill dismissed.

J. Kenyon Wilson, of Elizabeth City, N. C., and Small, MacLean, Bragaw & Rodman, of Washington, N. C., for plaintiff.

C. E. Thompson and Aydlett, Simpson & Sawyer, all of Elizabeth City, N. C., for defendants.

CONNOR, District Judge. The subject-matter of this suit consists of two tracts or parcels of land, described in the pleadings and the deeds introduced in evidence as the "Thornton" tract, of 85 acres, and the "Gales" tract, of 281 acres, situate in Camden county, N. C. The record evidence discloses the following facts:

John L. Hinton, the ancestor of defendants, under whom they claim title, on March 1, 1854, conveyed to James B. Norfleet:

"A certain tract of swamp land called and known as the Old Lebanon juniper swamp, lying in the counties of Gates and Camden, and supposed to contain 5,000 acres, more or less, and is the same tract of juniper swamp to which I derived title from Hamlin L. Epps, administrator and commissioner of Admiral Brinkley, deceased, [as by] reference to the records of the register's office of Camden county, North Carolina, [will] at large and more fully appear."

This deed contains a covenant of warranty against "all and every incumbrance, claim, or demand from, by, or through him, the said John Hinton, or any person claiming by, or through, or under him." It was admitted to probate at the March term, 1854, of Camden county court, and registered in said county June 19, 1854, Book Z, page 596.

[1] The description of the land as "called and known the 'Old Lebanon juniper swamp'" is sufficiently definite to admit parol evidence to "fit the description to the thing." The description is what the courts refer to as "a latent ambiguity" and open to parol evidence to make it definite. Deaf and Dumb Asylum v. Norwood, 45 N. C. 65.

The grantor points to the source from which more definite description may be found—the deed under which he derived title. Reference to this deed and the records of the register's office of Camden county discloses a description in substantially the same language as in the deed to Hinton, as the "juniper swamp called the Old Lebanon," referring to "a deed from Thomas G. Benton to Brinkley and Riddick."

Reference to the deed from Thos. G. Benton to Riddick and Brinkley, dated August 1, 1847, discloses a general description as:

"A certain tract of land containing 5,000 acres, more or less, being in the county of Camden in the state of North Carolina, and known by the name of Old Lebanon swamp, being the same tract or parcel of land which the said Thomas G. Benton derived title from John B. Benton, by deed of bargain and sale bearing date the 3d day of February, 1843, and duly recorded in the clerk's office of Camden county in North Carolina and is bounded as follows: On the north by the lands of Gisbourne Cherry and George Happer, on the east by the lands of Harrison Weston and others, on the south by the lands of Gisbourne Cherry and others, and on the west by the lands of Joseph T. Allyn and others."

Reference to the deed from John B. Benton to Thos. G. Benton, February 3, 1843, discloses a description as "the Old Lebanon swamp, being the same tract or parcel of land which said John B. Benton purchased at the sale of James N. McPherson, deceased," followed by calls for the same adjoining lands as in the next preceding deed.

Reference to the next and other deeds, referred to, and called for in the chain of title, discloses substantially the same description as "the Old Lebanon swamp, or Old Lebanon," until we reach a deed from Ann Scott to Wylie McPherson, dated January 20, 1818, in which the land is described as:

"Five undivided sixth parts of a tract of land lying in the county of Camden, state of North Carolina, containing 6,000 acres, more or less, called and known by the name of the Old Lebanon estate, being the interest lately held by Exum Newby."

Reference to the deed from Exum Newby to Ann Scott, dated February 26, 1810, discloses the following description:

"All my undivided five-sixths of the Old Lebanon estate in the county of Camden, * * * which said five-sixths of the Old Lebanon estate I, the said Exum Newby, purchased of Thomas Fitt and Mathias E. Sawyer, as by these deeds of sale to me will appear. The lands composing the said Old Lebanon estate, lying and being in Camden county, are butted and bounded as follows, viz: Beginning at Pasquotank river, at Robert Edney's line, and running north along his line to the canal, thence along the canal to Gales' creek or run, then south to the river Pasquotank, thence up the said river Pasquotank to the head thereof, thence northwest to the line of the New Lebanon lands, thence along the line of the New Lebanon lands to Wainwright's patent line at Cartright's corner, thence south to the river Pasquotank, thence along the said river to the first station. Excepting thereout, the two tracts called Thornton and Gales; these two tracts containing 365 acres, or thereabouts. The whole of the lands belonging to the Old Lebanon being estimated at 7,000 acres, more or less."

Mathias E. Sawyer, on August 20, 1803, executed a deed conveying to Exum Newby one-third interest in a tract of land, known as Old Lebanon, containing the same description as the deed from Newby to Ann Scott, omitting the exception of the Thornton and Gales tracts.

On June 11, 1803, Thomas Fitt executed to Exum Newby a deed conveying one-half undivided interest in Old Lebanon, containing the same description as the deed to Ann Scott, with the exception of the Thornton and Gales tracts.

On June 25, 1800, Isaac Lamn, sheriff, conveyed to Thomas Fitt "the one-half undivided interest of William Reas in the Old Lebanon

estate," containing the same description as that contained in the deed of Fitt to Newby, with the exception of the Thornton and Gales tracts, and also referring to "a deed from John Hamilton to Mathias E. Sawyer."

On September 6, 1797, John Shaw conveyed to William Reas one-third part of the Old Lebanon estate, which he recites was owned by Mathias E. Sawyer, Enoch Sawyer, and himself as tenants in common. This deed contains the same description as the one from Exum Newby to Ann Scott, with the exception of the Gales and Thornton tracts.

Several deeds executed subsequent to June 3, 1795, by John Hamilton, Thomas Harvey, and others to Mathias E. Sawyer, are introduced, conveying tracts of land which appear to include the Old Lebanon swamp, but the boundaries do not correspond with those contained in the deed from Sawyer to Exum Newby and those executed subsequent thereto. There is nothing in these deeds relating or referring to the Gales and Thornton tracts. John Hamilton's deeds are dated September 22, 1795.

On June 3, 1795, John Hamilton executed a paper writing in the following words:

"Whereas, Ben Jones, the legal proprietor of the Lebanon swamp, Thomas Harvey, Nathaniel Payne, owners and coproprietors of 25 shares of twenty-five thirtieth parts as copartners of the same and commonly called the Lebanon Company lands, have on the day of the date hereof laid off to the subscriber four shares by way of division of the said Lebanon Company lands, which four shares it is alleged do surround the tracts of land called Gales and Thornton: Now these writings witness that I do hereby now and forever relinquish all right, title, claim, and demand unto the said two tracts, Gales and Thornton, having at present no interest therein."

Following his signature, under seal, to the foregoing, are these words:

"The said Thornton tract agreeably to the patent contains eighty-three acres and Gales tract one hundred and forty-one acres and a half, which quantity the said Hamilton hereby agrees to convey by a deed of relinquishment to any person who the said Jones may sell the same to"

—under seal, acknowledged in open court, and recorded in Camden county October 26, 1795.

On July 10, 1788, the state of North Carolina issued grant No. 40 to Benjamin Jones, covering 19,200 acres of land situate in Camden county, being a juniper swamp on the head of Pasquotank river. This land appears thereafter to have been known as the Lebanon swamp, and became the property of a company composed of Benjamin Jones, Thomas Harvey, Nathaniel Payne, and John Hamilton, called the "Lebanon Company."

On June 2, 1795, deeds reciting that, "without the intervention of a court of chancery, it was mutually agreed that a division or partition of the Lebanon Company's lands be made," etc., were introduced, among them a deed executed by Jones, Harvey, and Payne to John Hamilton, conveying to him that part of the Lebanon Company's lands so described to "take out of the Lebanon patent three thousand and six hundred and twenty-five acres, and no more." This land, as ap-

pears by the subsequent deeds, was thereafter known as, and called, the Old Lebanon swamp, as distinguished from the remaining portion of the Lebanon Company's land, thereafter referred to as New Lebanon. The surveyors locate "Old Lebanon," as shown on the map introduced in evidence, within the lines marked A, B, C, D, E, F.

It will be observed that the first paper writing referring to the Gales and Thornton tracts is the relinquishment by John Hamilton, June 3, 1795, one day after he acquired title by the deeds of Jones, Harvey, and Payne. The legal effect of this paper will be considered later. It is referred to now as a link in the chain of the record evidence.

To understand why this paper was executed, it becomes necessary to refer to two grants. On February 5, 1758, 30 years prior to the Benjamin Jones grant, Earl Granville conveyed to Samuel Edney:

"All that tract or parcel of land situate, lying, and being in the parish of St. Peters, in the county of Pasquotank, and in the said province, on the north side of Pasquotank river, in the desert, beginning at a gum on the west side of Juniper run, thence N. 77° W. 4½ chains to a gum, thence N. 30° W. 17 chains to a poplar, then N. 42° E. 40 chains, then S. 80° E. 40 chains, then S. 32° E. 41 chains, then S. 15° E. 20 chains to the first station, containing in the whole two hundred and eighty-one acres."

This deed was duly recorded in Pasquotank county. (Camden county was formed in 1777.)

On March 19, 1762, Samuel Johnson, governor, granted to Samuel Edney:

"A tract of land in Pasquotank county, on the north side of Pasquotank river, called 'the World's End,' beginning at a gum, thence N. 60° W. 40 chains, thence N. 30° E. 18 chains, thence N. 67° E. 43 chains, thence S. 35° W. 25 chains, to the first station, containing 85 acres."

If these two tracts are located within the boundaries of the Old Lebanon swamp, being of prior date to the Benjamin Jones grant, Samuel Edney had the superior title, unless it had been lost by some means recognized by the law. There is evidence, and I find as a fact, that for many years these two tracts were known and referred to as the Thornton and Gales tracts. It is manifest that they were so known as early as June 3, 1795, to the owners of the Lebanon Company lands. John Hamilton so designates them at that date. The deeds referred to expressly except them from the Old Lebanon swamp by those names, and the number of acres which they are said to contain corresponds with the grants. Assuming that these two tracts are within the boundaries of the Old Lebanon swamp, they are included in the description contained in the deeds from Jones, Harvey, and Payne to Hamilton, June 2, 1795. The paper writing which he executed June 3, 1795, did not convey them to any grantee. It was a mere disclaimer of title, followed by a promise to convey them to any person whom Benjamin Jones should direct. The relevancy of this paper consists in its evidential value, recognizing the fact that the two tracts were within the boundaries of the Old Lebanon swamp, but were held by a superior or paramount title. In his conveyance to Mathias Sawyer, he makes no reference to these tracts. When John Shaw, who acquired a one-third part of the Old Lebanon swamp, conveyed to Rea, September 6, 1797,

he excepted "the Gales and Thornton tracts, containing 365 acres," which is the number of acres, less one, contained in these tracts, and refers to the "patent boundaries of the two small tracts." It will be observed that Shaw executed two deeds to Rea, of same date—one deed conveying one-third, and the other one-sixth, part; the boundaries and exception are the same in both deeds. The description in the deed from Sheriff Lamn for Rea's interest to Fitt follows these deeds, as does the deed from Fitt to Newby, and Newby to Ann Scott, and her deed to Wiley McPherson, February 20, 1818. It is, therefore, manifest that McPherson did not acquire title by these deeds to the Gales and Thornton tracts. It is immaterial in this phase of the case in whom the title to the two tracts was vested; they are expressly excepted from the deeds under which John L. Hinton derived title.

Passing the question whether the two tracts can be located, and assuming that they are within the boundaries of the Old Lebanon swamp, or Old Lebanon, the question is presented whether the description in the deed from Hinton to Norfleet includes them. The land which he conveyed—

"is the same tract of juniper swamp to which I derived title from Hamlin L. Epps, administrator and commissioner of Admiral Brinkley, deceased."

[2] If the two tracts in controversy are within this description, it is immaterial whether Hinton had title to them, because he warrants the title to all of the land conveyed "as against himself and those claiming under, by, or through him." It being conceded that defendants claim under him, they are estopped by his warranty. Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655. Defendants insist that their ancestor did not "derive title" to the Gales and Thornton tracts from Hamlin L. Epps, administrator, because Admiral Brinkley, his intestate, had no title; that, on the contrary, he "derived title" to these tracts from Samuel Edney, the original grantee and owner of the paramount title. The question of title, therefore, becomes material upon the question of description. This necessitates an examination of the title to the two tracts.

[3] The record evidence discloses that:

On December 27, 1760, Samuel Edney conveyed to Newton Edney one-half of the Gales tract, described by metes and bounds, "containing 140 acres." This deed was duly proven and registered February 15, 1762. On October 7, 1765, Newton R. Edney conveyed by same description to Robert Cartwright. On January 29, 1783, Robert Cartwright conveyed by the same description to Josiah Sexton. No deed from Sexton is introduced. On May 30, 1796, Benjamin A. Jones conveyed to Enoch Sawyer by same description, concluding:

"It being the whole of the land which the said Benjamin A. Jones bought of Jeremiah Sexton."

He refers to the land as the "Gales tract." On February 6, 1816, Enoch Sawyer conveyed by same description to Thomas McDaniel, also referring to the land as the "Gales tract." On January 24, 1818, Thomas McDaniel conveyed by same description to Hollowell Old, referring to it as the "Gales tract." On December 1, 1770, Samuel

Edney conveyed to Timothy Hixon the other half of his 281-acre patent or grant. It will be observed that the first call in this deed "is a juniper adjoining a conveyance to Newton Edney out of said patent." On February 18, 1775, Hixon conveyed by same description to Newton R. Edney. On December 16, 1791, Newton E. Edney conveyed by same description to Joseph Edney. In October, 1796, Joseph Edney conveyed by same description to John Shaw. On May 5, 1800, Shaw executed a deed to Thomas B. Littlejohn, conveying, among other tracts:

"One other tract of land lying in Camden county, adjoining the Old Lebanon mill, containing about 150 acres of land, known by the name of Thornton."

While this description is rather indefinite, in view of the fact that it does not appear that Shaw owned the 85-acre tract, and in a short time thereafter conveyed the same land to Pugh, it is a reasonable inference that the land conveyed was the same tract purchased from Shaw. On November 5, 1812, Littlejohn conveyed to George Pugh a tract described as:

"A part of a patent granted to Samuel Edney, commonly called the Morris land, beginning at the river swamp near the Juniper run, at the dividing line between said tract and the tract called Gales, running nearly up the said run to the said patent line, thence along the said line westwardly to a poplar near the river swamp, thence along said patent line S. 80° E. to the place of beginning, containing, by estimation, 150 acres, more or less."

Reference to the calls in the deed from Earl Granville to Edney shows the call, S. 80° E., the call for the poplar, and other calls, indicating that this tract is the same part of the Gales, or 281-acre, tract conveyed by Edney to Hixon. The reference to it as "the Morris land" may be accounted for by a mistake in copying. On July 28, 1813, Pugh conveyed to Hollowell Old by the same description, and calls it "the Gales tract." This deed conveys only one-half of the tract which Littlejohn conveyed to Pugh.

The next link in the chain of title is the petition in the county court of Camden county, October term, 1826, by the heirs of Old, followed by the report of commissioners. John Hinton, an infant, represented by his guardian, Lewis Hinton, is one of the petitioners. As is usual, the description of the several tracts is very indefinite. It is claimed that the tract described as "Old Lebanon, three hundred acres," is the Gales tract. It is allotted to John Hinton as "a tract of land and swamp lying above Gales run, containing two hundred and ninety acres." It is stated that a plat is attached, but none is found in the copies of the report introduced. Parol evidence was introduced tending to show that 35 years ago John L. Hinton, the same person called John Hinton in the petition for partition, the grandson of Hollowell Old, claimed to be the owner of the Gales tract, had an agent looking after, and forbidding trespassing, cutting timber, etc., and having tenants upon it. This was 40 years or more subsequent to his deed to Norfleet.

On December 16, 1763, Samuel Edney conveyed, by the same description contained in his grant of March 19, 1762, the 85 acres to

Thornton Gray. It is probable that the name of the grantee fixed upon the land the name "Thornton," by which it is in subsequent deeds referred to. No deed from Gray is found, but on November 30, 1787, Samuel Spence conveyed, by the same description contained in the grant, and specifically referring thereto, what he calls "World's End or Thornton's" to Benjamin Jones. It will be observed that Ben Jones took a grant for the Lebanon Company lands, within which this tract is included, on July 10, 1787. On May 3, 1796, he conveyed by the description contained in the grant to Enoch Sawyer. He makes specific reference to this tract, which he also calls "World's End, or Thornton's." On July 13, 1801, Enoch Sawyer conveyed to F. B. Sawyer the same land, who, on October 13, 1809, conveyed to John Stanley. On December 16, 1850, Thomas Stanley and others, reciting that they are the heirs of John Stanley, conveyed this tract to John L. Hinton, the ancestor of defendants. This deed was proven and recorded April 6, 1909. It is conceded that Old Lebanon is, to a large extent, swamp.

It is claimed by defendants, and the evidence tends to sustain them, that the Gales and Thornton tracts are ridges, elevated above the surrounding lands; that they were capable of being cleared, inhabited, and cultivated; that the growth on them is of a different character from that on the surrounding land. There is undisputed evidence that many years ago people lived upon these tracts, built dwelling and farm houses upon them, and cleared and cultivated fields within their boundaries. The Thornton tract, after the conveyance to Stanley, was called "Stanley Island." The character of the land accounts for the entry and purchase of these small tracts at a very early date. The frequent change in the title, prices for which it sold, and other facts apparent from the deeds and parol evidence, show they had a distinctive status within the knowledge of those who sold and purchased them. Several very old persons testify that they have known and heard the 80 acres called "Stanley's Island," or "Thornton's," and the 281-acre tract "Gales," for more than 50 years. There is uncontradicted evidence that for many years a bridge was maintained across the swamp lying between the "Island" and the river, pine timber grew on the "Island," with signs of corn rows and apple trees; 25 or 30 acres had been in cultivation. One witness, 73 years old, says that he has known it as "Thornton's" or "Stanley's Island" for 40 years; has seen signs of a building on it; that it is "highland," well marked between the island and the river. W. C. Foster, 85 years old, has known the "Island" 50 years; had seen a part of a frame house on it, some fruit trees, and apple trees. Mrs. Charlotte Jones, 83 years old, had seen the bridge leading to "Thornton's" or "Stanley's Island" 65 years ago; was on it when about 13 years old; parts of an old house, scantling, etc., on the land; saw where the land had been cultivated—corn rows. These witnesses also testify that they have known the Gales tract many years; that people lived on and cultivated portions of it.

A careful examination of the evidence brings me to the conclusion that the two tracts in controversy have been well known and distinctly

separated from the surrounding swamp land, resided upon and cultivated by persons claiming under Hinton, defendant's ancestor.

[4-8] This brings us to the decision of the question whether these two tracts passed to Norfleet under the description contained in the deed from John L. Hinton March 1, 1854. Reference to a few rules, by which courts are guided in the construction of deeds, will aid in reaching a decision of this question. It is elementary that the court will endeavor to ascertain, and effectuate, the intention of the parties to the deed, and that such intention will be sought by reference to the language used by the grantor. If such language is of doubtful meaning, capable of more than one construction, that one will be adopted most favorable to the grantee, or, to state the rule affirmatively, doubtful language will be construed against the grantor. When a grantor, for the purpose of rendering a description of the property, otherwise uncertain or ambiguous, more certain, or for the purpose of pointing the grantee to the source from which a more particular or certain description may be found, refers to another deed or record, such deed or record so referred to will be treated as if embodied in the deed in which such reference is made, and the premises therein described will pass under it, as if written into the deed. 4 Am. & Eng. Enc. (2d Ed.) 803. In Everitt v. Thomas, 23 N. C. 252, Ruffin, C. J., said:

"We do not doubt that, by a proper reference of one deed to another, the description of the latter may be considered as incorporated into the former, and both be read as one instrument for the purpose of identifying the thing intended to be conveyed."

See Roper Lumber Co. v. Swain, 161 N. C. 566, 77 S. E. 700.

Hinton not only refers to the deed from Hamlin Epps, administrator, as the source from which he "derived title," but also refers to "the records of the register's office of Camden county." It is to these sources, therefore, that we must go to "identify the thing intended to be conveyed." Each of the deeds referred to are links in the chain of title, as if incorporated into his deed. In Ritter v. Barrett, 20 N. C. 266, Gaston, J., says:

"The very purpose of the reference would seem to be to ascertain with more particularity what it was apprehended might not have been otherwise sufficiently described."

The description of the land as "the Old Lebanon juniper swamp, lying in the counties of Gates and Camden, containing 5,000 acres," was ambiguous, uncertain, and, in the absence of parol evidence or some more definite description, difficult, if not incapable, of location. Recognizing this fact, plaintiff introduces the deed of Hamlin Epps and other deeds showing title in John L. Hinton.

It is also a well-recognized rule of construction that when a deed contains a general description, followed by a particular description of the premises granted, the latter will control the former, because, as said by Taylor, C. J., in Campbell v. McArthur, 9 N. C. 38, 11 Am. Dec. 738:

"The grantor has referred to [that patent] as the means of correcting any mistake in the description of the land, and of ascertaining what his intent was in making the deed."

The principle is well stated by Judge Walker in Gudger v. White, 141 N. C. 507, 54 S. E. 386:

"Where the description in a deed closes with a clause which clearly and unequivocally sums up the intention of the parties as to the particular property conveyed, such clause should have its proper effect upon all the antecedent phrases in the description, and is surely entitled to much weight in determining the true construction of the deed. * * * After all, the simple question is: What does the whole description show was * * * intended to be conveyed? When reading the deed, and looking at the facts and circumstances as they appear, what impression is left on the mind as to the purpose of the parties?"

Adopting the well-settled rule of construction, that every clause and part of the deed should be given force and effect as the parties must have intended, I am constrained to conclude that John L. Hinton, by describing the land which he conveyed "as the same tract of juniper swamp to which I derived title from Hamlin L. Epps, administrator and commissioner of Admiral Brinkley, deceased, reference to the records of Camden county North Carolina, will at large more fully appear," excluded the Thornton and Gales tracts, to which he not only did not derive title from Epps, administrator of Brinkley, but from an independent source, and under a title paramount to the title of those from whom Brinkley derived title to the Old Lebanon juniper swamp.

[9] It is insisted that the Thornton and Gales tracts cannot be located. Plaintiff alleges that:

It is the owner of the Old Lebanon swamp, "being the same which was on the 1st day of March, 1854, conveyed by John L. Hinton to James B. Norfleet by deed duly recorded, etc., * * * which is also embraced within the boundaries of the grant from the state of North Carolina to Benjamin Jones, dated July 10, 1788, and recorded in Register's Book D, page 353. That defendants have asserted an adverse claim to said land, and in an effort to take possession thereof have entered thereon and committed trespasses," etc.

The amended bill is substantially the same as the original bill, making reference to the same deeds.

Defendants admit that plaintiff is the owner of the lands described in the deed from their ancestor, John L. Hinton, to James B. Norfleet, and disclaim title to said lands, but deny that the lands which they claim, and of which they are in possession, are within the boundaries of said land conveyed to Norfleet by Hinton. The answer appears to be drawn upon the theory that the Thornton and Gales tracts are outside the boundaries of the Old Lebanon juniper swamp. They aver that they set up no claim or right, either as heirs or devisees of John L. Hinton or otherwise, to any of the lands conveyed by the said John L. Hinton to James B. Norfleet by deed as set out in section 3 of the bill. They also deny that they have gone upon any of the land described in the said deed. They aver that they own a tract of land adjoining the land described in the bill and are in possession of the same, and that they and those under whom they claim have been in possession thereof for 60 years. Repeating their disclaimer, they aver, in the sixth section of their answer, that they own the tracts of land known as Thornton and Gales, setting out their title thereto, "neither of which tracts are within the bounds of the tract of land conveyed by Hinton

to Norfleet." All of this in varying language is repeated in each paragraph in their answer, insisting that these two tracts are not within the boundaries of the land conveyed to Norfleet. If, by this language, defendants intend to aver that the tracts in controversy are situate outside the boundaries of the Lebanon swamp, it is manifest they are mistaken. If, however, they intend to say that, although within the boundaries of the large tract, they are not within the description contained in the deed from Hinton to Norfleet, for the reason that he did not derive title to them from Hamlin Epps, I am of the opinion that they are correct.

The inquiry is presented whether the tracts in controversy are located with a reasonable degree of certainty. The description in the grants, assuming that the beginning is located, is amply sufficient. The grant for the "Thornton," or 85-acre tract, fixes the beginning "on the north side of Pasquotank river, near the head of a place called the World's End, beginning at a gum." There is evidence locating "Stanley's Bridge," leading to the foot of Stanley's Island; high land; the corn rows on the island are visible; it is now covered with pine timber; has been called "Stanley's Island" many years; swamp around it; signs of a house having been on it; gum on line, on the corner. The gum was 24 or 25 inches in diameter; since the war "might not have been over 20 inches." Colvin ran the line "one chain and some links" from there; he was surveying for plaintiff. His map is in evidence. Witness J. T. Williams went with him around the lines; they took in the principal part of Stanley's Island. Witness is 65 years old. While of necessity the evidence locating a corner of a small tract of land of the character of "Thornton" or "Stanley Island" must be, to a degree, uncertain, there is ample evidence, both oral and natural, that the boundaries were recognized by persons owning, living upon, and cultivating it. They were well known and recognized for very many years. The lines of demarcation separating the high or ridge land from the surrounding swamp are clear. One witness says:

"Stanley's Island is high land, and the lands surrounding it are low swamps; plainly marked, an old puncheon road leading up to Stanley's Island from the river, known as Stanley's Island Bridge; no marked trees were found by the surveyors in 1915; found an old line, brushed out, made five or six years ago by Colvin; found the gum to which Williams testified, 30 inches diameter, about 15 chains from the end of the Island."

Witness Cox thinks it about "75 or 100 years old." W. C. Foster, 85 years old, says that he was on Stanley's Island "during the war"; saw "a piece of frame house; it fell down; but on part of it there were some apple trees, fruit trees, walnut trees." Mrs. Charlotte Jones, 83 years old, says she has known Stanley's Bridge; "could not tell where it was, but could go and show you;" knows Stanley's Island—bridge leads to it; heard it called "Thornton"—65 or 70 years; was there twice; not quite grown when there; saw parts of an old house, few old apple trees, signs of plowed ground, and corn rows. There was other evidence by old persons of the same character.

The deed from Earl Granville for the Gales, or 281-acre tract calls as the beginning for "a gum on the west side of Juniper run, on the

north side of Pasquotank river, in the desert—St. Peters parish." The calls are for course and distance to trees, and refer to the "plan or map hereto attached." Plaintiff's witness, a surveyor who ran around this tract, says that, "taking the gum to be at the figure 1 on the plat, the lines correspond to the calls in the deed." J. T. Williams, for defendant, says that the gum (No. 1) was pointed to him by Newton Edney, some 50 years ago, as the beginning corner—as the Samuel Edney corner; that Mr. John K. Abbott, a surveyor, also pointed the gum to him as the beginning of the Samuel Edney land. Both are dead. There was evidence that the land had been cultivated; old corn rows; saw house on it. When he was a small boy, Hinton cut logs on the land. Witness was his agent, looking after the land, about 259 acres; forbade other people from cutting on it; people were cutting "in the bottom." The principal part of the tract was high land, surrounded by swamp. John L. Hinton went on the land. Witness laid off road on it for Hinton. Witness acted as agent until Hinton died, 1910; pointed out gum to Colvin, when he was making survey; also to Dudley; there were three chops on it; found three juniper stumps at end of first call; went with Colvin and Dudley when they ran around land. There was some juniper on the tract.

B. F. Spence, 70 years of age, has lived near the Gales land "all of his life"; raised within 3 or 4 miles of it; was employed by plaintiff 1868–69, cutting juniper, "not on the high land." John L. Hinton claimed to own the high land; was in possession of it; gave me permission to get white oak for making cart spokes on it. When witness was a boy there was a fence around the fields. Samuel Brothers lived on it; signs of cultivation. Jackie Brothers' field 25 or 30 acres. Sam Brothers' field was larger, on Gales run, within lines shown on map. J. W. Brothers, 74 years old, son of Sam Brothers, born above Gales run, said to be John L. Hinton's land. Father cultivated field on Gales' tract, Jackie Brothers was grandfather; cultivated field on land. It was called the Hinton land. Charity Turner, daughter of Sam Brothers, says that Hinton came to her father "about the rent." She was born and reared on the Gales tract.

There was much other evidence of the same character. There is evidence that plaintiff cut timber on the tract and Hinton objected. Hinton had some trees cut, but could not get them out. An adjoining owner objected to his carrying them across his land. It is manifest that, from the age of the deeds, the character of the land, the death of those who have owned and lived upon it, obscurity and uncertainty surrounds the subject-matter. I am of the opinion that there is evidence, if the cause was being tried by a jury, fit to be submitted to them on the question of location. I am further of the opinion that, as a matter of fact, the boundaries of the "two tracts are, with a reasonable degree of certainty, correctly located."

A decree may be drawn, dismissing the bill, at the cost of plaintiff.

JOHN L. ROPER LUMBER CO. v. PORTSMOUTH FISHERIES CO.

(District Court, E. D. North Carolina. September 24, 1919.)

1. SHIPPING ⊂=54—CHARTERER ENLARGING LIABILITY FOR DAMAGE FROM THAT OF BAILEE TO INSURER.
Where respondent, who chartered libelant's dredge, agreed, in event it was impossible to obtain insurance, to assume the same liability for damage or loss as an insurance company would if a policy were issued, respondent enlarged its liability as a bailee into that of an insurer, and became liable for the stranding and sinking of the dredge as a result of perils of the sea.

2. INSURANCE ⊂=403—PERILS OF THE SEA WITHIN MARINE INSURANCE.
Where a dredge which it was sought to tow from one point to another sank during the night, *held*, that the sinking was a result of the perils of the sea, and would be included in a marine policy.

3. SHIPPING ⊂=42—CHARTERER OF VESSELS ACCEPTING SAME ON OWN RESPONSIBILITY AND UNDER WARRANTY.
Where respondent, after examination, chartered a dredge as suitable for its purpose, and signed a receipt accepting the same as in satisfactory condition, *held*, that respondent, who assumed the liability of an insurer, must be deemed to have accepted the dredge on its own responsibility, and not on any implied warranty as to seaworthiness.

4. SHIPPING ⊂=58(3)—MEASURE OF DAMAGES FOR LOSS OF VESSEL.
On libel against respondents, who chartered a dredge and agreed to assume liability as an insurer to the extent of $6,000, *held*, that the dredge, which was sunk, was worth $6,000, in view of the increased cost of materials.

In Admiralty. Libel by the John L. Roper Lumber Company against the Portsmouth Fisheries Company. Decree for libelant.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for libelant.

Guion & Guion, of New Bern, N. C., for respondent.

CONNOR, District Judge. On and prior to October 1, 1917, libelant owned a suction dredge, moored at its "mill dock" in Belhaven, N. C. Respondent, being engaged in the construction of a fish factory at Portsmouth, N. C., desired to rent a dredge of the character of that owned by libelant, and on October 17, 1917, wrote its superintendent as follows:

"Portsmouth Fisheries Company,

"Morehead City, N. C., Oct. 17, 1917.

"Mr. A. T. Gerrans, General Superintendent, New Bern, N. C.—Dear Sir: We learn that you have a small suction dredge at Belhaven, N. C., and if there is any way you can possibly let us have it for about two weeks' work at Portsmouth, N. C., we will greatly appreciate it, and pay your charge for same.

"We are just completing a fish factory at Portsmouth, and had engaged the dredge Croatan from the government, but at the last moment they required us to insure it for $30,000, and we were unable to get a company that would write it. We then bought machinery to equip us a small dredge of our own, and that machinery is now hung up in Philadelphia, and we cannot tell when the embargo will be lifted. We mention these facts to let you know the situation we are in, and if you can do anything to help us out we will be under many obligations to you.

"Very truly yours, Portsmouth Fisheries Co.,
"W. M. Webb, Sec. & Treas."

This letter resulted in the following correspondence:

"Oct. 19, 1917. File 27.

"Portsmouth Fisheries Co., Morehead City, N. C.—Dear Sirs: We have a small suction dredge at Belhaven that is not being used at the present time, but is contracted for on November 15th.

"I do not know whether this machine would suit you or not. It would be necessary for you to go over to Belhaven and find out. In case it did suit you, our charges for renting the boat would be $25 per day from the day that she left Belhaven until the day that she was returned there by you.

"The valuation of the boat would be $6,000; same would have to be insured, both fire and marine risk, in our favor, for this amount. The boat would have to be accepted and taken charge of by your towboat and returned in first-class condition, wear and tear excepted, and under no circumstances would our contract of November 15th have to be interfered with by our letting you have this boat, as you specified for two weeks.

"Should it so happen that you should need it longer than you figure, you must be prepared to deliver same at Belhaven upon call. Should be glad to have you go and see the boat and advise further.

"Yours very truly, A. T. Gerrans,
"ATG/Aq. General Superintendent."

"Morehead City, N. C., Oct. 24, 1917.

"Mr. A. T. Gerrans, G. S., New Bern, N. C.—Dear Sir: Referring to yours of the 19th, we sent a man to Belhaven to look at the dredge, and we think it will do our work. This man returned last night, stating that there was some talk of a sale of the dredge, and that you would advise us if we could proceed to comply with your demands, and arrange to tow the dredge to Portsmouth. We are anxious to get it right away, so we may be through by the 15th of November.

"We do not believe that we can get insurance on the boat, but if we take it we will assume the responsibility to the amount of $6,000. However, if you have any connection that will insure it, and you will place it, we will pay the premium. We presume that you can get term insurance, and in our case 30 days will more than cover the time it will be in our possession.

"If we can get it, it is our intention to get a man at Ocracoke, who has handled this machine before, to operate it for us, and we are now waiting on your decision before we proceed further.

"Hoping to have a favorable reply, we are,

"Very truly yours, Portsmouth Fisheries Co.,
"W. M. Webb, Sec. & Treas."

"Telegram.

"Norfolk, Va. Oct. 29, 1917, 10:15 A. M.

"W. M. Webb, Sec., Portsmouth Fisheries Co., Morehead City, N. C.

"You can send immediately for dredge at Belhaven. We understand your letter of twenty-fourth to be acceptance of all conditions stipulated in our letter of October nineteenth, and if insurance cannot be obtained your proposition of assumption of liability of six thousand dollars will be substituted. Your representative to deliver your order and to sign receipt for boat being in satisfactory condition when taken. John L. Roper Lumber Co."

"Telegram.

Morehead City, N. C., Oct. 29, 1917.

"John L. Roper Lumber Co., Norfolk, Va.

"Telegram received. Will send for dredge to-morrow or next day.
"Portsmouth Fisheries Co."

"Telegram.

"Norfolk, Va., Oct. 29, 1917, 10:20 A. M.

"Mr. William Collins, Supt., Belhaven, N. C.

"You can deliver an order Portsmouth Fisheries Company the dredge taking receipt specifying that the boat is accepted as being in satisfactory condition. Be sure and take such a receipt. A. T. Gerrans."

"To Whom It may Concern:

"The bearer is authorized to receipt for dredge.

"Yours, Portsmouth Fisheries Co.,
"By W. M. Webb, S. & T.

"Morehead City, N. C., Oct. 29, 1917."

The "bearer" of Exhibit No. 7 was S. F. Piner, who delivered the order to Mr. Collins, the representative of libelant at Belhaven. He found the dredge at the "mill dock" of libelant's mill at Belhaven, in water of four feet depth. She is described as follows:

"Her hull was 20 feet width and 50 or 60 feet long; the boiler was set to the aft of the rear end; the engine that drives the pump was set to the front and nearly in line with the boiler; the rotary pump was set to the left in the hold, as it was called, right on the platform, just behind this pump, to the right of her, was a double engine, and my recollection is had four drums; two drums represented the cable that handles the spuds on the side, and the other two drums represented the rising and lowering of the agitator. The end where the agitator is, when it is in the water, the top of the deck is not over four to six inches above the water; the other end is, I suppose, two feet; it sits on an angle, and when it is pulled, it is pulled from the right end. There is a pump to keep the water out. When it is being towed, it is sheathed up about six feet high. * * * It is customary when she is being towed to keep steam on it; that was a reasonable precaution."

The siphon was directly connected with the boiler for the purpose of pumping water out of the hull; "all you have to do is to turn the valve and it sucks it up."

Piner examined the dredge and signed the receipt, as follows:

"John L. Roper Lumber Company,

Belhaven, N. C., Oct. 31, 1917.

"Received of the John L. Roper Lumber Company the suction dredge Sandwich for account of the Portsmouth Fisheries Company on their contract with the Lumber Co. Said boat being accepted as being in a satisfactory condition to us.

Portsmouth Fisheries Co.,
"S. F. Piner."

This receipt was forwarded to libelant, inclosed in the following letter:

"John L. Roper Lumber Company,

Belhaven, N. C., Nov. 1, 1917.

"Mr. A. T. Gerrans, G. S., New Bern, N. C.—Dear Sir: I am inclosing herewith receipt from Portsmouth Fisheries Co., signed by S. F. Piner, for dredge Sandwich, which leaves here this A. M.

"Yours truly, W. M. Collins, Supt."

On November 1, 1917, Piner wired respondent:

"Belhaven, N. C., Nov. 1, 1917.

"W. M. Webb, % Portsmouth Fisheries Co., Morehead City, N. C.

"Boats arrived yesterday all right. Just got dredge in shape this morning. Leaving for Portsmouth today. S. F. Piner."

Piner says that he could examine only the deck of the dredge; could not examine her hull in the water; "had the engines fired up on the boiler; that part was satisfactory." He says that something was said between Collins and himself regarding his inability to examine the hull. Collins denies this, and is corroborated in his denial. He was not present when the receipt was signed. He dictated it and left

for other parts of libelants' works. While it was difficult to go into the lower part of the dredge to examine her hull, it was practicable to do so, and nothing was said or done by libelant's representative to prevent Piner from doing so; nor was any statement made by any of said representatives to induce or suggest that Piner should not make a thorough examination of every part of the dredge. Piner says:

"I had been engaged running by water all of my life, since I was eleven years old. I lived on a boat that length of time." Had experience in towing but "no deep sea towing."

He was in the employment of respondent, engaged in fishing. The bottom of the water in which the dredge was moored was mud; the water was subject to wind tides. He says:

"You can take any leaky boat, and put them on a mud bottom; it will tighten them. Still it will have no lasting power to it, liable to drop out at any time, especially in moving the boat. Under tow it would have a tendency to hold the seams together. When it stopped, it would have a tendency to open the seams. The weather was clear and the water smooth; but little breeze. Piner towed the dredge with two crews on the tows. Capt. Foster on the head boat, and six or seven men on the fishing boat. Left Belhaven about 12 o'clock; made first stop at Judith's Marsh, about 25 miles, about 7 o'clock at night. Dredge was not leaking then. Weather was fair, "but it looked doubtful about taking the run across the sound with the tow; so we stopped there to wait until the moon rose, to see what the conditions were. There was no one on the dredge."

Piner says:

That he went on board the dredge just before night to put the light on her. "We were still towing then. The men came back and reported that the dredge was not leaking any, so I never bothered to go aboard any more; but sat up until about 12 o'clock, when I went and found the weather didn't suit me to start across; so I decided to lay in there until morning."

The dredge was lying between two entrances to a harbor. When he went to bed the wind was about north, as near as he could judge; moderate then; not blowing any to hurt; no sea at all where we were lying. The dredge was in ten feet of water. The wind was "breezing" the next morning; at 8 o'clock blowing "right heavy." The dredge had not leaked while being towed, nor when lights were put on; "at daybreak she was sunk" on bottom. Towed about four miles an hour. When Piner examined the dredge at Belhaven, the tide was low. She was on bottom; about three feet water. He went over the dredge four or five times; was there two days. No one told him not to examine the hull. "They said it was in good condition." Could have put her on the "stays." Cannot tell anything about the hull from an examination of the inside. The reason I did not haul her out "was in a hurry, and these people said her bottom was all right." In this he is not corroborated, and his statement is denied. The dredge is not used for navigable purposes; only towed; stays pretty much in one place. The steam was not up; no boats on her side. The Sound is one of the roughest pieces of water in the state; sometimes smooth; was on that day. The dredge evidently sprung a leak, while being towed; probably the action of the water washed the mud out of her seams. No other explanation is offered or suggested.

The only negligence which can reasonably be charged to the representatives of respondent is their failure to keep up steam and have some on the dredge to pump the water out when it was found that she was leaking. It would seem that this should have been done. It is suggested that a boat should have been placed on each side of her. The other precautions would have been more certain to prevent her from sinking. It is insisted by the respondent that, in offering to lease or rent the dredge, libelant warranted that she was tight, staunch, and seaworthy; whereas it argues, in the absence of evidence of any other cause for sinking, she sank because her hull was in bad condition. There is evidence that the boat, moored in fresh water, would be "eaten into by some insects."

However, this may be, the libelant contends that, by the terms of the contract, respondent was to "go over to Belhaven and find out whether the machine would suit them." It sent a man to Belhaven for that purpose, and on October 24th wrote that it thought it would do its work, to which on October 29th libelant telegraphed:

"You can send immediately for dredge at Belhaven. * * * Your representative to deliver your order and to sign receipt for boat being in satisfactory condition when taken."

This proposition was accepted by telegram. Libelant's superintendent, wired its agent at Belhaven to deliver the dredge, "taking receipt specifying that the boat is accepted as being in a satisfactory condition. Be sure and take such a receipt." Respondent's agent, Piner, presented the order, and the dredge was turned over to him for examination. I am unable to find that libelant's agent did or said anything which was calculated to restrict the examination or made any representation calculated to do so. Full opportunity was given Piner to make such examination as his duty to respondent required. There was no valid reason why he did not make a thorough examination of her hull. He accepted the dredge and executed a receipt therefor, as "being in satisfactory condition to us." This closed the contract in respect to the condition of the dredge. The terms of the contract were plain, and libelant performed its obligation in strict accordance therewith. Whether she sank because of the defective condition of her hull, or by reason of the failure of respondent's representatives to keep up steam and have a crew on her to operate the pumps to pump the water out, as it came in through the seams, opened by the action of the water while she was being towed, are not very material, because, under the terms of the contract, respondent assumed the liability for her safety as insurer.

On October 19th, the general superintendent of libelant wrote respondent:

"The valuation of the boat would be $6,000. Same would have to be insured, both fire and marine risk, in our favor for this amount. The boat would have to be accepted and taken charge of by your own boat and returned in first-class condition, wear and tear excepted."

Respondent answered October 24th:

"We do not believe we can get insurance on the boat, but if we take it we will assume the responsibility to the amount of $6,000. However, if you

have any connection that will insure it and you will place it, we will pay the premium. We presume that you can get term insurance and in our case thirty days will more than cover the time it will be in our possession."

Libelant, on October 29th, wired respondent that it could send immediately for the dredge:

"We understand your letter of twenty-fourth to be acceptance of all conditions stipulated in our letter of October nineteenth, and if insurance cannot be obtained your proposition of assumption of liability of six thousand dollars will be substituted."

Respondent on October 29th wired libelant:

"Telegram received. Will send for dredge tomorrow or next day."

[1-4] Libelant on November 2d made effort to get insurance on the dredge, but failed. The dredge was taken by Piner with the result hereinbefore set forth. By this contract respondent assumed the same liability for damage to her or loss as an insurance company would have done if a policy had issued. The liability was that of a bailee, as insurer. A bailee's common-law liability exempted him from loss arising from inevitable accident. A bailee may, however, enlarge his legal responsibility by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care; the bailment or compensation to be received therefor being a sufficient consideration therefor. Sturm v. Boker, 150 U. S. 312 (330), 14 Sup. Ct. 99, 105 (37 L. Ed. 1093). The extent of the liability assumed by the terms of the contract is the same which an insurance company would have taken in a policy insuring the dredge against the perils of the sea, and it would seem that the stranding and sinking of the dredge was within the risks covered by a policy.

While, as argued by counsel for respondent, in such cases there is an implied warranty that the ship or dredge was seaworthy, in the sense of fitness to discharge the work or purposes for which she was constructed, the respondent by its contract assumed the duty of making its own examination of the dredge and accepting her upon its own judgment, and not relying upon any implied warranty. It said, in response to libelant's terms that the dredge must be insured for $6,000, that it did not believe that it could get insurance, "but if we take it we will assume that responsibility to the amount of $6,000." This proposition was accepted, and, after examination by the agent sent for that purpose, accepted. While the terms imposed are rigid, they are too plain to be misunderstood. There was no concealment or misrepresentation. It appears that libelant purchased her at a public sale by a receiver for $1,000 and put repairs and additions to the amount of $2,500 or $2,600 upon her. This would be a fair measure of value, but for the uncontradicted evidence that, by reason of the increased cost of material incident to the war, she could not be replaced for less than $7,000 or $8,000. This, of course, is an estimate of libelant's superintendent.

I am of the opinion, upon the evidence, that $6,000 was a fair value to place upon it, and was so recognized by respondent. She was accepted and receipted for "as being in a satisfactory condition to us."

While not necessary, to impose liability upon respondent for her loss, to find that its agents were negligent in handling the dredge, there is evidence that the reasonable precaution of having, during the towing and while tied up during the night, to have her steam up, with a crew ready to use her pumps when she was found to be leaking, the liability rests upon the contract by respondent, which expressly assumed the responsibility of insurer. The extent of the liability is fixed by the parties at $6,000. There is no satisfactory evidence of the value of the pipe returned.

A decree may be drawn for $6,000, with interest from the date of the libel, and cost.

ZIGICH v. TUOLUMNE COPPER MINING CO. et al.

CRNICH v. SAME.

(District Court, D. Montana. October 24, 1919.)

Nos. 295, 296.

1. REMOVAL OF CAUSES ⟸36—REMAND WHEN JOINDER NOT FRAUDULENT.
   Where, on motion to remand a case begun in state court against a resident and nonresident, and removed by the latter to the federal court, plaintiff makes it appear that on reasonable grounds he believed in good faith that the defendants were jointly liable to him, the cause will be remanded, for the joinder is not fraudulent, however the truth may turn out to be.
2. REMOVAL OF CAUSES ⟸107(7)—AFFIDAVITS ON MOTION FOR REMAND STATING MERE CONCLUSIONS.
   Where an action begun against a resident and a nonresident defendant was removed to the federal courts by the nonresident defendant, affidavits on motion for remand that plaintiff had reasonable grounds to believe that defendants were jointly liable to him are insufficient to warrant remanding of the cause, where there was nothing but a mere statement of the conclusion, or a statement that the belief was based on information asserted to have been obtained from unnamed persons.
3. REMOVAL OF CAUSES ⟸107(7)—MOTION FOR REMAND DENIED FOR WANT OF GOOD FAITH.
   On motion by plaintiff to remand to the state court an action removed from that tribunal on the ground that the joinder of a resident with a nonresident defendant was fraudulent, *held*, that remand must be denied; the affidavits offered by plaintiff being insufficient to show that joinder was in good faith.

At Law. Action by Steve Zigich, an infant, by his guardian ad litem, Philip Zigich, against the Tuolumne Copper Mining Company, a corporation, and another, begun in state court and removed to the federal court, together with an action by Mary Crnich, an infant, by her guardian ad litem, Anton Crnich, against the same defendants, also begun in the state court and removed to the federal court. On motions to remand. Motions denied.

H. J. Freebourn and J. O. Davies, both of Butte, Mont., for plaintiffs.

Kremer, Sanders & Kremer, of Butte, Mont., for defendants.

BOURQUIN, District Judge. These are familiar cases of removal hither on allegations of diverse citizenship, separable controversy, and fraudulent joinder, and motions to remand.

So long as 8 of 12 jurors may render verdicts in state courts, and 12 of 12 are necessary in federal courts, plaintiffs will strive to retain causes in the former courts and defendants to remove them to the latter; and so long as the facts will warrant their efforts, not only is it their right to thus choose the forum, but it is ordinarily also the duty of attorneys to their clients. Incidentally, this anomalous situation, a heavy handicap upon plaintiffs in federal courts, excites resentment against said courts.

The complaints herein allege that the wards were injured by dynamite caps by them procured from a shed owned by defendant company and in charge of its employé, defendant Graham, exposed to the wards' access by defendants' concurrent negligence. Fraudulent joinder is alleged, in that Graham was but a surface employé to load and unload cars at the company's mine plant, and had no charge of the shed, and that plaintiffs had no reasonable grounds to believe otherwise.

Pretermitting questions of procedure, the evidence for defendant consists of affidavits by its president, its general manager, and Graham, in substance that he was such employé only, without care, charge, or custody of the shed or its contents.

The evidence for plaintiffs is three affidavits by their counsel and one by one Noal. Those of counsel in substance are that prior to suits commenced, he visited the company's mine plant, and amongst other buildings saw a shed with open door and dynamite caps and fuse within; that Graham approached, and of him affiant asked, "Who makes up the primers here?" Graham answering, "The miners make up their own;" that affiant further asked, "Where do they get their caps and fuse?" Graham answering, "I keep them supplied;" that affiant further asked, "Do you keep any blasting caps in this shed?" Graham answering, "No;" that thereupon affiant showed Graham the caps and fuse in the shed. Graham said, "We always keep this door locked." Affiant said, "It is not locked now." Graham became angry, locked the door, and said affiant would "have to get away from there;" that persons there employed and others, none of whom he names, informed affiant that Graham, while surface laborer at the mine, also performed the duties of storekeeper, in that he received, checked, and receipted for caps, fuse, and other supplies, opened, closed, and locked that shed, sometimes made primers for the miners, and on occasions acted as watchman; that affiant had reasonable grounds to believe and does believe the allegations of the complaint are true, that defendants are jointly liable herein, and that he intends to prosecute the actions to judgments against both defendants. Noal's affidavit is to the conversation between counsel and Graham.

[1] The settled rule is that, if plaintiff upon reasonable grounds in good faith believes that defendants are jointly liable to him, and properly makes it so appear on motion to remand, his joinder of defendants is not fraudulent, however the truth turns out to be, and remand will be granted.

[2, 3] It is not enough, however, that plaintiff alleges he so believes upon reasonable grounds, mere conclusions, but he must duly set out the grounds, that the court may determine whether or not they are reasonable and sufficient upon which to base a belief of joint liability. Herein plaintiffs affidavits are insufficient. In so far as they count upon information from unnamed persons, the rule applies that they will receive no consideration.

What counsel saw at the plant and his conversation with Graham (1) do not identify the shed counsel saw with the shed wherein the wards secured the caps; (2) are consistent with Graham's employment as a mere laborer, without care, custody, or charge of the shed and caps, which appears by otherwise undisputed evidence, and so are not sufficient to furnish reasonable grounds for plaintiffs' belief that Graham had charge and control of the shed, neglected his duty in respect thereto, and with the company is jointly liable to plaintiffs.

Obviously counsel was seeking information to warrant joinder of some local citizen with the nonlocal company. Therein is no fault, but he was too willing to halt inquiry which easily might have gone further; too willing to rely on indirection where direction might have been found out; too willing to leave ambiguous a situation that a few direct inquiries might have made definite; too willing to seize upon slight circumstances for inferences favorable to the joinder desired; too willing to be persuaded he had reasonable grounds to believe joinder authorized.

In the circumstances these cases are within the rule of Wecker's Case, 204 U. S. 185, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757. The joinder is fraudulent, within the law of removal, defendant company cannot thus be deprived of its right to trials in this court, and remand is denied.

BUHL MALLEABLE CO. v. HUDSON.

(District Court, E. D. Pennsylvania. November, 1919.)

No. 5520.

1. SALES ⟸355(4)—VARIANCE BETWEEN PLEADING AND PROOF.
In an action for price of castings, there was no variance between the complaint, which alleged a sale and delivery to defendant, and proof, which showed a sale to defendant and a delivery on his order to another.

2. SALES ⟸355(4)—VARIANCE BETWEEN PLEADING AND PROOF.
In an action for the price of castings sold and delivered, the complaint which declared for an agreed price, or for the value, if no price was found, is not open to objection that it stated a cause of action on a book account, when the proof was of a written contract and performance.

At Law. Action by the Buhl Malleable Company against William F. Hudson. Verdict for plaintiff. Sur motion by defendant for new trial. Motion denied.

Carr & Steinmetz, of Philadelphia, Pa., for plaintiff.

C. Wilfred Conard, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The position of the defendant now taken is characterized by his counsel as wholly technical. On its face it seems also to be ungracious, because the defendant is complaining of the only thing in the trial which gave him the possibility of a verdict in his favor. This point is, however, neither as technical nor as ungracious as it appears to be. It has this claim of merit. The defendant had been buying on his own account castings which were sold and delivered to him by the plaintiff. On his version of the facts in this case these castings were neither sold nor delivered to him, but to a third party, the Guaranty Motors Company. At the most he had made himself responsible for the bill, and it is his right to recover from the Motors Company whatever the plaintiff recovers from him.

The complaint is that the plaintiff brought its action for goods sold and delivered to the defendant, and recovered on proof of the contract of the defendant to pay for castings sold and delivered to the Motors Company. This is averred to be a substantial injustice to the defendant, because it takes away from him what would otherwise be a clear right to recover from the Motors Company, and substitutes for it a claim of doubtful merit. Counsel, because of this, feel justified in asking that the plaintiff be held to a recovery upon the cause of action upon which it declared.

The position taken does not lend itself readily to a clear statement of what it is. The case of the plaintiff was in reality a sale to the defendant and a delivery to the Guaranty Motors Company. The defense was a denial of any such sale, and all liability of the defendant, and a further denial that the castings had the value set forth in the statement of claim.

[1, 2] One feature of the complaint now made is that there was a variance, because the plaintiff averred a sale and delivery to the defendant, and proved a sale to the defendant and delivery to a third party. The reply is that the proof was delivery to the third party by the express direction of the defendant, and hence, in legal intendment, a delivery to him.

Another feature of the same complaint of a variance is that the averment was of a cause of action on a book account of goods sold and delivered, and the proof was of a written contract and performance. The answer is that the name thus given to the cause of action is a misnomer. It is not founded upon a book account, but upon a promise of defendant to pay for what was delivered to him; the book entries being merely evidence of what was thus delivered. The promise, it is true, might be merely the promise which the law implies from the sale and delivery; but it is none the less a promise to pay, if expressly made, or if made in writing.

The distinction is essentially the difference between the ultimate fact and the evidentiary facts by which it is made to appear. The essential right set up by the plaintiff was its right to recover the fair value of the castings it sold to the defendant, and at his direction delivered to the Guaranty Motors Company. This right was in no way changed or lessened because the defendant gave the plaintiff his order in writing for the castings and written directions to deliver to the

Motors Company. Nor do we think the cause of action was changed because there was mention of the price to be paid. Whether the price had been agreed upon was in dispute, or at least what the agreed price was. The plaintiff declared for the reasonable value of the castings, and declared for the agreed price, so that it might recover for the agreed price, if one was established, or for the value, if no agreement as to price was found. This was good pleading, and did not limit otherwise the right of recovery. Vallee Bros. v. North Penn, 32 Pa. Super. Ct. 111.

As affecting only this case, the defendant was not harmed, but was greatly benefited by the state of the pleadings and the course of the trial. His defense of no sale on his credit was hopelessly weak. The castings were delivered, accepted, and used, without complaint of quantity, quality, or value until many months afterwards. Indeed, no complaint in this respect was made until after the original affidavit of defense was filed. If the action had been upon a written contract for an agreed price, defendant would have encountered very serious difficulties in presenting his defense of inferior quality. As the case was presented as one of the fair and reasonable value of what was delivered, the defendant had the fullest opportunity to present this feature of his defense.

The rule for a new trial is discharged. In order that the date of entry of judgment may be definite, no judgment is now entered, but plaintiff has leave to enter judgment on the verdict, with costs, etc.

PLEWS v. BURRAGE. (No. 999.)

BURRAGE v. PLEWS. (No. 877.)

(District Court, D. Massachusetts. October 27, 1919.)

1. INJUNCTION ⇐26(5)—RESTRAINING ACTION AT LAW; EQUITY JURISDICTION.
   Where a judgment pleaded as a bar by defendant in an action at law was the result of a long and expensive trial, equity has jurisdiction to entertain a suit to enjoin prosecution of the action.
2. JUDGMENT ⇐683—RES JUDICATA; ASSIGNOR BOUND BY JUDGMENT AGAINST ASSIGNEE.
   Decree for defendant in a suit brought by an assignee of a contract, with consent of the assignor and in his interest, to set aside a second assignment to the obligor for fraud, *held* a bar to a subsequent action by the original assignor to enforce the contract.

At Law. Action by Arthur S. Plews against Albert C. Burrage. On motion by plaintiff to require answer. Denied.

In Equity. Suit by Albert C. Burrage against Arthur S. Plews. On motion by complainant for preliminary injunction. Granted.

In 999 Law:

Whipple, Sears & Ogden and Sherman L. Whipple, all of Boston, Mass., for plaintiff.

Boyd B. Jones, of Boston, Mass., for defendant.

In 877 Equity:

Henry F. Hurlburt and Hurlburt, Jones & Hall, all of Boston, Mass., for plaintiff.

Whipple, Sears & Ogden and Sherman L. Whipple, all of Boston, Mass., for defendant.

MORTON, District Judge. The bill in equity in the state court was brought by Ross "for the benefit of himself and Arthur S. Plews * * * as his interest may appear." The present bill in equity alleges—and I understand the fact not to be disputed—that in bringing that suit Ross acted with the consent of Plews and under an agreement with him whereby Plews was to receive one-third of whatever might be recovered. The prayers of the bill in the state court were, so far as here material, that the assignment of the so-called "commission note" to Burrage be set aside, and that the obligations of it be enforced against him. The question whether Burrage had obtained the "commission note" by fraud was basic. If he had obtained it honestly, that was the end of the plaintiff's case; and the decision was that he had so obtained it.

In the present action at law Plews is suing on the same "commission note." Admittedly his rights under it have, formally at least, been assigned through Ross to Burrage. When this assignment is pleaded by the defendant, the plaintiff avowedly intends to reply that the assignment was obtained by fraud and is invalid. The present questions are whether the action at law involves as a requisite to recovery therein issues which have been decided against the plaintiff in the state court, and, if so, whether Burrage has standing in equity to enjoin the action at law in this court, or should be left to make his defense of res judicata in the action itself.

[1] As to the latter question: The case in the state court occupied 104 trial days before the master. It cost the parties, for stenographer's fees and for master's fees in excess of the regular compensation, upwards of $40,000. It is evident that to compel a defendant to retry such a case, even though he have a good defense, is to impose a great hardship on him. It is a hardship sufficiently great to entitle him, in my opinion, to invoke the aid of equity for relief from it.

[2] The fundamental question involved in the present action at law, viz. the liability of Burrage on the "commission note," was litigated in the state court proceedings. His defense that he is now owner of it by assignmentfrom Ross and Plews was there sustained. Plews authorized that suit, was to profit by it, if successful, and was in fact a party to it, and he must abide the result. He cannot divide his claim of fraud against Burrage and present it piecemeal, and he ought not to be allowed, by invoking the jurisdiction of this court, to experiment again with the same cause somewhat differently stated. Moreover, in view of the state court decision, the present action at law necessarily involves a disaffirmance by the plaintiff of his assignment of the "commission note" to Ross. The decision in favor of Burrage was based, not on any original want of interest on the part of Ross in the contract sued on, but upon the fact that Ross, as owner

of the contract (or "note"), had made a binding sale of it to the defendant and therefore had no further interest in it. It is not open to the plaintiff, after having authorized Ross to bring such a suit and allowed that suit to go to final judgment, to disaffirm his assignment.

It follows that in the action at law the defendant's motion for a stay pending the final disposition of the equity suit should be granted, and that the plaintiff's motion that the defendant be required presently to answer, be denied, and that in the equity suit the plaintiff's motion for a temporary injunction (or restraining order) should be granted, and the defendant's motion to dismiss should be denied.

Orders and decrees may be presented accordingly.

In re NICKERSON.

(District Court, D. Massachusetts. September 9, 1919.)

No. 463.

SEAMEN ⊂=32—WAGES OF DECEASED SEAMAN; FEES OF SHIPPING COMMISSIONER.

The right of a shipping commissioner to allowance of a fee out of wages due a deceased seaman paid to him *held* not affected by Act June 19, 1886, § 1 (Comp. St. § 8138).

In Admiralty. In the matter of Henry B. Nickerson, deceased seaman. On petition of Ernest B. Grant, Shipping Commissioner, for allowance of fees. Granted.

Charles J. Miller and Berry & Bucknam, all of Boston, Mass., for petitioner.

Thomas J. Boynton, U. S. Atty., and Alonzo H. Garcelon, Sp. Asst. U. S. Atty., both of Boston, Mass., for the United States.

MORTON, District Judge. Nickerson was a seaman, who died while in the merchant service, on September 21, 1918. There was due him as wages at the time of his death $39.47, which was paid to the United States shipping commissioner at Boston, and by him has been paid into this court, where it now is.

The shipping commissioner has filed a petition praying that he be allowed out of this money $2 and 1 per cent.—i. e., $2.39—as expenses in the case. The question is whether he is entitled to that sum. The statutes and order of court under which the claim is made were fully discussed in U. S. v. Grant, 224 Fed. 644, in this court, where it was pointed out that the order fixing the expenses of the commissioner at $2 and 1 per cent. was made in 1873 by the late Judge Shepley and has been in force ever since.

The ground now urged against the order is that it is inconsistent with Act June 19, 1886, c. 421, 24 Stat. 79 (Comp. St. § 8138). That act provides that—

"On and after July 1, 1886, no fees shall be charged * * * by * * * shipping commissioners, for the following services to vessels of the United States, to wit."

Then follows a list of various services rendered by the officers referred to. Those mentioned which are rendered by the shipping commissioner are:

"Furnishing the crew list; * * * certificate of protection to seaman; * * * shipping or discharging of seamen; * * * apprenticing boys to the merchant service."

The statute then continues:

"And all provisions of laws authorizing or requiring the collection of fees for such services are repealed, such repeal to take effect July 1, 1886. Collectors or other officers of customs, inspectors of steam vessels, and shipping commissioners who are paid wholly or partly by fees shall make a detailed report of such services, and the fees provided by law, to the Secretary of the Treasury, * * * and the Secretary of the Treasury [or the Secretary of Commerce] shall allow and pay, from any money in the Treasury not otherwise appropriated, said officers such compensation for said services as each would have received prior to the passage of this act.'

The effect of this statute is to make the commissioner's compensation dependent on the services which he renders, and to put the payment for those services on the United States, instead of on individuals. The commissioner is not entitled to be paid by the United States for services for which he would not, prior to the statute referred to, have been entitled to charge individuals.

Under the law as it stood prior to the act of June 19, 1886, it must be taken as established in this court that the commissioner was entitled to make a charge for expenses in accordance with Judge Shepley's order of 1873. The question then is whether the statute in question abolishes that charge. The language of the act is extremely precise:

"No fee shall be charged * * * for the following services, to wit."

Attending to the effects of a deceased seaman was not among the services scheduled. The compensation substituted by the act in lieu of fees is based upon "a detailed report of such services and the fees provided by law." It seems clear that the commissioner, if he reported such a fee as is here claimed, could not be allowed for it out of the treasury under the statute. It was obviously not the intention of Congress to change by the statute the amount of compensation, but only the method of payment.

For these reasons it seems to me that the statute did not nullify the order of court under which the claim is made, and that the petition should be allowed.

So ordered.

MEMORANDUM DECISIONS

CONSOLIDATED GAS CO. OF NEW YORK v. NEWTON, Atty. Gen., et al. (Circuit Court of Appeals, Second Circuit. June 27, 1919.) No. 240. Appeal from the District Court of the United States for the Southern District of New York. Suit in equity by the Consolidated Gas Company of New York against Charles D. Newton, as Attorney General of the State of New York, Edward Swann, as District Attorney of the County of New York, and others, constituting the Public Service Commission of the State of New York, First District. Appeal from an order denying application of the City of New York for leave to intervene as a party defendant. Affirmed. For opinion below, see 256 Fed. 238. See, also, 260 Fed. 244. William P. Burr, Corp. Counsel, of New York City (Terence Farley, Vincent Victory, and Judson Hyatt, all of New York City, of counsel), for appellant. Shearman & Sterling, of New York City (E. Henry Lacombe, John A. Garver, and William L. Ransom, all of New York City, of counsel), for appellee. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Order affirmed.

DELGADO et al. v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. November 25, 1919.) No. 3347. In Error to the District Court of the United States for the Western District of Texas; W. R. Smith, Judge. Fred Delgado and another were convicted of crime, and they bring error. Affirmed. Volney M. Brown, of El Paso, Tex., for plaintiffs in error: W. H. Fryer, Asst. U. S: Atty., of El Paso, Tex. Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

PER CURIAM. The record in this case does not show any reversible error. The judgment is affirmed.

FAUSER v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. December 1, 1919.) No. 3419. In Error to the District Court of the United States for the Southern Division of the Southern District of California. Robert O'Connor, U. S. Atty., and Gordon Lawson, Asst. U. S. Atty., both of Los Angeles, Cal.

PER CURIAM. Ordered, writ of error dismissed for noncompliance by the plaintiff in error with the provisions of subdivision 1 of rule 16 of the rules of practice of this court (208 Fed. ix, 124 C. C. A. ix.)

UNITED STATES v. RAINIER BREWING CO. et al. (Circuit Court of Appeals, Ninth Circuit. October 28, 1919.) No. 3383. In Error to the District Court of the United States for the First Division of the Northern District of California. Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., and Charles W. Thomas, Asst. U. S. Atty., of Sacramento, Cal. Theodore A. Bell, of San Francisco, Cal., for defendant in error.

PER CURIAM. Writ of error dismissed, pursuant to motion of counsel for plaintiff in error. For opinion below, see 259 Fed. 359.

WALKER GRAIN CO. v. GREGG GRAIN CO. et al. (Circuit Court of Appeals, Fifth Circuit. November 8, 1919.) No. 3345. Petition to Superintend and Revise from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. The Gregg Grain Company and others filed an involuntary petition against the Walker Grain Company, and, the prayer for appointment of a receiver having been granted, the Walker

Grain Company petitions to superintend and revise. Petition denied. See, also, Walker Grain Co. v. Blair Elevator Co., 254 Fed. 422, 166 C. C. A. 54. William H. Slay, U. M. Simon, Mike E. Smith, and Theodore Mack, all of Ft. Worth, Tex., for petitioner. Stanley Boykin, of Ft. Worth, Tex., for respondents. Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

PER CURIAM. This is a petition to superintend and revise the action of the court in approving and confirming an order of the referee, made on the application of alleged creditors who filed an involuntary petition in bankruptcy against Walker Grain Company, a corporation, for the appointment of a receiver of the assets of the alleged bankrupt. The certificate of the referee showed that on the hearing before him of the application for the appointment of a receiver a state of facts was disclosed which fully justified the granting of the relief sought by the petitioning creditors as a means of preserving the assets of the alleged bankrupt. There is no merit in any of the grounds upon which the decree of the court confirming the order of the referee is complained of. The petition is denied.

THE WEST HARDAWAY. (Circuit Court of Appeals, Ninth Circuit. October 21, 1919.) No. 3357. Appeal from the District Court of the United States for the Territory of Hawaii. George A. Davis and S. C. Huber, both of Honolulu, T. H., for appellant. Andros & Hengstler and Louis T. Hengstler, all of San Francisco, Cal., for appellees.

PER CURIAM. Dismissed for noncompliance by appellant with the provisions of rules 23 and 24 (231 Fed. v; 144 C. C. A. v).

END OF CASES IN VOL. 260

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